Panwah Steel Pte Ltd v Burwill Trading Pte Ltd
[2006] SGCA 34

Case Number : CA 7/2006

Decision Date : 18 September 2006

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; Tan Lee Meng J

Counsel Name(s) : Alvin Yeo Khirn Hai SC and Chua Sui Tong (Wong Partnership) and Chong Siew Nyuk Josephine and Aqbal Singh A/L Kuldip Singh (UniLegal LLC) for the appellant; Gurbani Prem Kumar and Yee Weng Wai Bernard (Gurbani & Co) for the respondent

Parties : Panwah Steel Pte Ltd — Burwill Trading Pte Ltd

Commercial Transactions – Sale of goods – Breach of contract – Damages for breach of contract – Appropriate measure of damages for breach of contract by non-delivery of goods

Contract – Contractual terms – Conditions – Appellant buying rebars from respondent and selling to third party for use in construction project – Condition of agreement for sale of rebars from respondent to appellant that supply of rebars "shall be as per the progress requirement of the project" – Whether respondent entitled to cease supplying rebars to appellant due to appellant's non-compliance with condition

Words and Phrases – "Available market" – Section 51(3) Sale of Goods Act (Cap 393, 1999 Rev Ed)

18 September 2006 *Judgment reserved.*

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 The respondent, Burwill Trading Pte Ltd ("Burwill"), is a supplier of steel reinforcing bars ("rebars") and is part of the Natsteel group of companies. The appellant, Panwah Steel Pte Ltd ("Panwah"), is a stockist, trader and exporter of rebars. It purchases rebars from suppliers like Burwill and then resells the rebars to contractors for various construction projects and export markets. Burwill supplied rebars to Panwah under the following contracts:

(a) the Changi Agreement C020483(3) dated 23 May 2002;

(b) the First Term Contract C030107 dated 11 March 2003;

(c) the Second Term Contract C030626 dated 4 December 2003;

(d) the Yung Sheng Agreement C030520 dated 10 October 2003;

(e) the First Burmese Agreement C040283 dated 18 June 2004; and

(f) the Second Burmese Agreement C040329 dated 2 July 2004.

2 Burwill had sued Panwah for moneys in respect of unpaid rebars supplied by Burwill to Panwah under the Changi Agreement, and the First and Second Term Contracts. Panwah admitted Burwill's claim for the sum of $1,394,953.65. On the other hand, Panwah counterclaimed against Burwill for

damages in respect of Burwill's short deliveries under the Changi Agreement, the Yung Sheng Agreement, and the First and Second Burmese Agreements. The trial judge ("the judge") dismissed Panwah's counterclaims. On appeal, Panwah did not contest the judge's dismissal of its counterclaims for the Yung Sheng Agreement and only appealed on certain issues concerning the Burmese Agreements and the Changi Agreement.

The Burmese Agreements

3 Under the First Burmese Agreement, Burwill had agreed to supply 2,000mt (metric tonnes) of rebars (+/- 10%) to Panwah for the purposes of export to Burma. Burwill only delivered 1,212.258mt out of its minimum obligation to deliver at least 1,800mt out of 2,000mt, leaving an undelivered quantity of 587.742mt. Under the Second Burmese Agreement, the agreed quantity was 980mt for the same purposes. According to Panwah's submissions on appeal,[note: 1] Burwill left 165mt undelivered under this second agreement. (We note that this is a lower figure than that initially used by Panwah in its re-amended defence and counterclaim, which was 275mt.) Panwah is appealing against the judge's decision on the loss and damage as a result of Burwill's short delivery under the Burmese Agreements.

The Changi Agreement

4 The Changi Agreement involved the sale of 39,000mt of rebars from Burwill to Panwah. Panwah was acting as a middleman to supply the rebars to Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd ("Koh Brothers"). Koh Brothers was the main contractor of a proposed Changi Water Reclamation Plant C3A at Tanah Merah Coast ("the C3A project"). The supply of rebars under the Changi Agreement was for the duration of one and a half years from 1 June 2002 to 31 December 2003. However, the agreement between Panwah and Koh Brothers ("the KB Agreement") was for two years from 30 June 2002 to 30 June 2004.

