Stahltec Metallhandels GmbH v Chuan Ann Metals Pte Ltd and Others
[2005] SGHC 46

Case Number : Suit 1249/2003

Decision Date : 02 March 2005

Tribunal/Court : High Court

Coram : Choo Han Teck JC

Counsel Name(s) : Lim Tong Chuan (Loo and Partners) for the plaintiff; Lee Eng Beng and Meah Tze Hua (Rajah and Tann) for the second and third defendants

Parties : Stahltec Metallhandels GmbH — Chuan Ann Metals Pte Ltd; Wee Aik Guan; Tam Chee Chong

Companies – Receiver and manager – Duty of receiver and manager

Contract – Contractual terms – German law governing contract – Whether retention of title clause validly incorporated -Whether retention of title clause transparent, clear and comprehensible – Whether English translation of retention of title clause constituted valid notice

Tort – Conversion – Plaintiff's contract with first defendant containing retention of title clause – First defendant not paying bills – First defendant put into receivership – Whether receivers and managers committing conversion by selling goods in custody to third party – Whether receivers and managers liable for storage costs of goods in plaintiff's possession pending outcome of trial

2 March 2005

Choo Han Teck J:

1 The plaintiff is a company incorporated and having its registered office in Germany. It was at all material times the manufacturers of rolled steel which it sold and supplied to its customers, one of whom was the first defendant. The first defendant was subsequently placed under receivership by one of its creditors, the Oversea-Chinese Banking Corporation ("OCBC Bank"). The second and third defendants were the receivers and managers appointed by OCBC Bank. The plaintiff obtained judgment against the first defendant for breach of contract on account of unpaid bills.

2 The claim against the second and third defendants ("the other defendants") was for damages for the tort of conversion. The plaintiff's claim was based on a retention of title clause in the contract between it and the first defendant. By 26 January 2003, the other defendants had sold all the goods in their custody to a third party, but prior to that had released a portion to the plaintiff. This portion represented the goods identified in a joint inspection by the plaintiff and the other defendants ("the disputed goods"). The plaintiff claimed that apart from the disputed goods, the total goods converted were valued at €255,000 as at 26 November 2003, but prices for steel had since risen and the value claimed was now €331,000. The plaintiff was also claiming storage costs of the disputed goods, on the ground that it was unable to sell the goods because of the other defendants' objections. The storage charges claimed amounted to $200,287.62, being $22,254.18 a month for nine months. The plaintiff was also claiming a sum of $5,037.23 for some other steel sold by the other defendants in November 2003.

3 The other defendants denied that the retention of title clause was a valid clause in the contract. Their defence was two-fold. Firstly, they argued that the clause was not validly incorporated into the sale contracts. Secondly, they argued that even if the said clause had been incorporated, it was not applicable because the clause was not "transparent, clear and comprehensible". In the first case, Mr Lee Eng Beng, counsel for the defendants, submitted that the

contract was a standard-form contract, and had not been validly notified to the first defendant in a commonly understood language, as required under German law. He submitted that the English version that the plaintiff produced as proof of notification, was, in fact, lifted from another contract to which the first defendant was not a party. Moreover, it was plagiarised from another German supplier's standard form.

4 The contract in question between the plaintiff and the first defendant was in the German language and signed on 16 August 1999. The relevant part of the retention of title clause in the English version purportedly given to the first defendant reads as follows:

> 1. All goods delivered shall remain our property (goods in which title is retained) until all accounts receivable from Purchaser are settled. This shall also apply to future and conditional claims, *eg* from acceptor's bills of exchange.
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> 2. Machining and processing of the goods in which title is retained shall take place on our behalf as our being the manufacturer in the meaning of Art 950 BGB (Civil Code), without any obligation on our part deriving therefrom. The machined and processed goods shall be deemed to be goods in which title is retained in the meaning of para 1.
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> 3. If the goods in which title is retained are processed, combined and mixed with other goods by Purchaser, we shall have joint title to the resultant merchandise, proportionally in the amount of the invoiced value of the goods in which title is retained. If by such combining, mixing or processing our title ceased to exist, Purchaser shall hereby assign to us the proprietary/prospective rights to which Purchaser is entitled in the new products, proportionally in the amount of the invoiced value of the goods. In such case Purchaser shall keep the new products in custody for us free of costs. In proportion to our co-ownership rights the new products shall be deemed to be goods in which title is retained as defined under para 1.

