Asia Polyurethane Mfg Pte Ltd v Tandjung Marketing International Pte Ltd [2007] SGHC 3

Case Number : Suit 252/2006

Decision Date : 02 February 2007

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Goh Peck San and Christopher Yap (P S Goh & Co) for the plaintiff; Letchamanan Devadason and Pauline Tan Kwee Sain (P Tan & Company) for the defendant

Parties : Asia Polyurethane Mfg Pte Ltd — Tandjung Marketing International Pte Ltd

Civil Procedure – Pleadings – Failure to properly plead claim and defence -Whether defence raised during the trial can be relied on when not pleaded

Contract – Breach – Plaintiff alleging payment for goods paid to defendant was actually intended for it – Claim for payment due to plaintiff – Defendant alleging that payment was to set-off commission payments owed to it

2 February 2007 Judgment reserved.

Choo Han Teck J:

1 The plaintiff is a private company manufacturing and trading in chemicals and fertilisers. At the material time Tan Kay Seng ("TKS") managed this company, exercising full control and authority over its business. TKS was the patriarch of an Indonesian family. He died in December 2002 and is survived by his widow and children, four sons and six daughters. One of his sons, Erman Tandjung ("Erman") had taken over the management and control of the plaintiff company. Ertah Tandjung ("Ertah"), the managing director of the defendant company is the youngest son of TKS. Ertah was employed by the plaintiff company in 1987 and left in 1997. It was not entirely clear what his job was, but it appeared that he was involved in finding customers for the plaintiff's products. In 1999, TKS asked him to help the plaintiff recover some money and business from a company called Shanghai Vehicle Awning Ltd ("SVA") in China. With some persuasion from his mother, Ertah finally agreed to help the plaintiff, but not in his personal capacity. He agreed to do so only through the defendant company. Consequently, TKS wrote a letter in Chinese dated 28 April 1999 to Ertah, setting out the proposals he had in mind. According to Ertah, he told TKS that he could not agree to the terms in this letter. Hence, in May 1999, TKS showed a written agreement dated 3 May 1999 to Ertah. It was referred to by the parties as "The Commission Agreement" ("The Agreement"), and TKS signed it on 7 May 1999. The document also carried a date of 20 May 1999 on the first page but nothing seemed to turn on this as neither party explained why that date was written. Ertah testified that he signed it soon after 3 May 1999. By this Agreement the plaintiff appointed the defendant as its distributor in China, and on terms that the defendant would be given a 10% commission for all business brought to the plaintiff from China.

2 Ertah secured a contract for the sale and purchase of the plaintiff's products to SVA. This was known as Contract 2293 and had a total contract price of US$558,400 but the goods were to be shipped in 10 shipments. The plaintiff would release each shipment upon sight of payment by a letter of credit. SVA had its own agent to deal with the defendant. Its agent was Shanghai Luwen Foreign Trade & Industry Co ("SLFTI"). The Commission Agreement appears to apply to this deal that Ertah had brought together for the plaintiff and SVA. There were no problems with the shipments except for the fifth shipment. The plaintiff claimed, in the Second Amended Statement of Claim, that the defendant was in breach of its fiduciary duty by selling similar goods to SVA under Contract 88901-

1for the contract sum of US$52,350. This sum was paid by SVA to the defendant, who, in order to fulfil its obligations to SVA, procured from the plaintiff the same goods which were then shipped as the 5th shipment, to SVA. The plaintiff's main case, it appeared, was that in respect of the goods shipped and referred to, as the fifth shipment, it was, in fact, goods sold directly to the defendant under an invoice No.8318. The defendant denied this, and, there was insufficient evidence to show that this was the case. Consequently, the narrative was not very clear because the plaintiff was unable to call any witness to explain why the fifth shipment became an outright sale to the defendant. Mr Goh, counsel for the plaintiff, suggested, that Ertah changed the transaction so that the defendant could earn the profit being the difference between the contract prices of the back-to-back sales, that is, the sale (of what would have been the fifth shipment) from the plaintiff to the defendant to SVA. The order for the fifth shipment was placed on 21 December 1999 by the defendant, and the goods shipped on 28 December 1999. There was also a reference to a loss under the sixth shipment, but no particulars of that loss, namely, how the loss was incurred or what manner of breach was involved, was pleaded. The pleading in respect of this "sixth shipment" was unclear and the evidence so sparse that I am unable to make any finding of it in favour of the plaintiff on this count, and by which, for the avoidance of doubt, I include the references in the Statement of Claim and the evidence concerning the sale to the companies known as Plastofab Technology Services and Fertiland Chemical Co. The statement of claim was not a coherent piece of pleading. The evidence seemed to show that the defendant just did not pay over the $52,350, and, unless justified, would have been in breach of its duty as an agent to the plaintiff.

