

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1993] SGHC 64

S168/1987

Between

The Bank Of East Asia
Limited

... Plaintiff

And

General Diesel Supplies (S)
Pte Ltd

... Defendant

GROUND OF DECISION

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**The Bank Of East Asia Limited v General Diesel Supplies (S)
Pte Ltd**

[1993] SGHC 64

S168/1987

Punch Coomaraswamy J

19 March 1993

1

Judgment:

2 Coram: Punch Coomaraswamy J

3 **GROUND OF DECISION**

4 The plaintiffs are bankers and one of their clients was Suntan
Engineering Pte Ltd <

"Suntan" > . In November 1984, Suntan was granted certain of the banking

facilities by the plaintiffs on foreign letters of credit, local letters of credit and

trust receipts. At the hearing before me, the plaintiffs did not adduce any
evidence of

the circumstances or purposes for which these facilities were given. In particular they

did not adduce any evidence to show that Suntan were to utilise these facilities only for

new and future transactions.

5 The defendants were suppliers of machinery and on 9 November 1983 Suntan and the

defendants entered into a hire purchase agreement whereby the defendants let and Suntan

hired one Fukushima DDW-275D winch < "the winch" > . Under the hire

purchase agreement, the hire purchase price of the winch was for S\$400,000. The relevant

clauses under that agreement were:-

6 3(b) On signing this agreement, the Hirer shall pay to the Owner an initial payment of

\$20,000.00 (which shall become the property of the Owner absolutely) in consideration of

the option to purchase contained in Clause 12 hereof.

7 3(c) So long as the hiring shall continue, the Hirer shall pay without
previous demand

the monthly hire rentals in the amount and manner set out in item 9 Part B of
the Schedule

hereto. The Hirer's liability to pay the hire rentals shall continue notwithstanding any

defects in the equipment or the breakdown, loss of or damage to the equipment.

8 12 If the Hirer (having meanwhile duly observed and performed all the
terms _____ and

conditions of this agreement whether express or implied) shall pay to the Owner such _____ sums

under Clause 3(c) hereof as shall with the sum paid for the option to purchase
amount _____ in _____

the aggregate to the hire purchase price and shall also pay all sums payable to the Owner

under Clause 5 hereof, this agreement and the hiring thereby constituted shall determine

and the Hirer shall become the absolute owner of the equipment but until such time the

equipment shall remain the sole property of the Owner and the Hirer shall be a
mere bailee

thereof.

9 Pursuant to the agreement, the winch was delivered to Suntan at their
shipyard premises

in Jurong by the defendants on 12 November 1983. \$200,000 was still to be paid
under the

hire purchase agreement as of 10 July 1985. It was only on payment of this sum
that Suntan

could exercise its option to purchase the winch and acquire ownership of it. In
order to

pay this balance, Suntan applied to the plaintiffs for a letter of credit in favour
of the

defendants for \$200,000. The defendants were required to tender for payment a
delivery

order acknowledging receipt of the goods "covering delivery of final payment
of one

unit Fukushima diesel driven winch to Singapore from the seller's godown on

or before

30.7.85".

10 The plaintiffs requested Santan to amend the letter of credit to including the

following:-

11 1. Delivery order in duplicate issued by the beneficiary to the order of the applicant

and to be countersigned by the applicant's authorised signatory (signature to be verified

by the bank) covering receipt of goods in good order and condition. 2. Seller's godown to

buyer's godown. 3. Delete "final payment of".

12 In response to the plaintiffs' request, Suntan signed the application for amendment to

the documentary letter of credit on 10 July 1985 whereupon the letter of credit was

established by the plaintiffs.

13 This letter of credit set out the requirements for negotiation as appear in the

application for amendment to documentary letter of credit and that documents are to be

presented for negotiation within 16 days after the date of delivery order. The letter of

credit became available to the defendants for negotiation against, inter alia, their

delivery order to Santan and signed by Santan's authorised signatory (which the plaintiffs

will verify) evidencing receipt of goods in good order and condition and covering delivery

of the winch from seller's godown to buyer's godown in Singapore on or before 30 July

1985.

14 In order to obtain payment of the balance monies due under the hire purchase agreement

and pass title of the winch to Santan, the defendants on 12 July 1985 prepared a delivery

order for the winch and obtained Santan's authorised signatory's signature
thereon and

negotiated the letter of credit. The delivery order is dated 12 July 1985, ie the
date it

was prepared. The delivery order and invoice was for \$200,000. The delivery
order did not

set out the unit price for the winch nor did it state that the winch was physically

delivered on 12 July 1985. The plaintiffs paid the defendants the sum due on the
letter of

credit. The defendants received the proceeds of the letter of credit in their bank
account

with The Chase Manhattan Bank NA on 18 July 1985.

