

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1994] SGHC 9

S1455/1993, RA181/1993

Between

Natsteel Trade International
Pte Ltd

... Plaintiff

And

Kloeckner Singapore Pte Ltd

... Defendant

GROUND OF DECISION

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**Natsteel Trade International Pte Ltd v Kloeckner Singapore
Pte Ltd**

[1994] SGHC 9

S1455/1993, RA181/1993

K S Rajah JC

08 January 1994

1

JUDGMENT:

2 This is an appeal from the decision of the learned Assistant Registrar,
Mr James Leong

on 30 August 1993 awarding interlocutory judgment to the respondent with damages to be

assessed and costs of \$2,500.

3 The appellant, Kloeckner Singapore Pte Ltd ("KSPL") and Kloeckner
Steel

Trade, USA ("KST") are part of the Kloeckner Group of Companies and have offices

and branches world wide. KSPL is primarily a trading company and its main operations

revolve around sourcing materials for buyers as well as locating buyers for the goods and

products sold by various manufacturers and producers. The appellant would purchase goods

and products to resell them to buyers who require them. In addition, the appellant would

on occasion liaise between the sellers and buyers of a particular product or commodity.

The appellant is not in the business of manufacturing steel billets. One of the facts in

dispute is whether the appellant acted as a middleman or a seller who failed to perform

its side of the bargain.

4 The First Shipment

5 Sometime in March 1992, the respondent agreed to purchase 20,000 metric tons of steel

billets to be supplied by Birmingham Steel Corporation ("BSC") for shipment

in

June/July 1992 ("the 1st shipment"). The 1st shipment however was delayed due to

default by BSC.

6 When the shipment was delayed, the respondent threatened to make a delay claim of about

US\$500,000. A meeting was then held on 12 September 1992 in Singapore at which

representatives from the respondent, BSC and the appellant was present. The meeting was

held at the respondent's office. The purpose of the meeting was according to the

appellant/defendant for BSC and the respondent to resolve the difficulties with regard to

the 1st shipment. This is disputed by the plaintiff/respondent.

7 The respondent was represented by Mr Ong Sey Peng ("Ong") and Mr Koh Chwee

Seng ("Koh"). BSC was represented by Mr Bob Wilson the Vice-President of BSC. Mr

Gerald Tay from the appellant's office and Mr Gundlach of KST were also present. At the

meeting, BSC offered a package deal to the respondent. In consideration of the respondent

not making any delay claim with regard to the 1st shipment, BSC agreed to confirm that the

1st shipment would be shipped in December 1992. BSC further agreed to reduce the price of

the 1st shipment by US\$3 per metric ton. In addition, BSC offered to give the respondent

an option to buy a further 20,000 metric tons plus/minus 5% at US\$237 per metric ton. The

appellant and KST stood to make a commission of about US\$3 per metric ton.

8 The Second Shipment

9 At this meeting, the appellant and KST also agreed to obtain 5,000 metric tons of

Krakatau steel billets for the respondent at US\$235 per metric ton to assist them with

their demands. An estimated loss of US\$100,000 on the transaction was

anticipated by the

appellant and KST because the price of billets had by then increased and the appellant

would have suffered a loss as a result of selling the Krakatau billets ("the 2nd shipment") to the respondent. The loss was estimated at about US\$100,000.

10 It is the appellant's case that the price of the 2nd shipment was adjusted to recover

the estimated loss. The respondent did not exercise the option and the respondent gave the

appellant a credit note for US\$100,000. The appellant/defendant's submission is that all

parties including BSC and the respondent clearly intended and agreed that the role of the

appellant and KST in BSC's option transaction was limited to the recovery of the estimated

US\$100,000 loss. Mr Claus Gundlach of KST sent a fax dated 28 August 1992 to the

appellant's Gerald Tay of KSPL. It reads:

11 ZCZC SIN592 CWA506

12 QU,SIN,SEMM

13 KCD

14 R5583

15 TO KL SINGAPORE

16 AUG 28 1992 HOUS MSG 92/342

17 ATTN MR GERALD TAY

18 TOP URGENT TOP URGENT TOP URGENT

19 "RE: VISIT NATSTEEL

20 DEAR GERALD:

21 TO PUT THAT THING TOGETHER IS JUST A NIGHTMARE.

22 HERE IS NOW THE FINAL, FINAL AGENDA WE COULD PUT
TOGETHER WITH THE BIRMINGHAM PEOPLE:

23 MR BOB WILSON, VICE-PRESIDENT AND RESPONSIBLE FOR
ALL SALES FOR BIRMINGHAM STEEL IS

PARTICIPATING IN A BOARD MEETING IN SEATTLE INCLUDING
THE 9TH OF SEPTEMBER.

