HG Metal Manufacturing Ltd v Nam Tat Hardware Co (a firm)
[2006] SGHC 37

Case Number : Suit 911/2004

Decision Date : 01 March 2006

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Leslie Yeo Choon Hsien (Leslie Yeo and Associates) for the plaintiff; Gong Chin Nam and Hoon Tai Meng (T M Hoon and Co) for the defendant

Parties : HG Metal Manufacturing Ltd — Nam Tat Hardware Co (a firm)

Contract – Breach – Contract providing for payment by letter of credit – Parties agreeing on alternative modes of payment – Whether contract terminated or repudiated or simply varied – Whether contract subsequently breached – Whether substantial damages proved

1 March 2006 *Judgment reserved.*

Woo Bih Li J:

Background

1 The plaintiff company HG Metal Manufacturing Ltd ("HG") is a steel stockist. It had entered into a contract dated 6 September 2004 ("the Contract") with the defendant firm Nam Tat Hardware Company ("Nam Tat") to buy from Nam Tat its entire stock of 4,741.812mt of mild steel sheets, plates and chequered plates at a unit price of $890 per metric tonne. The total contract price was therefore about $4.2m but the quantity sold under the Contract was subject to a qualification of plus or minus 3%.

2 Under the Contract, the mode of payment was to be by way of two letters of credit. The first letter of credit for 50% of the contract value was to be "at sight" and to be issued within seven days from the date of the contract. The second letter of credit for the other 50% was to be "at 30 days sight" and to be issued within 14 days from the date of contract. Delivery was to be effected at Nam Tat's yard only upon receipt of the letters of credit.

3 The letters of credit were not issued and instead different modes of payment were subsequently agreed upon. The first main issue was whether the Contract had been terminated at the time when the parties agreed on the first collection, and was substituted by two *ad hoc* agreements of sale for smaller quantities, or whether only the mode of payment had been varied for two collections of metals leaving the Contract otherwise intact and still applicable. The importance of this issue will be seen later as Nam Tat subsequently sold part of the balance to a third party. HG did not take delivery of the remaining quantity in Nam Tat's possession. Consequently HG initiated this action to claim damages from Nam Tat.

4 After hearing the evidence and considering the submissions, I granted HG judgment for a nominal sum of $10 with each party to bear its own costs of the action and of an application for summary judgment and to bear the hearing fees equally. HG has appealed against my decision. I set out below my reasons.

The court's reasons

5 It is not in dispute that soon after the Contract was signed, HG's managing director, Tan Chan Too, had a discussion with Kwa Chin Tat, a partner of Nam Tat, on the mode of payment. On this point I accepted Mr Kwa's evidence that it was Mr Tan who said that HG had fully utilised its letter of credit facilities and persuaded him to allow HG to take delivery of 2,000mt first by an alternative mode of payment *ie*, HG would sign Nam Tat's delivery order for this quantity in advance and Nam Tat would present this together with its invoice to one of HG's bankers and receive payment of the same. I did not accept Mr Tan's version that it was Mr Kwa who was keen for HG to collect the goods in order for Nam Tat to receive payment earlier than the time it would take for a letter of credit to be issued. I also did not accept Mr Tan's absurd suggestion that the proposed alternative mode of payment was as secure as cash on delivery. There was no letter of credit from a bank to assure Nam Tat that when it presented the signed delivery order and its invoice to a bank, it would receive payment. There was not even a bank guarantee.

6 Ms Foong Lee Heng, the head of finance in HG, gave evidence that as at 30 September 2004, HG had a fixed deposit of about $8m and a cash and bank balance amounting to about $6.4m. In addition, HG had total bank facilities of $93m to draw on as at 30 September 2004. This evidence was to support Mr Tan's evidence that it was Mr Kwa who wanted to change the mode of payment. However, Ms Foong did not elaborate as to HG's financial position, including its commitments and plans, as at the date of the Contract *ie*, 7 September 2004. Furthermore, if HG had all these facilities available at the relevant time, why was there a need to split up the letter of credit into two to be issued at different times? In addition, as Mr Kwa said and I accepted, it was he who had wanted payment to be by way of letter of credit when the Contract was negotiated. Having done so, he would not have initiated a change in the mode of payment.

7 Whether or not HG's letter of credit facilities had been fully ulitilised at the relevant time, I accepted that this was what Mr Tan told Mr Kwa. Mr Tan had changed his mind, for reasons best known to himself, and persuaded Mr Kwa to accept a mode of payment less secure than what the Contract had provided for.

