

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1997] SGHC 273

Suit 1147/1994

Between

Containers Printers Pte Ltd

... Plaintiff

And

Christopher Tan
Associated Merchant Bank Pte
Ltd

... Defendant

GROUND OF DECISION

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Containers Printers Pte Ltd v Christopher Tan and Another

[1997] SGHC 273

Suit 1147/1994
Lai Kew Chai J
28 October 1997

1

Judgment:

2 The plaintiffs claim against the second defendants damages for

breach of contract to deliver a set of machines which were intended to produce
tin cans

and which, in turn, were intended to be used to store edible oil. The damages
fall under

two heads: (a) actual loss of \$893,119.00 which is the alleged difference
between the cost

of the replacement set of machines and the contract price allegedly agreed; and
(b) loss

of profits due to non-production over 18.58 months of \$2,973,792, a figure which is

\$107,254 more than the sum previously claimed.

3 2 In the alternative, the plaintiffs claim against the first

defendant damages for breach of warranty of authority to contract on behalf of the second

defendants. The common defence of both defendants is that in truth and in fact the first

defendant, who dealt with the plaintiffs' representatives at all material times, did not

agree to sell the set of machines.

4 **The issue**

5 3 The central issue of fact for determination is this: was a

contract of sale and purchase of the set of machines concluded in the telephone

conversation between PW1 Amelia Lim Seok Thim and the first defendant at about 12 noon on

29 June 1994?

6 4 I should refer to one matter for clarification so far as this issue of fact is concerned. By para 6 of the Re-amended Statement of Claim the plaintiffs

plainly "aver(red) that there was (a) firm and binding oral agreement entered into on

or about the 29th day of June 1994." However, in the preceding two paragraphs of the

statement of claim, there were allegations that the parties on 28 June 1994 "had agreed to the sale and purchase of the aforesaid machineries at a price of \$425,000."

The next averment went on to say "(h)owever, the first defendant wanted to obtain the

approval of the second defendants' head office before concluding the sale and purchase and

at his request the plaintiffs made out a written **offer** of the same date, upon such

terms which were dictated by the first defendant." It was further averred that the

first defendant had indicated that he would give a firm answer the next day. It was not

altogether clear if it was the plaintiffs' case that a **conditional** agreement was concluded subject to the fulfilment of a **condition subsequent**. This ambiguity was

clarified by the fact that it was common ground that the plaintiffs' letter of 28 June

1994 to the second defendants constituted an **offer**. It must follow that there could

not have been an agreement concluded on 28 June 1994.

7 The agreed facts

8 5 The plaintiffs carry on business, inter alia, as manufacturers
of metal cans. They manufacture 3 litre, 3 kilo and US one gallon cans and, in
particular,

rectangular cans. They sold about 90% of the rectangular cans to their sister or associated company known as Ngo Hong Chew Edible Oil Limited ("Ngo Hong Chew").

Ngo Hong Chew were direct competitors of a company known as Devon
(Singapore) Pte Ltd

("Devon") for market shares in Africa and Middle East countries in the sale of edible oils packed in rectangular cans.

9 6 It is an important piece of background to note that Devon, as a company, collapsed in June 1993. It was placed under judicial management under the provisions of the Companies Act. The judicial managers, in line with one of the statutory

objectives of the scheme of judicial management, tried to sell the assets of Devon as a

going concern. If that had succeeded, a scramble for the assets of Devon would have been

averted and, hopefully, a higher price might have been realised. But the efforts to sell

Devon's assets as a going concern failed because the secured creditors could not agree on

the apportionment of the proceeds of sale among themselves. This eventually led to the

discharge of the orders for judicial management and the appointment of

Liquidators to wind

up Devon. In these circumstances, the set of machines in dispute had to be sold.

10 7 The second defendants are merchant bankers. They had leased the

set of machines in question to Devon. When it became clear that the sale of
Devon's assets

as a going concern could not proceed, they took steps to sell the set of machines.
Through

the first defendant, their Credit & Marketing Manager, the second defendants

negotiated with the plaintiffs and another party known as Rim Engineering
Enterprise who

were also very keen to purchase the machines.

