Anti-Corrosion Pte Ltd *v* Berger Paints Singapore Pte Ltd
[2010] SGHC 351

Case Number : Suit No 989 of 2009

Decision Date : 03 December 2010

Tribunal/Court : High Court

Coram : Philip Pillai J

Counsel Name(s) : Jonathan Yuen and Joana Teo (Harry Elias Partnership LLP) for the plaintiff; Sathiaseelan s/o Jagateesan, Kenneth Lim and Ramesh Kumar (Allen & Gledhill LLP for the defendant.

Parties : Anti-Corrosion Pte Ltd — Berger Paints Singapore Pte Ltd

Contract

3 December 2010 Judgment reserved.

Philip Pillai J:

Introduction

1 The plaintiff is a painting contractor in the business of mixed construction and renovation services, including paint application works. The defendant is a manufacturer and supplier of paints. The defendant has been supplying the plaintiff with paint for three separate projects since 2005.

2 The first proposal given to the plaintiff by the defendant only included paint manufactured by the defendant for use on the external surfaces. However, in relation to a project at Toh Guan that the plaintiff was working on, the defendant submitted a proposal in January 2006, which included the use of its paint for internal surfaces:

> **2. <u>Internal Concrete Surfaces Including Ceiling</u>**
>
> Primer Coat : 1 coat of Berger Decora Emulsion
>
> Finishing Coat : 1 coat of Berger Decora Emulsion

3 The product data sheet provided to the plaintiff stated that as surface preparation, one had to, *inter alia*, "apply a suitable sealer coat such as Berger Plastaseal or Berger Water-Based Sealer" prior to application of the Berger Decora Emulsion. This was not reflected in the proposal submitted by the defendant to the plaintiff. The plaintiff had then inquired whether a sealer coat was necessary, as a result of which, the defendant wrote a letter dated 12 January 2006, that read as follows:

> **Subject: Proposed Paint System For Toh Guan Road East Capital One**
>
> With reference to the above subject and our discussion regarding the coating for the internal concrete surfaces including ceiling.
>
> We are pleased to forward our letter for your submission to your client that it is not a [sic] necessary to apply a sealer coat before applying Berger Decora Emulsion even though it was

stated in our product datasheet.

4 In addition to the above letter, there was a further communication by the defendant on 13 January 2006, granting the plaintiff a warranty on the proposed paint:

> **Subject: Warranty**
>
> With reference to the above subject, we will be providing you with five (5) years warranty on our products used in any of your up coming project as long as is base on our proposed paint system.

The effect of this warranty, in particular, has been hotly disputed. The plaintiff claims it is an open warranty that applies to all future projects undertaken by itself, but the defendant maintains that the warranty only applied to the project at Toh Guan. I will return to this point later. However, for now, it suffices to say that the plaintiff relied on these communications in relation to the project at Toh Guan and ordered Berger Decora Emulsion. The paint was applied to the internal surfaces of the project at Toh Guan without a sealer coat. There were no problems.

5 In July 2007, the defendant approached the plaintiff with a proposal to use its paints in a project located at Bukit Batok Street 23 ("the Project"). This proposal also suggested, *inter alia*, the use of Berger Decora Emulsion on internal surfaces:

> **2. <u>Internal Concrete Surfaces Including Ceiling</u>**
>
> Primer Coat : 1 coat of Berger Decora Emulsion
>
> Finishing Coat : 1 coat of Berger Decora Emulsion

The defendant's proposal was included without alteration in the plaintiff's quotation for the Project. There was in this instance, no request or provision of confirmation that no sealer coat was necessary for the Project, notwithstanding the data sheet to the contrary, unlike the case in the previous Toh Guan project. Berger Decora Emulsion is a low cost paint that was supplied to the plaintiff at a cost of S$1.125 per litre. Based on the defendant's proposal, the plaintiff tendered a quotation of S$1,900,000.00 for the painting works at the Project to the main contractor. This was accepted and the plaintiff was appointed to carry out painting works.