5 According to the plaintiff's Mr Holzapfel, the English version was only given in or about December 2001. There was no dispute that German law governed the contract and both sides called expert evidence in respect of that law. The plaintiff relied on Dr Christof Siefarth, and the defendants on Miss Birgitta von Dresky. The two German lawyers agreed that the contract in question was a standard-term contract and it was further agreed that in such contracts, the party who produced the standard terms was obliged to give the other party a reasonable opportunity to note the contents of the terms. The evidence of German law that was not in dispute is that the "text of standard form conditions has to be presented in the language of negotiations or in a world language by the presenter only if the opposing party explicitly requested to do so". This is itself a translation of the Court of Appeals of Naumburg's decision of 19 June 2003 (File No 2 O 68/02, published: NJOZ 2004, vol 01, p 14).

6 However, Dr Siefarth stated that the right to notification applied only before the parties had concluded the contract. Mr Lee Eng Beng, counsel for the defendant, accepted that this was so, but his argument was that the disputed goods were not sold in a single contract, but a series of contracts. Each sale was thus a separate contract. In this regard, he did not accept Dr Siefarth's opinion that the contract document in question provided a "framework agreement" under which all the sales were carried out. Miss von Dresky also disagreed with Dr Siefarth. Her opinion was that the contract in question was a standard-form contract and not a "framework agreement".

7 The proper English version of the relevant clauses, according to Miss von Dresky,[1] should be as follows:

1. All goods delivered shall remain our property ("Goods in which Title is Retained") until all accounts receivable, in particular also the respective balance in our favour regardless of its cause in law, are settled. This shall also apply if payment is made in regard to specifically designated claims.

2. Machining and processing of the Goods in which Title is Retained shall take place for us as the manufacturer in the meaning of Act 950 BGB (German Civil Code), without any obligation on our part. The agreed goods are deemed to be Goods in which Title is Retained in the meaning of paragraph 1. If the Goods in which Title is Retained are processed, combined and mixed with other goods by purchaser, we shall have joint title to the new goods, proportionally in the amount of the invoiced value of the Goods in which Title is Retained to the amount of the invoiced value of the other goods used. If by such combining or mixing our title ceases to exist, purchaser hereby assigns to us already now the proprietary rights in which purchaser is entitled to in regard to the new situation or the goods, proportionally in the amount of the invoiced value of the Goods in which Title is Retained and shall keep the same in his custody for us free of charge. The co-ownership rights resulting therefrom shall be deemed to be Goods in which Title is Retained in the meaning of paragraph 1.

3. Goods in which Title is Retained may only be resold by purchaser in the normal course of his business on his normal terms and conditions and only as long as he is not in default, always provided that:

a) the claims from the resale shall be assigned to us according to paras 4 to 6. He shall not be entitled to dispose in any other way of the Goods in which Title is Retained, or:

b) that he agrees with his purchaser a retention of title and that the claims from the resale shall be assigned to us according to paras 4 to 6. He shall not be entitled to dispose in any other way of the Goods in which Title is Retained.

4. All claims of purchaser from the resale of Goods in which Title is Retained are hereby already now assigned to us. They shall serve as collateral to the same extent as the Goods in which Title is Retained.

5. If the Goods in which Title is Retained are resold by purchaser together with other goods, not sold by us, the claim from the resale shall be assigned to us proportionally in the amount of the invoiced value of the Goods in which Title is Retained. In the case of resale of goods in which we have co-ownership rights in accordance with paragraph 2, we shall be assigned a part of the claim in the amount of our proportion of co-ownership.

6. In such case that purchaser uses the Goods in which Title is Retained to perform contracts for works or contracts for works and materials, paragraph 4 and 5 shall apply in regard to the claims resulting out of such contract.

7. Purchaser is entitled to collect claims resulting from the resale according to paragraph 3 and 6 unless we revoke this authorisation which we are entitled to do at any time. We will make use of our right to revoke only in the cases mentioned in paragraph A II 6. Purchaser shall in no event be authorised to assign the claims. At our request and unless we do so ourselves, purchaser shall notify his purchasers immediately of the assignment to us and furnish us with the information and records required to effect collection of payment.

8. If the value of the existing collateral exceeds the secured accounts receivable by more

than 10% in total, we shall be obliged, at purchasers' request, to release collateral in the appropriate value according to our choice. In case of seizure of property or other interference by third parties purchaser shall inform us immediately.

