

Highness Electrical Engineering Pte Ltd v Sigma Cable Co (Pte) Ltd
[2006] SGHC 114

Case Number : Suit 403/2005

Decision Date : 29 June 2006

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : Alvin Chang (M & A Law Corporation) for the plaintiff; Gan Kam Yui (Bih Li & Lee) for the defendant

Parties : Highness Electrical Engineering Pte Ltd — Sigma Cable Co (Pte) Ltd

Contract – Breach – Repudiatory breach – Plaintiff subcontractor contracting with defendant supplier for supply of goods at fixed prices and on dates determined by plaintiff – Defendant withholding delivery of goods to compel plaintiff to agree to increases in prices of goods such that delivery of goods delayed – Whether defendant's conduct amounting to repudiatory breach of contract – Whether plaintiff entitled to accept defendant's repudiation of contract

Contract – Remedies – Mitigation of damage – Defendant in repudiatory breach of contract to supply goods to plaintiff – Whether plaintiff obliged to mitigate loss suffered by such breach by accepting defendant's offer to continue to supply goods at original contractual prices

29 June 2006

Judgment reserved.

Tan Lee Meng J:

1 The plaintiff, Highness Electrical Engineering Pte Ltd ("Highness Electrical"), which specialises in installing electrical works in building projects, sued the defendant, Sigma Cable Company (Pte) Ltd ("Sigma"), which manufactures and supplies electrical cables, for loss arising from an alleged breach of a contract to supply the plaintiff with electric cables for one of its projects. Sigma denied breaching the contract in question and asserted that even if it did, most of the losses claimed by Highness Electrical were outside the ambit of the contract.

Background

2 In 2003, Highness Electrical was awarded a subcontract for the installation of electrical works at a building project in Toh Guan Road East ("the building project"). To fulfil its obligations in the building project, Highness Electrical entered into a contract on 17 December 2003 with Sigma for the supply of various types of electrical cables from December 2003 to 31 December 2005.

3 The relevant documents evidencing the contract in question are Highness Electrical's purchase order dated 8 December 2003, Sigma's letter dated 16 December 2003 and Sigma's confirmation order dated 17 December 2003. The total cost of the electric cables to be supplied under the contract was \$2,796,884.09, exclusive of goods and services tax. It is common ground that the electric cables were to be delivered progressively over a period of about two years until 31 December 2005 and that the prices quoted by Sigma for the electric cables were only valid until the end of December 2005, by which time the building project was supposed to have been completed. The purchase order issued by Highness Electrical, which was accepted by Sigma, provided that payment for goods ordered under the contract was to be made within 60 to 90 days and that the delivery dates for the goods ordered were to be advised by Highness Electrical.

4 Both Highness Electrical and Sigma had dealt with each other for many years before the contract in question was entered into. Initially, the parties had no real difficulties under the present contract although Highness Electrical was tardy in paying for goods ordered, until this problem was ironed out by 6 December 2004. However, when the price of raw materials for the required electric cables, such as copper and cathode, increased significantly, Sigma wanted to increase the prices for certain types of cables supplied to Highness Electrical and even sought to terminate the contract at an earlier date without just cause. According to Highness Electrical, Sigma deliberately withheld the supply of electric cables ordered by it in order to force it to agree to price increases, a charge denied by Sigma. On two occasions, in July and December 2004, Highness Electrical acceded to the price increases, which amounted to more than \$160,000.

5 What is clear is that by early February 2005, Sigma still had not delivered goods ordered several months before that date. Highness Electrical consulted its lawyers, M & A Law Corporation, who wrote to Sigma on 3 February 2005, alleging that the contract had been repudiated by the latter and that the repudiation was accepted by its client.

6 On 30 March 2005, Sigma altered its position and agreed to supply electric cables at the prices originally agreed upon in December 2003. According to Highness Electrical, the offer was irrelevant because it no longer had any confidence in working with Sigma and the latter tried to impose new unacceptable conditions for resuming the delivery of goods, including a "lead time" for manufacturing cables.

7 In June 2005, Highness Electrical instituted this action to recover damages for the loss it had suffered as a result of having to pay higher prices for the electric cables in question. At that time, it was purchasing electric cables that it required for the building project on a piecemeal basis from various sources. It was only in September 2005 that it entered into a contract with Keystone Cable (S) Pte Ltd ("Keystone") for the supply of electric cables yet to be delivered under its contract with Sigma. Needless to say, the prices under the contract with Keystone were significantly higher than those quoted by Sigma in its contract with Highness Electrical on 17 December 2003.