11 8 On 2 June 1994 Ms Amelia Lim (PW1), the Finance & Accounts

Manager of the plaintiffs, telephoned the second defendants and told one of their

employees of the plaintiffs' interest in the purchase of the machines. This
message was

relayed to the first defendant. On the following day, the first defendant
telephoned Ms

Amelia Lim who told him of the plaintiffs' interest in the machines. Following the

telephonic conversation, the first defendant faxed the plaintiffs. The invoices containing

the description of the machines, with the parties and prices blanked out, were also faxed

to the plaintiffs. The machines comprised 4 units, namely (1) a Mawag Prexite Automatic

Duplex Angle Slitter; (2) a Shin-I US Gallon Automatic Can Forming Line; (3) A Sabatier

Tropicalised In-Line Stretch Former; and (4) a Smag Automatic Tinplate Seam Welding

Machine. They formed a production line, producing rectangular cans.

12 9 In the fax of 3 June 1994, the second defendants stated that

the proposed sale was on an "as is, where is" basis without any representation,

guarantee, warranty or indemnity as to the condition, suitability for use or

merchantability of the machines. They also indicated they would be happy to arrange for

the plaintiffs' representatives to view the machines.

13 10 The first defendant and Mr Cheo Tiong Heng, the Managing

Director of the plaintiffs, met on 7 June 1994 at the latter's office at 90 International

Road, Singapore. The meeting lasted more than an hour. Mr Cheo took the first defendant

for a tour of the plaintiffs' factory. It was obviously an exploratory meeting with both

sides seeking as much information as possible from the other and, inevitably, there were

the usual bargaining ploys and posturings.

14 11 On 27 June 1994 the first defendant telephoned Mr Cheo and an

appointment was made to meet him at his office on 28 June 1994. The first defendant told

Mr Cheo that Mr Gerald Mah Kah On, the General Manager of the second defendants, would

also attend the meeting. On 28 June 1994 it turned out that Mr Gerald Mah was unable to

attend the meeting because of another matter requiring his urgent attention. The first

defendant telephoned Mr Cheo and told him that although Mr Gerald Mah could not attend the

meeting he would still like to meet Mr Cheo to explore further the prospects of a sale.

They agreed to meet at 3 pm.

15 12 The plaintiffs' Mr Cheo and the first defendant gave different versions of what had transpired during and by the end of the meeting. I shall return to these conflicting versions shortly.

16 13 However, it is common ground that at the end of the meeting the first defendant was given a letter typewritten on the plaintiffs' letterhead, dated 28

Jun 1994 and signed by Mr Cheo as the Managing Director. It has to be set out in full for

its full import to be appreciated:

17 "June 28, 1994

18 Associated Merchant Bank Pte Limited

19 9 Battery Road

20 \$08-03 Straits Trading Building

21 Singapore 0104

22 Attention: Mr Christopher Tan

23 Credit and Marketing Manager

24 _____

25 We place firm bid for following machineries on a "as is

where is" basis based on the following conditions:-

26 Machineries:-

27 (1) Mawag Slitter

28 (2) Shin-I US Gallon Can Forming Line

29 (3) Sabatier S.A. S26 Tropicalized in-line stretch former

30 (4) Smag Automatic tinplate seam welding machine Model

ZSMA-5/120/180

31 Terms of Payment

32 (A) Total S\$425,000 for all 4 machineries.

33 (B) Delivery: 06 July 1994 subject to the discharge of Judicial
Managers.

34 (C) 10% D/P and 90% before delivery date - 06 July 1994.

35 Yours faithfully

36 CONTAINERS PRINTERS PTE LTD

37 Sgd: Cheo Tiong Heng

38 _____

39 CHEO TIONG HENG

40 Managing Director "

41 The plaintiffs' office copy of this letter contained the written

instructions of Mr Cheo to Ms Amelia Lim, firstly, to provide 10% down
payment when the

first defendant "confirms tomorrow" and, secondly, the financing was to be

provided by DBS Finance. This letter, on any view, was incontrovertibly a

written offer by the plaintiffs.

42 **The controversy**

43 **(a) The plaintiffs' case**

44 14 On the pleadings, the plaintiffs' case is that by a telephone conversation between the first defendant and Ms Amelia Lim on 29 June 1994 the first defendant indicated that he had obtained his head office's approval and that he would be sending a formal reply to the written offer.

