IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1993] SGHC 48

Suit 288/1986

Between

Swiss Singapore Overseas Enterprise Pte Ltd

… *Plaintiff*

And

Horng Chang Enterprise Pte Ltd

… *Defendant*

GROUNDS OF DECISION

Version No 1: 29 Oct 2026 (23:45 hrs)

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Swiss Singapore Overseas Enterprise Pte Ltd v Horng Chang Enterprise Pte Ltd and Others

[1993] SGHC 48

Suit 288/1986
G P Selvam JC
01 March 1993

1 ***The sale and purchase contracts***

2 This case concerns a serial sale of waste paper of Japanese origin. The ultimate consumer was an Indian company, Emami Paper Mills Ltd of Calcutta (`the Indian buyers`), who entered into an agreement with a Singapore company, the plaintiffs, for the purchase of pure white waste paper cuttings.

3 In November 1984 the plaintiffs entered into an agreement (`the Horng agreement`) with the first defendants, Horng Chang Enterprise Pte Ltd, to purchase 220mt of waste paper at the price of US$88,000. The waste paper was to be delivered at the port of Calcutta, India where it would be collected by the Indian buyers who were involved in the business of repulping waste paper and recycling it into pure white writing paper. The shipment of the paper was to be effected in containers at any Japanese port. The Horng agreement provided for inspection of the paper by an inspection agency of international repute or Nippon Kaiji Kentai Kyokai, the second defendants, who are independent cargo surveyors. The Horng agreement described the commodity as `pure white cutting`. There was no other specification in the agreement.

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4 In December 1984 the first defendants said that they were only able to supply 120.33mt of waste paper. The Indian buyers agreed to accept that quantity. The plaintiffs accordingly agreed to receive the same quantity.

5 To fulfil their agreement with the plaintiffs, the first defendants entered into an agreement with Khoei Timber Products Co, the third defendants. Payment by the plaintiffs to the first defendants was to be effected by a letter of credit in favour of the latter. The letter of credit was eventually established by the Singapore branch of the State Bank of India. One of the documents stipulated in the credit was a `surveyor`s certificate from any Japanese government department certifying the quality of material is as per NARI specifications and does not have any printed, typed, written or computer printed material and have only pure white in colour`. The credit described the commodity as `waste paper - pure white paper cuttings`.

6 The first defendants in their turn established a letter of credit in favour of the third defendants. It was issued by Chartered Bank, Singapore. The credit described the commodity as `waste paper - pure white paper cutting of Japan origin`.

7 The second defendants of Kobe, Japan were appointed to inspect the cargo. On 20 December 1984 the second defendants received a telex from the first defendants in the following terms:

> *Re: Waste paper - Pure white paper cutting*
>
> *We have received call from our supplier Khoei Timber Products Co Ltd. That some of cargoes have been slightly dirty when pacing [sic] and that you not approval to the condition of the L/C. We have placed the order through the samples that they have sent. Since if the cargoes is slightly dirty due to packing, we will accept it.*

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> *Therefore, kindly proceed with the surveyor according to the L/C term.*

8 The inspection certificates

9 The second defendants issued four certificates all dated 12 January 1985 for the total quantity of 120.33mt. The certificate mentioned the Chartered Bank letter of credit. Each certificate included the following statement:

> *This is to certify that: We, the undersigned, did, at the request of Khoei Timber Products Co Ltd inspect the undermentioned commodity to be exported to Calcutta, India, and hereby report as follows:*
>
> *Commodity: ... m/tons of waste paper - pure white paper cutting of Japan origin ... containers ... bales.*
>
> *By order and on account of: M/s Horng Chang Enterprise Pte Ltd, Singapore.*
>
> *Shipper: Khoei Timber Products Co Ltd.*
>
> *Inspection*
>
> *Attending the said warehouse, we found:*
>
> (A) Quality
>
> *The quality of material is as per Nari Specification and does not have any printed, typed, written or computer printed material and have only pure white in colour.*
>
> *(B) Quantity*
>
> *223 bales of this consignment were properly packed in containers.*
>
> *Conclusion*
>
> *From what we have surveyed, we conclude that the quality and quantity of the goods have been shipped in strict conformity with credit terms and conditions.*

10 This dispute

11 The shipment of the total quantity of 120.33mt of waste paper was effected at Kobe, Japan on board the vessel mv `Lanka Srimathi` on 12 January 1985. The ship arrived at Calcutta in or about the third week of February 1985. On arrival it was found that the goods were very poorly wrapped and it was further discovered that part of the consignment was not in the form of cuttings but consisted of rolls and/or sheets. The Indian customs at that time believed that 70% of the goods was in the form of rolls and/or sheets when in fact only 4mt were in rolls or sheets. Indian customs did not at first permit the Indian buyers to collect the waste paper on the ground that the goods being rolls and sheets, the Indian buyers required a licence or written permission from the Indian Government to import such rolls and sheets. Later the Indian buyers were permitted to collect the waste paper on production by them of a banker`s guarantee that any customs duties or penalties payable by the Indian buyers would be paid.