Whether Sigma repudiated the contract

8 As in many cases of this nature, the position of the party who claims to have accepted a repudiation by the other contracting party depends on whether that other party had committed a repudiatory breach in the first place. In this context, the following words of Buckley LJ in *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 WLR 361 ("*Decro-Wall International*") at 379–380, are worth noting:

Each party to an agreement is entitled to performance of the contract according to its terms in every particular, and any breach, however slight, which causes damage to the other party will afford a cause of action for damages; but not every breach, even if its continuance is threatened throughout the contract or the remainder of its subsistence, will amount to a repudiation. To constitute repudiation, the threatened breach must be such as to deprive the injured party of a substantial part of the benefit to which he is entitled under the contract.

9 As for what is required to deprive the innocent party of a substantial part of the benefit to which he is entitled under the contract, Buckley LJ added at 380 that the test is whether the consequences of the breach are such that "it would be unfair to the injured party to hold him to the contract and leave him to his remedy in damages as and when a breach or breaches may occur".

10 Buckley LJ's approach was endorsed by Lord Fraser of Tullybelton in *Federal Commerce &*

Navigation Co Ltd v Molena Alpha Inc [1979] AC 757 at 783 and has been adopted in local decisions: see *Kool Team Marketing v Pacific Sunwear Pte Ltd* [2002] 2 SLR 243 at [40].

11 Sigma certainly acted most unreasonably after the prices of raw materials for the electric cables required by Highness Electrical went up. Having contracted on 17 December 2003 to supply Highness Electrical specified electric cables at fixed prices until the end of 2005, it was neither obliged to reduce prices if the cost of raw materials went down nor entitled to increase prices when the cost of raw materials went up.

12 The first increase in prices demanded by Sigma was in relation to two types of XLPE/PVC electric cables measuring 500mm² and 1,000mm² in conductor size ordered by Highness Electrical under its delivery instruction No HE/DI/04/0037, which was issued on 7 April 2004. By mid-May 2004, only some of the electric cables ordered had been delivered. When Highness Electrical pressed for the delivery of the remaining electric cables, Sigma sought an increase in the prices for the outstanding cables. Under the contract, the agreed prices for cables measuring 500mm² and 1,000mm² were \$19.30 and \$38.50 per metre respectively. On 8 June 2004, Sigma informed Highness Electrical that the prices for the cables that had been ordered would be increased to \$25.50 for the 500mm² cables and \$51.60 for the 1,000mm² cables. Highness Electrical had a tight schedule to meet and was liable for delay in completion of its electrical work in the building project. It claimed that it acceded to the price increases only because it urgently needed the cables to complete its work. Only after the increase in prices was agreed to were the remaining electric cables delivered in late June and July 2004.

13 The second round of price increases occurred after Highness Electrical issued delivery instruction No HE/DI/04/0128 on 20 September 2004 for the delivery of two types of XLPE/PVC cables measuring 500mm² and 1,000mm² in conductor size by the first week of October 2004. Sigma did not deliver the cables despite repeated requests. On 18 December 2004, Sigma sent Highness Electrical a fax confirming that the prices for the goods would be increased from \$19.30 and \$38.50 per metre to \$25.50 and \$51.60 per metre respectively for the 500mm² and 1,000mm² XLPE/PVC cables. Highness Electrical claimed that it eventually agreed to pay more for the cables because it was in urgent need of them. The cables were then delivered on 20 December 2004 and 4 January 2005. After commencing this action, Highness Electrical discovered from Sigma's internal documents that the requested cables had been manufactured only after it had agreed to the price increases requested.

14 On 10 January 2005, Sigma made it plain in a letter to Highness Electrical that it was not going to fulfil its contractual obligation to supply electric cables at the prices agreed under their contract of 17 December 2003 and quoted new increased prices to Highness Electrical. The letter was as follows:

[D]ue to the current raw material price increased more than 100%, we are unable [to] meet the old price.

After review[ing] our long-term relationship, we will requote to you as follows:-

...

We hope you can understand our current situation and look forward [to] your acceptance of the above offer by [14/1/05] and the delivery date should be to reconfirm.

15 On 11 January 2005, Highness Electrical rejected the new prices in the following terms:

We regret to inform [you] that we are unable to accept your new pricing.