24 WE CERTAINLY CAN NOW MOVE QUESTIONS BACK AND FORTH ASKING WHY HE COULD NOT CUT THAT MEETING ONE DAY SHORT, AND BELIEVE ME WE TRIED EVERYTHING, BUT THEY WOULD NOT BUDGE.

25 SINCE WE BOTH HAVE THE INTEREST TO TURN AROUND THAT MESS INTO A FRUITFUL BUSINESS RELATIONSHIP IN THE FUTURE YOU HAVE TO MAKE A MEETING WITH NATSTEEL ON SATURDAY THE 12TH POSSIBLE.

26 MR BOB WILSON WILL ARRIVE ON SEPTEMBER 11TH AT 11:05 PM AND WILL LEAVE SINGAPORE COMING BACK TO THE U.S. SUNDAY SEPT 13TH 7:00 AM IN THE MORNING.

27 NOT ONLY DO WE WANT TO TALK ABOUT THE 20,000 MT BUT ALSO A FRAME CONTRACT THAT I WILL BRING WITH ME FOR 60,000 MT FOR 1993.

28 THIS MEETING IS SO ESSENTIAL THAT I HOPE THAT NATSTEEL WILL MAKE THE TIME AVAILABLE AND I TRUST THAT YOU WILL ARRANGE EVERYTHING.

29 MY SUGGESTION IS THAT WE SHOULD START WITH A LUNCH MEETING, HAVING THE ENTIRE AFTERNOON AND EVEN THE EVENING IF NECESSARY, SO THAT WE HAVE TIME TO PREPARE FOR THE MEETING IN THE MORNING (12TH)."

30 TKS N BRGDS CLAUS =9208282120

31 The appellant says it was agreed and understood by all parties that the appellant's obligations, if any, were conditional upon BSC producing and shipping the steel billets. As manufacturers and suppliers, BSC had the obligation to produce the billets before any obligation of the appellant or KST to deliver the billets could arise and the appellant and KST could not accordingly be expected to make delivery to the respondent. The appellant's Gerald Tay being told to make a meeting considered essential with the respondent possible is consistent with the work of "middlemen". BSC is

interested not only in turning the mess around but also for a fruitful business in the

future and a contract for 60,000 metric tons is stated.

32 The appellant's fax of 16 September 1992 to the respondent after the
meeting of 12

September 1992 reads:

33 TO: NATSTEEL TRADE

34 DATE:16.9.92/0930h

35 Mr Chiang See Poh, Mr Koh Chwee Seng

36 FM: Gerald Tay

37 FAX NO: 2663335 NO OF PAGES: 1

38 SUBJ: PRIME BILLETS

39 With reference to your fax FX/M2/1925/92 and our fax FX- 1897 dd
9.9.92 and our telcon

on 15.9.92.

40 As mutually agreed we herewith confirm the following:

47 This option of offer to Natsteel and its affiliate cos. is valid till 15 January 93.

48 3.2 In the event that the option of offer is not exercised by Natsteel or its affiliate

cos. by 15 January 93, Natsteel will reimburse Kloeckner Singapore Pte Ltd with a credit

note amounting to USD100,000.-. This amount is to be offset against any future orders

(irregardless of products) between Kloeckner Singapore and Natsteel.

49 Once again we apologise for all the inconveniences caused and would like to take this

opportunity to thank you for your co-operation and assistance rendered in resolving this

matter and look forward to the continuation of a mutually rewarding relationship with your

esteemed company.

50 Best regards

51 Signed

52 The parties negotiated and the appellant has reduced into writing the terms of

agreement. The question is whether there is a Sale and Purchase Agreement for the sale of

20,000 metric tons of steel billets by the appellant to the respondent. Paragraph 3.1

appears to suggest that there is a contract of sale of goods but the respondent's

Statement of Claim required the contract, inter alia, to be inferred from various

documents. If the definition in s. 2(1) of the Sale of Goods Act 1979 is not complied with

the question as to whether there is a contract for the sale of goods must be considered.

