

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1995] SGHC 17

Suit 562/1989

Between

Chuan Hiap Seng (1979) Pte
Ltd

... Plaintiff

And

Progress Manufacturing Pte
Ltd

... Defendant

GROUND OF DECISION

Contract — Contractual terms — Conditions; Contract — Contractual terms
— Implied terms; Commercial Transactions — Sale of goods — Breach of
contract

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Chuan Hiap Seng (1979) Pte Ltd v Progress Manufacturing Pte Ltd

[1995] SGHC 17

Suit 562/1989
G P Selvam J
23 January 1995

1 The contract

2 This is a claim for damages for breach of contract for the sale of goods. The goods in question were steel pipes manufactured in Germany. The plaintiffs and defendants are Singapore incorporated companies. The plaintiffs are stockists of steel pipes and as such resell them locally and to overseas buyers. The defendants' main business is galvanizing steel products. As a subsidiary business they import steel pipes in bulk and sell them wholesale in Singapore.

3 The contract of sale between the defendants as sellers and the plaintiffs as buyers was dated 22 June 1988 and was evidenced by a 'sale confirmation letter' from the defendants to the plaintiffs. The plaintiffs accepted the terms of the contract by appending their signature to the sale confirmation letter. The material contents of that letter were as follows:

Commodity European made oiled seamless pipes in quality ST37-0 according to DIN 1629 tolerance according to DIN 2448 in length of 20 ft + 100/-0
Quantity 20m/tons 21.3 x 2.77mm
30m/tons 26.9 x 2.87mm 30m/tons 33.4 x 3.38mm 40m/tons 42.2 x 3.56mm 40m/tons 48.3 x 3.68mm 40m/tons 60.3 x

3.91mm 200m/tons Price US\$625 per m/ton (Theoretical weight) Payment 30 days upon our invoice Packing in bundles of max 3 m/tons unprotected against rust **Shipment** Delivery June/July/August 1988 subject to shipping space partial shipment must be allowed Remarks Progress will provide one way transportation from port to your store but exclude unloading at your store. Mill certificate will be provided.

4 It will be noted that there were six different kinds of pipes. They were varied in diameter and thickness. Partial delivery was permitted in that shipment was to be effected in June/July/August 1988 subject to availability of shipping space.

5 The defendants before entering into the contract with the plaintiffs had entered into a contract with a local company called Chalimex Metal. That contract was not placed before the court. But the court was informed by the defendants that it was substantially in like terms and it included the statement 'Mill certificate will be provided'.

6 **The claim**

7 At the time the sale confirmation letter was signed the fourth and fifth lots were on the way to Singapore or were already in Singapore. So on 25 June 1988, lots 5 and 6 (48.3 x 3.68 mm and 60.3 x 3.91 mm) were delivered by the defendants. No mill certificate accompanied the delivery. The delivered pipes did not conform to the specifications with regard to length in that some of the pipes exceeded the stipulated length. Those pipes were sent to the defendants for shortening to conform to the required length. The plaintiffs took the excessive lengths with them and paid the defendants for the cutting and galvanising services. Although they sought a discount for the excessive length, the defendants refused to accede. The invoice together with the mill certificate

was delivered about two weeks after the delivery of the pipes. The plaintiffs paid the full price of the invoice.

8 Disputes arose out of the delivery of the first four lots of smaller diameter and thickness. The plaintiffs in their pleadings asserted that the first and second lots were longer than the permitted specification of `20 feet + 100/- 0` and that they were pitted. The specification permitted the pipes to be longer by 100mm maximum.

9 As regards the third and fourth lots, the plaintiffs having examined them after their arrival in Singapore accepted them as being within the specification. Later the plaintiffs rejected them and refused to take delivery. Their pleaded case was that there was no mill certificate accompanying those two lots.

10 The pleaded particulars of the damages gave a figure of S\$190,047 being the difference between the alleged market price on or about 16 January 1989 and the contract price. The contract price of the theoretical weight of 120 tons according to the plaintiffs in Singapore dollars was \$145,500. The alleged market price was S\$335,547. This gives a price increase of approximately 130%. In addition, the plaintiffs claimed survey fees of S\$5,875.

11 **The defence**

12 The defendants at first denied the over-length in respect of the first two lots but subsequently admitted that there was over-length but denied liability. The defendants went on to assert that the only ground for rejection which the plaintiffs gave at the time of the delivery was that the pipes were pitted and there was no mention of over-length or the absence of the mill certificate. The defendants further asserted that the plaintiffs agreed at first to appoint a surveyor

to inspect the first two lots but failed to do so. Time passed as the plaintiffs insisted on a survey being done at the plaintiffs` warehouse. The goods, however, were in the defendants` warehouse. Eventually, a survey did take place at the defendants` warehouse but the surveyor found no pitting. As regards the mill certificate, the defendants tendered a fax copy and undertook to produce the original within three weeks. The defendants` argument was that the over-length and nondelivery of the mill certificate did not entitle the plaintiffs to reject the goods. The defendants admitted that there was over-length and said that it could be corrected according to needs by cutting off the excessive length.

