

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1997] SGHC 223

Suit No 1050 of 1988

Between

Himatsing Trading Co (Pte)
Ltd

... Plaintiff

And

Continental Grain (S) Pte Ltd

... Defendant

GROUND OF DECISION

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Himatsing Trading Co (Pte) Ltd v Continental Grain (S) Pte Ltd

[1997] SGHC 223

Suit No 1050 of 1988
G P Selvam J
29 August 1997

1

Judgment:

2 1. This case concerns the sale and
purchase of a parcel of soyabean oil. On the 18 July 1987 the plaintiffs made a
contract

for the purchase of 1768 metric tons of crude degummed soyabean oil in drums
at a price of

US\$430 per metric ton FOB Singapore later converted into a

3 c and f Chittagong contract. I

shall call this the plaintiffs' contract. The plaintiffs asserted that they made the

contract with the defendants. The defendants did not dispute that the plaintiffs had a

contract but alleged that the contract was not with the defendants but another party

called IMYO Pte Ltd ("IMYO").

4 2. On the same date, that is 18

July 1987, the defendants contracted to sell and deliver to IMYO at Singapore 2000 tons of

crude degummed soyabean oil in bulk and not in drums at a price of US\$352.50 per metric

ton. The contract made with IMYO shall be called the "IMYO contract". The

plaintiffs said that at the material time they were totally ignorant of the IMYO contract

and in any event it was of no concern to them.

5 3. In the event neither the

defendants nor IMYO honoured the plaintiffs' contract. In consequence the plaintiffs

9 "Imyo Pte Ltd

10 70 Shenton Way

11 #04-03A Marina House

12 Singapore 0207

13 Dear Sirs

14 Contract No CGS DS 076/87-88

15 We are pleased to confirm the

following sale to you:

16 Commodity Crude Degummed Soya Bean

Oil (Any Origin)

17 Specification NSPA Rule 103-03A but

FFA one percent maximum

18 Quantity 2000 metric tons 5 percent

more or less

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19 Price US\$352.50 per metric ton CIF

(Jurong)

20 Shipment Per vessel loading 3-10

August 1987

21 Packing In bulk

22 Payment Upon negotiation of Letter

of Credit opened by end-buyer to us in Singapore. Letter of Credit must be
opened by 22

July 1987 and received by 24 July 1987.

23 Weight/Quality Shipped Quality and

landed weight final per independent surveyor's report.

24 Discharge Buyers to guarantee

discharge vessel at rate of minimum 80 metric tons per house SHINC time to
start counting

6 hours after tendering NOR, WIBON, WIPON, WIFPON, WICCON.
Demurrage shall be per Charter

Party but maximum US\$8000.00 per day or prorata. All other discharge terms
per Charter

Party.

25 Insurance Seller to cover

26 Others terms

27 and Conditions 1) Confirmation of

sales is subject to Letter of Credit be opened by 22 July 1987 and if otherwise,

renegotiation may be opened upon both buyer's and seller's agreement.

28 Other terms

29 and Conditions 2) Other terms and

conditions not conflicting with the above per FOSFA 54 including its extension
of Shipment

clause and its Arbitration clause, with Arbitration in London.

30 Please countersign and return one

copy of this confirmation

31 .

32 Seller Buyer

33 Continental Grain (S) Pte Ltd Imyo
Pte Ltd"

34 6. There was no evidence to the
effect that the plaintiffs were made aware of this contract or any of its terms.
The

plaintiffs' witness Mr Himatsinh said in evidence that he was not made aware
of this

contract in July 1987. That evidence was irrefutable and I found Mr Himatsinh
to be a

reliable and veracious witness. I accepted his evidence without any hesitation.

35 7. It is important to note that the
IMYO contract made no mention of the origin of the parcel and accordingly the
loading

period of 3-10 August 1987 was no significance. The quantity of the cargo and
that it was

to be in bulk were important terms for reasons to be stated later. Another
important term

of this contract was the payment clause requiring the opening of the letter of credit by

22 July 1987.

36 8. The plaintiffs' contract

was evidenced by a fax also dated 18 July 1987 from the plaintiffs directly to the

defendants and it read as follows :

37 "FM: Himatsing Trading Co
(Pte) Ltd

38 TO: Continental Grain (S) Pte Ltd

39 Reference our telephonic talks with

your *Mr Goh* yesterday evening, we confirm having bought and *you confirm having*

sold to us 1,800 metric tons (Two pct MOL - Buyers' option) crude degummed

soyabean oil packed in new steel drums at USD430/00 per metric ton FOB S'pore for

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shipment during LH August/FH September 1987. All terms and conditions
(Except payment

term) as per our copy fax dtd 16.7.87 at 1745 hours deemed to be duly confirm
and *accepted*

by you. As regards to terms of payment, we hereby confirm and accept to
establish L/C

latest 24th July 87."