Kindly refer to your quoted prices as per Order Confirmation Number: 0301900L dated 17th December 2003. We have quoted our Main Contractor as per that pricing accordingly and are unable to raise any price increase as the Tender Sum had been agreed since then.

16 In view of the impasse, the delivery of goods to Highness Electrical was held up, putting it in a very difficult position *vis-à-vis* the main contractor. Highness Electrical complained that despite having agreed on two occasions to price increases, Sigma continued to delay deliveries of the goods ordered by it. From 22 October 2004 to 14 January 2005, Highness Electrical made further requests for deliveries of cables ordered in the following five delivery instructions:

<u>Date of delivery instruction</u>	<u>Delivery instruction no</u>	<u>Delivery date</u>
22 October 2004	HE/DI/04/0154	25 October 2004
22 October 2004	HE/DI/04/0156	25 October 2004
20 December 2004	HE/DI/04/0217	22 December 2004
13 January 2005	HE/DI/05/0008	1 February 2005
14 January 2005	HE/DI/05/0015	14 February 2005

17 Highness Electrical claimed that despite its repeated requests, Sigma did not deliver the ordered cables with the exception of items 3 to 10 of delivery instruction No HE/DI/04/0154 issued on 22 October 2004. It alleged that by 3 February 2005, none of the outstanding items had been delivered. Highness Electrical's director, Mr Hong Heng Peng, testified that Sigma's sales and marketing manager, Mr Yap Hock Chai, informed him that Sigma's general manager, Mr David Hahn, had instructed him to seek consent to the price increases before the cables that had been ordered would be manufactured. Neither Mr Yap nor Mr Hahn, who both wrote several crucial letters to Highness Electrical, were called by Sigma to rebut the evidence of Highness Electrical's witnesses or to shed any light on the issues raised by them.

18 Apart from delaying deliveries and demanding price increases, Sigma warned Highness Electrical on 23 December 2004 that the contract would be terminated unless it received a forecast of the electric cables required for the remaining period under the contract. Sigma added that after reviewing the current order by Highness Electrical, it would inform the latter "of the outcome". Why Sigma thought that it could impose new terms unilaterally or terminate the contract at its own will because of price increases in the raw materials needed for the manufacturing of the electric cables required by Highness Electrical under the contract of 17 December 2003 cannot be fathomed.

19 Although it was displeased with Sigma's high-handedness, Highness Electrical complied with the demand for the forecast. Notwithstanding the completion of the forecast, Sigma did not deliver all the electric cables already ordered by Highness Electrical.

20 On 2 February 2005, Sigma unilaterally attempted to terminate the contract at an earlier date by informing Highness Electrical that the latest delivery date for electric cables under the contract was the end of April 2005 and not 31 December 2005, as originally agreed upon, after which the contract would be considered as "completed".

21 Highness Electrical claimed to have had enough of Sigma's high-handedness. On 3 February 2005, its solicitors, M & A Law Corporation, wrote to Sigma as follows:

[F]rom on or about 25 October 2004 to date, you have, despite our clients' urgent requests, failed, neglected and/or refused to make deliveries of the said Cables progressively pursuant to our clients' Delivery Instructions as follows –

<u>Delivery Order Date</u>	<u>Delivery Order No.</u>
22 October 2004	HE/DI/04/0154
22 October 2004	HE/DI/04/0156
20 December 2004	HE/DI/04/0217
13 January 2005	HE/DI/04/0008

Further to the above, by your letter to our client dated 23 December 2004, you have also expressly or impliedly stated your refusal to continue with further deliveries of the said Cables, and/or to terminate the Contract with our clients, purportedly because of an "**increase of prices of raw materials** ..."

As such, you have unequivocally evinced an intention not to be bound by the terms and conditions of the Contract between you and our clients and have wrongfully terminated the Contract or alternatively repudiated the same.

We are instructed that our clients accept your repudiation of the Contract and are therefore discharged from any primary obligations or otherwise under the Contract.

In the circumstances, our clients will look to you for all losses and damages suffered as a result of your wrongful termination and/or repudiation of the Contract.

22 On 30 March 2005, instead of addressing the contents in M & A Law Corporation's letter of 3 February 2005, Sigma informed Highness Electrical that it would sell the latter electric cables at the prices fixed under the contract of 17 December 2003 and that the latest delivery date for electric cables ordered would be extended to the end of December 2005, which was the date fixed under the said contract for the final delivery of wires.

