Smith & Associates Far East Ltd v Britestone Pte Ltd
[2006] SGHC 238

Case Number : Suit 108/2005, RA 304/2006

Decision Date : 22 December 2006

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : Sham Chee Keat (Ramdas & Wong) for the appellant / defendant; Terence Tay / Jeffrey Lim (Wong & Leow LLC) for the respondent / plaintiff

Parties : Smith & Associates Far East Ltd — Britestone Pte Ltd

Commercial Transactions – Sale of goods – Breach of contract – Damages for breach of contract – Plaintiff purchasing electrical components from defendant and re-selling them to third-party – Components causing third party to suffer damage – Plaintiff held responsible for damages and settling third party's claim – Whether defendant liable to pay plaintiff amount paid under settlement with third party on ground of defendant's breach of implied condition of contract with plaintiff even though defendant not participating in negotiation of such settlement sum – Whether sub-sale may be taken into account when computing damages arising directly and naturally from breach of contract – Section 54 Sale of Goods Act (Cap 393, 1999 Rev Ed)

22 December 2006

Tan Lee Meng J

1 The appellant, Britestone Pte Ltd ("Britestone"), appealed against the order of the Assistant Registrar, Ms Dorcas Quek, requiring it to pay damages amounting to US$302,184.00 to the respondent, Smith & Associates Far East, Ltd, the Hong Kong Asian headquarters of an American company, NF Smith & Associates LP (collectively referred to as "Smith"), for supplying the latter with counterfeit capacitors. I dismissed the appeal and now give the reasons for my decision.

Background

2 Smith distributes electronic components, semiconductors and computer products. Britestone, a Singapore company, which is also in the electronic components business, sources goods from traders, distributors and manufacturers and supplies them to its clients.

3 On 11 August 2003, Smith purchased 52,000 units of "AVX" capacitors bearing the part number "TPSC336K016R0300" from Britestone. Smith re-sold the capacitors to Celestica Thailand Ltd ("CTL"), a subsidiary of Celestica International Inc. After receiving the capacitors, CTL installed them onto printed circuit boards for its customer, EMC Corporation ("EMC"), in Cork in Ireland and in Franklin in the United States.

4 In September 2003, it was discovered that the capacitors supplied by Britestone to Smith were counterfeit goods. As a result, the counterfeit capacitors had to be removed from the printed circuit boards and replaced with genuine products. EMC submitted a claim to CTL for US$444,690.00 for solving the problems arising from the installation of the counterfeit capacitors in the printed circuit boards supplied to them in Ireland and the United States. CTL held Smith responsible for the amount claimed by EMC. Smith and CTL had several rounds of negotiation over a period of nine months and it was finally agreed on 1 July 2004 that Smith would pay CTL the sum of US$300,000.00 in full and final settlement (the "settlement") of CTL's claims against Smith.

5 In 2005, Smith commenced the present proceedings against Britestone. It alleged that Britestone breached an implied condition of the contract that the capacitors would conform with the description "AVX" and the stated part number. Smith claimed the settlement sum of US$300,000.00 that it paid to CTL as well as another US$2,184.00 for loss of profit, or alternatively, damages to be assessed.

6 It was common ground that the implied condition that the capacitors conform to their description had been breached. On 20 March 2006, both parties agreed to a consent judgment, under which Britestone accepted liability for breach of the contract. The assessment of damages was left to the Registrar.

7 During the assessment of damages by the Assistant Registrar, Smith called four witnesses, including its General Counsel, Mr Matthew Henry Hartzell ("Mr Hartzell"), its managing director, Mr John Bernhardt Prymmer III ("Mr Prymmer"), the senior manager of Celestica Electronics (S) Pte Ltd, Mr Ng Lup Wai, and the Global Programme Manager of Celestica International Inc, Ms Kimberly Aube ("Kimberly"). Britestone called two witnesses, namely its managing director, Mr Park Hee Woong ("Mr Park") and its sales manager, Ms Tan Mee Yee ("Ms Tan"). Britestone was given leave to call two expert witnesses to give evidence but they did not appear at the hearing before the Assistant Registrar.