[Emphasis supplied by me].

40 9. The fax dated 16 July 1987

referred to in the above fax communication was sent by the plaintiffs to IMYO
and copied

to the defendants. It read as follows :

41 "FM: Himatsing Trading Co

(Pte) Ltd

42 TO: Imyo Pte Ltd

43 CC: Continental Grain (S) Pte Ltd

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44 Ref to yr fax (No.2) of today, we

are plsd to accept the offer as follows :

45 Commodity Crude Degummed Soyabean

Oil

46 Quantity 1,800 m/tons (Two percent

more or less at our option)

47 Quality Unsaponifiable

matter...1.5PCT Max

48 Free fatty acid, as oleic

...0.75PCT Max

49 Moisture and Volatile matter

50 Insoluble

Impurities/Sediments...0.3PCT MAX

51 Flash Point...250 deg F Min

52 Phosphorous...0.035 PCT MAX

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53 Contamination with fish oil

54 or marine animal oil...Negative

55 Packing In New Steel Drums

56 Weight 190 Kgs nett

57 16 Kgs Tare

58 206 Kgs Gross

59 Colour of Drum At our option - red

oxide or black & white top

60 Shipment LH August 87 / FH

September 87

61 Price US\$430/= per metric ton FOB

Singapore

62 Payment By 100% LC at sight issued

direct to seller by 15/8/87

63 Documents Negotiate against Com.

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Invoice, Packing List, SGS Certificate on Specification, Quality, Weight and Quantity and

Delivery Order

64 Remarks Buyer to give/nominate

vessel 14 days prior to loading"

65 10. A plain reading of the above

two faxes can lead to only one conclusion: the plaintiffs had a contract with the

defendants as set out in their fax of 18 July 1987 incorporating the terms of the fax 16

July 1987 and the opening date of letter of credit was 24 July 1987. As mentioned earlier

the contract was converted into a c and f Chittagong contract and the price was increased

to US\$453.50 per metric ton to include the freight.

66 *The letter of credit*

67 11. The plaintiffs established a

letter of credit within the stipulated time. The credit was in favour of the

defendants.

The credit had no reference to the IMYO contract, but only the plaintiffs' contract.

If the plaintiffs' contract was with IMYO as asserted by the defendants, it would be

IMYO and not the defendants who would be entitled to the credit based on the terms of the plaintiffs' contract.

68 12. An examination of the letter of credit shows that the defendants' obligations before they could negotiate the credit

were as follows :-

69 (a) The defendants had to procure and produce a full set of 3 clean "shipped on board freight prepaid" bills of lading in respect of 1768 tons of crude degummed soyabean oil with Chittagong as the discharge port. (This quantity was very different from the 2000 tons 5% under the IMYO

contract.)

70 (b) The cargo was to be packed in steel drums of 190 Kg nett each. (Again this was very different from the delivery in bulk contemplated by the IMYO contract.)

71 (c) The plaintiffs' contract and the letter of credit stated six specifications. (The IMYO contract did not stipulate these specifications.)

72 (d) The credit called for a shipment of the cargo in drums at Singapore for Chittagong latest 31 August 1987. (Under

the IMYO contract the delivery to IMYO was to take place at Singapore and there was no

specific date of delivery. There was a loading date of 3-10 August 1987 which was of no

significance. If the shipment took place in South America as it eventually did it

would

take some 45 days for the cargo to arrive at Singapore, that is mid-September.
Delivery in

Singapore by 31 August 1997 was impossible in practical terms).

73 13. At this juncture it is

important to state that the defendants were fully aware of the predicament they
were in

because upon receipt of the plaintiffs' fax stating that they had a contract with
the

defendants and specifying its terms a junior officer in the employ of the
defendants

brought it to the attention of their chief trader, Mr Goh Khim, that there were
two

contracts for the same cargo. Mr Goh Khim told him that he would resolve the
problem. But

alas! He did nothing to resolve the problem. Instead Mr Goh Khim decided to
ride two

horses simultaneously. There was an intimation to the Court that Mr Goh Khim

would be

called to give evidence. When the time came he failed to present himself. The Court was

informed at the trial that he had left the defendants' employment and was no longer

in Singapore. Mr Wong of IMYO could not be located either; and IMYO had ceased to operate.