23 On 25 April 2005, M & A Law Corporation wrote to Sigma to reiterate its position that Highness Electrical had accepted Sigma's repudiation of the contract and was, as such, discharged from all further obligations under the said contract.

24 Sigma claimed that Highness Electrical had no grounds on 3 February 2005 for regarding the contract as having been repudiated by it. As for its letter of 23 December 2004, which threatened to terminate the contract unless Highness Electrical furnished a forecast of its future requirements was concerned, it pointed out that even if there had been a breach, such breach had been waived by Highness Electrical, which continued to order goods and to take delivery of goods after that date.

25 Sigma also pointed out that M & A Law Corporation's letter of 3 February 2005 specified Sigma's letter of 23 December 2004 as being the critical letter and only hinted at the non-delivery of the goods ordered in the specified delivery instructions as a factor in the decision to terminate the

contract. Sigma also noted that in M & A Law Corporation's second letter of 25 April 2005 reference was only made to Sigma's letter of 23 December 2004 and it was reiterated by the solicitors that Sigma's letter evinced a clear intention on Sigma's part not to be bound by the contract.

26 Sigma gave a number of reasons for delaying the supply of goods to Highness Electrical. To begin with, it complained that Highness Electrical was in breach by failing to pay for goods on time. However, there is not a single document that proves that delayed payment was linked to the halt in the supply of electric cables ordered by Highness Electrical. Besides, it is common ground that by early December 2004, Highness Electrical had paid up whatever was outstanding and yet the delivery of goods was still being delayed when Highness Electrical regarded the contract as at an end on 3 February 2005. I thus reject Sigma's assertion that delayed delivery was due to delayed payment by Highness Electrical for goods already delivered.

27 As for its attempts to increase prices, Sigma asserted that price changes were a fact of life in long-term commercial contracts and could not be regarded as repudiatory. It pointed out that Highness Electrical acceded to two rounds of price increases, in June 2004 and December 2004, and did not repudiate the contract at the material time. However, it ought to be noted that there is a world of difference between seeking price increases and holding up the delivery of goods to achieve this goal, knowing that this made it very difficult for Highness Electrical to carry out its obligations in the building project. Indeed, on 29 January 2005, Highness Electrical pleaded with Sigma to deliver cables ordered as early as October 2004 because the delay in delivery of goods had "tightened up [its] work completion schedule to 2 days". After evaluating the evidence, I accept that there is a link between the delay and the price increases sought by Sigma and that Sigma was withholding supplies to force Highness Electrical to succumb to its demands.

28 Admittedly, Highness Electrical's position could have been stated more clearly in M & A Law Corporation's letter of 3 February 2005 and it is unfortunate that M & A Law Corporation's letter of 30 March 2005 merely referred to Sigma's letter of 23 December 2004. All the same, it could not have escaped anyone's attention that Highness Electrical was very concerned about the delays in delivery of the electrical cables ordered for the project and this was sufficiently outlined in M & A Law Corporation's letter of 3 February 2005. Sigma argued that the proportion of goods not delivered was not significant when viewed in the context of a contract for \$2,796,884.09 worth of goods. However, it is trite that in contracts such as this where goods are to be delivered over a period of time, one must consider not only quantitatively the ratio of the cost of the breach to the contract as a whole but also the degree of probability that such a breach will be repeated. In the light of Buckley LJ's test in *Decro-Wall International* ([8] *supra*), which is whether the consequences of the breach are such that it would be unfair to the injured party to hold him to the contract and leave him to the remedy in damages as and when a breach occurs, there can be no doubt that with its delayed deliveries to apply pressure on Highness Electrical to pay higher prices, Sigma was guilty of repudiatory conduct and that Highness Electrical was entitled to accept the repudiation of the contract through its solicitor's letter on 3 February 2005.

29 Before turning to the question of assessment of damages, mention must be made of the fact that Highness Electrical also complained that although Sigma offered to perform the contract, it tried to impose additional conditions regarding "manufacturing lead time" of between four and eight weeks before goods ordered could be delivered. It pointed out that there was no previous agreement that Sigma would be given such lead time and the time given to the latter to deliver goods in the past varied between one day and one month, depending on Highness Electrical's requirements at the building project at the relevant time. On the other hand, Sigma argued that the cost of stocking some of the electrical cables was prohibitive and that was why the cables were manufactured only after they were ordered. In my view, not much turns on this issue of lead time because most of the delays

after Highness Electrical was no longer in arrears in its payments in early December 2004 exceeded any lead time claimed by Sigma. As has been mentioned, by 3 February 2005, goods ordered several months ago had not been delivered. In any case, as I have found that there are substantial grounds for Highness Electrical to regard Sigma's conduct as repudiatory, the issue of manufacturing lead time need not be further discussed.