12 Further, in or about April 1985, the Indian buyers discovered that the waste paper was coated with a chemical substance which substance rendered it impossible to repulp the waste paper into pure white paper. The chemical coating caused light brown, brown, blue and black specks to appear when it was subjected to the repulping process. It was discovered that 90% of the waste paper was affected and defective in this way. As a result the consignment was unsuitable for the purpose for which the Indian buyers purchased the same - that is to say, to make pure white stationery by the recycling process.

13 Following the arrival of the consignment at Calcutta there was a period of accusations. The plaintiffs on 17 April 1985 remonstrated with the first defendants on the basis of the problem encountered by the Indian buyers. Then

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on 4 May 1985 the plaintiffs sent a telex to the second defendants referring to the certificates. The telex went on as follows:

> *You surveyed and certified that the consignment under certificates were pure white waste paper cuttings as defined in Nari specifications. Unfortunately it was discovered on consignment reaching in Calcutta that the commodities was not pure white waste paper but a chemically coated paper. We had accepted this consignment on the basis of your certification which is apparently wrong certification. In the process we have suffered a loss of USD500,000 which includes cost of material as well as production loss suffered by us. We lodge a claim with you for the same.*

14 The response of the second defendants to the plaintiffs was as follows:

> *We are puzzled about your complaint on quality of the captioned. Our inspection was carried out for delivery between Horng Chang Enterprise Pte Ltd, consignee and Khoei Timber Products Co Ltd, supplier, not for delivery between others and we would say that we were not in position acting on behalf of consignee in this case.*

15 Throughout entire period of inspection, consignees` representative, Mr Kuo Jen Shui, managing director witnessed spot where commodity was stocked.

16 Because of no mention about applicable Nari specifications item number in L/C, after consensus as to the `pure white` was obtained between supplier and him, we checked/inspected commodity together with him based upon the consensus and he accepted commodity as being in conformity to terms of L/C.

17 Thence it was vanned in containers in his full attendance but no markings were made on bales identifying certification of our inspection.

18 From circumstances, it is our understanding that commodity was delivered to consignee to their satisfaction without any trouble. Also, we would

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add the fact that we received agreement letter on commodity with Mr Sui`s signature.

19 Since matter you are complaining is considered due to divergence of view on quality of commodity between you and Horng Chang Enterprise, you are advised to get in touch with this company (Mr Shui) for solving problem.

20 On 17 May 1985 the plaintiffs telexed the second defendants that their losses were over one million United States dollars.

21 On 20 May 1985 the first defendants stated to the plaintiffs that the `Japan suppliers have the cargo according to the sample that we have given to you and moreover they have surveyed the cargo before shipment`. The plaintiffs thus were told that they were given a sample by the first defendants. It will be recalled that on 20 December 1984 the first defendants had confirmed that they placed the order with the third defendants through samples they had sent.

22 The second defendants in a subsequent telex dated 20 May 1985 elucidated their position further:

> *In reply to your telex dated 17 May 1985, we comment as follows.*

23 First of all, we wish to inform you of the fact that consignee`s order (Horng Chang Ent Pte`s) was placed through the sample submitted by supplier (Khoei Timber Prd Co) under condition of relevant L/C. `The quality of material is as per Nari specification and does not have any printed, typed, written or computer printed material and have only pure white in colour`.

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24 Further, we would point out that the sample was of coated material and accepted by consignee`s own examination before his coming to Japan for witness.

25 Since there was no description about Nari specifications grade number in the L/C, nor idea of supplier/consignee`s on it, all we could do at time of inspection for delivery between supplier/consignee was to inspect commodity together with consignee`s representative whether it was of same quality as the sample and after completion of inspection, commodity was confirmed as same as the sample and accepted by consignee.

26 This leads us to believe that your complaint on commodity is due to difference of opinion on quality between you and Horng Chang Ent Pte Ltd.

27 Again, you are kindly advised to contact Mr Kuo Jen Shui, managing director of this company in order that you may hear from him of exact situation in this case.