3 The justification the defendant relied on was adduced through the testimony of Ertah. His evidence was two-fold, first that the payment by SVA for the fifth shipment was made with the consent of TKS, with the knowledge that it was to be used to set-off the defendant's claim for commission payment due. The plaintiff denied this defence in its reply and defence to the counterclaim. The counterclaim was made for breach of contract in not giving the defendant exclusive distribution rights from May 1999 to December 2000 and a further two years thereafter. In this regard, the evidence did not support this. On 29 December 1999, TKS wrote in the Sales Confirmation Order as follows: "This is the only time I am making the exception; the next time when the goods are supposed to be shipped you have to follow normal procedure." The fifth shipment was undeniably different from all the other shipments because of the payment that was made directly to the defendant instead of the plaintiff. I do not accept the defendant's explanation that this was an exception created with the knowledge or consent of TKS. The latter's remark made after the event as set out above suggests that he was unaware of the deviation from the procedure. Although I am not convinced that the fifth shipment constituted a separate and independent sale to the defendant, I find that the evidence showed that first, there was a shipment that constituted the fifth shipment; secondly, that SVA had paid for it by sending the payment to the defendant; and thirdly, that the defendant did not pay that money to the plaintiff. The pleading that the fifth shipment was a sale to the defendant such as to impose a fiduciary duty on the defendant to account for the money from SVA was entirely right, but I think that the evidence sufficiently showed that the defendant was contractually bound to pay over the money to the plaintiff – as an agent, and not that it was in breach of duty as a fiduciary in appropriating the benefits of the sale, that is, the profit, to itself; and that that evidence was adequately covered by the pleadings, albeit, barely so. The plaintiff did not dispute that its contractual obligations of the ten shipments to SVA had been fulfilled. At any rate, no evidence was brought to show otherwise. Ertah's evidence on this point was not contradicted.

4 The defendant thus counterclaimed for $84,415.88 being unpaid commission. This included "travelling expenses" calculated at US$0.50 per kg of goods sold, and which sum of $84,415.88 represented the balance of money due to the defendant after taking into account all payments made under the ten (the plaintiff argued that there were only nine) shipments under Contract 2293. The defendant founded its counterclaim on The Agreement of 3 May 1999, and also on a subsequent

document entitled "Supplementary Matters in the Shanghai Visit" ("Supplementary Agreement"). The parties disagreed as to the import of these two documents. Mr Goh submitted that the only clause granting the defendant a claim to expenses was to be found in clause 5 of The Agreement in which a fixed sum of $7,000 was stipulated to be paid on each occasion. Mr Devadason, counsel for the defendant, relied on clause 8 of the Supplementary Agreement which provided as follows: "[The plaintiff] shall be [100%] responsible for [Ertah] accompanying the purchaser/s travel abroad. At most it shall be once a year." The reference to "100%" was handwritten but unsigned. Mr Goh submitted that that was inserted by Ertah without the knowledge or consent of TKS. That seemed plausible to me because TKS signed on seven other amendments. It is equally plausible that it was an omission on the part of TKS. The only evidence we have is from Ertah and I will accept that. However, in my view, it does not help his cause because it referred only to expenses incurred by Ertah in "accompanying the purchaser/s travel abroad". There was no satisfactory evidence to the purchaser's travel, or Ertah's expenses, or any specific claim made previously.