8 After hearing the evidence for three days, the Assistant Registrar ruled that Smith was entitled to damages totalling US$302,184.00. Britestone appealed against her decision.

The Appeal

9 At the hearing of the appeal, Britestone pointed out that apart from accepting liability for breach of contract, it also accepted liability for the US$2,184.00 that Smith had claimed as its loss of profits. Britestone's appeal was thus only concerned with whether it was liable to pay Smith the US$300,000.00 that the latter paid under the settlement with CTL.

10 The loss suffered by Smith with respect to the settlement concerns a sub-sale to CTL. The normal rule is that sub-sales are not taken into account when computing damages arising directly and naturally from a breach of contract. However, they may be relevant in the context of s 54 of the Sale of Goods Act (Cap 393, 1999 Rev Ed), which provides as follows:

> Nothing in this Act affects the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable ….

11 Section 54 of the Sale of Goods Act leaves room for the application of the second branch of the rule in *Hadley v Baxendale* (1854) 9 Exch 341, which was summed up by Alderson B in that case as follows at pp 355-356:

> [I]f the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.

12 It is pertinent to note that in *Monarch Steamship Co Ltd v A/B Karlshamns Oljefabriker* [1949] AC 196 at 224, Lord Wright observed that reasonable businessmen "must be taken to understand the ordinary practices and exigencies of the other's trade or business" and that need not generally be the

subject of special discussion or communication. In the present case, Smith and Britestone had traded with each other for a long time and Britestone's sales manager, Ms Tan, accepted during cross-examination that when Smith ordered the capacitors, it was stated that the capacitors were for its customers.

13 Although there was a chain of contracts in the present case, this does not affect Smith's claim. Admittedly, in *Dexters Ltd v Hill Crest Oil Co (Bradford) Ltd* [1926] 1 KB 348, Bankes, Warrington and Scrutton LJJ expressed the view, obiter, that where there is a chain of contracts, all the contracts in question must be the same if recoverable damages are to be passed along the chain. However, in *Biggin & Co Ltd v Permanite Ltd & Ors* [1951] 1 KB 422, ("*Biggin*"), Devlin J, while accepting that material variations in contracts down the line could lead to claims for damages not contemplated by the original seller, added as follows at 433-434:

> If the variation to a description is such that it is impossible to say whether the injury that ultimately results would have flowed from the breach of the original warranty, the parties must as reasonable men be presumed to have put the liability for the injury outside their contemplation as a measure of compensation. If this is, as I believe, the nature of the principle, it must be applied very differently according to whether the injury for which the defendant is being asked to pay is a market loss or physical damage. In the former case…, any variation that is more than a matter of words is likely to be fatal because there is no way of telling its effect on the market value. In the latter case the nature of the physical damage will show whether the variation was material or not.

14 Devlin J's view on the materiality of variations in a string of contracts was endorsed in *Bence Graphics International Ltd v Fasson UK Ltd* [1997] 3 WLR 205, ("*Bence Graphics*") at 222 by Auld LJ, who proceeded on the basis that on the material before the trial judge, "there appear to have been no *material differences* between the contracts in the chain which would have put damage claimed at any point in the chain outside the imputed contemplation of the buyer and seller, given their knowledge that the vinyl film and the decals into which it was concerted were required to serve their purpose for a minimum of five years". [emphasis added] In the present case, there are no material differences in relation to the warranty complained of in any of the contracts in the chain. The contract between Smith and CTL described the capacitors in the same terms as they were described in Smith's contract with Britestone. The contract between CTL and EMC required capacitors with specified characteristics which were matched by AVX capacitors bearing the part number TPSC336K016R0300 and it was Britestone's counterfeit capacitors that had to be purged from the machines. In short, there is nothing in the chain of contracts that affects the original warranty given by Britestone to Smith, which was broken because the capacitors that had been supplied were counterfeit goods.

