IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1995] SGHC 196

Suit 1556/1992

Between

Ceramic Brickworks (S) Pte Ltd

… *Plaintiff*

And

Asia-Tech Construction & Engineering Pte Ltd

… *Defendant*

GROUNDS OF DECISION

Commercial Transactions — Sale of goods; Commercial Transactions — Sale of goods

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Ceramic Brickworks (S) Pte Ltd v Asia-Tech Construction & Engineering Pte Ltd

[1995] SGHC 196

Suit 1556/1992
G P Selvam J
18 August 1995

1 **The claim and counterclaim**

2 This case concerns a contract for the sale and purchase of bricks for the construction of a building called `Landrich Condominium`. The plaintiffs were the sellers. The defendants were the buyers and they were the principal building contractors of the project.

3 The sellers brought this action for recovery of the price of 8,320 bricks delivered and loss of profits in respect of 1,991,680 bricks which the defendants said they would refuse to accept. The defendants counterclaimed for an alleged failure of the plaintiffs to supply bricks of contractual quality and repudiatory breach of contract. The counterclaim became the real matter to be adjudicated. These are the outline facts of the case.

4 **The facts**

5 On 11 December 1991 the defendants sent a fax to the plaintiffs in the following terms:

> *We would like to invite you to submit your quotation for the supply of common brick and clay brick for our above project at Pasir Panjang Road with the following specification:*
>
> *Specification*
>
> *All bricks are to be dimensions stated in BS 3291:1985 unless otherwise approved, and are to be hard, well-burnt, machine presses, square and clean with true arises, of uniform size and shape, and with a frog on one or both bed faces and without holes or voids.*

6 Clay bricks are to be of the best quality. The average compressive strength, when tested in accordance with BS 3921 is to be not less than 7N/mm2 (1,000 lbs per square inch).

> *Delivery: In about one (1) month`s time.*
>
> *Please submit your quotation not later than 20 December 1991 by fax. Should you have any queries please contact Ms Belle Chan.*

7 The letter emanated from Mr David Blomfield who as an engineer knew exactly what he needed and stated his specifications in very clear terms.

8 There were negotiations between the parties. In the result an agreement was reached on 9 January 1992 (the contract). It was in the form of a typewritten letter from the plaintiffs to the defendants. It was signed by both parties. Its material contents were as follows:

> *This is to confirm our sale to you as buyer, and your purchase from us as seller of the undermentioned goods subject to the following terms and conditions:*
>
> *Description of goods: Common bricks, SISIR Standards, SS103:1974*
>
> As per sample.
>
> Quantity: Exceeds two million pcs (approx).
>
> Price: 16.87 cents per pc.

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> Delivery: Delivery schedule to be advised. Above price includes delivery to site for loads of 7/8 pallets each.
>
> Payment: 30 days.
>
> Packing: 520 pcs per pallet.

9 The words `As per sample` were handwritten. The price `16.87` was also in manuscript. The plaintiffs` representative, Mr Quintus Ong, signed next to the manuscript parts of the contract to signify his agreement to the addition and alteration. The specifications mentioned in the letter of 11 December 1991 were not included or incorporated in the contract. They do not, therefore, form part of the contract.

10 On 13 and 16 May 1992 the plaintiffs, at the request of the defendants, delivered a total quantity of 8,230 pieces of bricks. The defendants alleged that those bricks were substantially different from sample bricks delivered to Mr Blomfield by Mr Quintus Ong. The defendants protested and declared that they would not accept any bricks of the quality which were actually delivered. In the meantime part of the bricks delivered had been used in the erection of a wall.

11 The plaintiffs` reaction to this was somewhat casual. On 20 May 1992 Mr Quintus Ong sent a further quotation as follows:

> *We are pleased to offer as follow:*
>
> *(1) Project(s): Landrich Country Villas*
>
> (2) Description of goods: Common bricks - locally produced SISIR standards, SS103:1974.
>
> (3) Quantity: 2,000,000 pcs.
>
> (4) Price: 19.0 cents per pc.
>
> (5) Payment: 30 days.
>
> (6) Duration: To be advised.