5 The references to the right to claim expenses and commissions were relevant because Mr Devadason had argued that the defendant was entitled to set-off the expenses incurred against the plaintiff's claim for the US$52,350 as an alternative to the defendant's right to set-off the amount pursuant to an agreement with TKS in December 1999. On that occasion, TKS had asked all his children to attend his 60th wedding anniversary, but Ertah refused on account of his dispute over money with TKS. Consequently, TKS told him that he would forgive all debt owing by Ertah if he attended the anniversary celebration. Ertah called one of his sisters, Lilli Tandjung ("Lilli"), and his nephew Anthony Antakusuma ("Anthony") to testify to this agreement between TKS and Ertah. Lilli was a rambling and often incoherent witness, but seemed to me an honest witness. Anthony also appeared detached and reasonably neutral and thus I am inclined to believe that TKS might have made that agreement with Ertah. Mr Goh submitted that TKS never agreed to the set-off because he continued to refer to Ertah's debts in his will. That was not important, in my view, because he could have forgotten to change the will, or had been referring to some other debts, and even if it were this debt, he would have been in breach once the set-off had been agreed. However, the fatal flaw to the set-off by reason of TKS's forgiving the debt was that it was not pleaded in the defence. Had the defendant pleaded it, the plaintiff might have called other siblings and Ertah's mother to testify to the contrary.

6 It was difficult to tell from the evidence and circumstances of this case which of the two principal protagonists, Erman and Ertah, was generally more honest or reliable. On the issue of his father's forgiveness of the debt owed by the defendant to the plaintiff, Ertah had the advantage of his two persuasive witnesses, Lilli and Anthony. Lilli, I should reiterate, was rambling but honest. Ertah also appeared to be truthful on this point. The forgiveness of debt by TKS probably explained why Ertah did not claim for the outstanding commissions until the plaintiff made its claim. It should also be noted that it was not made clear whether TKS forgave all of Ertah's debts, that is, including those of the defendant, or only Ertah's personal debt, but Erman could only deny the existence of the agreement between his father and his brother, whereas, Ertah was a direct witness, as he recalled, TKS said, "If you don't claim me, I don't claim you." He also had the corroboration of his sister on this point. In a complicated situation such as the present, where the litigants are companies owned by different members of a quarrelling family, and the actions of the individuals might be confused with that of the corporate entities, with the further uncertainty whether the debts were personal or business, it was incumbent on the parties to be clear which debt was being forgiven. In the absence of clear evidence, the duty of the court was to decide whether the party on whose responsibility the burden fell, had satisfactorily discharged that burden. In this case, Ertah's evidence of the forgiveness of debt by his father was not very clear. It would have been more helpful to him had he pleaded it in his defence. The plaintiff could then have responded in its reply, and perhaps, produce evidence to the contrary, thus allowing the court to weigh two competing versions. Although the

plaintiff's counsel had challenged and questioned Ertah on this issue, he made no reference to the omission in pleading.

7 The difficulty I had in understanding the issues by reason of the imprecise pleadings and poorly adduced narrative evidence was compounded by the vagueness of some of the documents. The parties had produced some important documents that were written in Chinese but not translated, and in one instance, had a Chinese document translated by the witness himself. In the circumstances, the only fact that I was able to find was that the defendant, as agent for the plaintiff, had failed to hand over the US$52,350 being the purchase price for the fifth shipment from the plaintiff to SVA. Unfortunately, that was not the plaintiff's pleaded case. It pleaded, and proceeded at trial, on the basis that the fifth shipment was a direct sale by the plaintiff to the defendant. It was so out of context, and out of the agreement that the plaintiff's claim for this must fail. The only one who could possibly have saved it would be TKS, but he being dead, there was no evidence to prove the deviation from the original contract. On a technical ground, I disallow the defendant's claim for further commission based on the Supplementary Agreement which provided that "US$0.50 per kg shall be for the above Company's travel usage but must factually report the actual amount". The document seemed to refer to the travel expenses of SVA and not the defendant's, which had already been separately provided for. In any event, it required a "factual" reporting that was not proven to my satisfaction. And no one from SVA testified in support of the defendant's claim.

8 The defendant also made a counterclaim based on the contractual provision that the company be retained as commission agent for the SVA contracts for a second term of one year. Counsel submitted that on the plaintiff's own evidence, the plaintiff continued with a further 15 shipments after the initial ten, but, he submitted, the defendant was only claiming for loss of commission on ten shipments only. However, in respect of this, as well as its claim for the commission on the fifth shipment, I accept the evidence from the defendant's witnesses that by attending the anniversary celebration of Ertah's parents, all debts between the plaintiff and defendant were set-off against each other. That was the defendant's evidence, and although it may not be its defence if it was not pleaded, it would bar them, even if there was no pleading from making a claim.

9 In the circumstances, I dismiss the plaintiff's claim as well as the defendant's counter claim. This is a case in which I do not think that either party deserved an award of costs. There shall therefore be no order as to costs.