
CANADA / JUDGMENT

Nikka Traders, Inc. v. Gizella Pastry Ltd.

2012 BCSC 1412

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nikka Traders, Inc. v. Gizella Pastry Ltd.,

2012 BCSC 1412

Date: 20120926

Docket: S093451

Registry: Vancouver

Between:

Nikka Traders, Inc.

Plaintiff

And

Gizella Pastry Ltd.

Defendant

Before: The Honourable Madam Justice Maisonville

Reasons for Judgment

Counsel for Plaintiff:

K.L. Geddes

Counsel for Defendant:

B.M. Gordon

Place and Date of Trial:

Vancouver, B.C.

June 11-15, 18, 20-22, 2012

Place and Date of Judgment:

Vancouver, B.C.

September 26, 2012

- [1] When does the responsibility of a seller terminate? If the seller knows that the goods are being purchased for a specific reason, being for consumption in another country and accordingly have to pass customs, is the seller liable if the goods do not pass customs? Is a condition that the goods be importable part of fitness for purpose under the British Columbia Sale of Goods Act, R.S.B.C. 1996, c. 410 (the "Act")? What if the goods were otherwise fit for use in Canada?

I. Summary

- [2] The plaintiff Nikka Traders, Inc. ("Nikka Traders") brings an action against the defendant Gizella Pastry Ltd. ("Gizella's") for the breach of an express or implied term of a contract between the parties for the sale of a shipment of cookies for importation into Japan. I find in favour of the plaintiff. I find there was a breach of contract by the defendant and that there additionally was an implied condition under s. 18(a) of the Act, that the goods would be fit for the plaintiff's stated purpose of sale in Japan.
- [3] The plaintiff seeks damages identified as reimbursement for the cost of the shipment plus its incidental costs in addressing and replacing the banned shipment. It also seeks additional costs and interest.

II. Introduction

A. Background

- [4] The plaintiff Nikka Traders is a small Vancouver-based corporation which sources Canadian goods for export to the Japanese market. Founded by Wayne Lytton in the early 1980s, his son, Shawn Lytton ("Mr. Lytton"), is now President of the company. For many years, the company has focused on Canadian food products and imported them into Japan.
- [5] Cheena Japan Ltd. ("Cheena Japan") is Nikka Traders's chief customer in Japan. Cheena Japan was originally founded by Wayne Lytton, but is now separately owned.
- [6] The defendant Gizella's is a manufacturer of pastry products with whom Nikka Traders began doing business around 2001, and with whom the plaintiff continued to do business until the present issue arose in 2007.

- [7] Mr. Lytton was always searching for new products for his company to import into Japan. One day in 2000, when he was shopping at a large store, he saw one of the defendant's products on the shelf. Thinking Gizella's may be able to bake products for Nikka Traders, Mr. Lytton contacted the defendant and was put in contact with Mark Dodd, Gizella's export sales manager. They arranged to have a meeting.
- [8] Mr. Lytton explained to Mr. Dodd that he was looking for a manufacturer of cake products, specifically a maple mousse cake for importation into Japan. Mr. Dodd told Mr. Lytton both he and Gizella's had extensive experience dealing with the Japanese market. Mr. Lytton was impressed by Mr. Dodd's knowledge of the Japanese market and business practices. He testified at trial that he had rarely encountered someone who possessed the vast experience in importing goods into the Japanese market like that possessed by Mr. Dodd. Mr. Lytton stated that he "felt like a student learning from him." Mr. Lytton explained the business of Nikka Traders to Mr. Dodd and showed him the product catalogue for the plaintiff company.
- [9] Mr. Dodd explained that Gizella's could produce a product which would have a clean declaration for the authorities in Japan which is a requirement for importation into that country. In order to obtain a clean declaration, a list of ingredients, together with the method of manufacture, must be submitted to the Japanese authorities for approval. A clean declaration accepted by the Japanese would clear the goods through customs.
- [10] I find that Mr. Dodd was an expert in the export of Gizella's products into Japan. He told Mr. Lytton that the defendant had experience in getting products into Japan. During the early 2000s, Gizella's sold products in five countries including Japan. During that period, approximately 29 to 30% of Gizella's business was the sale of goods destined for foreign markets.
- [11] Mr. Dodd's expertise was paramount in Mr. Lytton's consideration about entering into a business relationship with Gizella's as he needed to supply saleable products to Cheena Japan for distribution. I find that Mr. Dodd assured Mr. Lytton he could get a "clean dec".
- [12] I further find that Mr. Lytton, acting on the above representations, entered into a business relationship with Gizella's for the manufacture and purchase of cookies for importation into Japan.
- [13] All that remained was for Gizella's to create a tasty recipe. They baked a sample and sent it to Nikka Traders. The sample was tested and approved.
- [14] Next, Nikka Traders ordered a small quantity of the maple mousse cake for the purpose of export to Japan. Nikka Traders's aim was to ensure the product made it through Japanese customs. Both parties were aware of this purpose. That first product, maple mousse cake, went through Japanese testing without issue and the parties' business relationship progressed.

