Smith & Associates Far East, Ltd v Britestone Pte Ltd
[2006] SGHC 186

Case Number : Suit 108/2005, NA 45/2006

Decision Date : 13 October 2006

Tribunal/Court : High Court

Coram : Dorcas Quek AR

Counsel Name(s) : Andy Leck and Terence Tay (Wong & Leow LLC) for the plaintiff; Sham Chee Kiat (Ramdas & Wong) for the defendant

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

13 October 2006

AR Dorcas Quek:

The facts

1 The plaintiff ("P"), a company incorporated in Hong Kong, is the Asian headquarters of N.F. Smith & Associates, LP, which is a distributor of electronic components, semiconductors and computer products. The defendant ("D") is a company incorporated in Singapore. The D also trades in electronic components by sourcing for goods from traders, distributors as well as manufacturers, and supplying them to its customers. On or about 11 August 2003, the P purchased 52,000 units of capacitors of the "AVX" brand and part number "TPSC336K016R0300" from the D at the price of US$9,776. After receiving the goods, the P re-sold the capacitors to its customer, Celestica Thailand Ltd ("CTH"), which is a subsidiary of Celestica Inc. CTH in turn installed these capacitors on printed circuit boards and sent them to its customer – EMC Corporation ("EMC") at Cork in Ireland and Franklin in the United States of America.

2 According to the P, the capacitors were discovered to be counterfeit capacitors in September 2003. Thereafter, Kimberly Aube, the Global Program Manager of Celestica International Inc (another subsidiary of Celestica Inc), supervised the "purging" of the capacitors. The "purging" process involved replacing the unused capacitors at CTH's premises, replacing the capacitors installed on printed circuit boards that were still in CTH's goods warehouse pending delivery to EMC and replacing the capacitors installed on printed circuit boards that had already been delivered to EMC at Cork and Franklin.

3 Based on the P's evidence, EMC's cost for purging the goods in Cork and Franklin amounted to US$444,680. A document entitled "EMC Global Summary – Purge Costing", which was exhibited to Kimberly Aube's affidavit of evidence-in-chief set out the details of the total costs incurred. EMC claimed its costs of US$444,680 from CTH and CTH then claimed this sum against the P. After several rounds of negotiations between the P and CTH, an agreement was entered on 1 July 2004 for the P to pay US$300,000 as full and final settlement of any claims CTH would have against it. In 2005, the P commenced these current proceedings against the D, alleging that the latter breached an implied condition of the agreement that the capacitors would conform with the description of the "AVX" brand and the particular part number. The P claimed for US$302,183 as damages, comprising US$2,184 for loss of profits and US$300,000 for compensation paid to CTH, or alternatively, for damages to be assessed. On 20 March 2006, the parties entered a consent judgment before VK Rajah J for the issue of liability to be resolved in the P's favour and damages to be assessed by the Registrar.

4 In the assessment of damages heard before me, the P maintained its claim for the sum of

US$302,183. The P called four witnesses – Matthew Henry Hartzell (Vice President and General Counsel of N.F. Smith & Associates, LP), John Bernhardt Prymmer III (managing director of the P), Ng Lup Wai (Senior Manager of Celestica Electronics (S) Pte Ltd) and Kimberly Aube. The D called two witnesses – Park Hee Woong (Managing Director of the D) and Tan Mee Yee (Sales Manager of the D).

The law on damages for breach of contract of sale of goods

Right to claim damages for breach of condition

5 The parties had agreed that an implied condition that the goods conform to their description had been breached. As rightly submitted by the plaintiff's counsel ("PC"), the buyer, under s 53 of the Sale of Goods Act (Cap 393, 199 Rev Ed) ("the Act"), may treat a breach of condition as a breach of warranty entitling him to claim for damages. That section provides:

> **Remedy for breach of warranty**
>
> **53.** —(1) Where there is a breach of warranty by the seller, or where the buyer elects (or is compelled) to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may —
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> (a) set up against the seller the breach of warranty in diminution or extinction of the price; or
>
> (b) maintain an action against the seller for damages for the breach of warranty.

Remoteness of damages

6 The general principles in contract law are applicable in determining the appropriate quantum of damages. Damages awarded have to put the P in a position he would have been if the contract had been fulfilled. In this regard, the P has to show that: (a) the damages claimed were *caused* by the D's breach; and that (b) the damages are *not too remote*: *Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360.

7 In respect of remoteness of damages, it is trite law that only damages which may *reasonably be supposed to have been in the contemplation* of both parties may be recovered: *Hadley v Baxendale* [1854] 9 Ex 341. Two well-known principles have been derived from this general rule. First, any damage which will result from the ordinary course of things is recoverable. This principle is encapsulated in s 53(2) of the Act, which states:

> (2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

8 The second principle is that the defendant is taken to have contemplated abnormal damage arising out of special circumstances outside the ordinary course of things, if he had actual knowledge of the special circumstances. Such damages are known as "special damages" under s 54 of the Act: *Bence Graphics International Ltd v Fasson UK Ltd* [1988] QB 87.