Assessment of damages

30 As the trial was only scheduled for three days, there was no time to consider the documentation concerning assessment of damages for Sigma's breach of contract. As such, I directed that the assessment of damages be done by the Registrar. Even so, a few points ought to be noted in this judgment.

31 To begin with, some of Highness Electrical's claims for losses relate to purchases of electric cables from other parties before the termination of its contract with Sigma on 3 February 2005. It ought to be placed on record that Highness Electrical's counsel, Mr Alvin Chang, helpfully withdrew these claims on his client's behalf before the end of the trial to avoid any further arguments in relation to these purchases.

32 Secondly, Sigma argued that even if it was in breach, Highness Electrical should have mitigated its loss by accepting its offer on 30 March 2005 to continue to supply goods at previously agreed prices because any attempt to purchase electric cables from other parties, such as Keystone, would necessarily result in Highness Electrical having to pay higher prices in view of the increase in the prices of raw materials for the required electric cables. In regard to mitigation of damages, the following passage from Karthigesu JA's judgment in *China Resources Purchasing Co Ltd v Yue Xiu Enterprises (S) Pte Ltd* [1996] 1 SLR 734 at 741, [24] is worth noting:

If, notwithstanding the particular facts of this case, there was a duty to mitigate then the standard of reasonableness to be applied to the decision of the innocent buyer is not a high one. 'The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him could have been taken.' See *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452 at p 506. It is a question of fact, depending on the circumstances of the particular case, whether the plaintiff acted reasonably. See *Payzu Ltd v Saunders* [1919] 2 KB 581 at pp 588–589.

33 While it is clear from *Brace v Calder* [1895] 2 QB 253 that steps taken by the innocent party in mitigation of loss may include, where appropriate, an acceptance of a reasonable offer by the party in breach to make good the loss or part of it, it is evident from *Dunkirk Colliery Company v Lever* (1878) 9 Ch D 20 at 25 that the innocent party is not required to accept any performance other than in the "ordinary course of business". In the present case, the history of the parties' relationship between December 2003 and 3 February 2005 was such that Highness Electrical, which had the task of completing its electrical work at the building project on time, had lost confidence in Sigma's ability to perform its part of the bargain. Having had so many problems with Sigma, Highness Electrical was entitled to avoid putting itself at the mercy of Sigma in the future. I thus find that it acted reasonably in refusing to accept Sigma's belated offer on 30 March 2005 to perform its obligations under the terminated contract.

34 Finally, it cannot be overlooked that under Highness Electrical's contract with Sigma, the latter was only obliged to sell electric cables to Highness Electrical at the agreed prices until

31 December 2005. In its forecast of requirements that was submitted to Sigma in December 2004, Highness Electrical stated that the electric cables mentioned in the forecast were all to be delivered by the end of 2005. However, when the contract was terminated on 3 February 2005, Highness Electrical knew that work on the building project had been delayed and would extend beyond 2005 and that higher prices would have to be paid for electrical cables ordered from Sigma after 2005. As it turned out, the building project has not been completed and Highness Electrical is still purchasing large quantities of electric cables in 2006 and expecting Sigma to top up the difference in prices between their contract of 17 December 2003 and Keystone's prices. It is rather disturbing that although Highness Electrical pleaded in para 8 of its amended statement of claim that it had suffered loss and damage and had incurred additional cost and expense amounting to \$1,279,966.15, it was apparent during the trial that a very large portion of this alleged loss or expense had not been incurred by the end of 2005. In fact, Highness Electrical finally took the position that the claim for this sum was the best reasonable estimate of its losses. Sigma's counsel, Ms Gan Kam Yui, asserted that this was wholly inconsistent with Highness Electrical's pleaded case, which is that \$1,279,966.15 had been incurred, lost or expended. All these must be borne in mind when assessing the damages to which Highness Electrical is entitled for Sigma's breach of contract.

Costs

35 Highness Electrical is entitled to costs, which will be based on the Subordinate Courts' scale if the Registrar awards it damages that are less than the amount required for a claim to be instituted in the High Court.

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