15 On 12 August 1985 Santan signed a trust receipt in respect of the winch
in favour of

the plaintiffs. On 5 September 1985 Four Seas Communications Bank Ltd
appointed Receivers

and Managers over Santan pursuant to two debenture deeds. The plaintiffs
informed the

Receivers and Managers that by reason of the trust receipt they had a lien over
the goods

(ie the winch) until their indebtedness was paid in full.

16 On 23 December 1985 the Receivers and Managers wrote to the
defendants stating that

their investigations revealed that although Santan had paid the \$200,000 under
the letter

of credit, the winch had not been delivered and required the plaintiffs to deliver
the

winch to the Receivers within seven days of the said letter.

17 The defendants replied to the Receivers on 7 January 1986 advising that
the winch was

covered under the hire purchase agreement dated 9 November 1983 and was
actually delivered

to Santan's yard in late 1983. They stated that the letter of credit was meant to
cover

the remaining balance of \$200,000 overdue on the winch.

18 The Receivers and Managers also wrote to Tan Pong Tyea, a director of
Santan on 18

November 1985. Tan Pong Tyea replied on 30 November 1985 stating that the
letter of credit

was for part payment of the winch serial No 40225 which was installed on a
completed

vessel.

19 In these circumstances, the plaintiffs commenced this action against the
defendants for

damages on the basis that the representations contained in the delivery order
evidencing

delivery of the winch on the date of the delivery order was false and untrue as
no winch

was delivered on the date of the delivery order to Santan. The claim was for
damages for

fraudulent misrepresentation contained in the delivery order.

20 In their defence, the defendants referred to the hire purchase agreement
and to the

physical delivery of the winch to Santan's yard in November 1983 pursuant to
the hire

purchase agreement. They averred that there was a balance of \$200,000 owing
and until

payment is made, title in the goods did not pass to Santan. Santan arranged for
payment of

the balance by a letter of credit and in order to negotiate the letter of credit and

obtain payment, a delivery order which evidenced delivery by the defendants
and receipt by

Santan of the winch was tendered. The delivery order and payment under the
letter of

credit gave constructive delivery of the winch to Santan as owners and vested
title of the

winch in Santan. This was as agreed between Santan and the defendants. The
defendants also

averred that they complied with all the requirements of the letter of credit and
proper

documentation was presented to and accepted by the plaintiffs and the property
in the

winch passed to Santan.

21 Burden of proof

22 The plaintiffs bear the burden of proof and the standard of proof is on a
balance of
probabilities.

23 In the present case, fraud is alleged against the defendants. The more
serious the

allegation, the higher degree of probability is required; but I am mindful that it
need

not reach the very high standard required by criminal law. This test was
approved by

Denning LJ in *Hornal v Neuberger Products Ltd* < 1957 > 1 QB 247.

24 The Evidence

25 At the trial the plaintiffs called two witnesses and the defendants also
called two

witnesses.

26 The plaintiffs' first witness was the Receiver, Peter Chi Man Kwong who
was appointed

by Four Seas Communications Bank Ltd. In his evidence, he said that as he
could not find

the winch, he did not investigate the validity of the trust receipt relating to the
winch.

He said he was not aware of the hire purchase transaction and knew this only
when he began

to investigate the whereabouts of the winch. His evidence was not useful as he
did not

have any direct knowledge of the transaction in issue.

27 The next witness the plaintiffs called was one Chan Swee Nee < "Chan"
>

, a manager of the credit/correspondence banking department. The questions
directed to him

by the defendants firstly dealt with ascertaining whether he knew that a delivery
order

was not a document of title and that the plaintiffs did not obtain security over
the winch

through the trust receipt as a document of title. On this line of cross-examination, I

told the defendants' counsel that this was a matter of law and I would not place much

weight on the evidence of the plaintiffs' witness.

28 Through the evidence of Chan, the defendants were able to establish that the plaintiffs

had required the amendments to the application for letter of credit and did not inquire

from Santan the nature of the transaction for which the letter of credit was being

established. The evidence of Chan was that he assumed that a new winch will be physically

delivered under the letter of credit. Although he assumed that the letter of credit was

for an outright purchase of a winch, he did not ask Santan of the nature of the

transaction. He also agreed that if the winch was still in the possession of Santan, he

would proceed on the trust receipt to recover the winch. From his evidence, I determined

that the plaintiffs were really not concerned with the manner in which the letter of

credit facility was utilised. It was not agreed with Santan that the letter of credit was

to be for a new or future transaction.