74 14. In these circumstances I could

not help concluding that both Mr Wong of IMYO and Mr Goh Khim of the defendants were

involved in duplicity against the plaintiffs who were entirely innocent throughout.

Further the inevitable inference I drew was that Mr Goh Khim was helping Mr Wong and IMYO

to benefit by the difference between the f.o.b. price the plaintiffs agreed to pay and the

price IMYO was apparently paying to the defendants less the packing and other

incidentals.

Excluding the packing and incidental expenses, the price difference was US\$77.50. On the

total quantity of 1768 tons the profit was US\$136136 excluding the packing and other

incidental expenses; and this would be achieved without any financial exposure by IMYO.

The only conclusion the above matters led to was that there was a direct contract between

the plaintiffs and the defendants.

75 *An alternate approach*

76 15. The evaluation I have outlined

above was based on the construction of the relevant documents and the plaintiffs'

letter of credit. I shall now approach the case from another angle based on the evidence

relating to the negotiations, formation and the breach of the plaintiffs' contract.

There will be some unavoidable repetition of what I have stated earlier. The

plaintiffs

are a Singapore company. The defendants are also a Singapore company but they are part of

a large group of companies whose principal office is in Switzerland. The plaintiffs

required the goods not for their own use but for resale to Bangladesh. The plaintiffs,

while being aware that the defendants would be the suppliers, did not make the initial

approach to them directly. They contacted IMYO. The events that developed thereafter as

related by the plaintiffs' only witness, Mr J T Himatsinh, were as follows.

77 16. Mr Himatsinh knew Mr Wong of

IMYO. He did not want a direct contract with IMYO and definitely wanted to contract with

the defendants as principals because (a) the contract was large and he had had no

confidence in Mr Wong or IMYO; (b) the defendants were one of the world's

biggest

commodity traders; and (c) Mr Wong was prepared to act as the defendants' agent. He

added that he did not personally know the defendants but knew Mr Wong; hence his initial

approach to Mr Wong.

78 17. Following Mr Himatsinh's

overture to Mr Wong, the plaintiffs received a fax from IMYO on 15 July 1987 at 2.44 pm

requiring acceptance on the same day by 5 pm. The quantity offered was 1500 metric tons 2%

more or less at sellers' option. The price stated was US\$430 pmt f.o.b. The payment

provision read as follows : "100% L.C. at sight issued direct to seller - M/s

Continental Grain (Singapore) Pte Ltd". The payment provision was important because

it expressly identified Continental Grain (Singapore) Pte Ltd, the defendants, as the

seller. Further the letter of credit was to be established to them based on the f.o.b.

price the plaintiffs were paying. There can therefore be no doubt, as between the

plaintiffs and IMYO, the plaintiffs were the intended buyers and the defendants were their

intended sellers. This was reaffirmed by another provision in the offer which said :

"Buyer are requested to nominate vessel within 7 days upon receipt of seller tender

of cargo readiness." The cargo was to be tendered by the seller who had been identified as the seller.

79 18. The offer was not accepted and

there was further negotiation between Mr Himatsinh and Mr Wong. In consequence a fresh

offer was received by the plaintiffs from IMYO the following day, that is 16 July 1987. In

the fresh offer the quantity was increased to 1800 metric tons (2% more or less).

The

packing was to be in new steel drums. The price remained the same. There were some other

minor changes in the offer but they were not material to the issues before me.

The fax

offer called for acceptance the same day by 6 pm. This time the fax was copied to the

defendants. Upon receipt of the fax the defendants would have been aware that a fair

reading of it identified the defendants as the sellers and the plaintiffs as buyers.

This

offer was also not accepted by the plaintiffs. Following further negotiation, IMYO sent a

third offer which also referred to the defendants as sellers and the plaintiffs as buyers.

This third fax-offer was also copied to the defendants.

80 19. The plaintiffs, in response,

sent a fax at 5.45 pm on 16 July 1987 to both IMYO and the defendants. It began as follows

: "Ref. to yr. fax (No 2) of today, we are plsd. to accept the offer as follows." The quantity mentioned was 1800 m/tons (2% more or less) at the plaintiffs' option. The payment clause read: "Payment: By 100% LC at sight issued direct to seller by 5/8/87". The plaintiffs' fax thus set out the terms they accepted ("the acceptance fax").

81 20. On 17 July 1987 IMYO by a fax to the plaintiffs and a copy to the defendants proposed a variation of the opening date of

the letter of credit to be established in favour of the defendants. They asked for the

letter of credit to be opened by 24 July 1987 instead of 15 August 1987. The plaintiffs

agreed to the variation by their fax of 17 July 1987. By the same fax they asked for the

sellers to fax their confirmation. This fax was not copied to the defendants.