5 In December 2003, Panwah asked Burwill for a six-month extension to the Changi Agreement up to 30 June 2004 in order to make it of the same duration as the KB Agreement. At an 8 December 2003 meeting, Burwill requested that Panwah obtain written confirmation from Koh Brothers that the KB Agreement was indeed until 30 June 2004. Such confirmation was duly obtained and Burwill agreed to the extension at the prevailing prices in a telefax dated 15 December 2003. The telefax also contained a stipulation that the supply "shall be as per the progress requirement of the project" ("the Condition"). This Condition was included because Burwill wanted to ensure that all the rebars ordered by Panwah would be used in the C3A project and that Panwah could not take advantage of the soaring prices of steel and resell the rebars for a profit on the open market. There was some dispute whether Panwah had actually agreed to the Condition, but during the course of the trial Panwah accepted that it had.

6 In 2004, the amount of rebars ordered by Panwah was increasing dramatically and Burwill became suspicious of this. When Burwill's representatives visited the C3A site, they noticed that unused rebars were being stored. Burwill began to suspect that Panwah was attempting to stockpile the rebars in contravention of the Condition and consequently ceased delivery of the rebars on 25 June 2004. This was followed by a formal notification of cessation dated 1 July 2004. At that time, the undelivered balance was about 8,100mt ("the Shortfall"). However, the C3A project did not require the Shortfall, because Koh Brothers had earlier redeployed a surplus of 11,764.079mt of rebars from another site to the C3A project. Koh Brothers nonetheless wanted Panwah to deliver the Shortfall under the KB Agreement because it wanted to replenish its own stocks. Both Burwill and Panwah were apparently unaware of Koh Brothers' intentions. Panwah was unable to satisfy Koh Brothers' demands because of Burwill's cessation of supply. As a result, Koh Brothers withheld

payment of about $1.4m for the rebars already delivered and claimed damages of $3m against Panwah. The action was heard by the judge along with Burwill's counterclaim against Panwah. Judgment was given against Panwah and Panwah's appeal against the judge's decision in *Panwah Steel Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2006] 1 SLR 788, is the subject of another appeal before this court (*Panwah Steel Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2006] SGCA 35).

7 In the instant case, Panwah is appealing against the judge's decision not to grant a declaration that Panwah was entitled to an indemnity from Burwill in respect of all claims by Koh Brothers against Panwah arising out of Burwill's short delivery under the Changi Agreement (see *Burwill Trading Pte Ltd v Panwah Steel Pte Ltd* [2005] SGHC 234 (hereafter referred to as "GD")).

8 In so far as the Burmese Agreements are concerned, it was *conceded* by Burwill that it had *not* pleaded cl 14.7 of its Standard Terms and Conditions of Sale ("Standard Terms"). In the circumstances, given (as we shall see) the judge's holding that Burwill was not liable with respect to these Agreements only because of the operation of cl 14.7, there is a remaining issue as to the quantum of damages that ought to be awarded to Panwah, and which we will deal with in a later part of this judgment.

The issues canvassed before this court

9 There were in fact three main issues canvassed in some detail before this court, bearing in mind that what was at issue before this court revolved around Panwah's counterclaim against Burwill for non-delivery of rebars under the Changi Agreement (Panwah having, as we have seen, accepted liability for $1,394,953.65 with respect to Burwill's claim against it).

10 The first main issue centred on whether or not Burwill was entitled to cease the supply of rebars under the Changi Agreement as Panwah had failed to comply with the Condition.

11 The second main issue centred on whether or not Panwah had, in any event, exceeded its contractual credit limit under the Changi Agreement, thus entitling Burwill to cease the supply of rebars to Panwah.