6 Painting works at the Project were carried out between September 2007 and April 2008. Between August 2007 and April 2008, the defendant supplied the plaintiff with, *inter alia*, Berger Decora Emulsion from 31 different batches of manufacture ("the Paint") for a total sum of S$49,250.00. As and when the plaintiff required paint, it would place an order with the defendant. The paint would be delivered together with a delivery order on which the plaintiff had to sign against receipt. After that, the defendant would issue a tax invoice against which the plaintiff would make payment. Significantly, in each tax invoice, it was provided:

> **CONDITIONS OF SALE**
>
> "Except to the extent that the customer has the benefit of any non-excludable statutory rights whether as a consumer or otherwise Berger Paints Singapore Pte. Ltd's liability in relation to the goods is limited to replacing the goods or reimbursing the cost of acquiring equivalent goods. This liability shall not arise unless Berger Paints Singapore Pte. Ltd. receives notification of the alleged liability within a reasonable period of the event alleged to give rise to liability. Berger Paints Singapore Pte Ltd. will not be liable for ay loss or damage whatsoever arising out of:-

(i) information given by the supplier in relation to pre-application procedures and application methods, or

(ii) faulty surface preparation, product preparation or product application."

In each delivery order, the following terms were provided:

CONDITIONS OF SALE

…

2. No claim shall be entertained unless made in writing to the Seller within 7 days of receipt of goods by Buyer and Seller's liability in relation to the goods and services rendered is limited to replacing the goods or services.

3. Seller may provide Buyer in good faith, with advice on surface preparation, painting system and application procedures, but as the Seller does not exercise any control over the final choice of the surface preparation procedures, or of the choice of the painting system, nor exercise any control over the surface preparation, painting system or application procedures carried out, Seller shall not be liable for any loss, damage or injury arising from surface preparation, the choice of the painting system or the application procedures.

4. As the Seller cannot exercise control over the handling, storage, mixing, application or use of any goods supplied, all conditions, warranties and representations, express or implied, statutory or otherwise, made as to the quality of the goods after they have undergone handling, storage, storage, mixing, application or use, or fitness for any purpose of the goods supplied shall be excluded, and the Seller shall not be liable for any loss, damage or injury, howsoever caused.

5. Defective goods, agreed to be defective by the Seller shall be replaced as originals ordered if required and practicable, but shall not form the subject of any claim for consequential loss, damage or expense. Defects in quality of goods contained in any delivery shall not be a ground for cancellation of the remainder of the contract.

7 On 18 April 2008, however, the plaintiff complained to the defendant that various internal surfaces in the Project had discoloured subsequent to the application of the Paint. The surfaces had turned pinkish and there were patterns of discolouration (collectively "the discolouration"). It alleged that the Paint was defective and was the cause of the discolouration.

8 Various meetings and on-site inspections were held thereafter to investigate the plaintiff's complaint and to ascertain the cause of the discolouration. Subsequently, the defendant made a goodwill offer to the plaintiff to provide replacement paint of a superior grade. The labour cost of repainting would have to be borne by the plaintiff. The plaintiff rejected the offer and insisted that the defendant bear the full costs of rectifying the problem.

9 On 15 May 2008, the plaintiff sent the defendant a letter stating that the total cost of repainting, excluding the cost of paint used, was S$443,243.20. The plaintiff demanded that the defendant bear the cost in full. The defendant disputed its liability.

10 Absent any resolution of the problem between the parties, the plaintiff carried out repainting works between June 2008 and September 2009 using paint bought from another manufacturer. The

plaintiff purchased paint from Haruna (S) Pte Ltd at a total cost of S$52,242.75 for repainting the Project ("the Haruna paint"). Subsequently, it brought the present action against the defendant, claiming the costs of rectifying the problem. It quantified these costs at S$1,185,545.60 in its Statement of Claim (Amendment No.1). Despite the voluminous evidence adduced at trial, the plaintiff's case is essentially a simple one that can be summarised in the following fashion: I bought paint from you, which was either defective or unsuitable for my purposes. It discoloured after application. I had to repaint the Project because of the problem. Therefore, you owe me the cost of the supplies and labour I expended during repainting. The crucial question in this case accordingly is whether the Paint was defective or unsuitable to the Project. The defendant is also pursuing a counterclaim for sums arising from unpaid invoices for paint supplied to the plaintiff.