B. Kona pie cookies

- [15] Ultimately, another product was created in approximately 2004 - Kona pie cookies. The cookies were very popular with Nikka Traders's client in Japan. Again, I find the plaintiff relied on the defendant and Mr. Dodd to create a product that would have a clean declaration to ensure the goods passed through customs.
- [16] With the new item, Kona Pie cookies, the process would be the same as for the earlier product. The item would be sampled at Nikka Traders and a small shipment would be ordered and sent to Japan, with Gizella's method of manufacture and a list of ingredients. Once the small shipment was accepted by Japanese authorities, larger orders would be placed by Nikka Traders to Gizella's. Occasionally, there would be breakage of the cookies. This would be noted, and there was an according adjustment in the amount owing. But apart from that occasional interaction, the relationship between the parties was a good one.
- [17] Nikka Traders regularly placed orders to Gizella's for the manufacture and delivery of Kona pie cookies. An order would be placed in writing, a delivery slip would be provided upon delivery, and an invoice would be produced. Apart from those written documents (the order, delivery slip and invoice), no written contract was created between the parties.
- [18] A number of the purchase orders, delivery slips and invoices were submitted into evidence.
- [19] The purchase orders were simply worded. The Plaintiff's name and address were in the upper left corner. On the top right, it stated:

Purchase Order

Show this Purchase Order Number on all correspondence, invoices, shipping papers and packages.

Additionally, immediately below those notations, some of the invoices had boxes to be filled out for the "Date of order" and the "Requisition No.". Below that were three rows for the "Ship to" address. This box stated "SAME ADDRESS AS ABOVE".

- [20] The purchase order form also contains columns for quantity ordered, quantity received, stock number description, unit price, and amount. At the bottom, the form states:
1. Please send ___ copies of your invoice.
 2. Order is to be entered in accordance with prices, delivery and specifications shown above.
 3. Notify us immediately if you are unable to ship as specified.

There is a line for an authorized signature to the right of these clauses.

- [21] In addition to these purchase orders, as noted, the plaintiff submitted into evidence invoices and delivery receipts from Gizella's. In the delivery slip, "From" is filled in with "Gizella's Inv. #". The date and invoice number of the plaintiff are also listed. There is a column for packages and next to that is a heading "Received in good condition". There is also place for a signature.
- [22] Those items comprised the entirety of the written part of the agreement between the parties.
- [23] A number of years passed with few problems. Nikka Traders successfully continued to purchase and export Kona pie cookies and other products from Gizella's to Japan.
- [24] In 2007, the cost of butter skyrocketed. Gizella's found it was no longer economically viable to manufacture the cookies unless the price was increased to reflect their increased costs. Ultimately Mr. Dodd, on behalf of Gizella's, advised Mr. Lytton that the only way Gizella's could continue to manufacture the cookies was to increase the price or substitute the butter with margarine.
- [25] Mr. Lytton felt he had no choice but to accept the margarine substitute. The company's customer, Cheena Japan, had clients to supply and was awaiting the orders. Mr. Lytton agreed to the margarine substitute.
- [26] Shortly after the change, trouble arose at Japanese customs respecting a shipment of 134 cases of Kona pie cookies. Nikka Traders had shipped the product to Japan in accordance with their usual practice. However, the Japanese authorities did not release the product after it arrived. Rather, it was detained. According to the authorities' inspection, the Kona pie cookies had tested positive for the banned substance, tertiary butylhydroquinone ("TBHQ"), which is a type of preservative usually found in shortenings or margarines.
- [27] As a consequence of the test results, Japan detained the product and the plaintiff's customer, Cheena Japan, was listed on the Japanese Ministry of Health website as the importer of a product containing a banned substance. According to Mr. Lytton, this was "a matter of face" for Cheena Japan, who feared that the bad publicity would diminish its reputation and consequently future sales of its products would be threatened.
- [28] The emerging trouble was first seen in an email inquiry made by Raymond Wong, an employee of the plaintiff, who emailed the quality assurance manager of the defendant to inquire if Gizella's used TBHQ. On August 1, 2007, Mr. Wong faxed to a Gizella's employee, Vanessa Chan, a copy of the Japanese test results in which the Japanese authorities claimed they detected the presence of TBHQ in a sample of the Kona pie cookies. While a review of the testing was going to be undertaken in Canada by the parties, Mr. Dodd noted there were more serious problems. In an email on August 3, 2007, he stated:

