

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1991] SGHC 103

DC Suit 6418/1990

Between

Additive Circuits (S) Pte Ltd

... Plaintiff

And

Wearnes Automation Pte Ltd

... Defendant

GROUND OF DECISION

Commercial Transactions — Sale of goods — Breach of contract; Contract — Breach

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Additive Circuits (S) Pte Ltd v Wearnes Automation Pte Ltd

[1991] SGHC 103

DC Suit 6418/1990
Lai Siu Chiu JC
26 July 1991

1 The plaintiffs in this case claimed against the defendants the sum of \$35,934, alternatively, the sum of \$33,941.60 and in the further alternative, damages resulting from the alleged non-acceptance on the part of the defendants of certain quantities of printed circuit boards (`the goods`) which the defendants had ordered from the plaintiffs under the defendants` purchase order No 3605 dated 15 May 1989 (`the purchase order`). The plaintiffs alleged that by a subsequent purchase order No 4252 dated 16 August 1989, the defendants attempted to unilaterally cancel the balance of the purchase order. The plaintiffs` claim for \$33,941.60 as evidenced in its debit note No AC D0095 dated 26 September 1981 was for the value of the work in progress for the balance of the purchase order and its alternative claim for \$35,934 represented the loss of bargain being the different between the value of the purchase order (\$113,000) and the sum already paid (\$77,066) by the defendants by the time of its alleged breach.

2 The plaintiffs issued their writ of summons and filed their statement of claim on 24 October 1990, the defendants` solicitors filed the memorandum of appearance on 17 November 1990 followed by the defence and counterclaim on

4 December 1990. It was only after it had filed the reply and defence to counterclaim on 9 January 1991 that the plaintiffs on 14 January 1991, vide Summons-in-Chambers No 621 of 1991, applied for summary judgment against the defence (‘the application’). The affidavit of Tan Yong Kwang (‘Tan’s affidavit’) filed in support of the application was not the usual affidavit under O 14 r 2 and Form 15 of the Subordinate Courts Rules 1986 (‘the Rules’) filed in support of an application for summary judgment, but was essentially an answer to the defence’s allegations as set out in the defence and counterclaim.

3 The essence of the defendants’ complaint as set out in the affidavit of Chan Ghim Hong (‘Chan’s affidavit’) was that the agreement with the plaintiffs to purchase the goods was that the 20,000 pieces would be delivered in four equal instalments, viz on 22 June 1989 (the first delivery date), 3 July 1989 (the second delivery date), 15 July 1989 (the third delivery date), and 24 July 1989 (the last delivery date).

4 The defendants alleged that the plaintiffs, by three letters dated 24 May 1989, 15 June 1989 and 29 June 1989, attempted to unilaterally vary the contractual delivery schedules, without the defendants’ consent. The delivery schedule proposed in the plaintiffs’ said last letter would have resulted in the plaintiffs delivering 4,000 instead of 5,000 pieces to the defendants on 8 August 1989.

5 Despite their attempts to vary the delivery schedule, the plaintiffs nonetheless adhered to the first and second delivery dates and adhered to the third delivery date to the extent that it delivered 3,640 instead of 5,000 pieces as stipulated. The plaintiffs failed to make any delivery (for the final balance of 5,000 pieces) on the last delivery date, in consequence of which the defendants averred that on 14 August 1989 they cancelled the undelivered balance of 6,360

pieces. The defence counterclaimed for damages for the loss they allegedly suffered.

6 Tan's affidavit acknowledged that the defendants 'had grumbled and complained about the rescheduling of the delivery dates' but contended that the defendants had not intimated to the plaintiffs that they rejected the rescheduling and therefore the plaintiffs believed the same was accepted. He asserted that when notified by the defendants' representative of the cancellation of the balance 6,360 pieces on 14 August 1989, he did not agree to the cancellation but only to hold the said balance in abeyance. Tan's affidavit further alleged that the defendants were prompted to cancel the said balance because it had overindented orders for the defendants' customers who did not require the goods and exhibited a fax (exh 'TYK2') from the defendants to the plaintiffs dated 15 August 1989 in support of his contention.

7 In response to Tan's affidavit, Chan's affidavit denied that the defendants had approved or acknowledged the variation of the delivery dates. Further, he deposed that the defendants' representative, one KK Lee, had protested to the plaintiffs' representative on the plaintiffs' attempts to reschedule the delivery dates. Chan's affidavit explained that exh TYK2 confirmed the defendants' cancellation of the purchase order and the reference to DTC in the same had no relevance to the purchase order but was to possible future and independent transactions between the parties should the defendants' Taiwanese customer, DTC Technology, have any requirements.