45 15 According to Mr Cheo, he and the first defendant negotiated on the price and eventually it was agreed at \$425,000. However, the first defendant wanted to obtain his head office approval. The first defendant "promised that he would revert before 12 noon the next day" (ie 29 June 1994). Mr Cheo in his affidavit evidence in

chief went on to say that he informed the first defendant that as he was going to

Indonesia early the next morning the first defendant should contact Ms Amelia
Lim to let

the plaintiffs have his confirmation. Mr Cheo, at the request of the first
defendant, put

his offer in writing as reproduced above, although he was reluctant at first
because he

did not want the first defendant to use his offer to shop around for a higher price.
Mr

Cheo called Ms Amelia Lim into his office to let her know of the parties'
arrangement and

that the first defendant would be calling her by 12 noon the next day to inform
her

whether the first defendant's head office approval had been obtained. Mr Cheo's

instructions to Ms Amelia Lim were given in the presence of the first defendant.

46 16 Mr Cheo also instructed Ms Amelia Lim to provide the 10%

deposit to the second defendants should the first defendant telephone her with
his

confirmation the next day.

47 17 Mr Cheo flew to Indonesia on 29 Jun 1994. He telephoned Ms Amelia Lim in the afternoon. She told him that the first defendant had failed to call her

and that she had to call him instead, after 12 noon. Ms Amelia Lim informed Mr Cheo that

the first defendant had verbally confirmed that he had obtained his head office approval.

Ms Amelia Lim in her affidavit evidence asserted that "our offer was thereby accepted."

48 18 In para 15 of his affidavit of 24 October 1995 Mr Cheo went on to say that Ms Amelia Lim further told him that the first defendant had added that he (the

first defendant) would follow up with a letter to formally confirm that an agreement had

been entered into. Mr Cheo said he was very happy that the deal was concluded. He produced

the telephone bill evidencing that a call was made at the relevant time to the plaintiffs'

office in Singapore. Mr Cheo explained that in view of the conclusion of the deal he did

not contact the first defendant.

49 19 However, according to Mr Cheo, at about 10.40 am on 30 Jun

1994 he was informed by Ms Amelia Lim that the first defendant had telephoned her early in

the morning to say that he was not able to accept the plaintiffs' offer as any contract

signed would be invalid. The first defendant had said that "any decision must still

be made by the judicial managers." Ms Amelia Lim further told Mr Cheo that the first

defendant had added that the plaintiffs should wait until after the judicial managers were

out of the picture. Mr Cheo said he trusted the first defendant and therefore waited.

50 20 After his return to Singapore from Indonesia, Mr Cheo contacted the first defendant on 5 July 1994. He queried the first defendant who gave a

version different from that given to Ms Amelia Lim. The first defendant told him that in

fact the judicial managers were not in the picture and that another party had offered the

second defendants a better price. Mr Cheo accused the first defendant of coming up with a

lame excuse to repudiate the contract. It was then that the first defendant denied that he

had told Ms Amelia Lim that the plaintiffs' offer had been accepted. He tried to get it

out of the first defendant what the higher offer was but he was not told. He only learnt

that it was merely \$5,000 more during the discovery stage in these proceedings.

51 21 By a letter dated 20 July 1994 the plaintiffs' solicitors wrote to the General Manager of the second defendants, Mr Gerald Mah, and

the first
defendant. It set out substantially what was the case asserted by the plaintiffs'
witnesses in the witness box.

52 22 I now turn to Ms Amelia Lim's evidence bearing on the issue
which is crucial for the case of the plaintiffs. The question is whether the first
defendant had over the telephone unconditionally accepted the written offer of
the
plaintiffs. It is the case of the plaintiffs that the written acceptance which the
first
defendant had promised to send was a matter of formality.

53 23 I pick up the evidence from the stage Ms Amelia Lim was called
into Mr Cheo's room on 28 June 1994 in which the first defendant was present.
After the
introduction, Ms Amelia Lim observed that the first defendant was "dictating"
to
Mr Cheo the terms to be included in the written offer of the plaintiffs. Mr Cheo
wrote

down the terms on a piece of paper and instructed his secretary, one Ms Tan Seo Lian, to

type the written offer recited above.