Section 2(1) Sale of Goods Act 1979 defines a contract for the sale of goods as:

53 A contract by which the seller transfers or agrees to transfer the property in goods to

the buyer for a money consideration called the price.

54 The Option

55 On 30 November 1992, the respondent purported to exercise the option
and they referred

to a conversation with Mr Vincent Teo. The fax reads:

56 Date: 30 November 1992

57 To: KLOECKNER SINGAPORE PTE LTD

58 Attention: Mr Vincent Teo

59 Fax: 225-4980

60 From: Peter Lau/Ng Nai Pong

61 Our Ref: FX/M2/2680/92

62 Pages: 1

63 Please notify us at fax: 261-7372 if not received properly

64 _____

65 20,000 MT SAE 1010K BILLET EX-BIRMINGHAM (MARCH 93
SHIPMENT)

66 Re Mr Gerald Tay's Fax (FX-1932) dated 16 Sept 1992.

67 We hereby confirm to exercise the option to purchase the above billets
Ex-Birmingham

Steel for shipment in March 1993.

68 As spoken to Mr Vincent Teo, we wish to request the shipment of the
above cargo to be

effected earlier in January/February 1993. Please find out from the producing
mill and

revert soonest possible.

69 All terms and conditions follow our previous contract (Our Purchase
Order No FP8926)

dated 3 March 1992. Price USD237 per mt CFRFO Jurong Wharf, Singapore.

70 Regards.

71 Signed

72 Ng Nai Pong

73 The respondent wanted shipment to be effected earlier and action had to
be taken by the

appellant to ascertain if that could be done by reference to the producing mill.
The

question is whether there is unqualified acceptance. It is a triable issue.

74 On 7 December 1992, the appellant informed the respondent that the shipment could not

be made in March 1993 and on 24 December 1992, the respondent sent its Purchase Order to

the appellant which was subject to terms and conditions in an annex. The following, inter

alia, are conditions and instructions in the purchase order:

75 9. Please notify us at once by letter if order cannot be completely executed

immediately ... We reserve the right to cancel any such order wholly or partly if delivery

is not effected on the date mentioned on the order.

76 10. If any of the above conditions or instructions cannot be executed by the supplier,

a letter must be sent to this office immediately or before delivery is made ... If no

letter is received before delivery is made, it will be understood that all the conditions

and instructions mentioned on this form will be carried out to the letter.

77 On 29 December 1992, the appellant again informed the respondent that
the March 1993

shipment was not possible.

78 The Statement of Claim requires the contract to be inferred including
conditions 9 and

10 referred to above. The construction of conditions 9 and 10 falls to be
determined and

on the facts is a triable issue having regard to the fact that the respondent was
informed

on two occasions.

79 The Sale and Purchase Agreement

80 The evidence of Mr Lau Miang Seng, the Trading Manager of the
respondent is that there

is an agreement to purchase 20,000 metric tons billets Ex-Birmingham Steel at
a price of

US\$237 per metric ton CFRFO, Singapore. The agreement is contained in or
evidenced by or

is to be inferred from the following documents:

81 (a) The appellant's facsimile message dated 16 September 1992;

82 (b) The respondent's facsimile message dated 30 November 1992;

83 (c) The appellant's facsimile message dated 3 December 1992;

84 (d) The respondent's purchase order No. P/M2/304/92 dated 15 December 1992;

85 (e) The respondent's purchase order No. FP 8926 dated 3 March 1992;

86 and that it was an express term of the agreement that the billets were to be delivered

to the respondent by 31 March 1993 by the appellant notwithstanding the wish expressed for

delivery in January/February.

87 Respondent's Claim

88 The respondent's claim was that the appellant/defendant in breach of the agreement

contained in or evidenced or to be inferred from the above documents failed to deliver the

billets by 31 March 1993 and the respondent had to enter into the market to purchase and

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purchased 20,000 metric tons of equivalent billets on or about 21 May 1993 at
US\$282 per

metric ton from Vanomet Pte Ltd. The appellant failed to perform and there was
no defence

to the action.

89 The letter of 16 September 1992 after the meeting of all the parties does
not state

that the appellant would sell and that the respondent would buy. Clause 1 makes
reference

to delivery in the following terms:

90 ... As mutually agreed we herewith confirm ...

91 1. We will deliver ... for shipment end October 92 ...