8 A second affidavit filed by the plaintiffs' Goh Chor Cheng complied with Form 15 of the Rules. At the same time, the affidavit asserted that the defendants had acquiesced in the plaintiffs' variation of delivery dates. The affidavit went on to say (and this was the crux of the case) that the plaintiffs had

successfully adhered to three of the four original delivery dates and the total quantities delivered represented 68.2% of the purchase order. Further, the plaintiffs were ready and willing to deliver the balance of 6,360 pieces which the defendants had purportedly cancelled. It criticized the defendants' counterclaim as being no more than a bare counterclaim for damages without particularizing specific damages.

9 A reply affidavit was filed by the defendants' Chan Ghim Hong which largely repeated the defendants' previous contentions and it also disputed the plaintiffs' version of what transpired at the meeting of both parties' representatives on 14 August 1989, Mr Chan asserting that the balance of the purchase order was cancelled and not held in abeyance as the plaintiffs had contended.

10 Based on the facts as I have set out, the plaintiffs were awarded judgment on 4 April 1991 by the deputy registrar in the sum of \$35,934 with taxed costs, but execution on the judgment was stayed pending the trial of the defendants' counterclaim.

11 The defendants appealed against the deputy registrar's decision and the plaintiffs cross-appealed against his decision granting a stay of execution on the plaintiffs' judgment.

12 Both appeals came up for hearing before me on 30 May 1991, and after hearing both counsel's arguments, I dismissed the defendants' appeal as well as the plaintiffs' cross-appeal. Counsel for the defendants then applied for further arguments to be heard which I granted. I heard further arguments on 18 July 1991, as a result of which I reversed the deputy registrar's decision, and allowed

the defend` appeal with costs, together with the usual consequential orders. I now give my reasons.

13 The essential facts of the case were not disputed and the only issue for determination was whether the defendants were entitled to terminate the contract, or whether their rights, if any, only sounded in damages, for the plaintiffs` (admitted) failure to deliver in full the third instalment and for their total failure to deliver the fourth instalment.

14 Counsel for the plaintiffs submitted that if there was in fact a breach, then, being a contract to be performed by instalment deliveries, the court would have to consider the ratio which the breach bears to the entire contract and the degree of probability or improbability that such a breach will be repeated. That again turned on whether the failure to deliver went to the root of the contract. Counsel cited in support of his arguments **Cornwall v Henson** [1900] 2 Ch 298 **Freeth v Burr** [1874] 9 LR CP 208 **The Mersey Steel & Iron Co v Naylor Benzon & Co**, [1884] 9 AC 434 **Decro-Wall International SA v Practitioners in Marketing** [1971] 1 WLR 361 and **Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd** [1962] 1 All ER 474[1962] 2 WLR 474

15 Counsel for the defendants argued that the tests propounded by his opponent had no application when there were no future obligations left to be performed by the defendants at the time the contract was terminated. He relied on the *Hong Kong Fir* case **Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd** [1962] 1 All ER 474[1962] 2 WLR 474 and on ` *The Mihalis Angelos* `6 Much turned upon the interpretation of Diplock LJ`s decision in the *Hong Kong Fir* case **Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd** [1962] 1 All ER 474[1962] 2 WLR 474

16 Mr Pillay in his further arguments for the defendants submitted that the tests propounded by the plaintiffs' counsel on whether a breach is 'fundamental' as derived from the dicta of Diplock LJ only applies to situations where the innocent party has further undertakings to perform. He referred to **United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd** [1968] 1 All ER 104 [1968] 1 WLR 74 where Diplock LJ, in comparing synallagmatic contracts with unilateral ones, explained his dicta in the **Hong Kong Fir** case⁵ at pp 108-109:

*The remedy of the other party [referring to synallagmatic contracts] may be limited to recovering monetary compensation for any loss which he has sustained as a result of the failure, **without relieving him from his own obligation to do that which he himself has undertaken to do and has not yet done**, or to continue to refrain from doing that which he himself has undertaken to refrain from doing. It may, in addition, entitle him, if he so elects, to be released from any further obligation to do or refrain from doing anything. **The Hong Kong Fir case was concerned with the principles applicable in determining what kind of failure by one party to a synallagmatic contract to perform his undertaking releases the other party from an obligation, which ex hypothesi has already come into existence, to continue to perform the undertaking given by him in the contract ...** (Emphasis is mine.)*