8 I also accepted that Mr Kwa was irate when Mr Tan proposed an alternative mode of payment so soon after signing the Contract. I will say more about this later.

9 The delivery of 2,000mt was effected between 9 to 17 September 2004 by self-collection at Nam Tat's yard. Due to the nature of the goods, it was not possible to allow HG to collect exactly 2,000mt and the delivery order and invoice reflected a quantity of 1,999.441mt. According to Mr Kwa the actual quantity collected turned out to be 1,994.134mt.

10 HG had signed and returned a delivery order dated 8 September 2004; Nam Tat then presented the same and the relevant invoice to its banker for onward presentation to HG's banker on 9 September 2004. Nam Tat did not receive payment until 17 September 2004.

11 According to Mr Kwa, Mr Tan then sought to take delivery of another 1,000mt. Mr Kwa wanted payment for this quantity to be by way of letter of credit but was again persuaded by Mr Tan not to insist on this mode of payment and to accept Mr Tan's assurance that payment for this quantity would be received by 30 September 2004. As Mr Kwa agreed to this on or around 20 September 2004, he allowed collection for this quantity to be done between 20 to 28 September 2004. According to him, the actual quantity collected this time was 1,084.356mt and Nam Tat prepared an invoice for 1,079.135mt after taking into account the shortfall from the first delivery. Mr Kwa's figures did not quite add up because the difference between 1,999.441mt, as stated in the delivery order and invoice for the first collection, and 1,994.134mt, being the amount collected, is 0.307mt, whereas the difference between the 1,084.356mt collected and the invoice for 1,079.135mt

in respect of the second collection is 5.221mt. Also, while Mr Kwa's evidence was that a total of 3,078.490mt was collected by then, Mr Tan's evidence was that 3,078.578mt was collected. The parties were unable to resolve this minor difference in the quantities collected which difference was immaterial in the circumstances.

12 However, I accepted Mr Kwa's account as to how the arrangement for the second collection came about and the due date for payment *ie*, 30 September 2004. Also, contrary to Mr Tan's initial assertion, the mode of payment for the second collection was not the same as for the first collection. For the second collection, the delivery order was not signed by HG in advance. Also, it was submitted by Nam Tat with the invoice by hand to HG on 29 September 2004 and not through Nam Tat's banker. Nam Tat did not receive payment until 8 October 2004.

13 The parties agreed that the balance with Nam Tat then was 1,785mt although it was not clear to me how that figure was derived. However, when HG sent its lorries on 9 October 2004 to collect the balance, no collection was allowed.

14 According to Mr Tan, he was shocked when the lorries were asked to turn back on 9 October 2004 and he immediately contacted Mr Kwa who told him that the quantity left was insufficient to meet the contract quantity. According to Mr Kwa, it was he who called Mr Tan on 9 October 2004 and asked for an "immediate sight" letter of credit failing which he would sell the balance to someone else. Mr Tan did not agree to procure the letter of credit.

15 Of the two, I found Mr Kwa to be more credible generally. I have already mentioned Mr Tan's absurd suggestion that the presentation of documents to a bank, without a letter of credit, was as good as cash. I would elaborate that Mr Tan stubbornly stuck to this suggestion during cross-examination until he eventually admitted it was not as good as cash.

16 The Contract, if it still applied, called for payment to be by letter of credit. If, on the other hand, the Contract had ceased to apply, there was in any event no fresh agreement for the balance held by Nam Tat, whether it had already sold part thereof to a third party or not. Accordingly, as at 9 October 2004, HG was not entitled to collect the balance.

17 On 11 October 2004, Nam Tat sold 506.074mt to a third party, Master Sales Pte Ltd ("Master Sales"). On the same day, it sent a fax to HG listing out the remainder of the goods in its possession and requesting a letter of credit to be issued. On 12 October 2004, HG responded by sending a fax to Nam Tat itemising items missing from Nam Tat's updated list and informing Nam Tat "don't play". Nam Tat responded on 13 October 2004 with a similar updated list.

18 According to Mr Tan, HG then applied for a letter of credit for $1,588,650. This was issued on 18 October 2004.

19 On 20 October 2004, HG sent a fax to notify Nam Tat about the issuance of the letter of credit and that HG would be collecting "the balanced quantity" starting 23 October 2004. I should mention that the "balanced quantity" which HG was referring to was the 1,785mt since it was not accepting that Nam Tat was entitled to sell 506.074mt to a third party. The 1,785mt worked out, at the price of $890 per metric tonne, to $1,588,650 which was the sum stated in the letter of credit. However, the quantity of goods stated in the letter of credit was 1,700mt as this was based on the application for the letter of credit. Apparently HG's application for a letter of credit had factored in a goods and services tax of 5%. So, the quantity in the application had to be reduced to 1,700mt at $890 per metric tonne to arrive at the sum of $1,588,650.

