PT Master Mandiri v Yamazaki Construction (S) Pte Ltd
[2000] SGHC 80

Case Number : Suit 155/1999

Decision Date : 06 May 2000

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Jeffrey Beh and Kelvin Tan (Lee Bon Leong & Co) for the plaintiffs; Thomas Lei (Chor Pee & Partners) for the defendants

Parties : PT Master Mandiri — Yamazaki Construction (S) Pte Ltd

Contract – Remedies – Damages for breach of contract – Assessment of damages – Loss of profit from sub-sales effected after original contract – Whether damages too remote – Duty to mitigate loss

: This appeal arises out of an assessment, which the assistant registrar made of the damages, which the plaintiffs had suffered by reason of the defendants` breach of contract. There are two issues to be considered in the appeal: the first is whether the damages claimed by the plaintiffs are too remote and therefore not recoverable and the second is whether the plaintiffs failed to discharge their obligation to mitigate their loss.

The facts can be stated briefly. The defendant company operates a granite quarry on the island of Karimun, Indonesia. The quarry is owned by an Indonesian company called PT Karimun Granite (`PTKG`). The plaintiff is a company incorporated in Indonesia which carries on two types of business. It acts as a contractor and also as a supplier of spare parts and lubricants. Prior to the transaction in question it had supplied goods to the defendants for the operation of the quarry.

On 7 November 1998, the plaintiffs sent a fax to PTKG offering to buy 24 units of heavy machinery from them. This letter detailed the individual prices which the plaintiffs were prepared to pay for each machine and set out the total consideration as being S$428,000. Subsequently, it appeared that the owners of the machines were in fact the defendants rather than PTKG and negotiations continued between the plaintiffs and the defendants. Agreement was reached as was evidenced by the defendants` tax invoice dated 26 November 1998, specifying that they would sell the plaintiffs the same 24 machines at a total price of S$438,000. No breakdown of the individual prices was given in the invoice. The terms of payment provided for 50% of the price to be paid on receipt of the invoice and the balance 50% to be paid on approval of the export permit for the machines. The plaintiffs` acceptance of this contract was evidenced by their payment of 50% of the purchase price being S$219,000.

The plaintiffs, according to their managing director, had at the material time been supplying other quarries in Indonesia with plant and machinery. Several contractors had visited Karimun to look for scrap and upon seeing the machinery at the defendants` quarry, had expressed an interest in purchasing some units. The plaintiffs had negotiations with five such parties and concluded sub-sale contracts with them covering all 24 units.

On 14 December 1998, the defendants wrote to the plaintiffs telling them that they wanted to cancel the contract. On 18 December, the plaintiffs` solicitors wrote to the defendants stating that the plaintiffs accepted the repudiation of the contract by the defendants and demanded the sum of S$2.6m as damages in respect of loss of profit arising from the breach of the agreement.

On 28 December 1998, the parties met to try and resolve the matter. At the meeting the defendants told the plaintiffs that they could only deliver 18 units. The plaintiffs did not accept this offer. Instead they laid down various conditions for accepting a change in the contract terms among which were a demand that the defendants bear the plaintiffs` legal costs and that they pay plaintiffs compensation of $150,000. No agreement was reached then.

In the meantime the defendants had written the plaintiffs a letter dated 24 December in which they stated that they could deliver all 24 units. The plaintiffs only received this letter after the meeting on 28 December and were confused by it because it was at odds with what they had been told at the meeting. The plaintiffs wrote asking for clarification on exactly how many units were being discussed.

On 29 December the defendants replied to say that they needed approval from PTKG in order to get an export permit to complete the sale of the machines and that they were now able to get approval for only 18 units. The implication was that PTKG wanted the remaining six units for itself and the defendants offered to act as middleman in the sale of the six units to PTKG and to pay the plaintiffs all the proceeds from such sale. On the same day, PTKG sent a letter to the plaintiffs telling them that they were interested in buying eight units of the machines from the defendants.

On 16 January 1999, the plaintiffs` solicitors wrote to the defendants stating that the defendants had not made any concrete proposal to settle the plaintiffs` claim but that the plaintiffs were willing to accept $1m as damages in order to expedite the resolution of the matter even though their actual damages amounted to $2.6m.

