

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1993] SGHC 58

Suit No 2540 of 1991

Between

Fashion Textiles Industries (S)
Pte Ltd

... Plaintiff

And

Chin Heng Garments Factory
Pte Ltd

... Defendant

GROUND OF DECISION

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**Fashion Textiles Industries (S) Pte Ltd v Chin Heng Garments
Factory Pte Ltd**

[1993] SGHC 58

Suit No 2540 of 1991
Amarjeet Singh JC
15 March 1993

1 **Judgment:**

2 Coram: Amarjeet JC

3 **GROUND OF DECISION**

4 The Plaintiffs who are the Appellants herein, are manufacturers of fabrics and textiles ("the said goods"). They agreed to supply and supplied the said goods under separate agreements from between May 1991 and August 1991 to the Defendants who manufactured and exported garments. The agreements constituted contracts of sale by sample. The Plaintiffs' claim a sum of US\$529,895.55 or its equivalent in Singapore currency, damages including foreign exchange loss and interest in respect of the said goods sold and delivered to the Defendants.

5 The Plaintiffs applied for summary judgment. The Defendants opposed the Plaintiffs' claim for summary judgment on the grounds that there were a number of triable issues in fact and in law and they had a set off and

counterclaim. The issue of law was whether the Defendants could raise and claim a set-off/counterclaim in respect of a contingent exposure under unilateral open-ended Guarantees which they had issued to their customer and under which they were potentially liable in respect of the quality of the said goods bought from the Plaintiffs and resold as manufactured goods to their customer. The Defendants were given unconditional leave to defend the whole of the Plaintiffs' claim by the Asst. Registrar resulting in the Plaintiffs' present appeal against the decision.

6 The Plaintiffs in support of their claim relied on the Defendants' Purchase Orders, Letters of Credit issued on behalf of the Defendants, Invoices and the subsequent Delivery Orders in which the Defendants acknowledged receipt of the said goods. The Plaintiffs also gave due credit to the Defendants in respect of any of the said goods which were rejected and returned claiming only the balance amount due in respect of each purchase order which may be summarised as follows:

7 A. Items under Letter of Credit Terms:

8 S/No. Date Purchase Date Amount in US\$ Order Required

9 1 12.7.91 48698 10/7 - 120,078.06 25/7/91

10 2 12.7.91 48700 30/7 - 44,081.92 10/8/91

11 3 5.8.91 49612 10 - 192,224.21 (Less returned 20/8/91 goods)

12 4 (a) 15.7.91 48674) - 136,437.02

13 (b) 15.8.91)

14 (c) 30.10.91)

15 5 (a) 21.5.91 4668 15/6/91 16,857.22

16 (b) 21.5.91 48669 15/6/91 (Less returned 16,857.22 goods)

17 Sub-Total: 509,678.43

18 B. Items under C.O.D. Terms:

19 S/No. Invoice Date Amount in US\$

20 1 5353/91 16.7.91 3,602.45

21 2 5364/91 18.7.91 3,533.75

22 3 5395/91 22.7.91 232.76

23 4 5447/91 25.7.91 141.40

24 5 5478/91 27.7.91 2,438.68

25 6 5477/91 29.7.91 9,890.28

26 7 5543/91 02.8.91 236.60

27 8 5619/91 16.8.91 144.20

28 Sub-Total: 20,220.12

29 Total amount outstanding: **US\$529,898.25**

30 The Defendants averred that as manufacturers of garments exclusively for the overseas markets they accepted large orders for garments from retail conglomerates in Europe and the United States in accordance with specifications furnished by these end buyers. One of the Defendants' customers was Lane Bryant Retail Ltd (Lane Bryant) of the United States whose buying agent was Mast Industries Inc. ("Mast") who were in turn represented in Singapore by Winmas International Pte Ltd ("Winmas"). The Defendants had agreed to manufacture and supply Lane Bryant with more than 600,000 pieces of Turtleneck garments.

31 The Defendants did not deny the contracts with the Plaintiffs, the amounts in the contracts or the delivery. The Defendants, however, claimed in connection with the contracts that they suffered losses and were open to a potential claim for damages as a result of the following matters which they averred were triable issues:

32 (a) Late Delivery That there were breaches of the contract involving late delivery of the said goods resulting in loss and damage to the Defendants.