82 21. Mr Himatsinh said in evidence

that when he received the fax from IMYO asking for the variation of opening date of letter

of credit he spoke to Mr Wong of IMYO and asked him to convince the defendants to allow

the establishment of the letter of credit by 15 August 1987. Mr Himatsinh went on to say

that as suggested by Mr Wong he called Mr Goh Kim of the defendants on 17 July 1987. Mr

Goh Kim insisted on 24 July 1987 and he agreed to the variation. Mr Himatsinh did not stop

there. On 18 July 1987 the plaintiffs sent a fax direct to the defendants without copying

it to IMYO. Its contents are set out in paragraph 8. Its contents drove the last nail into

the coffin as to the identity of the contracting parties.

83 21. The above was in effect a

recapitulation of the agreed terms with reference to the acceptance fax and I

shall call

this "the recap-fax." In the recap-fax the plaintiffs asserted in crystal clear

terms that all terms had been agreed between the plaintiffs and the defendants.

There was

no response to the acceptance fax or the recap-fax from the defendants.

84 22. The next event was the issue of

the letter of credit. It was issued by Standard Chartered Bank in favour of the defendants

on the application of the plaintiffs. The plaintiffs sent a fax to the defendants on 22

July 1987 in the following terms :

85 "Re our fax (2nd) of 17 July

1987 and 18th July 1987 and thereafter our telephonic talks regd 1,800 metric tons (Two

percent MOL) Crude Degummed Soyabean oil packed in new steel drums confirmed sold to us by

you, kindly note L/C No 957/189719 established thru Standard Chartered Bank head office,

Singapore."

86 23. The credit however was not

advised until the following day. It is to be noted that the credit states that the

contract price was US\$483.50 c and f terms. There was therefore a variation of the

contractual term before the credit was issued. So it was clear that the defendants would

provide the cargo and arrange the transportation of the cargo to Bangladesh. The

specification of the goods mentioned in the credit was the same as those stated in the

acceptance fax. The last date for shipment at Singapore was 31 August 1987 and the expiry

date of the credit was 7 September 1987. The defendants did not contend that the credit

was not in accordance with the terms of the plaintiffs' contract.

87 24. On the basis of the above,

there could be only one answer as to who the contracting parties were - the

plaintiffs

were the buyers and the defendants and not IMYO were the sellers. This was because the

credit was established to pay for the plaintiffs' contract and not IMYO's contract.

88 25. The defendants received the

acceptance fax and the recap-fax from the plaintiffs saying that the plaintiffs had a

contract with the defendants. They then received the letter of credit pursuant to and in

compliance with the contract between the plaintiffs and the defendants. The defendants

then remained silent. They at no time said to the plaintiffs that they had no contract

with the plaintiffs and that their contract was with IMYO. The only security for payment

they had was the credit established by the plaintiffs. That credit could only be

negotiated only by the defendants and to do so they had to perform the plaintiffs' contract by complying with its terms and not the terms of the IMYO contract.

89 26. It was not entirely clear when and whence the defendants would secure the cargo at the time they contracted with the plaintiffs or IMYO. The clear evidence before the Court, however, showed that a bill of

lading dated 31 July 1987 was issued in respect of 1700 metric tons of crude degummed

soyabean oil loaded in bulk at San Lorenzo, Argentina and consigned to the defendants. A

survey report dated 3 August 1987 confirmed that loading of the parcel but did not give

the date of loading.

90 27. The defendants were in possession of the plaintiffs' letter of credit from 23 July 1987. It called for documents in respect of shipment of cargo in drums at Singapore for Chittagong. The

plaintiffs' letter of credit in favour of the defendants presupposed an underlying contract of soya oil in drums from Singapore to Chittagong. But the defendants could not negotiate the credit with the Lorenzo bill of lading. The defendants had a contract with IMYO which was not supported by a corresponding letter of credit.

91 28. In these circumstances, although the defendants would have been in possession of the documents relating to the San Lorenzo shipment during the first week of August 1987 nothing of any importance happened until 18 August 1987 when the defendants asked IMYO to amend the shipment date in the plaintiffs' letter of credit from 31 August 1987 to 30 September 1987. That would have given sufficient time for the cargo to arrive at Singapore, be packed and shipped at

Singapore for Chittagong. IMYO passed on the request to the plaintiffs. The plaintiffs, _____ of

course, were not under a legal duty to oblige the defendants or IMYO. So they expressed

their unhappiness. They said with justification that they had incurred over \$4000 for

opening the credit and further amendments would eat into their profits.