Measure of damages

(a) The prima facie measure

9 Under s 53(2) of the Act, the *prima facie* measure of damages resulting in the ordinary course of things is the diminution in value of the goods, i.e. "the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had fulfilled the warranty". However, this *prima facie* measure may be departed from in appropriate circumstances: *Bence Graphics International Ltd v Fasson UK Ltd*.

(b) Loss of profits under a sub-sale

10 One departure from the *prima facie* measure is to award loss of profits under a sub-sale, if it is within the reasonable contemplation of the parties that the breach was likely to have caused the buyer to lose the profit he hoped for under the sub-sale: *Richard Holden Ltd v Bostock & Co Ltd* [1902] 17 TLR 317. P.S. Atiyah, in *The Sale of Goods* (Tenth Edition, 2001) has observed at 553 that sub-sales are normally ignored in claims under s 53(3) of the Act (the first limb of *Hadley*), and that these are normally treated as special damages under the second limb of *Hadley* requiring proof of special knowledge of the probability of resale.

11 This view is also reflected in *Chitty on Contracts* (29th Edition, 2004) at [43-451]:

> Where the *seller knew that the buyer intended to resell the goods*, and *ought reasonably to have contemplated that the breach of his contractual undertaking as to the description or condition of the goods would not be unlikely to cause the buyer to lose the profit he hoped to make under the sub-sale*, the buyer may recover damages in respect of such a loss of profits caused by a breach of the seller's undertaking.
>
> [emphasis added]

(c) Damages paid by buyer to sub-buyer

12 The same analysis applies to recovery of compensation or damages paid to a sub-buyer; it still has to be shown that the sub-sale was within reasonable contemplation of the seller. In addition, it has to be established that it was not improbable that damages would be payable by the buyer to the sub-buyer. *Chitty on Contracts* at [43-459] sums up the requirements that are distilled from the relevant case law:

> …it was *within reasonable contemplation of the parties*, at the time of making the contract, that: (a*) the buyer would, probably would, resell the goods to a sub-buyer;* and (b) that the contract of sub-sale would, or probably would, contain the same or a similar contractual undertaking as to the description or condition of the goods; and (c) that it was *not unlikely that a breach of the seller's undertaking would cause the buyer to be in breach of his undertaking to the sub-buyer who would claim damages* from the buyer for the loss or damage he suffered.
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> If loss or injury occurs in these circumstances, *the buyer who has paid damage and costs to his sub-buyer for breach of the undertaking in the sub-sale may recover this amount from the seller*, together with his own costs in reasonably defending the sub-buyer's claim, as damages for the seller's breach of the original contract.
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> [emphasis added]

(d) Settlement of claim by sub-buyer against buyer

13 In most circumstances, it will be within the parties' reasonable contemplation that the buyer

will face potential suits by his sub-buyer, but is it also within the parties' contemplation that the buyer will *settle* the dispute with the sub-buyer? This is the pertinent issue to be resolved in the present case. PC, in this respect, relies on *Biggin & Co Ltd v Permanite Ltd & Ors* [1951] 2 KB 314 to submit that a reasonable settlement should be recoverable as damages payable by the seller to the buyer. PC also quotes Atiyah's summary of the *Biggin* case (at 114) as follows:

> And *if the buyer reasonably settles a claim made against him by the sub-buyer, the amount paid under such a settlement is prima facie the measure of damages recoverable from the seller, and is in any event the upper limit*. But it is open to the seller to contest the amount and to show that the sum paid was excessive, for he is of course not bound by the settlement to which he was not party. Moreover, the buyer still has to show that there was breach of contract by the seller; the settlement is only admissible to show that prima facie level of damages once liability is proved or established.
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> [emphasis added]

14 The decision in *Biggin* has been adopted by the Singapore Court of Appeal in *Brown Noel Trading Pte Ltd v Donald & McArthy Pte Ltd* [1997] 1 SLR 1. However, Defendant's Counsel ("DC") casts doubt on the correctness of the decision in *Biggin* by quoting from the Australian cases of *Unity Insurance Brokers Pty Limited v Rocco Pezzano Pty Limited* [1998] 193 CLR 603 and *White Industries QLD Pty Ltd v Hennessey Glass & Aluminium Systems Pty Ltd* [1999] 1 QdR 210*,* where the courts questioned the reasoning of the Court of Appeal in *Biggin.*

15 While I am bound by the Singapore Court of Appeal's decision to follow *Biggin* in *Brown Noel Trading,* I also find that there are sound reasons to adopt the decision in *Biggin*. I shall summarise the relevant cases before setting out my reasons for this conclusion.