92 Details of order will follow separately.

93 2. The order of 20,000 mt in size 140mm sq billets ex Birmingham (your
P/O No. FP8926)

will be shipped in December 92. Price USD232 per mt CFRFO Singapore.

94 All other terms/conditions remain unchanged per your P/O No. FP8926.
...

95 The appellant offered 20,000 metric tons of billets for latest shipment by
end of March

1993 but there is reference to the respondent reimbursing the appellant with a credit note

for US\$100,000 to be offset against any future orders irregardless of products.
The first

paragraph of the letter of 16 September 1992 refers to a fax dated 9 September 1993 and

telecon of 15 September 1992. The last paragraph refers to respondent having assisted _____ to _____

resolve matters. The respondent's case was that the appellant did not deliver the billets

because they had not ordered the billets from BSC, but questions of fact had to be

determined.

96 Order 14 Hearing

97 The learned Assistant Registrar, ordered the appellant to pay the
respondent's damages

to be assessed and fixed costs at \$2,500. The appeal is against the decision of

the

learned Assistant Registrar ordering interlocutory judgment and the appellant/defendant

says that there are at least 5 triable issues:

98 (1) Whether there is a validly concluded contract in law;

99 (2) Whether the contract (if any) was a conditional contract;

100 (3) Whether the appellant is the proper party to the contract (if any);

101 (4) Whether Birmingham Steel Corporation is in any way liable to the respondent;

102 (5) Whether the respondent has suffered any damages as claimed or at all.

103 Issue No. 1

104 The appellant submits that the question as to whether there was an offer and acceptance

to constitute a valid contract or whether the contract, if any, is void or unenforceable

due to uncertainty as to delivery dates is a triable issue I agree.

105 The respondent's fax/letter of 30 November 1992 proposes to exercise the option granted

on 12 September 1992. The respondent at the same time asked for shipment to be effected

earlier. Acceptance was not final and unqualified in the terms of the offer. If the

appellant had succeeded in obtaining delivery in January or February, there would be a

different contract.

106 There is a further need to ascertain the concluded contract from an exchange of

documents. The court must look at the whole of the correspondence that has passed between

the parties.

107 In *Hussey v Horne-Payne* 1879 3 App. Cas. 311 at 322 Lord Selborne said:

108 ... The observation has often been made, that a contract established by letters may

sometimes bind parties who, when they wrote those letters, did not imagine that they were

finally settling the terms of the agreement by which they were to be bound; and
it appears

to me that no such contract ought to be held established, even by letters which
would

otherwise be sufficient for the purpose, if it is clear, upon the facts, that there
were

other conditions of the intended contract, beyond and besides those expressed
in the

letters, which were still in a state of negotiation only, ... and I think it especially

important to keep that principle in view when, as in the present case, it is
attempted to

draw a line at one point of a negotiation, conducted partly by correspondence
and partly

at meetings between the parties, without regard to the sequel of the negotiations,
which

to my mind plainly shews that terms of the intended agreement, which were of
great

practical importance, and were so regarded on both sides, then remained

unsettled and were

still the subject of negotiation between them.

109 In *Foley v Classique Coaches, Ltd* (1934) 2 KB 17, Viscount Dunedin said (P.21):

110 ... This case arises upon a question of sale, but in my view the principles which we

are applying are not confined to sale, but are the general principles of the law of

contract. To be a good contract there must be a concluded bargain, and a concluded

contract is one which settles everything that is necessary to be settled and leaves

nothing to be settled by agreement between the parties. ... As a matter of the general law

of contract all the essentials have to be settled. What are the essentials may vary

according to the particular contract under consideration. We are here dealing with sale,

and undoubtedly price is one of the essentials of sale, and if it is left still to be

agreed between the parties, then there is no contract.

111 In this case, delivery, one of the essentials of sale was not accepted without

qualification and cannot be said to have been concluded because negotiations and

discussions as to the delivery date could take place. The appellant is only required to

show that there is a reasonable probability of there being a real defence for leave to

defend to be given.

112 Issue No. 2

113 The meeting on 12 September 1992 was unusual. It took place at the respondent's office.

All the parties were present. The meeting was held with a view to settle the difficulties

arising from the delays by BSC and BSC was represented by the Vice-President of Sales and

Marketing. BSC agreed to deliver the 1st shipment by December 1992. It was something the

appellant nor KST would have been able to agree to and the meeting was held

to decide on

the matter. BSC agreed to reduce the price of the 1st shipment by US\$3 per metric ton.