13 The defendants further relied on the previous acceptance of two lots even though there was over-length and the mill certificates did not accompany the delivered lots. They also made a counterclaim for currency fluctuation, interest, store rent and certain miscellaneous items. Eventually the defendants, on my suggestion, dropped the counterclaim.

14 **The relevant law**

15 The decision requires the application of the following principles of law.

16 First, where there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description - See s 13 of the Sale of Goods Act 1979.

17 Secondly, the buyer is entitled to a reasonable opportunity of examining the goods before deciding whether to accept or reject them.

18 Thirdly, where the buyer rejects goods on the grounds of non-conformity with the terms of contract, the seller is entitled to make another delivery of

goods answering the terms of the contract provided the second delivery is within the contractual time for delivery. See , at p 314.

19 Fourthly, where a buyer rejects goods by giving no reason or by giving a wrong reason he may subsequently justify his rejection on a fresh ground provided such ground did in fact exist at the time of rejection. This principle does not apply if the seller within the contractual time of delivery could have rectified the non-conformity and made another delivery within the contractual time. See: at p 1278. See also where the principle is discussed at length in relation to tender of documents under banker`s letter of credit.

20 Findings of fact and conclusions

21 Lots one and two were sent to the plaintiffs` premises for their examination and acceptance on 31 August 1988. The plaintiffs rejected the pipes. The defendants took back the pipes. The pleaded case of the plaintiffs` was that (a) the pipes were longer than the description of `20 feet plus 100/-0` and (b) the pipes were rusted and were not of merchantable quality. In his evidence the plaintiffs` witness, Mr Liew Ma Choon, asserted these two grounds and added a third ground even though that was not pleaded. He relied on the fact that there was no mill certificate. The defendants on the other hand said that the only ground given on 31 August 1988 was that the pipes were corroded and that the additional grounds were not put forth on that occasion.

22 I had no hesitation in concluding that on 31 August 1988 the plaintiffs were given a reasonable opportunity to examine the goods and that such examination if performed would have revealed that there was over length. The over-length was in disconformity with the description and it gave the plaintiffs a right to reject the pipes. The plaintiffs, however, did not state on 31 August

1988 that over-length was also a ground for rejection. Had they stated it as a ground they would have instructed their solicitors of that ground and the solicitors who entered into correspondence with the defendants' solicitors on 16 December 1988 would have raised that ground. They did not do so. The same reasoning also applies to the mill certificate. Further, if the plaintiffs had raised the absence of mill certificate as a ground for rejection it would have been pleaded but it was not. There are two further reasons for my conclusion. First, the fact that the plaintiffs had earlier accepted lots five and six even though there was excess length and there was no accompanying mill certificate, renders it highly improbable that those grounds were in the mind of the plaintiffs' witness at the time of rejection. Secondly, if the ground had been raised the defendants when they took back the pipes could have and would have cut off the over-length and galvanized the ends and probably profited by selling the over lengths. As regards the mill certificate they would have immediately taken action to procure it.

23 I shall now consider whether the plaintiffs could raise the ground subsequently. A survey done on the pipes in late December proved the rust and pitting points to be groundless. The surveyor alerted the plaintiffs to the fact that there was over-length. The question therefore is whether the plaintiffs could raise it subsequently as that ground in fact had been open to the plaintiffs on 31 August 1988. The answer must be in the negative because the pipes were in the possession of the defendants in September, October, November and December waiting for a survey to be conducted. If the plaintiffs had raised the other grounds on 31 August 1988 the defendants could have corrected non-conformity before the survey and offered a second delivery. There was no express time limit for delivery. So the goods must be delivered within reasonable time. The conduct of the plaintiffs showed that December was not

too late for the defendants to make a redelivery as they were prepared to take delivery after inspection in December. Thus, on the principle stated above the plaintiffs were precluded from raising the grounds in January 1989 as it precluded the defendants from making a second delivery. Another way of stating it is that such a ground had been waived and could not be revived after the protracted delay.

24 There is another way of coming to the same conclusion. Section 34 of the Sale of Goods Act 1979 provides that the buyer is entitled to be given a reasonable opportunity of examining the goods before deciding whether to accept or reject them. He is not deemed to have accepted them until he has had such opportunity. In the usual case the examination of the goods must take place when the seller tenders them to the buyer and the buyer takes possession of them.