Issues

11 The issues I had to consider were:

(a) whether the Paint was defective or unsuitable to the Project;

(b) whether the defendant had contractually excluded liability in the event of such defect or unsuitability; and

(c) the appropriate quantum of damages, if any.

My decision

Whether the Paint was defective or unsuitable

12 It was undisputed that the Paint had discoloured after application to the surfaces of the Project. I also find that the discolouration was widespread and extended to most, if not all of the surfaces painted. As an aside, I would add that while the defendant tried to put forth the case that the discolouration was localised and not as rampant as the plaintiff claimed, I did not think that was tenable. The photographs alone, particularly the exhibit at page 43 of Mr Lee Kok Soon George's affidavit of 23 June 2010, showed that the discolouration was very widespread. Moreover, witnesses for the plaintiff, such as Mr Sundararajan and Ms Elizabeth Lee, have testified that on a visual inspection, the discolouration was widespread. Taken together with the photographs, I found their account on this point to be more credible than that of the defendant's witnesses to the contrary. The photographic evidence did not support the finding that the discoloration was localised.

13 The plaintiff's case turns on its establishing that it was the Paint that caused the discolouration. If the discolouration was caused by the Paint then the defendant would be *prima facie* liable subject to the enforceability of their exclusion clauses in the delivery order and tax invoices. The discolouration could have been caused by any one or a combination of the Paint, the preparation or application of the Paint, the surface preparation or condition of the skim coat.

14 Ms Elizabeth Lee, the expert witness for the plaintiff, put up a report based on her site inspection, 5 pails of Paint provided by the plaintiff, and 5 random dry Paint samples taken from the Project. She performed Thermal Gravimetric Analysis on the samples, to measure weight changes in materials with regard to temperature. She also performed cross-section SEM/EDX (Scanning Electron Microscopy) Analysis that gave information about the number of coats applied, the thickness of the individual coats, the bonding between coating to substrate and between individual coats, and pigment distribution. Based on the results of the analyses, she concluded that there had been disintegration of the Paint ingredients. Mr Wong Chung Wun, the expert witness for the defendant (who had not

conducted site inspections or tests of his own but merely reviewed Ms Elizabeth Lee's report), agreed that the Paint had disintegrated. However, he did not accept Ms Elizabeth's conclusion that "Poor paint condition in container resulted in coating discoloration at the [Project]". The element of causation was a major point of contention in the defendant's closing submissions. In particular, it was submitted that the plaintiff had failed to rule out excessive moisture and the alkalinity of the skim coat underlying the Paint, as possible causes of the discoloration.

15 I accepted that at the time of painting, the internal surfaces of the Project probably did not have excessive moisture levels. Mr Sundararajan s/o Nadarajan, the supervisor of the main contractors who hired the plaintiff for the project testified that before the start of painting works, he would test random spots to be painted using a moisture gauge to check that the concrete is not wet. [note: 1] This was done as a standard procedure before paint application. I saw no reason to disbelieve him. Mr Rajeev Goel, the Regional Technology Manager of the defendant testified that the walls were unduly moist on the basis of a touch test (*ie*, he had pressed his hand against the wall) conducted several months after the discolouration had happened. Between the two witnesses, I preferred Mr Sundararajan's evidence. He had performed the test contemporaneously with the painting and his methods appeared to have been the standard methods unlike Mr Goel's touch test. I accepted his account that the walls would not have had overly high moisture levels at the time of the painting works. This finding is also supported by the results of the SEM/EDX test carried out by Ms Elizabeth Lim that indicated good bonding between the different coats of Paint. As she explained, if there had been moisture, salts would have formed between the layers and cause poor adhesion. [note: 2]