12 The third main issue centred on the quantum of damages that ought to be awarded to Panwah with respect to the Burmese Agreements.

13 We will deal with each of these issues *seriatim*.

The Condition

14 As we have seen above, the supply of rebars from Burwill to Panwah under the (extended) Changi Agreement was subject to the Condition that such supply "shall be as per the progress requirement of the project".

15 It was Panwah's argument that the issuance of its purchase orders upon the receipt of Koh Brothers' purchase orders would satisfy the Condition. The judge rejected this argument on the basis that there had to be "something more than the subjective word of Koh Brothers" in order for the Condition to be fulfilled (see GD at [14]).

16 Counsel for Panwah, Mr Alvin Yeo SC, argued, however, that the contractual context and surrounding circumstances in fact mandated a contrary result. In particular, he argued that Burwill

was perfectly aware of Koh Brothers – and *vice versa*. It was clear, Mr Yeo argued, that all parties concerned (*viz*, Burwill, Panwah and Koh Brothers) were aware that there was a back-to-back supply arrangement, comprising the present contract (between Burwill and Panwah) and the KB Agreement.

17 Indeed, Mr Yeo argued, further, that these two contracts were in fact "mirror images" of each other – save for the fact that there had, originally at least, been a difference in the supply duration. The KB Agreement was scheduled to last for two years (from 30 June 2002 to 30 June 2004), whereas the contract in the present proceedings was scheduled to last for one and a half years (from 1 June 2002 to 31 December 2003). This necessitated, according to Mr Yeo, the six-month extension referred to above (at [5]). He also referred, in some detail, to the relevant correspondence between Panwah and Burwill regarding the six-month extension, culminating in the letter from Burwill to Panwah dated 15 December 2003, which not only granted the extension but also contained the Condition. The material portions of this letter read as follows:[note: 2]

> CONTRACT FOR *C3A CHANGI WATER RECLAMATION PLANT*
>
> RE: EXTENSION OF CONTRACT DURATION TILL JUNE 2004 FOR CONTRACT C020483
>
> …
>
> 1. We are pleased to inform that the management [of Burwill] has *agreed to extend supply of reinforcement bar to Changi Water Reclamation Plant, C3A till June 2004 under the terms and conditions stated in the existing contract C020483*.
>
> 2. Supply of materials shall be *as per the progress requirement of the project*.
>
> 3. As such, the banker's guarantee of $500,000, which follows contract C020483 is to be … extended till June 2004.
>
> 4. This extension will be made valid upon receipt of the formal documents stating the approval of the banker's guarantee by the relevant bank authorities.
>
> 5. We look forward to your response, thank you.
>
> [emphasis added]

18 Burwill had argued that para 2 of the letter (reproduced in the preceding paragraph) was a new and independent condition, which therefore provided for Burwill to assess and analyse the requirements of Panwah. In other words, the mere "subjective word of Koh Brothers" would not suffice – an argument which, as we have seen (at [15] above), was accepted by the judge.

19 Mr Yeo argued, however, that para 2 of the letter was *not* a new and independent condition but, rather, merely reiterated the original purpose of the project. He further argued that, in any event, the interpretation advanced by Burwill was not commercially workable.

20 We are of the view that Mr Yeo's arguments are to be preferred. It was clear that Burwill and Panwah did not discuss or unpack the details of the progress requirement in para 2 of the letter at the time the extension was agreed to. Up to that particular point in time (*ie*, prior to the extension of the contract between the parties), the detailed analysis argued for by Burwill (and accepted, as we have seen, by the judge) did not exist. We agree with Mr Yeo that if such a radical change were contemplated, it would indeed have been expressed in clearer terms. In our view, the letter of

extension of 15 December 2003, in the context of the surrounding circumstances taken as a whole, demonstrated the intentions of both Burwill and Panwah to rationalise the supply durations between the Changi Agreement and the KB Agreement. Indeed, the very heading as well as para 1 of this particular letter refer, in no uncertain terms, to the C3A project. Almost one and a half years had already elapsed. In the light of the very general language of para 2 of this letter, it is unlikely that the parties had intended any radical change to the existing practice – at least not in the manner that Burwill had contended for.