16 In *Biggin*, the plaintiffs were requested by the Dutch government to supply bituminous adhesive for use with roofing. The goods were ordered from a third party and turned out to be of unsatisfactory quality. The Dutch government was sued by its contractors and the Dutch government thus commenced legal proceedings against the plaintiffs. It eventually agreed to submit to arbitration in England. On the first day of arbitration, the Dutch government and the P reached a settlement agreement in which the P agreed to pay 43,000 pounds. The P claimed this sum from the defendants, together with their own costs of arbitration and costs of the Dutch government.

17 The trial judge, Devlin J, disallowed the claim for the settlement sum. Devlin J did not dispute that the defendant ought to have foreseen a claim by the Dutch government, but held that the compromise reached between the P and the Dutch government was not a foreseeable consequence.

18 On appeal, the Court of Appeal reversed this part of Devlin J's decision. Somervell LJ held, at 321:

> I think that the [trial] judge here was wrong in regarding the settlement as wholly irrelevant. *I think, though it is not conclusive, that the fact that it is admittedly an upper limit would lead to the conclusion that, if reasonable, it should be taken as the measure*. The result of the judge's conclusion is that the plaintiff must prove their damages strictly to an extent to show that they equal or exceed 43,000 pounds; and that is that involves, as it would here, a very complicated and expensive inquiry, still that has to be done. *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 *relevant to prove that the settlement was made under advice legally taken*...

[emphasis added]

19 The facts in *Biggin* are very similar to *Brown Noel Trading,* save that the latter case involved non-delivery of goods. The appellant had contracted to purchase goods from the respondents so as to sell it to a third party. The respondents failed to deliver these goods, and the third party commenced an action against the appellants for breach of contract. The appellants subsequently settled the third party claim at US$150,000. This claim was disallowed by the trial judge. The Court of Appeal, having found that the respondents knew that the appellants had bought the goods for the purpose of re-sale, and that it was within their contemplation that if they had failed to deliver the goods contracted for, the appellants would lose their profit on re-sale and also be liable to the sub-purchaser in damages, applied the above holding in *Biggin.* It concluded that the appellants were advised by their solicitors in reaching the settlement and the settlement arrived at was therefore reasonable. The amount the appellants paid its sub-purchaser was allowed.

20 The Australian High Court in *Unity Insurance* was dissatisfied with the reasoning in *Biggin,* because the reference to public policy suggested that the Court of Appeal did not consider the case in terms of causation or remoteness. The Australian court could not accept the English court's assumption that every reasonable settlement resulting from a breach by the defendant must be regarded as within the defendant's contemplation. In its opinion, "it does not follow that that the fact that it was reasonable for the plaintiff to compromise the claim against the third party necessarily means that the settlement was within the reasonable contemplation of the defendant". Similarly, the Australian Court of Appeal in *White Industries* opined at 218 that it was not clear to what extent the English Court in *Biggin* "intended to qualify the basic proposition that the amount of a reasonable settlement was recoverable"; "a settlement which was reasonable…may later be proved to have been quite unnecessary".

<u>The decision in *Biggin* is justifiable</u>

21 The decision in *Biggin* may be rationalised in terms of causation and remoteness principles. First, a compromise between the sub-purchaser and purchaser does not offend the remoteness principle. Once sub-sales by the purchaser are within the parties' contemplation, it will, in normal circumstances, also be contemplated that any breach in contract would cause the purchaser to be in breach of its contract with the sub-purchaser and that the sub-purchaser will then claim for damages. As such, the Court of Appeal in *Biggin* accepted that damages had to be "assessed on the basis of liability to the Dutch government" (at 317). It is not unreasonable to further reason that *it will also be within the parties' reasonable contemplation that the purchaser may settle the claim advanced by the sub-purchaser.* Such a conclusion is not erroneous since it is a well-recognised fact that the costs of litigation will escalate as litigation continues. Any supplier of goods would surely recognise that there is a high likelihood of the sub-purchaser's claim being compromised. As Singleton LJ put it, at 322:

> Parties have been held to contemplate litigation in the sort of circumstances which have arisen here. It would, I think, be unfortunate if they were not also held to contemplate reasonable settlements in the type of circumstances which have arisen here.

22 Second, the decision does not ignore causation principles. While the English Court of Appeal reasoned primarily on the public policy front (stating that the law encourages reasonable settlements), it did not disregard the principle that the damages must be caused by the defendant's breach of contract. Singleton LJ noted at two junctures of his judgment that the settlement agreement must ultimately be reflective of the judgment sum that would have been awarded if the matter had proceeded to trial. He stated, at 325 and 326:

If, upon the evidence, the judge is satisfied that the *damages would be somewhere around the figure at which the plaintiffs had settled*, he would be justified in awarding the settlement figure.