The defendants` solicitors replied on 27 January to deny liability but stating that their clients were prepared, able and willing to transfer 18 units to the plaintiffs. They reiterated the defendants` readiness and offer to deliver the 18 machines to the plaintiffs and asked to be informed when the plaintiffs would take delivery of the same. They stated that the defendants would then arrange for an immediate delivery. On the same day, the plaintiffs` solicitors replied to say that they had just started legal proceedings against the defendants but that they would take instructions on the defendants` solicitors` letter.

On 29 January, the defendants` solicitors sent a chaser on the issue of the delivery of the 18 machines. Another chaser was sent on 2 February. This was replied to by the plaintiffs` solicitors on 3 February. They stated that the contract was a lump sum contract for purchase of 24 units of equipment. After the contract was entered into the plaintiffs had procured buyers for all 24 units but had to abort the sub-sales when the defendants repudiated the contract. The plaintiffs were therefore not obliged to take delivery of any machines.

Interlocutory judgment in this action was entered against the defendants on 31 March 1999. The assessment of damages took place in February this year. The plaintiffs claimed for the loss of profits that they had suffered by reason of the cancellation of the sale contract and produced representatives of their five sub- purchasers who testified as to the various sub-sales. According to this evidence, the total amount which the plaintiffs would have earned from the sub-sales was $1,056,000 and this meant that their profit from the sub-sales was $618,000 (ie after deduction of the purchase price of $438,000). The learned assistant registrar conducting the assessment deducted $6,000 to cover the costs that the plaintiffs would have incurred in transporting the machines to Singapore. This meant that the plaintiffs` net profit from the sub-sales would have been $612,000 and this is the amount the assistant registrar awarded the plaintiffs as damages. The defendants have appealed.

Are the damages too remote?

Not all damages that an injured party sustains by reason of a breach of contract are legally recoverable. The basic rule for assessing the damages payable to a party who has been injured by a breach of contract was set out in 1854 in **Hadley v Baxendale** [1854] 9 Ex 341. Damages which do not fall within the rule established by that case are regarded as too remote and thus irrecoverable. As far as damages for non-delivery of goods are concerned, the first part of the ***Hadley v Baxendale*** rule has been enacted as s 51(2) of the Sale of Goods (Cap 393) (`the Act`). That section provides that a purchaser of goods who has not received those goods due to non-delivery by the seller may recover the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller`s breach of contract. By sub-s (3) where there is an available market for the goods in question, the measure of damages is, prima facie, the difference between the contract price and the market price of the goods at the date when they should have been delivered.

The second part of the rule in ***Hadley v Baxendale*** which is that the injured party may recover such damages as may reasonably be supposed to have been contemplated by both parties, at the time the contract was made, to result from its breach, has not been specifically enacted in the Act. The right of the plaintiffs to claim such damages has, however, been preserved by s 54 of the Act which states that nothing in the Act affects the right of a party to recover interest or special damages in any case where by law such interest or special damages may be recovered.

The plaintiffs in this case did not seek to have their damages assessed under s 51(3). If there had been an available market for the goods concerned, the plaintiffs would have had no choice but to resort to s 51(3) because the usual consequence of a seller`s failure to deliver goods is that the prospective buyer will go out and buy replacement goods. In this case, however, the goods were distinctive in character in being second hand machines used in quarrying work and no evidence was given by the defendants that there was an available market to which the plaintiffs could have had recourse to make up for the defendants` breach.

The plaintiffs, having on-sold the machines, sought instead to recover their loss of profits from the resale contracts which had, necessarily, to be aborted. ***McGregor on Damages*** (17th Ed, 1997) has the following passages on when such loss of profits are recoverable:

> *844(i) Loss of profit on a resale. The earlier cases did not allow the buyer to recover the loss of profit on a resale, whether made before or after the purchase, where all the seller knew was that the buyer had bought with a general intention to resell, as in **Thol v Henderson**, or even where it was the practice, known to the seller, for buyers to resell before delivery, as in **Williams v Reynolds**. Later cases however have shown a more liberal tendency and allowed loss of such profit where the defendant knew the buyer would resell, or even where it was probable that the buyer would resell. ...*
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> *846 Where damages are allowed for loss of profit on a resale of which the seller knew the actuality or the probability, he will not be liable for an exceptional loss of profits unless he has been informed of the details of the sub-contracts and only then if he can be said to have taken the risk of such loss on his shoulders. This appears from the speeches in **Hall v Pim**. Lord Dunedin said: `The contracts ... must be contracts in accordance with the market, not extravagant and unusual bargains.` And Lord Shaw said: `It is not suggested that these prices were out of the ordinary course of business. Had this been so, different considerations might quite well have arisen.` Thus in **Household Machines v Cosmos Exporters**, where the seller knew of the plaintiff`s intention to resell but did not know the details of the sub-contract, Lewis J did not award the plaintiff the 12 per cent by which the sub-contract price was higher than the contract price, but gave only ten per cent. Similarly, in **Coastal International Trading v Maroil** where the sub-contract, of which the*