20 On 25 October 2004, HG's solicitors, Leslie Yeo & Associates, sent Nam Tat a demand relying on the Contract and requiring 1,785mt to be ready for collection by 12 noon on 27 October 2004, failing which HG would treat the Contract as repudiated.

21 On 28 October 2004, Nam Tat's solicitors replied to assert that as HG had repudiated the Contract, Nam Tat was no longer bound by its terms and that Nam Tat was not obliged to supply the goods as demanded by HG.

22 As I have mentioned, the first main issue was whether the Contract had been terminated at the time the parties had agreed on the first collection. If it had been terminated then, HG would have no basis to claim for breach of contract. Nam Tat's basis for claiming that the Contract had been terminated was, however, inconsistent.

23 In its amended defence, Nam Tat alleged that after Mr Tan had told Mr Kwa the first time that HG was not going to procure a letter of credit to be issued, Mr Kwa had said that the Contract had become useless and thus had accepted HG's repudiation of the Contract. The agreement to allow the first collection was a fresh agreement and not a waiver of the requirement to pay by letter of credit. The second collection was likewise pursuant also to a fresh agreement for the same.

24 In para 14 of Mr Kwa's affidavit of evidence-in-chief ("AEIC") he said he had told Mr Tan that the Contract had become useless when he learned that HG was not going to procure a letter of credit to be issued. Mr Kwa did not say explicitly that by making this statement, he had intended to and did terminate the Contract, although it is arguable that this is what he meant.

25 However the defendants' amended opening statement made no reference to Nam Tat's acceptance of HG's repudiation. Instead para 5.1 thereof alleged that the Contract had been terminated when HG informed Nam Tat that the letter of credit would not be issued. This allegation was repeated in para 6 of the defendants' closing submission, although in para 59 thereof Nam Tat reverted to the position that it had accepted HG's repudiation. As Nam Tat should be aware, a repudiation *per se* does not constitute a termination. It has to be accepted to result in a termination of the Contract.

26 As for the evidence, I was of the view that Mr Kwa was irate and did say that the Contract was useless or words to that effect. However, I was of the view that what Mr Kwa meant was that the Contract was useless if HG was not abiding by its terms. He had not intended to and he did not in fact terminate the Contract there and then but was merely expressing his frustration at this sudden and unwelcome development. The idea of his having terminated the Contract by accepting the repudiation was an after-thought. Indeed in the response dated 28 October 2004 from Nam Tat's solicitors (see [21] above), there was no assertion that the repudiation had been accepted.

27 Counsel for Nam Tat referred to *Vitol SA v Norelf Ltd* [1996] AC 800 where Lord Steyn said at 810 that "[i]t is sufficient that the communication or conduct clearly and unequivocally conveys to the repudiating party that the aggrieved party is treating the contract as at an end". Although I was of the view that I should not take too technical an approach in construing the words and conduct of laymen, I concluded that the words of Mr Kwa fell short of clearly and unequivocally conveying to Mr Tan that the Contract was at an end. Also, Mr Kwa's conduct in allowing the collections was equivocal.

28 Accordingly, I found that the Contract had not been terminated then and that the subsequent arrangements about the first and second collections were variations of the mode of payment only. There was no agreement to vary the mode of payment for the last collection but,

eventually, HG did procure a letter of credit to be issued for a sum sufficient to pay for the balance of 1,785mt. Nam Tat was liable to allow collection of the same but did not do so. Accordingly Nam Tat was in breach of contract.

29 I add that HG had sought to rely on the specifications of metal collected to support its contention that the Contract was still applicable then. Its argument was that some of the metals collected were of specifications different from those identified in the delivery orders for the first and second collections. It alleged that Nam Tat had allowed it to collect those different metals because HG would eventually be entitled to take delivery of all the metals sold under the Contract. Nam Tat's position was that because of the different areas where the various metals had been stored, it was not convenient to allow collection based on the items specified in the delivery orders. Since the unit price was the same, Nam Tat had allowed HG to collect what was convenient, but subject to the quantities stated in the respective delivery orders. This explanation was not illogical. I placed no weight on HG's argument about the collection of metals with different specifications as it was equivocal in the light of Mr Kwa's explanation. In any event, as mentioned above, I concluded that Nam Tat was in breach of contract based on other reasons.