…

The question is not whether the plaintiffs acted reasonably in settling the claim, but whether the settlement was a reasonable one; and in considering it, the court is entitled to bear in mind the fact that costs would grow every day the litigation continued. That is one reason for saying that *it is sufficient for the purpose of the plaintiffs if they satisfy the judge that somewhere around the figure of settlement would have been awarded as damages.*

[emphasis added]

23 Clearly, the above holdings imply that the Court of Appeal had assumed that there was no break in the chain of causation between the breach and the settlement. There would be no causal link in the event that the settlement sum deviated from the sum the court would have awarded at trial. The independent acts of the parties in settling the dispute would have disrupted the nexus between the breach and the settlement sum.

24 However, the settlement sum cannot be properly attributable to or caused by the supplier's breach if it were an "*unreasonable* settlement". In such situations, in Singleton LJ's words, somewhere around the figure of settlement would (*not*) have been awarded as damages. It is not wrong to conclude that a *reasonable* settlement which is reached under legal advice will probably be an accurate quantification of the actual sum the court would have awarded as damages. Otherwise, the chain of causation would have been broken by the buyer's act of negotiating an unreasonable settlement that was a far cry from the likely sum of damages that would be awarded by the court. As such, the decision of the English Court of Appeal in *Biggin* is justifiable on legal principles.

25 Nevertheless, the general principle that a supplier would contemplate that the buyer concludes a reasonable settlement with his sub-purchaser may not be a perennially applicable principle in all cases. The purchaser, for various reasons and acting under proper legal advice, may well settle a claim which is well above or below what it ought to have paid under the law. Despite such a possibility, the English Court of Appeal in *Biggin* probably adopted a pragmatic approach, holding that strict proof of the damages that would be awarded would be an expensive and complicated process, and hence, that proof of a reasonable settlement concluded under legal advice would suffice. It bears mentioning that the *Biggin* case involved a claim by a foreign government against an English company, and hard cases like this often result in "bad law". That said, I am of the view that the general principle in *Biggin* should apply in most situations, unless there is evidence led by the defendant to show that the damages awarded would not have been close to the settlement sum.

String contracts

26 At this juncture, I should also set out the legal principles underpinning compensation paid to sub-buyers in a series of "string contracts" as they are relevant to the present facts. *Benjamin's Sale of Goods* (Sixth Edition, 2002) at [17-080] stated the principles as follows:

…situation where the seller was in breach of his contractual undertaking as to the description or condition of the goods, and it was within the reasonable contemplation of the parties, at the time of making the contract, that

(a) the buyer intended to resell, or probably would, and that his sub-buyer would resell, and so on, so that there would be a series of sub-sales or "string contracts" of the same goods; and

(b) *that each contract in the series would, or probably would, contain the same or a similar, contractual undertaking as to description or condition of the goods*; and

(c) that it was not unlikely that a breach of the seller's undertaking would cause the buyer and each sub-buyer in the series to be in breach of his undertaking to his own buyer; and

(d) that it was not unlikely that, in the case of such a breach, the ultimate buyers would recover damages from their sellers, so that liability would in turn be passed up the chain of sellers and buyers.

In these circumstances, the buyer who has paid to his sub-buyer damages and costs for breach of the undertaking in the first contract of sub-sale (which the sub-buyer claimed from the buyer, as the result of similar payments of compensation between successive sub-buyers down the chain) may recover the amount paid by him to the sub-buyer, together with his own costs in reasonably defending the sub-buyer's claim against him; *the damages and costs paid or incurred by the buyer are taken as the measure of damages for the seller's breach of the original contract.*

[emphasis added]

27 The crucial requirement to be satisfied is requirement (b) – that each contract in the string of contracts contained similar undertakings. This requirement was also highlighted in *Chitty on Contracts* (above at [12]) in respect of a buyer claiming for compensation paid to the sub-buyer. This limitation ultimately arises from the need to *establish the chain of causation between the breach and the losses suffered by the final sub-purchaser*. As Devlin J, the trial judge in *Biggin,* held at 433 to 434 (and this point was not overruled by the Court of Appeal),

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.

28 Similarly, Auld LJ in *Bence Graphics Ltd v Fasson Ltd* approved the above holding by Devlin J, and reasoned as follows:

…the point is essentially one of causation, namely whether there is sufficient similarity between the sale contract and the subsequent contract(s) to enable a finding that breach by the seller of the sale contract has in fact caused the breach of the subsequent contract(s).