> *defendants were fully aware, contained unusual terms rendering the plaintiffs` profit under it unreasonable and such as would not have been within the contemplation of the parties, the profits awarded to the plaintiffs was arrived at after eliminating the extravagant effect of the unusual terms.*

The above passages show that it is settled law that in appropriate circumstances a purchaser may recover the loss of profits that he has sustained by reason of the seller`s failure to deliver the goods.

In his submissions before me, counsel for the defendants contended that two grounds strongly militated against the plaintiffs` claim. These were:

(1) the absence of any special knowledge on the defendants before or at the time they entered into the contract with the plaintiffs; and

(2) the sub-sales by the plaintiffs, or at least four out of five of them, came only after the sales contract was entered into by the parties here. These subsequent sub-sales could not have been in the defendants` contemplation so as to expose them for liability when the plaintiffs had to abort the sub-sales since being unable to know deals which would come after their contract, the defendants did not assume any such risk when they entered into the contract with the plaintiffs.

Taking the second point first, the defendants relied on the case of **Teck Tai Hardware (S) Pte Ltd v Corten Furniture Pte Ltd** [1998] 2 SLR 244 and in particular the following observation by Justice Lai Kew Chai (at [para] 20):

> *Further, if the sub-sale is formed after the sale contract in question, any consequential losses suffered by a buyer in respect of the sub-sale contract by reason of the seller`s breach of the sale contract cannot be recovered from the seller because such loss could not have been within the contemplation of the parties at the time of the sale contract.*

I do not agree that it is a basic precondition for liability for loss of profits arising from a sub-sale that the sub-sale concerned must have been entered into before the main contract. In the ***Teck Tai Hardware*** case, Justice Lai Kew Chai was not dealing with a claim for loss of profits on a sub-sale. He was dealing with a claim for consequential damage arising out of the supply of defective locks by the defendant sellers to the plaintiff buyers who were manufacturers of furniture. Both the plaintiffs and defendants were companies incorporated and operated in Singapore but the plaintiffs had installed some of the defective locks in furniture which was shipped abroad. As a result of the defects, the plaintiffs had to replace the exported items and incurred costs in so doing. The defendants` evidence was that the sellers knew that the locks would be used for the purpose of installing them into furniture and that the buyers were manufacturers of such furniture. But it was stated in the evidence that at the time the contract was made the sellers did not know the locks would be fitted into furniture which would then be exported. The learned judge`s conclusion was that there was nothing material known to the sellers before and at the formation of the contract for sale of the locks that justified a finding that the sellers had realised that losses in respect of overseas sales were likely to result from their breach. He therefore held that the sellers were not liable for these losses. His Honour`s judgment therefore turned on the absence of specific knowledge of overseas sales rather than on the fact that the sub-sales were made after the original contract was concluded. If there had been specific knowledge on the part of the sellers that the locks were likely to be exported either alone or as components of furniture, I think the decision in the case would have been different.

It is also worth noting that the case of **Patrick v Russo-British Grain Export Co** [1927] 2 KB 535 was not cited to Justice Lai Kew Chai. That case has stood for more than 70 years as an authority that loss of profits on sub-sales effected after the original contract is made can be recovered. There, wheat was bought and resold at a higher price. The seller failed to deliver, and there was no market available to the buyer at the time of the breach or subsequently. The parties contemplated that the wheat would probably be resold. Salter J awarded the plaintiffs the resale price less the contract price (ie their gross profit) as damages. He stated:

> *The arbitrators [this was an appeal from an arbitration decision] find that both parties contemplated that the buyer would probably resell. ... **Hammond v Bussey** is authority for holding that it is not necessary, in order to entitle the buyer to recover loss of profit on resale, that the seller should have known, when he sold, that the buyer was buying to implement a contract already made, or that the buyer would certainly resell; it is enough if both parties contemplate that the buyer will probably resell and the seller is content to take the risk. I think, therefore, that the arbitrators` finding is sufficient to support a claim for loss of profit on resale. It might well have been insufficient to support a claim for costs incurred in litigation with a sub-buyer or for penalties or damages paid to him.*

I next consider the plaintiffs` first ground which was that the defendants did not have any special knowledge before or at the time they entered into the contract with the plaintiffs of the probable resale of the machinery.