92 29. _____ The _____ defendants _____ behaved _____ as

though they had all the rights and were under no obligations to the plaintiffs. They

responded to IMYO on 27 August 1987 saying that the plaintiffs' letter of credit must

be workable to the defendants to negotiate as a means of payment and that at that _____ time _____ the

letter of credit date was not workable for them. So they asked for the shipment date _____ and

letter of credit expiry date to be extended to "30/9/87 and 21/9/87". There was

an obvious error - 21/9/87 should come first. This shows that the defendants

wanted to

wait until the bulk cargo arrived in Singapore so that it can be packed in drums and

shipped to Chittagong. They could then negotiate the plaintiffs' credit. It was obvious that Mr Wong and Mr Goh Khim were working together.

93 30. As at 19 August 1987 the

shipment date in the plaintiffs' contract and credit had not been amended. Without

the amendment, the defendants could not negotiate the credit as the bulk cargo would

arrive in Singapore only in mid-September 1987. It also meant that the plaintiffs'

contract would be breached. On that date (19 August 1987) the defendants asked for the

amendment of the plaintiffs' credit on the same date "otherwise we will have to

treat *this contract* as void and null and reserve *our right under our contract no*

CGS DS 076/87-88".[Emphasis added by me].

94 31. From the above what the defendants intended to achieve was clear: Keep the plaintiffs' contract and IMYO's contract alive until such time as they could procure the documents showing re-shipment in drums at Singapore. They would be able to do this by the second half of September as it would take about six weeks for a shipment from San Lorenzo to arrive in Singapore. They, that is Mr Wong of IMYO and Mr Goh Khim of the defendants, obviously had a private arrangement. Once the defendants negotiated the plaintiffs' credit, they would deduct from that amount what was due to them under the IMYO contract and pay the difference over to IMYO. All would have been happy if those events happened. But that was not to be.

95 32. As it happened the plaintiffs

amended their letter of credit not on 19 September 1987 but on 24 September 1987. This was

of no avail because both the defendants and IMYO had embarked on a different course of

action which benefited them but not the plaintiffs.

96 33. It happened that there was a

letter of credit issued by The Hongkong and Shanghai Bank Corporation issued on 7

September 1987 at the behest of United City Merchants (Singapore) Pte Ltd in favour of the

defendants in respect of 1982.269 mt of refined bleached and deodorised *palm oil* in

bulk and not 1800 mt of *soyabean oil in drums* for delivery in Singapore latest

by 30 September 1987. The court had no evidence about the contract relating to this letter

of credit save that on 21 September 1987 this letter of credit was amended to enable the

defendants to negotiate the documents in respect of the soyabean oil cargo

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loaded at San

Lorenzo. What is the same thing, on 21 September 1987 a letter of credit was issued by

amending a previously existing letter of credit to pay for the IMYO contract which called

for a letter of credit by 22 July 1987. Thus it came two months late.

97 34. In the meantime the plaintiffs

were left out in the cold. When the plaintiffs amended their credit the defendants

rejected it on the ground that it was not done within the agreed date. The fact was that

the plaintiffs were not under a legal duty to amend the credit stipulating a shipment date

beyond the shipment date. The plaintiffs in any event did not agree to amend the credit by

19 September 1987 as demanded by the defendants. In the result the defendants breached

their contract with the plaintiffs and accordingly I held them liable in damages, interest

and costs.

98 35. The defendants sought to rely

the plaintiffs' allegation in their defence that IMYO were the defendants'

agents. They denied having appointed IMYO as their agents and said that the plaintiffs

failed to prove that IMYO was their agent. It was a pedantic argument with no merits. The

issue of agency was a red herring because it was unnecessary for the plaintiffs to allege

or prove agency. What mattered was their assertion that they entered into a contract with

the defendants. In any event IMYO's involvement in so far as it related to the

plaintiffs' contract was as the defendants' agents. They were not the

plaintiffs' agents. The plaintiffs were not paying for the intermediary role of IMYO

and the defendants made sure that IMYO would reap a substantial benefit for their role.

The inevitable conclusion therefore was that as far as the plaintiffs were concerned IMYO

was the defendants' agents. Mr Himatsinh's evidence was that Mr Goh Khim

acknowledged IMYO as the defendants' agents. In the end what mattered was that a

contract was concluded between the plaintiffs and the defendants and it was not honoured

by the defendants. It

99 mattered not whether IMYO was an agent.

100 Dated this 29th day of August, 1997.

101 G P SELVAM

102 JUDGE

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Haresh Kamdar for the plaintiffs
Suresh Nair with Chan Hian Young for the defendants