54 24 According to Ms Amelia Lim, Mr Cheo personally handed the written offer to the first defendant and announced to her in the presence of the first

defendant that the first defendant would be calling her about the plaintiffs' bid by noon

the next day. The reason given was that the first defendant had to obtain approval from

his head office.

55 25 The first defendant did not call by noon the next day. She called him and he confirmed that he had obtained his head office's approval to the

plaintiffs' offer. In her affidavit evidence she stated: "(o)ur offer was thereby accepted. He told me he would follow up with a written acceptance of the written offer

made by us in the evening. However he volunteered that he was not sure when

the machines

can (sic) be released to us. When I asked for the reason, he explained that there might be

a provisional liquidator after 6 July 1995 (sic). He added that if the liquidator is (sic)

the same party as the judicial manager, then the machines can (sic) be released quite fast

but if a different party becomes (sic) the provisional liquidator, then it might take some

time to proceed."

56 26 Ms Amelia Lim went on to explain that she did not proceed to

pay the second defendants the 10% deposit immediately because she "was waiting for

the first defendant to forward the second defendants' written acceptance in the evening."

57 27 What transpired between Ms Amelia Lim and the first defendant

on 29 June 1994 is crucial. Inevitably, she was cross examined on this aspect of her

evidence including paragraph 8 of her affidavit evidence in chief. The notes of evidence

containing the cross examination are set out below:-

58 "Q: 29 June 94 - you had a conversation with Christopher Tan?

59 A: Yes.

60 Q: Was this conversation you had on the phone?

61 A: Yes.

62 Q: How long did this conversation last?

63 A: About 10 minutes.

64 Q: Para 8 - last sentence - "the first defendant confirmed...our written offer was thereby accepted... However, he volunteered...delivery...Since I was waiting for...I did not arrange..." Did Christopher Tan tell you that your offer is accepted?

65 A: He told me that he obtained his Head Office approval.

66 Court: Do I take it that he did not tell you in so many words that he accepted your company's offer?

67 A: Yes. He told me that Head Office had approved.

68 Q: You stated "our written offer was thereby accepted".

Was that your conclusion?

69 A: No. He said Head Office had approved and that he was accepting the offer. He said so.

70 Q: But just a few moments earlier, you told the court that he did not say in so many words that he was accepting the offer?

71 A: He did say.

72 Court: Why didn't you say so in your affidavit - para 8?

73 A: He only said he got Head Office approval. He did not say, for e.g. "The deal is on. I'm glad I got Head Office approval and we can sell you the machinery now".

74 Court: To be fair to you, I know your lawyer drafted this - what was the reason/basis for you to say: "our written offer was thereby accepted."?

75 A: He did tell me over the phone that our offer was accepted.

76 Court: Why didn't you say so in your affidavit? Alright Ms Lim please tell the court what was said exactly between you and Christopher Tan at about

12.30pm on 29 June 1994?

77 A: I called him on the phone at about 12.30pm. He told me that he had obtained his Head Office approval for our offer price of \$425,000. He told me that our

written offer was accepted. But he told me that he would follow up with a written offer

that evening. But he was not sure when the machinery could be delivered. I asked him. He

said there might be a provisional liquidator appointed after 6 July 1994. He told me that

if the liquidator is the same as the judicial manager then the machinery could be released

quite fast. He also told me that if a different party takes over then it might take quite

some time to proceed.

78 Q: From this conversation was it clear to you that plaintiffs could not take delivery of the machinery on 6 July 1994?

79 A: He mentioned he was not very sure when the machinery would be delivered.

80 Q: Did he tell you when he could deliver?

81 A: No.

82 Q: Did he indicate the approximate delivery date?

83 A: No.

84 Q: When Christopher Tan told you that his Head Office approved, did he say that Head Office had approved the other terms and conditions?

85 A: No.

86 Q: Did he ask you to ask Mr Cheo to change the delivery date?

87 A: No.

88 Q: Did he ask you to ask Mr Cheo to agree to an extension of time for delivery of the machinery?

89 A: No. He didn't ask.

90 Q: Even if there has been approval given to sell you the machinery at \$425,000, there were other terms with defendants?