17 Counsel further referred to Lord Coleridge CJ's dicta in **Freeth v Burr** [1874] 9 LR CP 208 at p 213:

*The question is whether the fact of the plaintiffs' refusal to pay ... **was such a refusal on the part of the purchasers to comply with their part of the contract as to set the seller free and to justify his refusal to continue to perform it ...** (Emphasis is mine.) **Freeth v Burr** [1874] 9 LR CP 208 concerned a contract deliverable by two instalments. The first instalment was delivered late in consequence of which the buyer claimed damages. The buyer thereafter refused to pay for the first delivery, claiming a right to set-off against damages for late delivery, but he still asked for delivery of the second instalment. The sellers refused delivery of the second instalment on account of the buyer's failure to pay for the first instalment. Eventually the buyer made payment for the first delivery. The buyer sued*

for damages for non-delivery of the second instalment and the court held in favour of the plaintiff-buyer.

18 There was in this case an unperformed obligation on the part of the seller, viz delivery of the second instalment, notwithstanding the buyer's failure to pay for the first delivery.

19 In **Maple Flock Co Ltd v Universal Furniture Products (Wembley) Ltd** [1934] 1 KB 148 the seller sued the buyer when the latter refused to accept further deliveries after the eighteenth delivery because the buyer alleged that the tests made on a sample of rag flock from the sixteenth delivery showed contamination. The contract provided for a total of some 66 deliveries. The Court of Appeal held that notwithstanding the plaintiff-seller's own breach, the buyer was in breach of the contract in refusing to take further deliveries. Again the buyer in this case had continuing obligations to perform vis-a-vis accepting the remaining deliveries.

20 The last case referred to by plaintiffs' counsel on this point was **Cornwall v Henson** [1900] 2 Ch 298 which involved not a sale of goods but a sale of land, payments for which were to be made by instalments. The plaintiff purchaser paid all but the last instalment. Although the vendor called on the purchaser to pay, he never gave notice that if payment was not made within a specified time, he (the vendor) would treat the contract as abandoned. The vendor eventually resumed possession of the land and attempted to sell it. The purchaser sued for specific performance and damages in lieu of or in addition thereto. The Court of Appeal found for the purchaser notwithstanding that the contract provided that in the event of default for 30 days of any instalment due, the vendor was at liberty to resell the land. The court's decision must have been premised on the fact that the vendor had an unperformed obligation, presumably to transfer title to the purchaser.

21 I accepted the defendants' counsel's arguments that in this case the defendants had no unperformed obligations after the last delivery date. Therefore the cases mentioned and the propositions of law cited therefrom had no application.

22 The plaintiffs in this case were required to deliver specific quantities of the goods on specific dates to the defendants. Failure to so deliver constituted a breach of contract by the plaintiffs which sounded in a claim for damages by the defendants; this point was not disputed by the plaintiffs' counsel. However, he argued that the plaintiffs' admitted breach did not relieve the defendants of the obligation to accept delivery of the balance of 6,360 pieces even if tendered late by the plaintiffs.

23 The plaintiffs' counsel's argument turned on whether time was of the essence of the contract, as contended by the defendants and disputed by the plaintiffs.

24 Mr Pillay contended that where delivery dates are specified, the law does not imply a 'reasonable time' for delivery and s 29(3) of the Sale of Goods Act 1979 ('the Act') has no application. He added that the question of whether time for delivery is of the essence is only relevant when one has to determine whether a breach is a repudiatory breach and it is not relevant where there are no unperformed obligations on the part of the innocent party. He referred in this connection to **Decro-Wall International SA v Practitioners in Marketing** [1971] 1 WLR 361

25 The facts of that case were that the plaintiffs, a French company, orally agreed to sell goods exclusively to the defendants, an English company, for which payment would be made by bills of exchange due 90 days from the date

of the invoice. It was an implied term of the contract that it was determinable by reasonable notice on either side. The defendants were slow in meeting payment on the bills of exchange and such delays varied from 2 to 20 days. The plaintiffs eventually sued the defendants, alleging that the defendants had wrongfully repudiated the contract by failing to pay bills on time. The defendants counterclaimed for damages for breach of contract. The Court of Appeal affirmed the judgment of Nield J in awarding damages to the defendants for breach of contract and held that the defendants' late payments did not go to the root of the contract so that the breaches sounded in damages only. It further held that the plaintiffs' breach and repudiation did not oblige the defendants to accept that the contract was at an end since a repudiation or breach by one of the parties did not discharge it. The court also took the view that the contract could only be determined by at least 12 months' notice by either party.