33 (b) Non-compliance with sample/unmerchantability That: i) the sale of the said goods being a sale by sample the goods did not correspond to the sample; ii) the said goods were not of merchantable quality; iii) the said goods were not fit for the purpose for which they were intended.

34 (c) Claim for an Indemnity in respect of Guarantee The Defendants had a claim for indemnity against the Plaintiffs in respect of Guarantees issued by the Defendants to Lane Bryant totalling approximately US\$405,993.00 in

respect of some of which Guarantees the Defendants had obtained back to back Guarantees from the Plaintiffs with respect to the quality of the said goods purchased from the Plaintiffs from which they made the garments which they then sold to Lane Bryant.

35 The Court had to determine which set off and or counterclaim was valid and entitled the Defendants leave to defend and if so how much they were entitled to defend having regard to the above matters.

36 LEAVE TO DEFEND

37 Late Delivery:

38 The Defendants claimed losses under two heads resulting from the late delivery of goods relating to Item A3, namely production losses and airfreight charges.

39 At the hearing, Counsel for the Plaintiffs did not address the Court in respect of the late delivery of goods in respect of item "A3". In the circumstances, I accepted the fact of a late delivery being made.

40 Production Losses:

41 The Defendants claimed that they had anticipated receiving the fabrics for the manufacture of the garments for Lane Bryant as agreed by the third week of August 1991. Because of the non delivery of the fabrics there was havoc caused to the production schedules of the Defendants. The production line devoted to the manufacture of the particular line of garments for Lane Bryant from the Plaintiffs' material had to go idle. They had no materials to work on.

The Defendants incurred losses through payment of wages to these workers which were approximately US\$1,100/- per day. There were other overhead expenses. The total loss including ancillary items was about US\$2,000/- a day for a total of some 36 days - and the loss exceeded totalled US\$70,000/-. The Plaintiffs on the other hand, submitted that these were dubious figures. The Defendants did not even have enough capacity to meet all the orders they had at the material time and had to send out work on sub-contract. It was not possible for any of the Defendants' production lines to be left idle. The Plaintiffs claimed that the Defendants had not supported their claim by any documents. The quantum of US\$70,000/- was speculative and a sham.

42 I decided on the evidence that as there had been late deliveries of fabrics to the Defendants of about a month, the Defendants had reasonable grounds for setting up a defence in respect of their set off/counterclaim. The issue should best be left for trial.

43 Airfreight Charges:

44 The Defendants incurred airfreight charges of S\$120,568.22cts. (approx. US\$70,000/-). The Plaintiffs' Counsel submitted that there was no substantiation of the air freight charges incurred by the Defendants. Counsel argued that the Defendants had exhibited two invoices by a freight forwarder Concorde Express, a Singapore company. Further, the documents did not show that the air freight of garments was in respect of item A3; that the airway bill which normally identified goods being shipped was not exhibited and that both invoices did not show to whom the goods were shipped; that in any case there was no necessity to air freight the goods and finally that no allowance had been given by the Defendants for sea freight charges which they would have to pay

anyway themselves. The Defendants in reply referred to various exhibits in the Affidavit filed on behalf of the Defendants on 1st January 1992 which showed that Winmas had indeed pressed the Defendants for the deliveries of the garments to be sent by air to Ohio Columbus through their freight forwarders Concorde Express and by the Defendants prepaying for the freight. The Plaintiffs under the contract with the Defendants were required to deliver the fabrics by 10/20 August 1991. Deliveries were only made in late September. The manufactured garments thereafter could not be sent by ship to reach their customer Lane Bryant in time for the Christmas season.

45 Having considered the arguments, the letters from Winmas dated 8, 16 and 17th October 1991 together with Concorde Express's two invoices was, in my opinion, prima facie proof that the quality of the garments and their various colours corresponded to the said goods ordered from the Plaintiffs and the air freighted garments was made from the said goods supplied in Purchase Order A3. As there was sufficient material on record in respect of the airfreight charges I held it to be a triable issue.