91 A: He didn't tell me the other terms and conditions.

92 Q: It is clear, is it not, that Christopher Tan told you that the second defendants could not deliver the machinery on 6 July 1994?

93 A: He said he was no sure. I was also not sure.

94 Q: Delivery date was an outstanding item?

95 A: Yes.

96 Q: Another outstanding item was that your company required delivery to be made on 6 July 1994 and not any other date?

97 Court: What is the reasonable basis for this question?

98 Mr Loh: I'm withdrawing the question.

99 Q: What was the purpose of Christopher Tan telling you about the delivery date?

100 A: He was not sure about the delivery date.

101 Q: Are you saying that Christopher Tan told you that price of \$425,000 was acceptable to his Head Office?

102 A: Yes.

103 Q: But that he could not comply with your company's other terms?

104 A: Yes, because he was not sure when the machinery could be delivered.

105 Q: He never told you he could deliver on 6 July 1994?

106 A: Yes. He told me he was not sure of the delivery date.

107 Q: Did he then say that because of this the second defendants were not able to give an answer to your offer?

108 A: No. He already told me his Head Office had agreed."

109 **(b) The defendants' case**

110 28 The evidence of the first defendant can conveniently be resumed from the time he was about to leave the plaintiffs' premises on 28 June 1994.

After Mr Cheo had handed him the offer, Mr Cheo again told the first defendant that his

offer would only be open until 12 noon on 29 June 1994 and that the second defendants had

to revert by then. Mr Cheo added that if the second defendants did not accept the offer by

that time and tried to negotiate again, he (Mr Cheo) would make a lower offer. Mr Cheo saw

the first defendant off at the car park where he reiterated that if the second defendants

did not accept the offer and reverted at a later date, he (Mr Cheo) would make a lower

offer.

111 29 From another customer's office he called Mr Gerald Mah that he had received the written offer from the plaintiffs of \$425,000 with the payment

terms

being 10% upon acceptance and the balance to be paid before delivery.
Otherwise, he didn't

go into the other terms of the offer. He further stated that the offer was valid
until 12

noon on 29 June 1994. Whether he had said so in such definite terms as recited
in his

affidavit evidence in chief is a matter I will deal with at the appropriate time.

112 30 Mr Gerald Mah told him that he would discuss with his head

office. That turned out to be Mr David Murdoch, an assistant director of the
Royal Bank of

Scotland plc who were majority shareholders of the second defendants and
responsible for

all aspects of the second defendants' management. Mr Gerald Mah further
indicated that

after his discussion with head office he would discuss the plaintiffs' offer with
the

first defendant on the morning of 29 June 1994.

113 31 According to the first defendant, Mr Richard Lim of Rim Engineering, the other interested party, requested the second defendants to delay the sale

as he wanted to persuade his Thai principal to raise the initial offer of \$400,000. He

told him that he was unable to delay the sale and advised him to put in a written offer as

soon as possible.

114 32 Mr Gerald Mah was busy in the morning of 29 June 1994 and the first defendant only started discussion with him late in the morning. Mr Gerald Mah at the

outset mentioned that head office was agreeable in principle to sell at the price of

\$425,000. He studied the offer and realised that delivery of the machines was required on

6 July 1994 subject to the discharge of the judicial managers. He explained to the first

defendant that although the judicial managers were due to be discharged on 6

July 1994, it

was unlikely that the second defendants could obtain physical possession of the machines

on the very same day so as to be in a position to effect delivery to the plaintiffs. He

pointed out that the consents of the substitute provisional liquidator and Devon's

mortgagee for the release of the machines were also required. The discussion ended past 12

noon and Mr Gerald Mah instructed the first defendant to call the plaintiffs to inform

them that the second defendants were unable to reach a decision.

115 33 At about 12.30 pm the first defendant telephoned Amelia and

informed her that the second defendants were not able to give her an answer to the

plaintiffs' offer as the second defendants had to seek the advice of the judicial managers

and of their own lawyers. He also briefly mentioned that the second defendants would not

be able to effect delivery on 6 July 1994 due to the fact that a provisional liquidator

would be involved. He said that he "believed" that the plaintiffs' written offer had lapsed.