However, whatever it [review of the testing] does entail would mean a whole new testing and clearing in Japan, its [sic] not a quick fix I'm afraid. Since the product has had a bad result now in Japan, they would ignore any and all foreign submissions, and everything would start over like day one the product [sic], you can be pretty sure of that.

- [29] Following the detention of the product, Gizella's was concerned about TBHQ in its products and looked into possible sources of contamination. There was speculation raised and discussed in emails which passed between Mr. Dodd and Mr. Lytton that margarine containing TBHQ used by the defendant was a possible culprit.
- [30] I am satisfied on a balance of probabilities that the Japanese authorities detained and quarantined the product as a consequence of their testing for and finding a prohibited substance. It is important to stress that the Japanese testing methods are not at issue here. The defendant, through Mr. Dodd, expressed the opinion that testing was capricious and faulty - but the fact remains that he told Mr. Lytton that the defendant could get the goods through with a clean declaration. It did not.
- [31] Instead, what is at issue is whether the goods were able to pass into Japan and whether their inability to do so was a breach of an implied term in the contract.
- [32] I do not find that the defendant, in any manner, deliberately or intentionally tried to provide the plaintiff product that would not clear the Japanese authorities. The defendant tried to produce the best product they could. Neither party was aware, before the shipment was detained, of the presence of TBHQ. Canadian authorities do not require this ingredient be listed on food products. I find, furthermore, that the defendant was mindful of its responsibility to the plaintiff to get the product into Japan with a clean declaration.
- [33] Mr. Lytton testified that the shipment of Kona pie cookies was detained by the Japanese authorities on August 2, 2007. Cheena Japan arranged for the testing of part of that shipment for TBHQ and the results confirming the presence of TBHQ were sent to Gizella's. A further test was performed on the product from an earlier shipment. The results were again forwarded to Gizella's. These results were only tendered to explain the action that followed and not for the truth of the testing results. Acting on this information, the defendant, in the days following the quarantine, conducted an inspection of its manufacturing process and told the plaintiff through Mr. Dodd that the only possible source of TBHQ was the Drakkar margarine that was used in another product. How it came to be in the plaintiff's product was puzzling, according to Mr. Dodd.
- [34] Both parties accept that the product was detained by the Japanese authorities on the basis of the banned substance. Mr. Dodd admitted that the product made by Gizella's for the plaintiff was rejected by the Japanese authorities. The goods were placed in quarantine, and were unable to be sold in the Japanese market. This is shown in numerous emails passing between the parties, in addition to the conversations where the parties discussed the dilemma. It was only after these communications, however, that Mr. Dodd, on behalf of Gizella's, emailed Mr. Lytton that:

Gizella's Pastry has a responsibility to this product FOB Vancouver, as we do not ship these goods directly overseas, and the SGS test results confirm the product is sellable, not forgetting the conflicting results from Japan. We can only guarantee our product to the Canadian standards, which in both tests confirm the product is fine.