28 Thereafter further accusations were made against the second defendants and the problem remained unresolved.

29 In consequence the plaintiff brought this action against the first defendants, the second defendants and the third defendants seeking damages.

30 The claim against the second defendants was based on negligence and breach of duty. The plaintiffs, it was alleged, actually and reasonably relied upon the certificates in purchasing the waste paper from the first defendants and that the certificates expressly or implicitly stated, inter alia, that:

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> (i) the waste paper purchased by the first defendants conformed to the ordinary and/or trade definition of pure white waste paper cuttings - namely, that the waste paper would not become discoloured through the process of repulping but would remain pure white at all times;
>
> (ii) the waste paper conformed to NARI specifications;
>
> (iii) the waste paper was free from chemical constituents inconsistent with repulping into pure white waste paper and/or inconsistent with NARI specifications;
>
> (iv) the waste paper was suitable for repulping into pure white writing paper;
>
> (v) the waste paper was in the form of cuttings and not rolls and/or sheets.

31 The plaintiffs went on to allege that the statements by the second defendants were false and/or were made negligently by the second defendants in breach of the duty of care owed by the second defendants to the plaintiffs. The particulars of negligent breach of duty alleged that the second defendants:

> (i) knew or ought to have known that the waste paper was chemically coated;
>
> (ii) ought to have known that the chemical coating would or could foreseeably result in discoloration of the waste paper on repulping and/or ought to have tested the waste paper or effected investigations to determine the effect of the chemical coating thereon;
>
> (iii) knew or ought to have known the waste paper sold by the first defendants was meant for the third party in Calcutta and accordingly was shipped from Kobe to Calcutta;
>
> (iv) knew or ought to have known that the waste paper was purchased by the first defendants for sale to another party and/or that such further sale was a reasonably foreseeable fact or chance;
>
> (v) ought to have known that such further purchaser required the waste paper not to possess a chemical substance such as was possessed by the waste paper;

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(vi) ought to have foreseen and/or did foresee that others would or foreseeably might rely upon the said certificates;

(vii) knew or ought to have known that part of the waste paper was not in the form of cuttings.

32 The pleaded case against the third defendants was that they knew or ought to have known that:

(i) the first defendants were purchasing the waste paper from the third defendants for resale to others;

(ii) the waste paper was chemically coated;

(iii) the chemical coating would or might foreseeably result in discoloration of the waste paper on repulping and/or ought to have tested the waste paper or effected investigations to determine the effect of the chemical thereon;

(iv) by reason of the description `pure white paper` and the requirement of conformity with NARI specifications, that the waste paper was required to be of such a kind as not to suffer discoloration upon repulping;

(v) that future purchasers from the first defendants required or might reasonably foreseeably require that the waste paper should not possess a chemical substance such as was possessed by the waste paper;

(vi) that the waste paper was required to be in the form of cuttings and not rolls and/or sheets.

33 The statement of claim against the third defendants went on to say that the third defendants owed to the plaintiffs a duty of care (i) not to sell to the first defendants waste paper containing the chemical coating contained by the waste paper and (ii) not to sell to the first defendants waste paper containing sheets and/or rolls but cuttings only. The plaintiffs further alleged that the third defendants negligently and in breach of their duty of care sold to the first defendants paper containing chemical coating and part of which waste paper was not in the form of cuttings but in the form of sheets and/or rolls.

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34 The plaintiffs additionally claimed damages against the second defendants and the third defendants and an indemnity for any sum they were obliged to pay the Indian buyers.

35 As the plaintiffs have no contract with the second and third defendants their claim against them was based on the tort of negligence or breach of duty.

36 The first defendants against whom the claim was based on contract were served with the writ. But they failed to enter an appearance. The action therefore did not proceed to trial as against them. The plaintiffs could have entered judgment against them under O 13 of the Rules of the Supreme Court 1970. They failed to do this.

37 The action against the second and third defendants proceeded to trial. The third defendants, however, made no show at the trial, their solicitors having discharged themselves for want of instructions.

38 The plaintiffs having no contract with the second and third defendants were constrained to seek protection under the law of tort. The case, therefore, involved a consideration of the parameters of liability for negligence causing economic loss in the context of contracts for sale of goods and survey of the goods.

39 **The law**

40 The question of liability for negligence in a sale of goods was first considered by the House of Lords in **Donoghue v Stevenson** [1932] AC 562 As summarized by Lord Keith in **Yuen Kun Yeu v A-G of Hong Kong** [1988] AC 175[1987] 2 All ER 705[1987] 3 WLR 776 at p 192: ***Donoghue v Stevenson***

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[1932] AC 562 established that the manufacturer of a consumable product who carried on business in such a way that the product reached the consumer in the shape in which it left the manufacturer, without any prospect of intermediate examination, owed the consumer a duty to take reasonable care that the product was free from defect likely to cause injury or health.