16 It was the point on the alkalinity of the skim coat that I found much harder to rule out. Before the Paint was applied, a skim coat was added by another subcontractor to the internal surfaces of the Project for smoothening purposes. No sealer coat was applied between the skim coat and the Paint. The composition of the skim coat was alkaline in nature. It is the defendant's case that the interaction of the alkaline skim coat with the Paint could have caused the discoloration. It is the defendant's case that the plaintiff had not shown that the discoloration could not have been caused by anything other than defects in the Paint. For completeness, it should be noted that the surfaces covered with the Paint were sanded before they were repainted with the Haruna paint, although the underlying Paint was not entirely sanded off. [note: 3] No evidence was led to establish the condition of the skim coat at the time when the Haruna paint was applied.

17 Ms Elizabeth Lee testified for the plaintiff that the results of the tests she ran showed that the Paint could be applied directly to a highly alkaline skim coat without a sealer coat without resulting in discoloration. [note: 4] The test involved applying coats of the sample paint to concrete slabs finished with skim coat, and observing for discoloration and compositional variation. I had reservations because the tests she carried out to reach this conclusion did not use the same skim coat as the one applied in the Project. I could not thereby conclude that the skim coat used in the Project was of a similar or lesser alkalinity than the one she used. Moreover, the paint sample she applied came from five pails chosen by the plaintiff out of the dozens supplied by the defendant. Without casting any aspersions on how these were selected, I could not be sure whether the five pails were accurately representative samples of the entire supply of Paint used in the Project. Moreover, there had been a long time lag between the receipt of the Paint from the defendant and the handing over of the five pails to Ms Elizabeth Lee for testing – I could not rule out the possibility that storage conditions and other factors might have affected the composition or quality of the samples in the five pails. The same reasoning applied to Ms Elizabeth Lee's conclusion that the "condition in container of the fresh paint samples should constitute cause for rejection of the material". Had such paint been delivered and found to be in such condition when the Paint was applied, it would have then been properly

rejected by the plaintiff.

18 Ms Elizabeth Lee also testified that the samples she selected, whether from a discoloured or non-discoloured patch, all contained skim coat; the difference between the discoloured and non-discoloured samples lay in resin content of the Paint. This, according to her, suggested that it was the Paint and not the skim coat that caused the discoloration. However, as pointed out by the defendant, the difference in resin content, determined *after* the discoloration had occurred, only went to show that there had been disintegration of the Paint. The disintegration of the Paint after its application may be the result of either improper mixing of the Paint before application or the result of the skim coat itself in different areas on the Paint. In and of itself, it did not show that defects in the Paint had caused the discoloration. Ms Elizabeth Lee did not explain to my satisfaction how the disintegration of the Paint necessarily evidenced defects in the Paint.

19 Against this backdrop, I weighed the fact that the Paint delivered had been taken from 31 different batches manufactured by the defendant. If indeed all the Paint were defective, it would suggest a manufacturing problem, *eg* with the formulation of the Paint. Considering that this was an off-the-shelf product, however, and that the plaintiff itself had used it previously without encountering problems, and that no defects were noticed upon the mixing and painting when the Paint was applied, I did not think this likely. I accepted Mr Gerard Albuquerque's evidence that samples of Paint taken from the Project were tested and found compliant with the specifications indicated on the defendant's product data sheet. I also found it difficult to understand why the plaintiff took 8 months to complain about the discoloration to the defendant. The plaintiff attempted to justify this on the basis that as it finished painting each level of the Project it would hand that over to the main contractor and move on to the next, and as such had no opportunity to observe the discoloration. However, surely the main contractors would have raised concerns about the discoloration once they became manifest and would not have waited till 8 months later. Further, the fact that the discoloration occurred in patterns rather than random patches suggested interaction with an underlying substances, rather than defects in the Paint alone. The fact was, the Paint was not applied to bare concrete but to surfaces covered with skim coat – the effect of the skim coat on the Paint has not been ruled out. This point, significantly, was not discussed in Ms Elizabeth Lee's report. When questioned during cross-examination, she suggested that the pattern may have been caused by the way the Paint was applied with roller brushes. However, from my observation of the photos, for example those at page 16 and 17 of Mr Lee Kok Soon George's affidavit of evidence-in-chief, I did not think so. The paint would have had to be applied in a very strange manner indeed to have caused such patterns. They were more consistent with the explanation that the Paint had reacted with the skim coat. In view of all these, the plaintiff has not proven on balance of probability that the defects in the Paint had caused the discoloration.