116 34 In the meantime, he was continuing negotiations with Mr Richard Lim. Rim Engineering made a written offer and the second defendants agreed to sell the machines at \$442,900 (inclusive of GST) on the basis of "as is/where is".

The second defendants sold the machines to Rim Engineering in the evening of 29 June 1994.

The sale was subject to clearance by the provisional liquidator which "would be obtained no later than three months" from 29 June 1994. Rim also paid cash \$100,000 "as non-refundable deposit".

117 35 The first defendant telephoned Ms Amelia Lim on the morning of 30 June 1994 and informed her that "the second defendants would not be accepting the

plaintiffs' offer dated 28 June 1994." She replied that Mr Cheo would not be happy

and he requested her to explain the position to Mr Cheo upon his return to Singapore.

118 36 The evidence of the first defendant and Mr Cheo as to what had transpired between them when Mr Cheo called on 5 July 1994 were conflicting. I need not

recite them as the exchanges had happened long after 29 June 1994.

119 37 Mr Gerald Mah confirmed in evidence what the first defendant said in court. Mr Murdoch confirmed that he was informed of the negotiations with the

plaintiffs and their offer. He said that he had given "in principle" approval to

Mr Gerald Mah. That meant between them that Mr Gerald Mah could accept the offer if all

the other terms and conditions were acceptable to him. His contemporaneous notes reminded

him that he was told that the offer had a deadline and that the offer contained other

terms which the second defendants could not comply.

120 **The findings**

121 38 I should address the issue whether the plaintiffs' offer was made on the condition that it was open for acceptance by 12 noon 29 June 1994, as the

first defendant asserted in evidence. On this issue, I accept the submissions of counsel

for plaintiffs, Mr Cheong Yuen Hee, that the offer was not subject to condition. I agree

that the first defendant's assertion was wrong. In my view, he was mistaken in believing

that there was such a condition imposed by Mr Cheo. I am of the view that Mr Cheo did not

intend to impose the condition. All he intended in saying what he had said to the first

defendant, whose version thereof I accept, was to apply some pressure on the second

defendants to respond as soon as possible. Mr Cheo also did not want the second

defendants

using his offer to obtain higher prices from other interested parties. In any event, the

first defendant did not make any response to Mr Cheo's remarks.

122 39 There remains the central issue whether the first defendant

had in the telephone conversation with Ms Amelia Lim on 29 June 1994 accepted the

plaintiffs' offer. On the evidence, I find that there was no acceptance of the offer, let

alone unconditional and clear acceptance of the offer. Ms Amelia Lim's evidence was

equivocal on this crucial issue. She was tentative in the witness box because she could

not point to any words of acceptance uttered by the first defendant. She asserted the

conclusion that the offer was "thereby accepted". The first defendant did not

tell her in so many words that the second defendants were accepting the offer. In this

respect, I accept the evidence of the first defendant. He told her the second plaintiffs

were not able to give an answer to the plaintiffs' offer. He did mention the outstanding

matters. He was forthright and I found him and his evidence reliable. He struck me as a

very careful man. He stood up well to searching cross examination by Mr Cheong Yuen Hee.

The first defendant could have said that head office had given in principle approval to

the price but this was not acceptance of the plaintiffs' offer.

123 40 It was also true that the second defendants were in no

position to accept the offer. They could not or were apprehensive that they would not be

able to deliver on 6 July 1994, as required. The consent of the provisional liquidator had

to be obtained as a matter of expediency.

124 41 If in fact the offer was accepted the question naturally
arises as to why Ms Amelia Lim had not taken any steps to procure the 10%
deposit and
tender it.

125 42 Since I have come to the conclusion that the second defendants
had not agreed to sell the machines to the plaintiffs, I need not deal with the
extensive

evidence led on damages. The plaintiffs' claims are dismissed with costs.

126 Sgd: LAI KEW CHAI J

127 [Judge]

128 Singapore,

129 28 October 1997.

Lai Kew Chai J

Cheong Yuen Hee (Counsel) with Lai Swee Fung and Sim Lin Piah
[Toh Tan & Partners] for the plaintiffs

Containers Printers Pte Ltd v Christopher Tan and Another

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Loh Boon Huat and Alan Loh Yong Koh [Godwin & Co] for the
defendants