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> (7) Delivery: Above price includes delivery to site for loads of 7/8/9 pallets each.
>
> (8) Packing: 520 pcs per pallet.
>
> *Meanwhile, thanking you for your continued support.*

12 Due to shortage of bricks in the market, may we advise you to confirm with us soonest possible.

13 The terms of the above quotation were, of course, radically different from the contract in two important points. First, it omitted the words `as per sample`. Next, it increased the price from 16.87 cents to 19 cents per piece. If the defendants had accepted the new offer they would have had a new agreement which on its face was very favourable to the plaintiffs. It was clear that the plaintiffs did not want to be bound by the contract of 9 January 1992 and wanted a fresh contract. On the face of it the new quotation gave the plaintiffs the right to deliver bricks of a poorer quality than what the defendants demanded and at a higher price at that. The quotation did not even state that they would supply for the new price of 19 cents bricks of the sample quality in respect of which a test report (the Setsco test report) was issued. In a telephone conversation, however, Mr Quintus Ong told Mr Blomfield that bricks of the sample quality would be delivered only at a price of 19 cents per piece. It should be mentioned at this stage that, by May 1992, there was an increased demand for bricks in the market with the consequent rise in the market price. It should be noted that the plaintiffs` quotation dated 20 May 1992 emphasized the point in these words: `Due to ***shortage of bricks*** in the market, may we advise you to confirm with us soonest possible.` [Emphasis added].

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14 In view of the plaintiffs` refusal to supply the better quality bricks, the defendants went into the market and purchased bricks at a higher price, that is at 20 cents and 22 cents per piece.

15 **The claim and counterclaim**

16 The plaintiffs issued these proceedings for the price of 8320 bricks delivered to the defendants. The price was S$1,403.58. In addition they claimed loss of profits in respect of 1,991,680 bricks which the defendants refused to accept. They quantified the loss at $99,584. The profits were calculated at 5 cents per piece. No particulars were pleaded in respect of the alleged loss to explain why they suffered a loss in a rising market and how they arrived at the alleged loss of 5 cents per piece. There was no evidence to show the market price of the kind of bricks which the plaintiffs had delivered and proposed to deliver.

17 The defendants admitted liability for the bricks they accepted and used but not for those they did not use and rejected. The defendants, however, made no payment as the plaintiffs failed and refused to supply bricks corresponding to the sample. By implication they intended to set off the amount payable against damages they were claiming.

18 The defendants made a counterclaim for S$102,275.20 being the additional cost they paid for the bricks they purchased from other sources. This was later amended to $77,332.37. Further they claimed $2,100 for removal and storage of the bricks they had received but had not used.

19 **Determination of main issue**

20 It is now necessary to state the position taken by the parties in regard to the inclusion of the words `as per sample` in the contract. The defendants say that by reason of the inclusion of the words they had a contract of sale by sample. The plaintiffs on the other hand say that it was not a contract by sample but a sale by description only - the description being `common bricks, SISIR standards SS103:1974`. The plaintiffs further said that the contract was silent as to quality.

21 Section 15 (1) of the Sale of Goods Act 1979 says that `a contract of sale is a contract for sale by sample where there is an express or implied term to that effect in the contract`. ***Benjamin`s Sale of Goods*** (4th Ed), at para 11-086, quotes ***`Sale`*** by Williston as follows:

> *In truth, a sample is simply a way of describing the subject-matter of the bargain, and the principles which are applicable to contracts to sell and sales by description are applicable here.*

22 In ***Re Walkers Winser & Hamm and Shaw, Son & Co*** [1904] 2 KB 152 it was accepted and the court impliedly affirmed that an express provision that barley sold to be `about as per sample` constituted a contract by sample. (In that case it was held that nonconformity with the sample was not excessive or unreasonable and therefore did not constitute a breach because there was a custom to that effect). The provision in the contract in the present case was a stronger case of a sale by sample because it was without the word `about` and it was in handwriting. Handwritten words in a typewritten document have a stronger effect. No trade usage or custom as to the words `as per sample` as they appeared in the contract in this case was pleaded. Mr Quintus Ong, however, said in evidence that the word `sale by sample` meant nothing. This, however, was his subjective understanding and part of his strategy to renege from a sale by sample because when the time for supply came the market price of bricks

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was rising. This became manifest when he sent the quotation omitting the words `as per sample` and increasing the price to 19 cents per piece. Mr Quintus Ong well knew that the inclusion of the words `as per sample` was part of the contract and by sending a new quotation and refusing to supply the sample quality bricks he was putting an end to the contract and making an attempt to make a fresh contract of sale by description only. The plaintiffs were clearly bound by the contract.