29 In this regard, the English courts have astutely observed that the limitation is not a rigid one. *Only material variations may break the chain of causation.* The ultimate issue is whether the variation would have cast a doubt on the initial seller's liability for the damage caused. Auld LJ in *Bence* aptly put it in this manner,

The matter was considered by Devlin J in *Biggin & Co Ltd v Permanite Ltd* [1951] 1 KB 422. He said, at p. 433, that he agreed with the reasoning that lay behind the view, namely that material variations in contracts down the line could lead to contractual claims for damages not contemplated by the original seller. *However, he clearly regarded the matter as one of fact for*

determination in each case, not as a rigid principle of law that all contracts in the chain must be in the same terms. He said, at pp.433-434:

> I respectfully adopt this principle, but I have still to determine how it should be applied in this case, and also *what degree of variation in descriptions breaks the chain*….To understand the application of the principle it is necessary to understand its basis. Like every principle in this branch of law, it stems from the broad rule that the damage is to be measure by those consequences of the breach which the parties as reasonable men would, if they had thought about it, have foreseen and accepted as natural and probable. If the variation to a description is such that it 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.

[emphasis added]

3 0 *McGregor on Damages* (17th Edition, 2003) observed at [20-087] that the above limitation also applies when the chain of contracts involves not only differences in warranties but also differences in goods. However, again the courts have been pragmatic in such situations. In the case of *Bence Graphics,* although the purchasers of vinyl film used the film to manufacture decals which were then sold to its customers, the court did not decide that the change in the type of goods sold had broken the chain of causation. Auld LJ agreed that "a substantial change to the goods sold as a result of the buyer subjecting them to a manufacturing process may break the chain of causation between the breach of the contract sued upon and any claim arising under a subsequent contract", yet decided on the facts that this was unlikely since a five-year film life was warranted by the buyer and all the other sub-purchasers along the chain of contracts. I concur with this pragmatic approach and will apply it to the present facts.

Issues

31 Based on the above legal principles, there are principally two issues to be determined:

(a) Claim for loss of profits:

i. Whether it was within the parties' reasonable contemplation that the goods would be re-sold by the P;

ii. Whether it was within the parties' reasonable contemplation that the P would suffer loss of profits if the goods were counterfeit.

(b) P's claim for compensation paid to CTH:

i. Whether it was within the parties' reasonable contemplation that the goods would be installed on printed circuit boards;

ii. Whether each contract in the series of contracts contained the same or a similar,

contractual undertaking as to description of the goods; and

iii. Whether the settlement sum reached between the P and CTH was reasonable

Issue (a): Claim for loss of profits:

(i) Whether it was within the parties' reasonable contemplation that the goods would be re-sold by the P

32 The P's first claim is for loss of profits amounting to US$2,184. According to the testimony of Matthew Henry Hartzell and John Bernhardt Prymmer III, the P bought the goods at US$9,776 and resold them to CTH at the price of US$11,960. This would have yielded the quantum of profits which the P now claims. The relevant invoices and purchase orders were adduced by these witnesses to substantiate these figures.

33 DC does not seem to dispute this evidence, but has submitted that the P did not tell the D that the goods were required for re-sale to its customers for the manufacture of printed circuit boards. DC also conceded that the D's witness, Tan Mee Yee, knew that the P might require the goods for sub-sale. In fact, the DC has concluded in his closing submissions that the P, at best, may be entitled to recover loss of profits.

34 The D's contention that it was aware that the goods would be assembled on PCBs is irrelevant. As stated above in [10] and [11], if sub-sales may be shown to be within the parties' reasonable contemplation, the purchaser's loss of profits from the sub-sale may be claimed. Although sub-sales are not normally within the parties' contemplation in the ordinary course of events, Tan Mee Yee clearly possessed knowledge of the sub-sale, having testified in court that the P was a trader who could sell the goods to another company. Furthermore, the P adduced evidence showing that N.F. Smith Group is a distributor of electronic components to manufacturers, and has been purchasing from and selling electronic commodities to the D for re-sale for more than 10 years. This evidence has not been refuted in any way by the D. Given the long-standing relationship between the parties, the D must have known the nature of the P's business and that the P frequently ordered goods for the purpose of re-sale to its customers.

(ii) Whether it was within the parties' reasonable contemplation that the P would suffer loss of profits if the goods were counterfeit.

35 The D, having known that the P distributes electronic commodities to other companies, ought reasonably to have contemplated that any breach of the implied term of description of the goods was likely to cause the P to lose the profits it hoped to make under the sub-sale. This is common knowledge in business. I therefore allow the P's claim of US$2,184.

Issue (b): P's claim for compensation paid to CTH

(i) Whether it was within the parties' reasonable contemplation that the goods would be installed on printed circuit boards.

36 The parties' real bone of contention concerns the P's claim for compensation paid to CTH. The P has to prove that sub-sales by the P are within reasonable contemplation. I have made a positive finding above in this respect. In addition, it should be common knowledge to all businessmen, especially the D and P companies which are involved in re-sale transactions, that any breach of the contract between them will have repercussions on the subsequent purchasers' liability to their

customers, who will probably commence action to claim for their damages. There is thus no question that requirements (a), (c) and (d) of the passage below from *Benjamin's Sale of Goods* have been fulfilled. Requirement (b) will be dealt with in the next issue.