20 The plaintiff submitted in the alternative that even if the Paint was not defective, the defendant was liable for it had submitted a proposal advising the use of paint that was unsuitable to the Project. The problem with that submission is that the plaintiff had not conformed to the product data sheet which specified that a sealer coat had to be applied before using the type of Paint proposed. To make commercial sense, the defendant's proposal has to be read together with the data sheet. Unlike the previous occasion involving the project at Toh Guan, the plaintiff had not specifically clarified with the defendant that no sealer coat was necessary. Even if I were to accept that the prior representation in the earlier project, to the effect that no sealer coat was necessary, extended to this Project, there was no evidence to show that the cause of the discolouration of the Paint was the Paint without the sealer coat and not the surface condition and in particular the skim coat.

Whether the defendant had contractually excluded liability for defect or unsuitability

21 In the light of the above, there is no need to go further to consider arguments under this head. I would just briefly note that if I had to decide on the issue of the warranty, I would have found that the defendant had warranted all its products used in any of the plaintiff's projects for a period of 5 years provided that the use was based on a proposed paint system by the defendant. In respect of the arguments based on the provisions in the Unfair Contract Terms Act (Cap. 396, 1994 Rev Ed) ("*UCTA*"), I would not have found the terms of the delivery orders and tax invoice to be unreasonable. The defendant understandably sought to limit product liability given that between the sale and application of the paint much could go wrong (either on the part of the user or manufacturer) and it could be a tedious process (as demonstrated by these proceedings) to determine fault. Moreover, the terms did not exclude liability entirely – the defendant merely limited his expense to replacement goods. Further, I have reservations as to whether the plaintiff was a "consumer" who could avail himself of the *UCTA* provisions. It was engaged in a trade. The evidence showed that it was likely a commercial party that had power to bargain and get concessions from the plaintiff unlike the average consumer *UCTA* was meant to protect. In respect of the arguments based on the Sale of Goods Act (Cap. 393, 1999 Rev Ed) ("*SOGA*"), I observe that the effect of s 55(2) is that an express condition can negative the condition and warranties implied by the statute if they are mutually inconsistent. I think it arguable that the terms as found in the delivery order and the tax invoice are inconsistent with the provisions in *SOGA* that would have otherwise been helpful to the plaintiffs in establishing warranties as to the fitness, character or quality of the Paint.

22 Similarly, as the defendant's liability has not been established, it is not necessary for me to consider the plaintiff's quantification of damages.

Conclusion

23 In the light of my findings above, I dismiss the plaintiff's action.

24 The defendant's counterclaim is for the sum of S$72,676.62. Out of this sum, S$50,166.49 related to paint products apart from the Paint that were supplied to the plaintiff. The plaintiff did not dispute that it had contracted for these goods. It also did not allege that these products were defective. The remaining sum of $22,510.13 represented Paint supplied to the plaintiff that had not been paid for. There was no dispute that the Paint had been ordered by the plaintiff and delivered by the defendant against the delivery orders and tax invoices. The plaintiff also did not deny that it has not paid against the invoices the defendant counterclaims on. As such, I allow the defendant's counterclaim.

25 Costs for the defendant to be agreed or taxed.

[note: 1] Mr Sundararajan s/o Nadarajan's AEIC of 11 June 2010 at para [4].

[note: 2] NE, 6 July 2010, at p 91 – 92.

[note: 3] NE, 28 June 2010 at p 159 – 160.

[note: 4] NE, 6 July 2010 at p 63.

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