- [35] In evidence, Mr. Dodd explained that, in this email, by 'FOB' he meant to the point of delivery. I accept this as an admission that the Japanese authorities had conflicting test results that there was a prohibited substance in the product, which resulted in the embargo.
- [36] At trial, Mr. Lytton expressed his view that receipt of this email was the first time that he learned of Gizella's position respecting the FOB terms and the defendant's view that it was only responsible for the product until it was delivered in Canada. For years, both the plaintiff and the defendant were in a commercial relationship with the plaintiff buying the product with a view to selling the goods for entry into Japan. I find that the defendant knew this purpose from the outset and assured the plaintiff of the defendant's expertise in the Japanese market to accomplish that goal.
- [37] I find it clear on the evidence of Mr. Dodd that the defendant knew the cookies were for import into Japan. I also accept the evidence of Mr. Dodd that he was an expert on the import of products into the Japanese market and further that he told Mr. Lytton of his acquired expertise knowing that he was speaking to a customer wishing to sell to that market. In the initial meeting with Mr. Lytton, he even expressed his firm views in respect of the Japanese testing process. Mr. Dodd readily conceded that he spoke with Mr. Lytton about his expertise in the Japanese market and the business that Gizella's did there. He assured Mr. Lytton that Gizella's could provide Nikka Traders with a clean declaration from the Japanese authorities. I find that the plaintiff has proven this reliance by the plaintiff upon the expertise of Mr. Dodd.

III. Claim of the plaintiff

- [38] The plaintiff is seeking reimbursement for the cost of the shipment of cookies plus its incidental costs in addressing and replacing the banned shipment.
- [39] The plaintiff seeks its claim on two grounds: first, the plaintiff seeks damages for breach of contract arguing there was an express term in the contract that the goods were saleable in the Japanese market; and second, the plaintiff claims damages for breach of s. 18(a) of the Act, arguing that the goods were not fit for their stated purpose.
- [40] The issues are framed as follows:
- (i) Was there an express term in the contract between the parties that the defendant would manufacture Kona pie cookies that were saleable in the Japanese market?

(ii) Alternatively, pursuant to s. 18(a) of the Act, was there an implied term in the contract between the parties that the defendant would manufacture Kona pie cookies that were saleable in the Japanese market?

[41] The plaintiff submits that on all the facts it is without dispute that the parties entered into an agreement knowing the product was purchased for import into Japan. It argues that Mr. Lytton was persuaded by Mr. Dodd's expertise in the Japanese market, and that Mr. Dodd knew of this reliance on his and Gizella's expertise. The plaintiff therefore submits that there was either an express term in the contract that the defendant would create a product that would be saleable in Japan or alternatively that there was an implied term in the contract that the goods would be fit for the purpose of export in Japan.

IV. Position of the defendant

[42] The defendant's position is threefold:

(i) First, the defendant argues that the plaintiff has failed to prove that the banned substance is in the product;

(ii) Second, the defendant argues that there is no express or implied warranty in the contract stating that the goods would be saleable in Japan.

With regard to any implied warranty of condition, the defendant specifically argues that s. 18(a) of the Act is inapplicable to the purpose of export to another country. In the alternative, they argue that the plaintiff did not rely on the defendant's expertise in export of goods to Japan and/or that the Kona pie cookies were sold under their trade name, and therefore s. 18(a) does not apply. The defendant also submits that any express or implied warranties between the parties came to an end upon the sale of the cookies from Nikka Traders to Cheena Japan by operation of s. 39 of the Act.

(iii) Third, the defendant argues that the plaintiff has suffered no actionable damages.

A. Lack of evidence of testing for TBHQ

[43] The defendant first argues that the lack of evidence of testing for TBHQ is fatal to the plaintiff's claim. I find that this is not so for the following reasons: the issue in this case is not whether the Japanese testing was correct. The defendant conceded that even if the test had been in error, any subsequent shipments would be treated as "suspect".

[44] The issues were, rather, whether it was a term of the agreement that the goods be saleable in Japan and whether there was a breach of s. 18(a) of the Act because the goods could not be sold in Japan. The fact remains that the goods were not able to be sold in Japan. The issue is simply put - is the defendant liable because the product could not be sold in Japan either by contract or by the Act.