> …situation where the seller was in breach of his contractual undertaking as to the description or condition of the goods, and it was within the reasonable contemplation of the parties, at the time of making the contract,
>
> (a) the buyer intended to resell, or probably would, and that his sub-buyer would resell, and so on, so that there would be a series of sub-sales or "string contracts" of the same goods; and
>
> (b) that each contract in the series would, or probably would, contain the same or a similar, contractual undertaking as to description or condition of the goods; and
>
> (c) that it was not unlikely that a breach of the seller's undertaking would cause the buyer and each sub-buyer in the series to be in breach of his undertaking to his own buyer; and
>
> (d) that it was not unlikely that, in the case of such a breach, the ultimate buyers would recover damages from their sellers, so that liability would in turn be passed up the chain of sellers and buyers.

37 Kimberly Aube testified that CTH builds printed circuit boards ("PCBs") for its customer, EMC, which "go in to their high end enterprise storage system(s) that are their top-tier line for their array of enterprise storage". D has raised the objection that it was not aware that the capacitors would be used on PCBs and used for the urgent manufacture of high-end storage systems of CTH's customers. It therefore denies liability for the damages which include costs of rectification action required to replace the capacitors that had been installed on the PCBs.

38 Tan Mee Yee's evidence is not entirely clear in indicating that she was not aware of the use of capacitors. I believe that she could have misunderstood the question posed to her on whether she knew that capacitors would be installed on PCBs. She answered as follows:

> I don't agree, because Smith [sic] also trading as a trader. They can sell to another company instead of the customer who assembles on board.

During re-examination, she repeated this idea:

> Because I also have no technical background, I will have no idea that capacitor [sic] is to be used for assembly in PCB. For trading, we don't really need to know what our customers selling to, whether for assembly or re-sell to the other party.

39 Tan Mee Yee seemed to be suggesting that the goods could have been sold to another customer, who would have resold to another customer instead of installed the capacitors on PCBs. Nonetheless, that answer implicitly acknowledged that capacitors would ultimately be used on PCBs. The D is not required under law to envisage that a specific sub-purchaser, the P's customer, would be the party who installs the capacitors on the PCBs. It is sufficient if the use of capacitors on PCBs, regardless of which party would install them, was reasonably contemplated. Tan's evidence reflects such awareness. As held by Devlin J in *Biggin* at 432*,* it does not matter how many links there are in the chain of contracts, provided that "what happened at the end (of the chain) was within the contemplation of the parties".

40 Furthermore, while Tan Mee Yee disavowed knowledge of the use of the capacitors in PCBs, John Prymmer stated in his affidavit of evidence-in-chief that there was no other conceivable use of the capacitors other than for installation on PCBs. During cross-examination, he elaborated on this, stating that capacitors are used to control flow of electricity on the boards and "on their own…they do nothing". Given that there was no evidence to contradict this evidence, and that it is common knowledge to any layperson that a capacitor has no intrinsic value on its own, I find it disingenuous for the D to maintain that it did not know that capacitors would finally be installed on PCBs. It is surely within the D's contemplation that the capacitors may be sold from customer to customer, and ultimately be used in relation to a PCB or some other related use. In this regard, I should mention that it is well-established law that the contract-breaker need not contemplate the precise manner of the damage occurring. It is sufficient if he should have contemplated that damage *of that kind* is not unlikely: *Christopher Hill Ltd v Ashington Piggeries Ltd* [1969] 3 All ER 1496 and [16-942] of *Benjamin's Sale of Goods*. Applying that principle to the present facts, it should have been well within the contemplation of the D, as a supplier of electronic commodities, that capacitors would be installed in boards or a related system. It is therefore immaterial whether the precise type of system (PCB or otherwise) was contemplated. As for the allegation that the D had no knowledge that the goods would be used in high-end systems, it is irrelevant since the damages claimed by P do not cover rectification of the high-end storage systems in EMH.

(ii) Whether each contract in the series of contracts contained the same or a similar, contractual undertaking as to description of the goods

41 On a related point, DC has also submitted that the case of *Biggin* is distinguishable because the same goods were being sold from one party to another whereas the settlement sum paid by the P was in respect of CTH's contract with EMC for different goods – high end storage systems – and unknown terms. The PC, in their reply, stated that *Biggin* is actually analogous to the present facts because the Dutch government was also obliged to pay damages to the roofing contractors.