8 I would note that the reference to "framework agreement" appears to be a reference to a technical legal term of which details were not given; but for the reasons following, I am of the view that it was not crucial to me in this case. I find that the intention of the parties was to enter into an indefinite term of dealing in which the plaintiff would sell and supply metal pipes to the first defendant as and when the latter places an order. Further, the parties agreed that the terms of the German contract document would bind the parties in such sale and supply. If by a "framework agreement", Dr Siefarth meant it in this sense, then I would accept the written document to be a "framework agreement". Assuming, for the moment, that notice of the retention clause was necessary, the issue thus concerned the adequacy of notice. In this regard, the question was whether the English version given to the first defendant was an adequate translation. Comparing the two, I am of the view that although the translations differ, as translations often do, the critical term was sufficiently clear, and that the first defendant would not be left in doubt as to whether the plaintiff retained title unless it was paid. Business between them thus proceeded on that basis and understanding.

9 I now turn to the next major issue in the trial, namely, whether the other defendants interfered with the plaintiff's goods, and converted them. The other defendants were notified of the plaintiff's claim under the retention of title clause on 21 November 2003. As a result, the other defendants took steps to identify the goods that belonged to the plaintiff. This was not easy because the first defendant had purchased such goods from other suppliers as well. Furthermore, the other defendants were not familiar with the goods, which were not distinctly marked out. The plaintiff made two inspections. The first was on 28 November 2003 and the second on 22 December 2003. The 28 November 2003 inspection was carried out by Mr Holzapfel and one James Ooi without prior arrangements with the other defendants. They sprayed paint on those pipes that they thought belonged to the plaintiff, but there was no verification by the other defendants or any independent person of the accuracy of this exercise. When the other defendants protested that the identification was inaccurate because the plaintiff had used marks identical to that found on the pipes of other suppliers, a joint inspection was held on 22 December 2004. This inspection was aborted and the plaintiff requested for a fresh date to complete the inspection. This was eventually done on 14 and 16 January 2004. A letter from the other defendants to the plaintiff dated 14 January 2004 set out some of the basis upon which the joint inspection was to be carried out. The identification of the goods would be done by the plaintiff's representative based on the packing lists or invoices provided by him. The goods identified would be segregated from the rest of the first defendant's goods. The inspection proceeded thus, after which, a "Final List" of the disputed goods was drawn up jointly by the other defendants' representative, Justin Lim, with Low Ai Kok, a director of the first defendant, and James Ooi, on behalf of the plaintiff. I accept the other defendants' evidence that the "Final List" represented the full identification of the disputed goods. It was only on 9 March 2004 that James Ooi deposed in an affidavit in reply that the "Final List" was not final because it was subject to verification by Mr Holzapfel.

10 I am of the view that the other defendants had acted properly and reasonably in response to the plaintiff's claim over the disputed goods. I am thus persuaded that the "Final List" was an agreed inventory of the goods identified. No reason or evidence was given to suggest that either the list or the inspection of 14 and 16 January 2004 was incomplete. Consequently, it was reasonable for the other defendants to dispose of the other goods in discharge of their duties and functions as receivers, and there being no evidence that those goods belonged to the plaintiff, there was no conversion by the other defendants in respect of those goods. So far as the disputed goods were concerned, they were handed over to the plaintiff by consent pending the outcome of the trial. I am

of the view that the other defendants had acted properly and reasonably in respect of the disputed goods at all times. They were under a duty as receivers to protect the goods of the first defendant and, until they could properly ascertain the ownership of those goods, they were entitled to assume that they belonged to the first defendant since the goods were in the first defendant's premises. A claimant must satisfy the receivers with reasonable evidence of ownership, and until then, the receivers are obliged to retain possession of the goods.

11 Since the other defendants were unable to prove or otherwise dispute the goods identified by James Ooi as being the plaintiff's goods, I allowed the goods in the "Final List" to be returned to the plaintiff. In respect of the plaintiff's claim against the other defendants for conversion, that claim failed for the reasons I have set out in the preceding paragraph. The plaintiff's claim for storage charges in respect of the disputed goods also failed. Mr Lim argued that the plaintiff was forced to keep the goods because the defendants were challenging the plaintiff's title on the ground that the retention of title clause was not incorporated into the contract. An interim order for sale could have been made. And the plaintiff had only to ask for it. There was no reason for the other defendants to keep the goods either. I do not see how the plaintiff can justify not taking any action to dispose of the goods if it felt that that was necessary to avoid expensive storage charges.

12 For the reasons above, I dismissed the plaintiff's claim for conversion, but allowed its claim for the return of the disputed goods in the "Final List". The defendant's counterclaim was dismissed.

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[1]Page 22 of Birgitta von Dresky's affidavit of evidence-in-chief filed on 19 October 2004