30 As I found Nam Tat to be in breach of contract, the second main issue was the quantum of damages suffered by HG.

31 A copy of a contract between HG and Bright Steel Sdn Bhd ("Bright Steel) dated 22 October 2004 and a copy of a quotation from Eastmart Associate Pte Ltd ("Eastmart") to HG dated 12 August 2004 to HG were exhibited in Mr Tan's AEIC to demonstrate that the market price for the month of October 2004 was US$675 per metric tonne. This should be more than S$890 per metric tonne, although how much more would depend on the prevailing exchange rate on which there was no evidence. More importantly, there was no evidence from the other contracting party, *ie*, Bright Steel, or any other evidence to demonstrate that the Bright Steel contract was genuine or was completed or partially performed. There was also no evidence from Eastmart or any other evidence to demonstrate that its quotation was genuine or was accepted by HG.

32 I should also mention that the price of Nam Tat's sale to Master Sales was US$595 per metric tonne. Using an exchange rate of say, S$1.65 to US$1, this would be S$981.75 per metric tonne. However, this was an export contract. Also, the terms were FOB Singapore. Accordingly, it was unsafe to use this contract to determine the market price for a local contract and where collection was to be done by the purchaser.

33 More importantly, para 27 of Mr Tan's AEIC alleged that HG had entered into a contract to supply steel plates to one Sunaro Enterprises ("Sunaro") and HG had intended to use the outstanding balance under the Contract to meet part of its obligations to Sunaro. As Nam Tat had defaulted, Mr Tan asserted that HG had to purchase an equivalent quantity at a higher price to meet its obligation to Sunaro. Mr Tan exhibited a copy of a sales contract with Sunaro dated 15 October 2004 to support his assertion but, when he was cross-examined, he admitted that this contract was not completed. There was also no suggestion that it was partly performed. The assertion about having to purchase a quantity at a higher price to meet HG's obligation under the Sunaro contract turned out to be a fabrication. It was possible for HG to have wanted the balance under the Contract for its own stock but that was not HG's stand for the trial. HG's stand was that the balance was to meet part of its obligation to Sunaro and that stand was not proved.

34 Accordingly, HG had failed to prove its damages. I add that it seemed to me that there was no substantial damages to speak of in the first place. If the price under the Contract remained as favourable to HG as HG wanted me to believe, HG would have sought to collect the remainder from

Nam Tat without prejudice to its right to claim damages for the 506.074mt sold, and delivered, to Master Sales. It did not attempt to pursue this course of action.

35 In closing submissions, counsel for HG submitted that Nam Tat's solicitors' letter of 28 October 2004 demonstrated that Nam Tat was not even prepared to supply the remainder of about 1,200mt. I was of the view that while that letter had stated that Nam Tat was not obliged to supply "the goods as demanded" by HG, this was a reference to the 1,785mt being claimed. That letter did not explicitly rule out supplying the remainder. Unfortunately, after that letter, HG did not ask to collect the remainder and, apparently, Nam Tat also did not offer immediately to allow collection of the remainder.

36 Nevertheless, Mr Kwa did eventually offer this. In an affidavit filed on 20 January 2005 in response to an application for summary judgment, Mr Kwa said that Nam Tat was still willing to sell the remainder at S$890 per metric tonne to HG with payment to be made by way of letter of credit. However, this was not acceptable to HG. This suggested that he did approach HG about the remainder, if not immediately, at least before his affidavit was executed. Mr Tan's affidavit filed on 4 February 2005 stated that HG was not prepared to accept the remainder. The "reason" for this position was that HG would have to buy the difference at a higher price from the open market in order to fulfil its own contractual obligations. I found this "reason" to be without logic. If the market price then was higher than the price under the Contract, it would have been in HG's interest to take the remainder from Nam Tat and buy a lower quantity from the open market to make up the difference, rather than to refuse to take the remainder at all and buy a higher quantity from the open market. As I have mentioned, HG could have done the former without prejudice to its claim in respect of the 506.074mt. There was no suggestion that Nam Tat would have refused to let HG reserve its rights in respect of the 506.074mt.

37 In the circumstances, I granted judgment in favour of HG for a nominal sum of $10. After taking into account the outcome of the different issues, the final outcome and the conduct of the parties, I decided that it was fair for each party to bear its own costs and to bear the hearing fees equally and I so ordered.

38 I would add that if HG had established the quantum of damages as claimed, this would still be subject to the plus or minus 3% qualification which Mr Tan had accepted would be at the option of Nam Tat *ie*, Nam Tat could supply the contract quantity less 3% and should not be liable for damages for the 3%.

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