Whether there was significant variation in contractual undertakings

42 Here there was a series of three contracts – between the P and D, between the P and CTH and between CTH and EMC. The fundamental issue here is whether the chain of causation has been broken in the series of sub-contracts by any significant variation in the contractual undertakings of each sub-contract. The P pleaded in its statement of claim that there was an implied condition of the agreement that the goods would conform to the description of "AVX" brand and model No: TPSC336K016R0300. Before VK Rajah J, the parties agreed that the D would be liable for the breach of this term. The invoice showing the sub-sale by the P to CTH also stipulated a specific description of the capacitors in the same terms as the contract between the P and D, and hence, a similar term must have existed in this sub-contract.

43 With respect to the contract between CTH and EMH, although no documents were adduced as evidence, Kimberly Aube stated in her affidavit of evidence-in-chief that EMH required "certain specifications of printed circuit boards which required large quantities of capacitors with certain electrical characteristics" and AVX brand capacitors bearing the part number TPSC336K016R0300 "have the required electrical characteristics for the PCBs". She further testified in court that CTH was bound to "procure material of EMC's approved vendor list" and CTH failed to do that in this case. It naturally follows from these circumstances that CTH also had the implied obligation to use only certain specified capacitors for the PCBs. Hence, in my opinion, there was no significant variation in all the contractual undertakings.

Whether change in type of goods broke chain of causation

44 Although CTH had sold PCBs, instead of capacitors, to EMH, this does not disrupt the chain of causation. A similar situation occurred in *Bence Graphics,* where the vinyl film was used to manufacture decals. Auld LJ's reasoning in that case is particularly apposite here; since all the contracts were subject to the implied term that the goods should comply with the stipulated description, it was inconsequential that the initial goods were transformed to different goods. There is no doubt there that *the damage suffered by EMH flowed from the breach of the original warranty between the P and the D.* As stated by Devlin J, the loss "was caused by a defect in the goods covered both by the original seller's description or undertaking and also by the descriptions or undertakings in all the intervening contracts" such that *the whole of the penultimate buyer's liabilities arose from the failure of the goods to behave as warranted by the original seller.* I therefore find that the change in the type of goods does not absolve the D from liability to the P.

(iii) Whether the settlement sum reached between the P and CTH was reasonable.

45 I have earlier stated at [25] that I will adopt the position in *Biggin,* subject to any evidence adduced to show that the settlement sum would not have been close to the quantum of damages awarded. The sum of US$300,000 thus has to be shown to be a reasonable settlement figure which was reached under legal advice.

Whether there was legal advice

46 The D submits that the P did not obtain independent legal advice save for its own present counsel in Singapore.

47 According to John Prymmer and Matthew Hartzell, the latter, who was in-house legal counsel of NF Smith, had negotiated with CTH for a settlement of its claim against the P and assisted in drafting the settlement agreement. He stated in cross-examination that he had also discussed this matter with some lawyers in Houston, though he did not specifically retain a lawyer for this matter. Having considered the need to preserve goodwill, and to avoid large amounts of legal fees resulting from litigation, he sought to settle the matter with CTH. CTH's original claim of US$444,680 was successfully reduced to US$300,000.

48 There was sufficient legal advice given in these circumstances. I note that *Biggin* merely specified that legal advice had to be sought, and not that *independent* legal advice was necessary. It is, moreover, unrealistic to expect a large corporation to retain an external lawyer when it has its own legal counsel. Furthermore, there is no conflict of interest in the P seeking legal counsel from Matthew Hartzell since an in-house legal counsel would certainly seek to settle the claim at the lowest possible quantum. Given that Matthew Hartzell had successfully reduced the initial sum claimed by CTH, and had not simply accepted the original claim, I find that there is nothing untoward in Matthew Hartzell's legal advice.

Reasonableness of the settlement

49 The D also alleges that the settlement between the P and CTH was unreasonably reached because of the following factors:

(a) the D was not involved in the settlement;

(b) the D did not ask for any specific documents during the negotiation to verify CTH and EMC's claims;

(c) Matthew Hartzell does not have technical background in capacitors, manufacturing of PCBs or purging of capacitors from PCBs. He had no personal knowledge of the document entitled "EMC Global Summary – Purge Costing";

(d) There was no evidence from the P's witnesses of how many goods installed on PCBs were purged;

(e) The P relied on mere tabulation by Kimberly Aube based primarily on EMC's input, and without sighting any further documents;

(f) The settlement was reached without due and proper consideration and verification. No reasonable businessman would have settled at such a large figure without sighting proper supporting documents.

I will address each of these allegations, bearing in mind that some of these are overlapping factors:

No involvement of the D in the negotiations

50 I do not see the necessity for the D to be roped into the negotiations. The P clearly had a right to conduct its own negotiations with its own sub-purchaser, especially since a multi-party negotiation might have been much more complicated and protracted. The failure to involve the Ds does not reflect unreasonableness in the settlement arrangement. This objection merely reflects the D's unhappiness in being unable to give its input so as to reduce the settlement sum further. In any case, the P did make an effort to contact the D. John Prymmer was requested by Matthew Hartzell to contact the D's managing director, Park Hee Woong to seek a contribution. John Prymmer's affidavit exhibited these letters, which stated that CTH agreed to a settlement sum of US$300,000. However, the D failed to respond to these letters.