15 As for the fact that the capacitors were installed onto printed circuit boards, this is not an insurmountable hurdle with respect to Smith's claim for damages. In *Bence Graphics*, the defendants were suppliers of cast vinyl film, which is also used to manufacture decals employed in the identification of bulk containers, this being the only end use intended in the case of film sold by them to the plaintiffs. The standard requirement in the container industry is that such decals should have a "guaranteed minimum five year life". Some 93% of the decals were supplied by the plaintiffs to SCL, who alleged that the film did not fulfil the warranties with which it was sold and was not reasonably fit for its intended purpose. There were many complaints from SCL's customers. The following passage from the judgment of Otton LJ at 216, with which Auld LJ agreed, is relevant to the present case:

> [T]he sellers would have known that any defect in the film would not have been detected on delivery or in the process of manufacture. The defect, ie the breach, would have caused

> deterioration of decals in service with the result that the ultimate users of the containers would complain to and claim damages against the container owners who would in turn make claims against the container manufacturers. The manufacturers in turn would make claims for damages against the plaintiffs which the plaintiffs would be "not unlikely" obliged to meet….
>
> These factors, to my mind, point indubitably … towards a measure of damage based upon the plaintiffs' liability to the subsequent or ultimate users of the plaintiffs' product *in which the defendants' goods were an integral part* and in the event of a breach of the warranty as to quality the plaintiffs' liability to those others would be triggered. [emphasis added]

16 In the present case, the capacitors sold by Britestone to Smith became an "integral" part of the printed circuit boards in the same way the vinyl film in *Bence Graphics* became an integral part of the decals. The fact that it was CTL and not Smith who fixed the capacitors onto the printed circuit boards should not matter in the circumstances of this case, and *especially so since the testimony of Smith's Mr Prymmer that the capacitors sold by Britestone to Smith had no use other than to be installed onto printed circuit boards was not contradicted by Britestone*.

17 For the aforesaid reasons, the damages due from Smith to CTL, which flow from Britestone's breach of warranty, would reasonably be supposed to have been in the contemplation of both Britestone and Smith when they made the contract and are the probable result of the breach in question. The next question to be determined is whether or not Smith is entitled to claim from Britestone the entire settlement sum of US$300,000.00 that was paid to CTL. In this regard, it is worth noting that in *Biggin,* [1951] 2 KB 314 at 321, Somervell LJ said as follows:

> The law, in my opinion, encourages reasonable settlements, particularly where, as here, strict proof would be a very expensive matter. The question, in my opinion is: what evidence is necessary to establish reasonableness? I think it is relevant to prove that the settlement was made under advice legally taken.

18 In the same case, Singleton LJ said at 325-326 that in considering whether a settlement is reasonable, the court is entitled to bear in mind the fact that costs would grow every day the litigation was continued. That is one reason for saying that it is sufficient to show that "somewhere around the figure of settlement would have been awarded as damages".

19 Britestone took the position that *Biggin* should not be followed as doubts had been expressed about this decision of the English Court of Appeal in two Australian cases, namely *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* [1998] 192 CLR 603 and *White Industries Brokers Qld Pty Ltd v Hennessey Glass & Aluminium Systems Pty Ltd* [1999] 1 Qd R 210. However, it ought to be noted that the views of Somerwell and Singleton LJJ in *Biggin* were adopted by the Court of Appeal in *Brown Noel Trading Pte v Donald & McArthy Pte Ltd*. [1997] 1 SLR 1 ("*Brown Noel*"). The decision of the Court of Appeal in *Brown Noel* binds the Assistant Registrar as well as the High Court. In any case, whatever doubts the Australian courts may have about *Biggin*, it was quite clear in this case that the rule on remoteness of damage was satisfied as the settlement reached between Smith and CTL concerned damages that were, for reasons already stated, within the contemplation of the Smith and Britestone when they made the contract for the sale and purchase of the capacitors on 11 August 2003.

20 In attempting to prove that it was not bound to pay to Smith the amount the latter agreed to pay CTL under the settlement, Britestone relied on a number of grounds. For a start, it complained that it was not involved in the negotiations between Smith and CTL. The reasonableness of the settlement does not depend on whether Britestone was involved in the negotiations between Smith

and CTL. Smith is entitled to settle its claim with CTL on its own and not complicate matters by having multi-party negotiations. In any case, Smith's Prymmer wrote several letter to Britestone's managing director, Mr Park. In the said letters, Britestone was informed that CTL had agreed to accept US$300,000.00 in full and final settlement of its claims against Smith and Britestone was asked to contribute towards the settlement sum. Britestone did not respond to these letters.