46 Non-compliance with sample/unmerchantability Losses: Items 5(a) and (b)

47 The Defendants alleged that in respect of Purchase Orders A5, the entire order was rejected by the end buyer as the colour shading of the material was defective. In consequence the Defendants lost the price for this order being US\$31,000/-. The Plaintiffs submitted that only the 'black' colour material amongst others had been rejected by Winmas. Moreover, the Defendants had neither clarified what had happened to the garments i.e. whether they had been sold or whether they were still in their possession. They had also not given any

reason as to why the defective fabrics were not returned to the Plaintiffs instead of the Defendants cutting them into garments. In any case, the Defendants only stood to loose profit and not the full contract price.

48 I found that there existed correspondence between the parties in respect of the rejection of the goods by Winmas which the Defendants claimed at the hearing were still unsold and in their possession. I therefore held that the Defendants' defence setting up a set off/counterclaim of US\$31,000/- in respect of their losses relating to Purchase Order "A5" did similarly raise triable issues.

49 NO DEFENCE

50 Non-compliance with sample/unmerchantability: Indemnity in respect of Guarantees

51 In respect of this claim, the Defendants averred that generally where the said goods were delivered, most of them were not up to standard. The Plaintiffs failed to conform closely to the specifications of the end buyer and there was apprehension on their part that many of the finished goods would not pass inspection by the end buyers' Inspectors and would either be rejected or the garments sold as defective merchandise and claims would be made in this regard. There had been numerous complaints with regard to the colour of the delivered materials being "off shade". Some batches of the goods delivered had strong odour and whilst in yet others, hair-like substances were peeling off as well. The Defendants had plenty of arguments with the end buyers resulting in the end buyers demanding for Guarantees or indemnities from the Defendants. The Defendants had no choice but to issue letters of Guarantees to the end buyers. Initially, when the end buyers were issued Guarantees, the Defendants

had insisted on and obtained back to back Guarantees from the Plaintiffs. The Plaintiffs after issuing some Guarantees refused to issue any further guarantees. All in all the Defendants had issued guarantees worth US\$405,993/-. None of these Guarantees had at the time of the hearing been cancelled by the end buyers or returned to the Defendants. They constituted valid and binding obligations on the Defendants and represented a liability to the Defendants which they would not have incurred if not for the Plaintiffs' breach and they had as such a valid set-off and or counterclaim as against the Plaintiffs by reason of the Guarantees. The Defendants contended that they had also suffered loss of goodwill and damage to their reputation as the end buyers had refused to place further orders with them.

52 The Plaintiffs countered these submissions pointedly by stating that:

53 (a) the goods in respect of item A4(a), (b) and (c) had not even been sold by the Defendants to Lane Bryant but to a third party and it was not even the subject matter of the Guarantees issued by the Defendants to Lane Bryant. The Defendants were unable to and did not deny this at the hearing. Nor did they deny payment to them by the third party.

54 (b) The Defendants had been paid fully by Lane Bryant in respect of all the garments made from the Plaintiffs' said goods contained in items A1, A2, A3, A5 and B1-8. If Lane Bryant had wanted to reject any goods, they would have done so promptly because the market for goods in the United States followed the four seasons and garment stocks are not retained in store for more than a short period. The Plaintiffs produced correspondence from Winmas and Mast to support their contention that the Defendants had been fully paid. At the hearing the Defendants' Counsel conceded that the Defendants had been paid in

full but stated that Lane Bryant could still claim against them on the Guarantees issued.

55 (c) The amounts of each of the guarantees were not specified. They were unilateral open-ended Guarantees issued to Winmas by the Defendants. The sum of US\$405,993/- was an arbitrary figure decided by the Defendants without any substantiation.

56 (d) The Guarantees were issued for claims arising from "off-spec" and "off-shade" defects. "Off-spec" related to defects in the manufacture of the said goods themselves for which only the Defendants were liable as that had nothing to do with the quality of the fabric supplied by the Plaintiffs. The defects were largely the Defendants' manufacturing defects. If there had been "off-shade" defects in the said goods, the Defendants should not have accepted the said goods and should have been sent back for redying.

57 (e) The Plaintiffs only issued two back to back Guarantees to the Defendants in respect of a small amount totalling US\$9,807.64cts because they were pressed by the Defendants and because they were promised payments failing which they refused to issue any further Guarantees and finally

58 (f) The Guarantees issued by the Defendants between July to October 1991 were contingent liabilities which may never be called up - indeed none had been called up as at the date of the hearing. There had already been a lapse of some six to nine months since the Defendants issued the Guarantees.