Price is one of the essentials in a contract of sale and BSC appears to have made the

decision.

114 Issue No. 3

115 The role played by the appellant in respect of the 2nd shipment is not free from doubt.

The discussion which gave rise to the 2nd shipment arose from negotiations to settle

and/or sale and purchase negotiations. At that meeting, BSC and the respondent was

present. An option was given and the price was fixed six months in advance. The appellant

was to be given a credit note if the option was not exercised and the respondent and BSC

discussed a long term "frame contract".

116 It may well be that the appellant was acting as principal but there is also sufficient

evidence to suggest that a different view could be taken of what transpired at the meeting

and is a matter that must be determined at a trial.

117 Some other reason for trial

118 Order 14 r. 3 reads:

119 3.-(1) Unless on the hearing of an application under Rule 1 ... the defendant satisfies

the Court with respect to the claim, or part of a claim, to which the application relates

that there is an issue or question in dispute which ought to be tried or that there ought

for some other reason to be a trial of that claim or part, the Court may give such judgment ...

120 An appellant should have leave to defend if he satisfies the court "that there

ought for some other reason to be a trial" of the claim or part to which the

summons

for judgment relates because the appellant may not be able to pin-point any precise

"issue or question in dispute which ought to be tried." The appellant has

pin-pointed issues and the issues require witnesses to be examined and the evidence

tested.

121 This is a case where the facts of the case are wholly within the respondent's hands,

and it would be unfair to enter judgment against the appellant before discovery. The

respondent may have acted harshly or unconscionably in sending letters to third parties.

It is desirable to ensure that judgment is obtained only in the full light of publicity.

The respondent found it necessary and proper not only to write to BSC but also to send a

copy of the letter to the American Attache.

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122 The letter from the respondent to BSC of 16 June 1993 requires an explanation.

123 The respondent does not dispute having met and communicated with the appellant's

suppliers and having written to BSC. Whether this is consistent with a contract between

the appellant and the respondent or only a deal arranged by the appellant must be sorted

out at a trial. Writing to the American attache is an unexplained feature of the claim

which may or may not have a bearing on performance but it is an unusual step that requires

to be examined.

124 Watkins LJ giving the judgment of the court in *Extraktionstechnik Gesellschaft* Fur

Anlagenbau MBH v Oskar 1984 Solicitors' Journal, Vol. 128 at p. 417 said:

125 ... To try to expose a defendant's vulnerability to the imposition of a condition by

artificially regarding a respondent as though he were a defendant served no

useful purpose

and was capable of being misleading. The same applied to tentative assessments of

respective chances of success, and relative strengths of good or bad faith, in a case

where both sides had a great deal of explanation to make of apparently questionable

conduct, including the swearing of affidavits. It was proper to look first at the defence

in isolation, to see whether there was lack of good faith or whether the defence was a

sham. But if one of those flaws in the defence was found, the decision as to the

imposition of a condition could not properly be made before an examination was also

undertaken of the plaintiff's case, having regard to any attack made on it by affidavit.

If that examination aroused suspicions that the claim might be made in bad faith, that

there was something shadowy about it, or that it might be tainted with illegality,
no

measuring, however approximate, of the respective degrees of possible bad faith
should be

made, nor should any opinion be expressed, however tentative, as to which case
appeared to

be stronger at that time. The present case was a classic instance in which, in
principle,

the court should give unconditional leave to defend. ...

126 The respondent wrote to BSC was going over the head of the appellant
when BSC was the

supplier and/or principal of the appellant. There is a letter from BSC in response
to the

respondent's letter.

127 The relationship between the appellant and the respondent in respect of
the second

shipment could well be that of a principal seller, or, agent, or as appellant's
counsel

described "middleman", but a finding of fact has to be made after a proper

trial.

128 The burden on the appellant was to show that there are triable issues.
Sellers do not

usually arrange for their buyers to meet their suppliers. I was satisfied that there are

triable issues of fact and law.

129 I set aside the order of the learned Assistant Registrar made on 30
August 1993 and

gave the appellant unconditional leave to defend with costs to be in the cause.

K S Rajah JC

Tan Tee Jim (Allen & Gledhill) for the plaintiff/respondent
Murugaiyan Sivakumar (Arthur Loke & Pnrs) for the
defendant/appellant