The defendants submitted that in 1998 the plaintiffs were not in the business of trading in second hand machinery but were carrying on the businesses of supplying lubricants and spare parts and of acting as contractors. The defendants` witnesses had said in their affidavit of evidence-in-chief that they were aware only of the contracting business. Further, there was no evidence that the plaintiffs had communicated details of any of the sub-sales to the defendants and it was not put to the defendants` managing director that he knew or ought to have known anything about the plaintiffs` sub-sales.

The plaintiffs, on the other hand, pointed out that under cross-examination, the defendants` managing director, Mr Matsunaga, when asked about the nature of the dealings between the plaintiffs and the defendants, had stated that the defendants had procured and the plaintiffs had supplied them with lubricants, construction materials and machinery and other requirements for their project. When he was asked whether it was correct to say that the plaintiffs were supplying spare parts and whatever the defendants required for their quarry, his reply was that he had to clarify that the general items supplied were in relation to items required for construction equipment. When asked what he thought the plaintiffs would have done with the machines, his reply was that he thought the plaintiffs wanted them for their own quarry works or for civil engineering works. Mr Matsunaga indicated that he did not assume that the machines were wanted for resale purposes as the pricing had been made on `FOB Karimun` terms. He then conceded, however, that the machines had to be exported (and this would have been at the plaintiffs` cost) and that he knew that the plaintiffs had no operations in Singapore. He also confirmed that the defendants had previously sold some machinery to the plaintiffs though he was quick to add that this had been sold as scrap.

The learned assistant registrar who had the advantage of seeing the witnesses obviously made a finding of fact that the defendants were aware that the machines would probably be resold. There is material in the evidence to support this finding. Quite apart from the fact that even on paper Mr Matsunaga does not appear to have been a satisfactory witness in that his answers were often reluctant and evasive, it was clear that since the defendants knew that the plaintiffs did not operate any quarries in Indonesia or in Singapore but had bought these machines on the basis that they would be exported from Karimun, it was probable they were being bought for resale. Further, the chairman of the plaintiffs gave evidence that the defendants were made aware at an early stage that the plaintiffs intended to resell the machines. The quantity of machines bought was also significant. If you need 24 machines you must have a reasonably large project. But the defendants were well aware that the plaintiffs were not a large operation and that they did not operate any quarries. Finally, when the defendants were unable to deliver six of the machines, they offered to act as middleman for the plaintiffs in the sale of these six machines to PTKG and to pass on all proceeds from the sale to the plaintiffs. The fact that they thought that such an offer would help compensate the plaintiffs for their loss indicates that they knew that the plaintiffs` intention was to sell the machines and considered that the plaintiffs` intended resale could be replaced by the resale to PTKG.

In the result, since the defendants were probably aware of the plaintiffs` intention to resell the machines, and since there was no available market where substitute machines could be purchased to fulfil the sub-sale contracts, the damages awarded are not too remote and the first ground of appeal must fail.

Did the plaintiffs mitigate their loss?

It is well known that the innocent party in a breach of contract case is required by law to take reasonable steps to try and minimise the damages that he will suffer as a result of the breach. ***McGregor on Damages*** sets out the position succinctly:

> *295 The extent of the damage resulting from a wrongful act, whether tort or breach of contract, can often be considerably lessened by well-advised action on the part of the person wronged. In such circumstances the law requires him to take all reasonable steps to mitigate the loss consequent on the defendant`s wrong, and refuses to allow him damages in respect of any part of the loss which is due to his neglect to take such steps. Even persons against whom wrongs have been committed are not entitled to sit back and suffer loss which could have been avoided by reasonable efforts or to continue an activity unreasonably so as to increase the loss. This well-established rule finds its most authoritative expression in the speech of Viscount Haldane LC in the leading case of* ***British Westinghouse Co v Underground Ry*** *where he said:*
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> *`The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.`*

The defendants` submission was that they were willing to deliver 18 of the 24 machines to the plaintiffs and that if the plaintiffs had taken these machines, they would have been able to satisfy most of the sub-sales. They would have made a profit from the 18 machines and would have only lost the profit on the six machines which the defendants were unable to supply.