25 Applying the above principle, I hold that the plaintiffs were not entitled to reject the first two lots by relying on the excess length of the pipes. They had the opportunity to ascertain whether the pipes were too long at the same time as they alleged that the pipes were rusty. The plaintiffs previously accepted pipes which were too long. So by not ascertaining whether there was excessive length and failing to reject them on that ground, they plainly waived that ground. It was too late for them to raise it some six months after they were afforded the opportunity to examine them.

26 Now the question of mill certificate. The effect of the provision that 'Mill certificate will be provided' depends on whether it is a condition or a warranty. If it is a condition, breach of it affords the innocent party to treat the contract as repudiated. In effect, the buyer may reject the goods. Otherwise he may only recover damages, if he has suffered any. A condition has been defined

as a term which is `so essential to its very nature that its non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all.` See at p 1012. The term which called for the mill certificate could not be a condition in the sense stated above. The delivery of the goods, in my view, constituted substantial performance of the contract. The mill certificate therefore could only be of secondary importance.

27 The plaintiffs` witness Mr Liew Ma Choon said in evidence that he would accept the mill certificate one or two days after delivery of the pipes. In respect of lots five and six the mill certificate was tendered much later and accepted without protest. It is therefore clear that the mill certificate was of no importance to the plaintiffs. I therefore hold that the term was merely a warranty and the failure to provide the certificate simultaneously with the goods did not entitle the plaintiffs to reject the goods. The plaintiffs are not seeking any damages in respect of this alleged breach.

28 In any event even if the requirement of the mill certificate is held to be a condition the plaintiffs should have raised it at the time of the initial delivery on 31 August 1988 so that the defendants would have had an opportunity to redeliver the goods with the mill certificate within reasonable time. This the plaintiffs failed to do. The plaintiffs` claim therefore was groundless. This reasoning also applies to lots 3 and 4.

29 I further hold that it was not an implied term of contract that the mill certificate must be provided simultaneously with the delivery of the goods. Before a term is implied into a contract the court must ask the question: `Is the implication asked for necessary?` As Scrutton LJ stated in ***Re Comptoir Commercial Aversois and Power, Son & Co`s Arbitration*** at p 899:

*It must be such a **necessary** term that both parties must have intended that it should be a term of the contract, and have only not expressed it because its necessity was so obvious that it was taken for granted. [Emphasis Added.]*

30 On the facts of this case I hold that it was not a necessary implication. The reasons are as follows: First, when the defendants effected delivery of the fifth and sixth lots without mill certificates the plaintiffs raised no complaints. Secondly, when the first and second lots were offered for delivery the plaintiffs did not ask for the mill certificate. If the mill certificates were necessary they would have insisted on it. By their failure to do so they made it manifest that it was not necessary and in any event it was not necessary at the time of delivery. Thirdly, the only function of the mill certificate was to enable the buyers to ascertain if the specifications were in accordance with the contract terms. This could easily be achieved by visual inspection of the goods. Fourthly, the plaintiffs did not plead the circumstances which made such a term necessary, nor did they adduce any evidence to support a necessity for it.

31 **Damages**

32 In case I am wrong in holding that the defendants were not in breach of contract, I shall express my views on the damages claimed by the plaintiffs.

33 The plaintiffs claimed that the market value of the goods had gone up. But there was no evidence of market price. What the plaintiffs produced was a sub-sale with an Indonesian party with whom they were in a very close and informal relationship. The sub-contract bore the date 11 July 1988 and called for delivery by 9 September 1988 the latest. It imposed a penalty of 5% for default up to a maximum of 5%. The plaintiffs, however, did not plead this contract. Nor did they reveal this in the application for summary judgment they had made. It is therefore a highly suspect transaction. To compound the

problem, the subcontract was in terms of length whereas the contract between the plaintiffs and defendants was in terms of tons. There was no means of matching them. Finally the sub-sale was on `C and F` terms. It meant that the plaintiffs had to pay the freight. Assuming that the sub-sale was for the entire quantity the plaintiffs had purchased from the defendants the plaintiffs must deduct the freight and other related charges. There was no indication of what this would have amounted to. All these factors led me to conclude that the sub-sale was not a reliable basis to calculate the plaintiffs` damages. There was no evidence to assess damages on any other basis.

34 The plaintiffs` claim therefore is dismissed with costs. There will be no order on the counterclaim or as to the costs of the counterclaim.

35 ***Plaintiffs` claim dismissed.***

G P Selvam J

Simon Yuen (Khattar Wong & Pnrs) for the plaintiffs
Jeffrey Beh (YM Jumabhoy & Co) for the defendants