41 Lord Keith then quoted the following extract from the speech of Lord Atkin in ***Donoghue v Stevenson*** :1

> *Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.*

42 I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act.

43 There will no doubt arise cases where it will be difficult to determine whether the contemplated relationship is so close that the duty arises.

44 Lord Keith went on to comment as follows:

> *The speech of Lord Atkin stressed not only the requirement of foreseeability of harm but also that of a close and direct relationship of proximity. ... Lord Atkin clearly had in contemplation that all the circumstances of the case, not only the foreseeability of harm, were appropriate to be taken into account in determining whether a duty of care arose.* ***Donoghue v Stevenson*** *[1932] AC 562 was concerned with biological injury and not economic loss for which the law does not afford a comprehensive remedy in tort. In such a case the party is expected to protect himself against such loss by suitable*

> *contractual arrangements. But a remedy is afforded in certain limited circumstances. The parameters of the remedy were considered in a number of very recent cases. In* ***Simaan General Contracting Co v Pilkington Glass Ltd (No 2)*** *[1988] QB 758[1988] 1 All ER 791[1988] 2 WLR 761 the English Court of Appeal was concerned with the question of liability for economic loss in negligence. The plaintiffs in that case were the main contractors for a building in Abu Dhabi. The main contract specified for incorporation into the curtain walling double-glazed units of green glass which were manufactured by the defendants. The plaintiffs sub-contracted the erection of the curtain walling to a company which was not a party to the action. The sub-contractors purchased the double-glazed units from the defendants. When the units had been installed the architect rejected the units as being defective by reason of discrepancies in the colouring. The plaintiffs brought a claim in negligence against the defendants, alleging that by reason of the defects in the glass units they had suffered economic loss in that the money which they would otherwise have received had been withheld.*

45 The Court of Appeal decided that a claim for pure economic loss, unaccompanied by physical damage to property of which the plaintiff was the owner or to which he could show a possessory title, lay only where he could show a special relationship between himself and the defendant. In so far as the glass units could be said to have been damaged the plaintiffs had failed to show any proprietary interest in them at the time when the damage occurred. Since the plaintiffs had required the sub-contractors to buy the glass units from the defendants only because they had been contractually obliged to do so they could not be said to have relied on the defendants, nor had the defendants assumed a direct responsibility to the plaintiffs for the quality of the units. Accordingly, there was no reason to depart from the normal contractual chain of liability.

46 Dillon LJ in his judgment said the following on the question of duty of care:

> *It is clear, as Lord Keith pointed out in* ***Yuen Kun Yeu v A-G of Hong Kong*** *[1988] AC 175, 191 by reference to the speech of Lord Wilberforce in* ***McLoughlin v O`Brian*** *[1983] 1 AC 410,*

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> *420, that foreseeability of harm or loss does not of itself and automatically lead to a duty of care. Foreseeability of harm is a necessary ingredient of a relationship in which a duty of care will arise, but not the only ingredient. Foreseeability of harm does not become enough to make the harm recoverable by the plaintiff just because what was foreseeable was harm to the plaintiff as an individual rather than as a member of a general and unascertained class; otherwise Lord Fraser could not in the* ***Candlewood*** *case [1986] AC 1 have rejected the views which he cited, at p 22, from the judgments of Gibbs and Mason JJ in* ***Caltex Oil (Australia) Pty Ltd v Dredge `Willemstad`*** *(1976) 136 CLR 529.*

47 If, however, foreseeability does not automatically lead to a duty of care, the duty in a ***Hedley Byrne*** type of case must depend on the voluntary assumption of responsibility towards a particular party giving rise to a special relationship, as Lord Keith held in ***Yuen Kun Yeu v A-G of Hong Kong*** [1988] AC 175, 196 (and see also his statement at p 784 that the ***Hedley Byrne*** case [1964] AC 465 was concerned with the assumption of responsibility) and as Robert Goff LJ had earlier held in ***Muirhead v Industrial Tank Specialities Ltd*** [1986] QB 507, 528 in a passage which would have been before Lord Keith in the ***Yuen Kun Yeu*** case.

48 But in the present case I can see nothing whatever to justify a finding that the defendants had voluntarily assumed a direct responsibility to the plaintiffs for the colour and quality of the glass panels. On the contrary, all the indications are the other way and show that a chain of contractual relationships was deliberately arranged the way it was without any direct relationship between the plaintiffs and the defendants.