23 The plaintiffs` pleaded case was that `the two pieces of bricks that were given to the defendants were mere references of the likely kind of common bricks produced by the plaintiffs under specification stated in the said contract` and had no legal validity. In this case the words `as per sample` were included with the knowledge and consent of Mr Quintus Ong. The words must have meant something. In my judgment they meant a sale by sample. It was a legitimate inference to make on the facts of this case that Mr Blomfield did not include in the contract the specifications set out in his letter of 11 December 1991 because the sample given to him met his requirements and it was unnecessary to spell them out in the contract. The words `as per contract` fulfilled the function. I accordingly reject the evidence of Mr Quintus Ong and hold that as a matter of construction of the contract there was an express sale by sample.

24 Next, even without those words `as per sample` the evidence made it clear that there was an implied term to the effect that there was a sale by sample. According to Mr David Blomfield, who was in the employment of the defendants at the material time and who negotiated and signed the contract for the defendants, he was sourcing for the supplier of some two million bricks for the project. The bricks he used were to meet certain requirements and had to be

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approved by the architects. To comply with these requirements he had to purchase bricks which were well burnt and uniform in shape and size. This shows precisely what he was looking for. According to Mr Blomfield, SISIR Standard SS103:1974 laid down only the minimum requirements for common bricks. But he had to purchase common bricks of quality better than common bricks of the lowest quality. The defendants` case against the plaintiffs, as outlined in the evidence of Mr David Blomfield, was that Mr Quintus Ong gave him the assurance that he would supply bricks as required by him and gave him a sample brick. He then obtained the approval of the architects. The architects confirmed their approval on 2 January 1991 in these words:

> *Further to our confirmation on the use of the bricks submitted for approval, we note that the same bricks be used for all brickwork, internal and external, with the exception of areas which would call for fair-face brick.*

25 Mr Blomfield met Mr Quintus Ong again on 9 January 1992 when the latter brought another sample similar to the one he had given earlier. Satisfied with the quality of the sample presented to him by Mr Quintus Ong, he concluded the contract. Further, he managed to reduce the price from 17 cents per piece to 16.87 cents per piece and insert the words `As per sample` on the standard form wording of contract presented by Mr Quintus Ong. They both signed the contract and Mr Quintus Ong initialled next to the insertions in handwriting as stated earlier in this judgment.

26 After the contract was signed but before delivery of any bricks, Mr Blomfield on 9 April 1992 asked the plaintiffs to provide a test report to be delivered. On the same date Mr Blomfield received a copy of a test report dated 18 September 1990 and conducted by Setsco Services Pte Ltd. It follows,

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therefore, that there could be no confusion as to the quality of the samples delivered to him.

27 Mr Blomfield`s uncontradicted evidence was that he signed the contract only after sighting the samples and getting approval of the samples. The very fact that Mr Blomfield asked for a sample to be produced before signing the contract would have made it abundantly clear to Mr Quintus Ong that the contract was being signed on the basis of the sample.

28 The plaintiffs further said that for a sale by sample there should be 30 samples accompanying the test report. If that were the practice the plaintiffs should not have signed the contract with the words `as per sample` without supplying on 30 samples. In any event this was not the pleaded case of the plaintiffs.

29 It was not open to Mr Quintus Ong to say that it was not a sale by sample. The evidence was all one way. There was an implied contract of sale by sample. It appeared that Mr Quintus Ong did not have much experience in negotiating contracts although he had watched the production of bricks by the plaintiffs for a long time as it was a family business. Because of this inexperience perhaps Mr Quintus Ong did not fully appreciate the consequences of his conduct.

30 **Meaning of sale by sample**

31 The incidents of a contract for the sale of goods by sample are set out in s 15(2) of the Sale of Goods Act 1979. It says, inter alia, that the bulk will correspond with the sample in quality and that the buyer will have an opportunity of comparing the bulk with the sample. Further the goods must be free from any defect, rendering them unmerchantable, which would not be

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apparent on reasonable examination of the sample. The defendants also pleaded that the bricks supplied by the plaintiffs and those they intended to supply under the contract were not of merchantable quality in that they were not reasonably fit for the purpose they were purchased for. This imports s 14(2) of the Sale of Goods Act which provides that:

> *(2) Where the seller sells goods in the course of a business, there is an implied condition that the goods supplied under the contract are of merchantable quality, except that there is no such condition -*
>
> (a) as regards defects specifically drawn to the buyer`s attention before the contract is made; or
>
> (b) if the buyer examines the goods before the contract is made, as regards defects which that examination ought to reveal.