29 The defendants tendered the statements of Fong Chee Eng < "Fong" > and

Tan Kim Bee <"Tan"> and called them to give evidence. Fong's evidence was

only relevant to the extent that he was responsible for the sale of the said winch under

the hire purchase in 1983. He identified the hire purchase agreement and said that he

witnessed the signature of the defendants' representative and arranged for Santan's

representatives to sign the hire purchase agreement. He also instructed the delivery of

the winch.

30 I regarded Tan's evidence as most relevant as she was at the material
time the credit

assistant of the defendants and was directly involved in the preparation of the
documents

against which payment under the letter of credit was obtained by the defendants.
She was

able to give evidence on the transaction in its entirety. She said that the winch
was

delivered to Santan by the defendants on 12 November 1983. The hire purchase
agreement

would be sent back to her department for safekeeping and this was done. The
invoice which

also evidenced the delivery of the winch was returned to her department. She
was aware

that a sum of \$200,000 was still owing on the winch under the hire purchase
agreement as

the sum due was regarded as a debt in the debtors' ledger kept by her.

31 Tan was also aware that the letter of credit was established to pay the balance of

\$200,000 owing on the winch. She prepared the delivery order on 12 July 1985 and gave it

to her staff in the sales department to obtain the signature of Santan's authorised

signatory. She confirmed that when Santan failed to pay the monies due under the hire

purchase agreement, her management gave them more time to pay the debt and charged

interest. She said that her management advised her that the letter of credit was to cover

the balance due on the winch under the hire purchase agreement. She knew this, as when she

negotiated the letter of credit, she had to allocate the funds to the relevant invoices.

32 What went on in her mind, I regarded as relevant to determine whether the invoice and

delivery order were prepared with a fraudulent intent and with the purpose of

misrepresenting falsely to the plaintiffs that a winch was being physically
delivered on

the date of the invoice when the letter of credit was negotiated.

33 Having considered the totality of the evidence and having heard the
witnesses, I

accepted the evidence of Tan and concluded that no fraud or false representation
was

intended. Her evidence was that she believed that the physical delivery in
November 1983

was sufficient for the purpose of delivery under the letter of credit and accepted
the

letter of credit and prepared the documents for negotiation on that basis.

34 List of issues

35 The parties submitted nine issues in their list of issues and having heard
the

evidence, I found for the defendants. In law when goods are already in the
physical

possession of a buyer and a further act needs to be done by the buyer to acquire

title in

the goods, ie making payment or arranging for irrevocable payment, then by
doing that act

there is constructive delivery of the goods from the seller to the buyer. A further
act of

physical delivery is unnecessary; see *Manton v Moore* (1796) 7 Term Rep 67;
101 ER 858.

36 If I am wrong that a physical delivery in November 1983 was sufficient
to support the

statement in the delivery order, then there was also a sufficient constructive
delivery of

the winch when payment was made under the letter of credit of the balance
monies due under

the hire purchase agreement and which enabled title in the goods to pass to
Santan. The

statement in the delivery order of acknowledgement of goods in good order and
condition

effectively gave constructive delivery of the winch by way of sale to Santan on
the date

that acknowledgement was signed. Irrevocable payment arrangements under the
hire purchase

agreement were made and Santan exercised the option to purchase the winch.
The defendants

gave good consideration for the payment under the letter of credit by
transferring title

in the winch to Santan.

37 I find that the defendants did not have any fraudulent or dishonest
intention when they

tendered the delivery order to negotiate the letter of credit. I find that the
defendants

honestly believed that the physical delivery in November 1983 under the hire
purchase

agreement was sufficient to satisfy the letter of credit requirements and that is
the

delivery they had in mind when they prepared and negotiated the letter of credit.

38 From the evidence and particularly from the amendments made to the
letter of credit and

the letter of Tan Pong Tyea dated 30 November 1985, I also find that Santan
had no

fraudulent intention at all when they applied for the letter of credit. For the
reasons

aforesaid, the plaintiffs' action is dismissed with costs.

39 (This does not merit reporting)

Punch Coomaraswamy J

Chew Swee Leng (Cooma, Lau & Loh) for the plaintiffs
Ajaib Haridass (Haridass Ho & Partners) for the defendants