59 In respect of this last ground, the Plaintiffs contended that there could be no set off as the Guarantee not being called upon there could be no claim to

set off. In that context, a counterclaim for an indemnity was also not a set off and defence. It was therefore not a triable issue.

60 I accepted all the Plaintiffs' submissions both in respect of the factual material and the law. I also found that the Defendants' claim of loss of goodwill was a bare allegation unsupported by any evidence in their Affidavits. I was of the opinion that there were no triable issues in respect of all the remaining items A1, A2, A4(a), (b) and (c) and B1 - 8 and so much of the balance in respect of item A3 that exceeded the provision made for the amount for which leave to defend had been granted in respect of which the monies were due to the Plaintiffs. I find it necessary however to address and clarify only the point of law raised by the Plaintiffs expressed at the outset in respect of the unilateral open-ended Guarantees issued by the Defendants and their status over the contingent liability created thereunder in so far as it affected the Plaintiffs and the consequent claim for an indemnity against them.

61 The scope and precise extent of an express indemnity is a matter of construction in every case. The general principle where the guarantor has paid nothing as yet is set out in *English and International Set-Off* by Philip R. Wood < 1989 ed. > as follows:

62 "In general, where the debtor and the creditor are solvent, a debtor may not set off his cross-claim against the creditor's primary claim unless both reciprocal claims are due and payable" 2 - 131

63 "If the principal debtor and the guarantor are both solvent and the guarantor has not paid under the guarantee, he is not entitled to set off the debtor's contingent liability for reimbursement against a debt due by the

guarantor to the debtor. This is simply an illustration of the maturity principle...."

10 - 16

64 A guarantor or surety in the circumstances may not call upon the principal debtor and demand that he makes provision for payment of the creditor before the debt is due and moreover, the guarantor or surety must show that a definite sum is payable: *Dale & Lolley* < 1808 > referred to in a note in *Nisbet v Smith* < 1789 > 2 Bro C.C. 579 at 582. Thus, in *Hughes-Hallet v India Mammoth Gold Mines Company* a trustee held shares in a company on trust for an adult cestui que trust who paid the money due to the company on the application allotment. When the company was wound up, the name of the trustees remained on the company's register as the holder of the shares. No further calls had been made. Anticipating a call to be made in the winding up, the trustee brought an action against the cestui que trust, claiming an indemnity against liability on the shares. Fry J, in holding that the action was a mere quia timet one and that it was premature and not maintainable, stated:

65 "If it can, it is obvious that every person who had undertaken a position of responsibility for another which entitles him to an indemnity, may sue before the right to indemnity accrues - before the damage has accrued which gives rise to the right to indemnity. It appears to me that there is no authority for such an actionIt appears to me that it would lead to most injurious consequences if I were to allow a person in the position of the Plaintiffs to seek for an indemnity before he is injured".

66 In my opinion, the Defendants' open-ended Guarantees had not been called upon and in view of the time lapsed they were unlikely to be called upon although I could not say whether in fact they would be called upon. A mere

exposure of the Defendants to a claim from their end buyers was totally insufficient to enable them to claim the relief for an indemnity they sought. The Defendants were in fact attempting to erode the Plaintiffs' claim from which erosion the Plaintiffs were entitled to be well protected. The necessity for predictability of payment in a commercial transaction and the principle of cash flow were complementary and concomitant factors which realistically entitled the Plaintiffs to their claim in respect of the remaining items.

67 I therefore allowed the Plaintiffs' appeal in fact and in law against the Asst. Registrar's order giving the Defendants unconditional leave to defend the whole of the Plaintiffs' claim to the extent that there would be judgment for the Plaintiffs in:

68 a) the Singapore dollar equivalent of US\$359,898.55cts. at the rate of exchange agreed at US\$1.00 to \$1.70 amounting to S\$611,827.53cts;

69 b) interest in the sum of S\$611,827.53cts. at the rate of 6% per annum from 1st November 1991 until judgment amounting to S\$15,964.30cts;

70 c) costs as agreed by the parties in the sum of \$7,000/-.

71 The Defendants were given unconditional leave to defend the balance of the Plaintiffs' claim amounting to US\$170,000.00 (rounded off).

Amarjeet Singh JC

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