21 Britestone also alleged that the settlement was unreasonable because Smith had not properly verified the claims of CTL and EMC. However, the Assistant Registrar was satisfied that this assertion was unsound as Smith's general counsel, Mr Hartzell, had testified that he had questioned various aspects of EMC's global summary of rectification costs and that he had asked "why it cost so much money" and "why rectification and purging had to be done so quickly". Furthermore, Celestica International Inc's Kimberly, who was involved in the process of purging the printed circuit boards, had verified the figures furnished by EMC. In fact, she had personally supervised the entire purging process in both Cork and Franklin and had monitored the relevant operating time, costs and expenses. When questioned about the documents in her affidavit of evidence-in-chief at the hearing before the Assistant Registrar, her answers showed that she had intimate personal knowledge of all the details in the documents. The Assistant Registrar was impressed by her "methodical and meticulous manner of tracing the steps of the entire purging process as well as the documenting of all the costs incurred". In these circumstances, Britestone's allegation that the claims of CTL and EMC had not been properly verified did not have a leg to stand on.

22 Another ground that was relied on by Britestone to question the reasonableness of the settlement was that Smith's general counsel, Mr Hartzell, did not have technical knowledge about capacitors, the manufacturing of printed circuit boards and the purging of capacitors from printed circuit boards. The Assistant Registrar rightly pointed out that there is no reason why Smith's legal counsel is required to have technical knowledge of capacitors and the purging process so as to effectively conduct negotiations with CTL. Mr Hartzell was clearly on top of things for when he was asked how he arrived at the conclusion that more than the settlement sum of US300,000.00 would have had to be paid in damages if the parties had not reached a settlement, he testified as follows:

> [D]rawing on my experience in 20 years of commercial litigation …. I have seen this type of claim both inside and outside private legal practice and legal practice as general counsel of Smith & Associations. In my experience, unless you settle a case where you have a claim of $400,000, you are never going to see a lower number from that claimant. I know from this case, from document I reviewed and discussions with CTL, that we were talking about costs, their lost profits, any time delays, any damage to reputation they might have from their customer and so forth. We did not even know at that time whether the entire problem had been solved. They hurried to get to customer to fix problem. As legal advisor to Smith, … I know that those damages could only have been worse.

23 It is also pertinent to note that the negotiations between Smith and CTL lasted nine months and that CTL's own costs in purging the printed circuit boards were finally excluded, leaving only EMC's own costs to be claimed from Smith. The length as well as the nature of the negotiations suggest that the settlement sum of US$300,000.00 was not hastily arrived at and without due consideration by Smith of the merits of CTL's case.

24 Finally, what cannot be overlooked is that Britestone did not introduce any evidence during the hearing before the Assistant Registrar as to what was the reasonable cost of purging the counterfeit goods from the printed circuit boards. It had applied to call two expert witnesses for the assessment of damages but none were called in the hearing before the Assistant Registrar. Having not furnished any evidence to contradict Smith's case, it is in no position to attack the Assistant Registrar's

carefully considered decision that the settlement sum was a reasonable one. In para 52 of her grounds of decision, she stated as follows:

> In sum, I find that the settlement was a reasonable one. There was proper legal advice given by the [plaintiff's] own legal counsel, who had properly taken into account the possibility of incurring exorbitant costs in the event that litigation took place. CTL had properly supervised every step of the purging process and was aware of the costs incurred. Matthew Hartzell, on behalf of the [plaintiff] had also asked for support of the claim. The [plaintiff] had spent substantial time attempting to reduce the sum claimed by CTL. The quantum that was settled for was more than reasonable, since CTL's own costs in purging were finally excluded and only EMC's costs were claimed.

25 As I agreed with the decision of the Assistant Registrar, I dismissed Britestone's appeal with costs.