49 In **Caparo Industries plc v Dickman & Ors** [1990] 2 AC 605[1990] 1 All ER 568[1990] 2 WLR 358 the House of Lords stated the principle that the liability for economic loss due to negligent misstatement was confined to cases

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where the statement or advice is given to a known or direct recipient for a specific purpose which is made known to the author of the statement or advice and upon which the recipient relies upon and acts to his detriment. The House of Lords also approved the following three elements required for a duty of care to exist: (i) reasonable foreseeability; (ii) a close and direct relationship of proximity between the parties; and (iii) it must in such a situation be fair, just and reasonable to impose liability in tort. **Caparo** [1990] 2 AC 605[1990] 1 All ER 568[1990] 2 WLR 358 decided that auditors owe no duty of care to potential investors who rely on the accounts of a company audited by them. **Al Saudi Banque v Clarke Pixley** [1990] Ch 313[1989] 3 All ER 361[1990] 2 WLR 344 decided that auditors of a company do not owe a duty of care to banks which lend money to companies in reliance on the companies` accounts and auditors` reports.

50 In **Smith v Eric S Bush (a firm)** [1990] 1 AC 831[1989] 2 All ER 514[1989] 2 WLR 790 the question for determination was: whether a valuer instructed by a mortgagee to value a house, knowing that his valuation will probably be relied upon by the prospective purchaser and mortgagor of the house, owes to the purchaser in tort a duty to exercise reasonable skill and care in carrying out the valuation. The House of Lords answered the question in the affirmative. The House of Lords treated that case as being `akin to contract`. The valuer knew that the prospective purchaser would probably rely upon the valuation. Next the valuer`s fee, albeit indirectly, was paid by the prospective purchaser. Thus it satisfied the tests stated in the ***Caparo***

51 case.4 It was a clear case where it would be just and reasonable to impose duty on the valuer.

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52 **Application of the law**

53 On the facts of this case the only parties to whom the surveyors would be liable for misstatement are the first defendants and the bank which established the letter of credit in favour of the third defendants, the terms of which were known to the second defendants.

54 It is abundantly clear to me that the second defendants were not made aware of the special terms of the other contracts between the Indian buyers, the plaintiffs and the first defendants. The second defendants did not prepare the reports with the plaintiffs in mind as the plaintiffs were not direct recipients of the reports. And it is not just and reasonable to impose a duty or liability on the second defendants in order to protect the plaintiffs as they could and should have appointed their own surveyors and instructed them of their special requirements. A director of the plaintiffs who gave evidence for the plaintiffs said : `Horng was our first party. If they cannot solve we go for the second defendants or the third defendants`. But their claims against the second and third defendants were launched without sound legal basis. In this case, the knowledge, proximity and fairness which were present in **Smith v Eric S Bush (a firm)** [1990] 1 AC 831[1989] 2 All ER 514[1989] 2 WLR 790 are not present to hold that the second and third defendants are liable in tort.

55 The reasons which I have given for holding that the plaintiffs could not succeed against the second defendants apply equally to the third defendants. This is not a proper case to impose liability in tort against the supplier in favour of the plaintiffs who had a remedy in contract against the first defendants. They could have easily protected their interest by appointing their own surveyors and giving them instructions of their requirements.

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56 The legal aspect of the case set out above sufficiently and effectively disposes of the matter. I shall now consider the factual aspects. First, it was established by evidence that the purpose for which the survey was required was only to ensure that the goods were in accordance with the terms of the Chartered Bank letter of credit and that they conformed to the sample furnished to the second defendants. The reference to NARI specifications had no meaning in the context as no NARI code number was given. And there were no applicable NARI specifications for the waste paper in question. Hence the need to go by the given sample. There was no reason for the second and third defendants to be aware that the paper was required for repulping into pure white writing paper. Admittedly the waste paper cuttings shipped could be put to some commercial use. They could be used for making cardboard. In these respects the second and third defendants performed their contractual obligations. A small part of the consignment, however, consisted of rolls and sheets. There was a misrepresentation in that respect. For reasons I have given the plaintiffs had no cause of action against the second and third defendants. Accordingly the plaintiffs were precluded from proceeding against the second and third defendants.

57 I therefore dismissed the plaintiffs` claims against the second and third defendants and awarded costs in favour of the second defendants.

58 Claims against the second and third defendants dismissed.

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Peter Koh (Koh & Yang) for the second defendants