21 It is true that counsel for Burwill, Mr Gurbani Prem Kumar, argued that the KB Agreement had not been entered into at the same time as the Changi Agreement, but a week later. It is also true, as Mr Gurbani pointed out, that Panwah had entered into the KB Agreement (which stipulated a supply period of two years) with full knowledge that the Changi Agreement was for one and a half years. We do not, however, find, with respect, that these arguments advance Burwill's case. The real issue, in our view, is one of *substance*. It is true that the respective timeframes (especially with regard to the respective supply periods) were not wholly in sync with each other. However, this was precisely why an extension of the Changi Agreement was required. It would therefore seem to be more probable than not that, in *substance* at least, there was a back-to-back supply arrangement, comprising the present contract (between Burwill and Panwah) and the KB Agreement.

22 In the circumstances, we would, with respect, differ from the decision of the judge with regard to this particular issue.

23 However, that does not conclude this appeal in favour of Panwah in so far as its counterclaim against Burwill under the Changi Agreement is concerned. In particular, we have to also consider whether or not Panwah had, in any event, exceeded its contractual credit limit, thus entitling Burwill to cease the supply of rebars to Panwah. And it is to this issue that our attention must now turn.

The credit limit

24 Mr Yeo referred the court to a great many documents to argue, *inter alia*, that the amounts with regard to the credit limit were not clearly expressed. He also argued against the alternative holding by the judge to the effect that there was an oral agreement between the parties that the credit limit would be reduced to $1.5m. Mr Yeo also pointed out that this agreement ought, in any event, to have been in writing.

25 We do not find, with respect, Panwah's arguments convincing. In our view, it was clear that Panwah had exceeded its contractual credit limit. We agree with the judge's analysis on this particular point, which was (if we may say so) both systematic and clear. We would just add that Panwah's argument to the effect that cl 2 of the Second Term Agreement had mistakenly utilised the figure of $1,500,000 instead of $800,000 was a bald assertion. In the circumstances, therefore, the judge's holding that this particular clause revised the previous global credit limit from $3,100,000 down to $1,500,000 instead is to be preferred.

26 We are also in agreement with the judge's alternative holding that there had been an oral agreement between the parties on 25 June 2004 that the credit limit would be reduced to $1.5m and that there had been a breach of this particular agreement. In this last-mentioned regard, we agree with Mr Gurbani that Panwah's argument to the effect that any revision to the credit limit must be in writing (pursuant to cl 2.2 of the Standard Terms) was not pleaded by Panwah and could not therefore now be argued because Burwill would, if this particular point had in fact been raised in the court below, have argued that the doctrine of waiver applied. Whilst, as Panwah argued, cl 2.2 was in fact in Burwill's re-re-amended reply and defence to counterclaim, this was by way of passing mention

only in the midst of other clauses that were quoted. More importantly, the role of cl 2.2 in *this* particular regard had never been raised by Panwah. This probably also explains why this objection by Panwah did not figure anywhere in the judge's decision. We also observe that what transpired between the parties on 25 June 2004 was a question of fact and credibility for the judge. He clearly found in favour of Burwill (see, especially, GD at [29] as well as at [33]–[35]), and we see no reason to interfere with this particular finding.

27 In the premises, we dismiss Panwah's appeal against the decision of the judge based on our findings on this particular issue.