26 The case was cited by plaintiffs' counsel to support his clients' stand, but it clearly had no application where the innocent/aggrieved party (the defendants in this case) had no future obligations to perform after the last delivery date had lapsed.

27 Alternatively, if the plaintiffs' tests were applicable, then it was the defendants' contention that the plaintiffs' total failure to deliver the last instalment went to the root of the contract. The plaintiffs had admitted that they failed to deliver the last instalment, but asserted that notwithstanding such breach, there was still an obligation on the part of the defendants to accept delivery albeit late, of the balance goods and to pay for such goods subject to any damages sustained.

28 It was clear on the facts that the defendants had objected to the plaintiffs' earlier attempts to reschedule and deliver later than the delivery dates stipulated.

Therefore, even if the parties had been silent on whether time would be the essence of the contract, the defendants' protests would have served to confirm that time would be the essence. I could find nothing in the facts to support the plaintiffs' contention that the defendants had acquiesced to the lateness in delivery. There was no conduct on the part of the defendants to lead the plaintiffs to believe that a new agreement could be implied that the period of delivery had been extended (see **Hartley v Hymans** [1920] 3 KB 475). **Bunge Corp v Tradax Export SA** [1981] 1 WLR 711[1981] 2 All ER 540 was cited by the plaintiffs' counsel to support his contention supported by s 10(1) of the Act that 'unless a different intention appears from the terms of the contract, stipulations as to time of payment are not of the essence of a contract of sale'. Further, 'whether any other stipulation as to time is or is not of the essence of the contract depends on the terms of the contract (see s 10(2) of the Act). At p 229 of the case, Lord Roskill quoted from 9 **Halsbury's Laws of England** (4th Ed) at para 481:

The modern law in the case of contracts of all types, may be summarized as follows. Time will not be considered to be of the essence unless: (1) the parties expressly stipulate that conditions as to time must be strictly complied with; or (2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence; or (3) a party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence.

29 The plaintiffs' counsel also submitted that s 31(2) of the Act applied to the contract. The section states:

Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to

a claim for compensation but not to a right to treat the whole contract as repudiated.

30 He cited **Regent OHG Aisestadt & Barig v Francesco of Jermyn Street Ltd** [1981] 3 All ER 327 in support of s 31(2) of the Act.

31 I was of the view that s 31(2) of the Act had no application to the facts of this case since it was not a question of defective deliveries that was in issue but a question of non-delivery on the plaintiffs' part of the final instalment. Further, the purchase order did not provide for payment to be made separately for each instalment.

32 Turning now to the plaintiffs' contention that the defendants' remedy only sounded in damages, an anomalous situation would arise if I accepted the arguments of the plaintiffs' counsel. On the one hand, the plaintiffs agreed that for their breach, the defendants had a claim for damages, yet on the other hand, the plaintiffs maintained that their breach did not discharge the defendants from the obligation to accept late delivery of the final instalment after the last delivery date. In other words, the defendants have a remedy both for damages as well as for specific performance by calling for delivery of the balance goods, a situation which is not tenable with accepted principles of law on the availability of specific performance (see ***Snell's Principles of Equity*** (28th Ed) at p 569) which is in lieu of and not in addition to damages and only where the latter would not be an adequate remedy.

33 On 13 July 1991, before I heard further arguments from both parties, the plaintiffs' representative, Goh Chor Cheng, filed a second affidavit ('the affidavit') to the effect that the work in progress for the balance goods could not be sold as they had been manufactured in accordance with the defendants' specific requirements. The plaintiffs could not therefore mitigate their loss.

34 Although my decision did not in any way turn on the materiality of the affidavit, had it been necessary for me to rule on the admissibility of the affidavit, I would have disallowed the plaintiffs from adducing further affidavit evidence as it would be unfair to the defendants. It is my view that when the court hears further arguments under s 34(2) of the Supreme Court of Judicature Act (Cap 322), it does so on the facts and evidence already adduced at the original hearing of the appeal.

35 Defendants' appeal allowed and plaintiffs' cross-appeal dismissed.

Lai Siu Chiu JC

Freddi Lim Chee Beng (Lee Ang Wu & Wong) for the plaintiffs
Mohan Pillay (Drew & Napier) for the defendants