The plaintiffs rejected this contention. They argued that the defendants had initially totally repudiated the contract and only when threatened with legal action did they come forward and offer to deliver 18 machines. They also cast doubt on the authenticity of the offer to deliver 18 machines pointing out that the letter from PTKG had indicated that that company was interested in eight machines rather than six as maintained by the defendants. The plaintiffs had no confidence in obtaining any unit at all at the material time because the defendants` position was that they could not get an export permit and it was clear that unless PTKG was prepared to release the machinery, the defendants would not be able to get it out of Karimun. Subsequent events showed the plaintiffs had been right to be doubtful because PTKG ended up buying nine machines rather than only six.

The plaintiffs` submissions on the issue of mitigation are not easy to accept. The defendants made several offers to the plaintiffs to try and reduce the losses that the latter would incur by reason of the defendants` inability to comply fully with the sale terms. They offered to sell the machines on the same terms and conditions as previously, they offered to make arrangements for the plaintiffs to inspect the machines again and they offered to act as brokers for the plaintiffs in respect of the six machines which PTKG wanted. The defendants were so keen to conciliate the plaintiffs that even after proceedings were commenced, they did not proceed with the sale to PTKG but held it back until April 1999 when it was clear that there could be no compromise. In my view the fact that PTKG eventually bought nine machines does not detract from the genuineness of the defendants` offer since there was evidence that the defendants had export permits for all 18 machines and the sale of the three additional machines was not effected until after it was clear that the plaintiffs had no intention of taking any of the remaining machines.

The defendants` offer to supply the 18 machines was not made only once. It was made several times starting from December 1998, first in the defendants` own letters and subsequently in several open letters from the defendants` solicitors to the plaintiffs` solicitors. If the plaintiffs had taken up this offer, they could have fulfilled some of the sub-sales as the evidence of at least two of the sub-purchasers was that they could price the machines individually and sell them separately. One of them expressly agreed that even if the plaintiffs could not deliver one out of the five units which he had contracted to purchase, he would have accepted the other four.

The evidence supports the inference that the real reason why the plaintiffs did not take up the defendants` offer was that they not only wanted the 18 machines but also wanted the defendants to agree to their other terms for a negotiated settlement. This included payment of monetary compensation and settlement of their legal fees. As their managing director stated, actually it was not that the plaintiffs did not want to accept the machines (and in fact they wanted those machines) but they had already set down their terms for such acceptance and the defendants did not agree to those conditions. The defendants` failure to agree to the plaintiffs` conditions should not have been a stumbling block. The plaintiffs could easily have replied to the defendants` various offers by stating that they were willing to accept 18 machines without prejudice to their right to claim for the other damages inflicted by the breach.

In my judgment, it was unreasonable on the part of the plaintiffs to refuse to accept delivery of the 18 machines. These were the exact machines they had agreed to buy originally, not substitute machines, and they had agreed to sell these same machines to their sub-purchasers. These were independent machines and there was no evidence that any of the 18 units could not have functioned without the presence of one or more of the six units which the defendants were withholding. Neither was there any evidence that any of the sub-purchasers could reasonably reject the tender of any of the machines on the basis that not all the machines they had contracted to buy were being delivered. There were also two sub-sales which were wholly unaffected by the defendants` breach in that none of the machines which the plaintiffs had agreed to sell under those two sub-sales were among the machines which the defendants would not be delivering. Further, the defendants were offering an immediate delivery so that there was no significant delay which could have altered the plaintiffs` position vis-.-vis their sub-contractors.

In the result, the plaintiffs having failed to mitigate their loss in respect of 18 machines are not able to recover those losses from the defendants. They are, however, able to recover the loss of profits which they incurred by reason of the defendants` inability to deliver six machines to them. They did not have to accept the defendants` offer to act as a broker in the sale of those machines to PTKG because that would mean accepting that sale and its proceeds in place of the sub-sales the plaintiffs themselves had arranged. They are entitled to recover their full loss in respect of those six machines and not simply the difference between the price at which they bought them from the defendants and the defendants sold them to PTKG.

Conclusion

In the result, I allow the defendants` appeal and set aside the assessment below which was based on non-delivery of 24 machines. I am remitting the case back to the registrar to assess the plaintiffs` loss of profits in respect of the six machines which could not have been delivered. In considering this point, the registrar would also have to consider whether the plaintiffs` profits on those machines were excessive and if so, make the necessary adjustments. As for costs, I will hear arguments from parties on how the costs here and below should be apportioned in the light of the partial success of the defendants.

Outcome:

Appeal allowed.