No verification of CTH and EMH's claims

51 Similarly, I do not find this particular argument to be sound. During cross-examination, Matthew Hartzell testified that he could not remember whether he asked for specific documents, but he might have asked for information at different times. The EMC Global Summary was supplied in response to the P's request for support for the quantum of damages claimed. The steps taken by the P were reasonable in view of the following explanation by Matthew Hartzell:

> If you are asking whether I asked for timesheets, invoices and that sort of thing, no, I did not. I was not prepared to litigate that issue at that time. Please bear in mind that I am a supplier of goods dealing with a customer who has a problem. And they told me it cost nearly $500,000 to fix this problem, so I asked what they mean, please support what they are talking about. So they did. I was just acting as a supplier trying to deal with the situation. If that is what you mean by did I ask for more specific document, I did not. And it was in an effort to keep costs down.

52 I also note that the negotiations had lasted nine months. The length of the negotiations is far from suggestive that the final sum of US$300,000 and the EMC Global Summary were accepted by the P hastily without due consideration of the merits of CTH's case. Moreover, Matthew Hartzell stated that he had questioned various aspects of the EMC Global Summary, such as "why it cost so much money" and "why rectification and purging had to be done so quickly". As such, I find this particular objection by the D unsustainable.

53 On another related point, DC has submitted that the EMC Global Summary was prepared by

Kimberly Aube based entirely on numbers provided by EMC, save for a few pages on CTH's own purging costs, and that the document is inadmissible because of hearsay. PC refutes these claims by arguing that the D had not asserted throughout the proceedings that the figures in the document were erroneous. PC also submits that the accuracy should not be doubted because Kimberly Aube was involved in the whole process of purging of the goods and had verified the figures given by EMC.

54 In my opinion, this argument is also unmeritorious. Although Kimberly Aube conceded that certain pages of the EMC Global Summary were submitted by EMC, she clearly considered the entire document to be her own report, albeit prepared with the assistance of EMC. While she stated that certain pages were prepared "100% based on EMC's input", she had also testified that she had verified the figures by looking at the corresponding receipts, bills and orders. Kimberly Aube had also incorporated information contained in this document into her own affidavit of evidence-in-chief. When questioned about various parts of the document during cross-examination, she displayed intimate knowledge of all the details of the document. Furthermore, she had personally supervised the entire purging process in Franklin as well as Cork, as well as monitored the operating time, costs and expenses. I find therefore that there is no hearsay as Kimberly Aube had personal knowledge of the details of EMC's costs. On the contrary, I was impressed by Kimberly Aube's methodical and meticulous manner of tracing the steps of the entire purging process, as well as documenting all the costs incurred. It can hardly be concluded that it was unreasonable for the P to have accepted the costs claimed in this document.

Matthew Hartzell's lack of expertise

55 This submission can be summarily dismissed. I do not see why the P's legal counsel is required to have technical knowledge of capacitors and the purging process so as to effectively conduct negotiations with CTH. He had queried certain items in the EMC Global Summary and that should have sufficed. Since the negotiations had taken nine months and Matthew Hartzell succeeded in reducing the sum claimed by CTH, there is no ground to find fault with the technical know-how of the legal counsel.

No evidence of number of damaged capacitors

56 D takes issue that Kimberly Aube only confirmed that two capacitors were burnt and two PCBs were damaged. Again, I do not see anything suspicious in this. EMC discovered the two damaged PCBs before the suspicion arose that the capacitors were counterfeit. CTH ceased production after obtaining confirmation that the goods were counterfeit and naturally, they would not have wanted to risk burning any further capacitors. This objection is a spurious one.

57 In sum, I find that the settlement was a reasonable one. There was proper legal advice given by the P's own legal counsel, who had properly taken into account the possibility of incurring exorbitant costs in the event that litigation took place. CTH had properly supervised every step of the purging process and was aware of the costs incurred. Matthew Hartzell, on behalf of the P, had also asked for support of the claim. The P had spent substantial time attempting to reduce the sum claimed by CTH. The quantum that was settled for was more than reasonable, since CTH's own costs in purging were finally excluded and only EMC's costs were claimed. There was also a *quid pro quo*, as CTH was given permission to audit the P's work processes in the future. As explained by Kimberly Aube, the large sum for purging was due to the urgency in rectifying the PCBs. There were only two weeks for all the products to be repaired and tested to meet EMC's demands to its customers. On all counts, this was, in my opinion, a reasonable settlement.

Conclusion

58 I therefore grant the total sum of US$302,184 as damages to the P. Interest will run from the date of the writ to the date of judgment. I will hear the parties on costs.