The Burmese Agreements

28 This is not quite the end of the matter. In so far as the Burmese Agreements were concerned, the judge had found that Burwill would have been liable to Panwah for damages but for cl 14.7 of the Standard Terms (see GD at [58]–[60]). Clause 14.7 itself reads as follows:

> 14.7 The Seller shall not be liable for loss of profit, loss of use, loss of contracts, delay in construction of building projects, or any consequential, economic or indirect loss whatsoever and in particular (but without prejudice to the generality of the foregoing) the Seller shall not be responsible for any form of damages, liquidated or otherwise, imposed by developers on main contractors and/or sub-contractors, whether the Buyer is a main contractor or sub-contractor or otherwise.

29 However, Burwill has since *conceded* that cl 14.7 of the Standard Terms was *not pleaded*. It would appear, therefore, that Burwill would be liable to Panwah with regard to the Burmese Agreements. We would add that, quite apart from the issue of pleadings, such a clause would itself have raised, in principle, a number of other potential legal questions – turning, *inter alia*, on the construction of the clause at common law as well as the status of the clause under the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed). Curiously, none of these issues appeared to have been raised at the trial by counsel concerned. Fortunately, though, they do not now need to be considered by the present court. Indeed, the very raising of these questions would have engendered, in turn, a host of other difficulties centring around the question as to whether or not new points of law can be raised at this particular stage of the proceedings.

30 However, Burwill had *another* string to its legal bow: It relied on the judge's further holding to the effect that the damages to be awarded to Panwah were based on the Second Burmese Agreement and that, consequently, no damages were awardable under the Second Burmese Agreement as the contract price was the same as the market price, and that US$7,052.90 was awardable under the First Burmese Agreement (see GD at [71]–[72]).

31 Hence, everything turned on the *precise set of criteria* to be utilised in calculating the damages Burwill owed to Panwah. As we have just noted, Burwill relied on the Second Burmese Agreement. Panwah, on the other hand, argued that there was better evidence of market prices at the time of the breach in the form of either the International Enterprise Singapore's ("IE") prices (IE was formerly known as the Trade Development Board) or the Building and Construction Authority's ("BCA") prices. The judge in fact rejected both the IE as well as the BCA prices. He was of the view, first, that the IE figures were unhelpful because "there was no evidence that import prices were the same as prices for local delivery" (see GD at [67]). Secondly, he was of the view that the BCA figures were unhelpful because the Burmese Agreements were *export* contracts (see GD at [71]).

32 The salient provision is, in fact, s 51(3) of the Sale of Goods Act (Cap 393, 1999 Rev Ed),

which reads as follows:

> Where there is an available market for the goods in question, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered or (if no time was fixed) at the time of the refusal to deliver.

33 There does not – surprisingly perhaps – happen to be much guidance on what constitutes "an available market" for the purposes of the provision just quoted. In *Benjamin's Sale of Goods* (A G Guest gen ed) (Sweet & Maxwell, 6th Ed, 2002), for example, it was submitted (at para 16-062) that "the courts are likely to eschew formal limitations on the meaning of 'available market', especially in the light of the fact that the concept provides only a prima facie measure of damages which need not be applied whenever there is some justification for not doing so" (and citing, *inter alia*, the House of Lords decision of *Charrington & Co, Limited v Wooder* [1914] AC 71 at 82, where Lord Dunedin observed, "I cannot agree with the view that the term 'market' has any fixed legal significance."). In the same work, it is further observed thus (see *ibid*):

> The availability of buyers and sellers, and their ready capacity to supply or to absorb the relevant goods is the basic concept of an "available market": it is submitted that there is no need to add to this the test of a price liable to fluctuations in accordance with supply and demand, as occurs in official exchanges or certain commodity markets. A fixed market price may render [the provision] ineffective as a ground for substantive damages, but it should not make the term "available market" inapplicable. A fluctuating market price indicates the existence of an available market, but it should not be a necessary test: "there must be sufficient traders who are in touch with each other" [citing *ABD (Metals and Waste) Ltd v Anglo Chemical & Ore Company, Ltd* [1955] 2 Lloyd's Rep 456 at 466].
>
> The word "available" should be given both a temporal and a geographical meaning: the buyers or sellers should be immediately accessible and within a reasonable distance of the place where the breach of contract occurs.