32 Section 14(6) explains `merchantable quality` as follows:

> *(6) Goods of any kind are of merchantable quality within the meaning of subsection (2) above if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances.*

33 The evidence before me clearly established that the bricks supplied and the bricks the plaintiffs proposed to supply did not correspond with the sample. Mr Blomfield was clear when he gave evidence on this. He said from his experience he could tell the difference. I accepted his evidence without any hesitation. In addition to this, photographs of the bricks supplied and the sample showed vividly that the bricks supplied, and therefore the bricks the plaintiffs proposed to supply, were much inferior to the sample.

34 The plaintiffs` contention that they contracted to sell common bricks and they supplied common bricks albeit they were of a poorer quality was not a valid argument. The samples supplied were also common bricks but of a better

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quality. That the samples were common bricks of better quality was borne out by two other factors. First, it will be recalled that when asked for the test report from which the sample was taken Mr Quintus Ong as a matter of course sent the Setsco report dated 13 September 1990. The purpose for which it was asked and was given was simple and plain - it was to obtain a description of the sample bricks and therefore the bulk of bricks that must be supplied. The report did not add anything to the contract but gave a clear indication of the bricks the plaintiffs agreed to supply and the bricks the defendants were legitimately entitled to receive. The report described the bricks as common bricks and gave a description of their other characteristics. Mr Quintus Ong said in evidence that if the defendants wanted bricks of the quality outlined in the Setsco report or the sample bricks they must pay a different price for them. This showed that he had no difficulty in identifying the quality of contractual bricks as he knew exactly which report represented the sample. The real problem was the price. The plaintiffs were trying to renege from the contract because after the conclusion of the contract and when the time for supply came they were unhappy with the price as the contractual quality bricks could have been sold for a much higher price in the then prevailing market. Accordingly, I hold that the brick did not accord with the sample.

35 **Implied term as to merchantability**

36 The defendants, in my judgment, failed to make out their case that the bricks supplied and offered by the plaintiffs were not merchantable. The evidence did not support their case founded on the `merchantability quality` of the bricks. In this case the evidence of the defendants established that there would be some difficulty in laying the bricks and there might be water seepage problem. These problems did not render the bricks `unfit for the purpose for

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which goods of that kind are commonly bought for`. This of course does not affect the defendants` case on `sale by sample` which I have held has been made out by the defendants.

37 **Did the plaintiffs repudiate the contract**

38 Finally, I hold that the plaintiffs repudiated their contract with the defendants. This was evidenced by the following. First, they supplied and insisted on supplying inferior quality bricks which did not conform with the samples. Next, by sending fresh quotation omitting the words `as per sample` and increasing the price and failing to confirm that they would supply contractual quality bricks they made it abundantly clear that they had no intention of abiding by the contract. The result is that the plaintiffs were in repudiatory breach of the contract which justified the defendants` purchase of bricks from other sources.

39 **Damages and costs**

40 The plaintiffs supplied 8,320 bricks, part of which had been utilized and the rest rejected. The plaintiffs did not take delivery of the rejected bricks and they remained with the defendants. The defendants, however, lost track of the rejected bricks and could not account for them. Accordingly, I held the defendants were liable to the plaintiffs for the full invoice for the 8,320 bricks. For the same reason I disallowed their claim for the shifting and storage of the bricks. The defendants quantified their claim for damages for the increased price they paid as $77,332.37. This was not challenged. Accordingly, judgment was given to the defendants for $77,332.37 less $1,403.58 being the price for bricks received with interest at 6% pa from the date of issue of writ.

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41 I awarded no costs to the plaintiffs` claim because they did not succeed on the real issue in the case. As the defendants succeeded on it, I gave the defendants the costs of the counterclaim including the costs of defending the plaintiffs` claim.

42 Plaintiffs` claim dismissed.

G P Selvam J

Tan Lee Cheng (Lee Bon Leong & Pnrs) for the plaintiffs
Thean Chow Leong (Tang & Tan) for the defendants

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