34 Whilst furnishing some guidance, the principles set out in the preceding paragraph are nevertheless still rather general in nature (*cf* also *Benjamin's Sale of Goods* ([33] *supra*) at para 16-059). The relative dearth of guidance with respect to what constitutes "an available market" is perhaps due to the fact that this is very much a *factual* inquiry (see also the observation of Lord Dunedin in *Charrington & Co Ltd v Wooder*, cited in the preceding paragraph). For example, much would turn on the nature of the product concerned, the quantities involved, the available sources of supply, the timeframe involved as well as the prices and price movements – to take but a few of the more common factors. What this means, on a more general level, is that one has to be rather careful in citing past precedents – even where the same product is concerned. The citation of precedents for the purpose of drawing general principles for application to the facts at hand do not, of course, pose any difficulties. Difficulties, however, will arise when one attempts to cite a prior precedent in order to persuade the court to adopt the precise figures therein – or even figures which are close to it. This is not to state that the court will never apply a precedent in such a specific fashion. However, the facts would need to be virtually on "all fours" with the facts in the case at hand.

35 It seems to us that, given the very factual nature of the inquiry in situations such as that which exists in the present proceedings, *tangible evidence* is imperative. To this end, it seems to us that the reliance, by Panwah, on the BCA and IE figures was not as unpersuasive as the judge made it out to be. Indeed, both sets of figures were tangible ones; more importantly, they were derived from the *average* of prices from *many contracts*. This, in fact, speaks more of a market than reliance

on just a single price – which was, ironically perhaps, precisely the case when the judge relied upon the price of the Second Burmese Agreement.

36 It should also be noted that *Burwill's own director*, Mr Jonathan Soh, not only referred to Burwill's import prices during the months of February, June and July 2004 but also (and more importantly) stated that "these prices are *fairly close to those published by International Enterprise Singapore* [*viz*, IE]" [emphasis added].[note: 3]

37 Bearing in mind the reference in the preceding paragraph and the judge's own reservations expressed *vis-à-vis* the BCA prices, we are of the view that the IE prices ought to be taken as the yardstick for this particular set of proceedings. But we hasten to reiterate that, given the inherently (and intensely) factual nature of the present inquiry itself, this ought not to be taken as a yardstick in future cases.

38 Taking the IE prices as the reference point, and bearing in mind that the shortfall concerned to be 587.742mt for the First Burmese Agreement and 165mt for the Second Burmese Agreement, we find that Burwill should pay Panwah a total of $38,356.84. The breakdown is as follows. The contract price for the First Burmese Agreement is US$388 or $659.99 per mt (based on the exchange rate at the date of breach on 16 July 2004, which was US$1 = $1.701). The IE price for July 2004 is $715.42 per mt. For the Second Burmese Agreement, the contract price is US$400 or $680.40 per mt, using the same exchange rate. In the circumstances, this works out to the total just mentioned, with the further breakdown, as follows:

(a) First Burmese Agreement – $32,578.54

(b) Second Burmese Agreement – $5,778.30

Conclusion

39 In summary, although we find that Panwah was not in breach of the Condition, we find that it had nevertheless exceeded the credit limit and, in any event, had breached the agreement arrived at on 25 June 2004 with regard to its (Panwah's) undertaking to reduce its outstandings down to the credit limit of $1.5m. In the circumstances, therefore, we dismiss Panwah's appeal with respect to the Changi Agreement.

40 However, we allow Panwah's appeal with respect to the quantum of damages awardable in so far as the Burmese Agreements are concerned.

41 Finally, taking all the circumstances into account, we order Panwah to pay Burwill 40% of its costs.

[note: 1] See the appellant's case at para 79.

[note: 2] See the appellants' core bundle at p 138.

[note: 3] See affidavit of evidence-in-chief at para 67. See also generally *id* at paras 65–68.