- [45] The defence also argues that even if the product was contaminated with TBHQ, this could have occurred after being shipped from the defendant's premises. I find this on the facts to be impossible given that TBHQ would be baked into the product and there was no suggestion that the plaintiff had any different product baked with the product. The fact that the product was shipped in a container does not mean it could have acquired TBHQ - it was by that time plastic wrapped.
- [46] Neither party knew of the existence of the banned substance. However, the defendant, through Mr. Dodd, expressly undertook that their goods would have a "clean dec". It was primarily for that reason that the plaintiff company commenced a business relationship with the defendant.
- [47] The defendant knew that Japanese testing usually occurs the first time a product is shipped, but products could be tested at any time in a very stringent manner. They knew that all ingredients, as well as the manufacturing process, had to be listed for Japanese authorities.
- [48] For many years, Gizella's products sent by Nikka Traders had listed the ingredient butter. When Gizella's switched to using margarine, the ingredients listed on the packaging was still butter. The goods were ultimately tested, after the change in the ingredients to margarine and, according to the knowledge of both the defendant and the plaintiff, the Japanese authorities did not clear the product. Irrespective of whether Japanese testing methods could be challenged, the cookies did not have a "clean dec" as promised by Gizella's.
- [49] The defence, furthermore, offered to make a new batch of the cookies with butter to ensure they passed with a clean declaration. Mr. Dodd stated that, by using butter in this way, there would not have to be repackaging and shipment of an initial small amount followed by a larger amount (i.e. the process the parties had adopted for the first shipment and subsequent shipments of new products).
- [50] Both parties submitted documents from settlement discussions that address this issue. This evidence primarily consisted of emails between the parties' employees, chiefly Mr. Dodd for the defendant and Mr. Lytton for the plaintiff.
- [51] There was no suggestion that these email discussions were privileged or impliedly protected from disclosure. Even if it was through inadvertence, actions such as the submission of certain communications into evidence can waive privilege. In *Royal Bank of Canada v. B.M.P. Global Distribution Inc.*, 2011 BCSC 1650, this Court adopted the Royal Bank's submission that the "[d]efendants waived [settlement] [p]rivilege by raising the issue through their own disclosure and reliance upon many privileged documents" (at paras. 5-6). Accordingly, even if the documents were originally privileged, that privilege has been waived due to both parties' reliance on settlement documents.
- [52] As well, there are established exceptions where privileged settlement communications can be admitted, for example to show that there has been waiver or election (see for example *Finn v. St. John's (City)*, 2002 NLCA 76).

- [53] I find accordingly that privilege was never intended by either party.
- [54] The email evidence shows that Gizella's, following testing of products in Vancouver, was prepared to make another large batch of cookies for the plaintiff in October. As noted by Mr. Dodd in his email dated September 5, 2007 to Mr. Lytton, the plan was to go "with all butter to ensure a safe pass". This batch had to be made quickly as Cheena Japan had client demands.
- [55] Mr. Dodd later cautioned Mr. Lytton that the management of Gizella's wanted to get out of producing the product for the plaintiff. Gizella's agreed it would, however, produce the cookies with butter while absorbing the added cost of butter. I find that this is an admission of the probability that the cookie contained TBHQ. Mr. Dodd testified that he did not know how the TBHQ got in the product but he acknowledged it had.
- [56] The difficulties attached to producing the product did not outweigh the benefit of the business relationship with the plaintiff according to the defendant. I find this is also evidence that the defendant accepted that the goods were not admitted to Japan, and that one reason for that could have been that TBHQ was in the margarine used by the defendant - even though I find the defendant does not accept that the Japanese authorities tested properly in part because Mr. Dodd's email in evidence states "they are finding so much TBHQ (or what they deem to be so) in Japan ...".

B. Claim in Contract - Term of the Contract Saleability

- [57] The plaintiff claims a term of the contract with the defendant is that the product would receive a clean declaration and be saleable in Japan. They argue this is consequent on the discussions between Mr. Dodd and Mr. Lytton.
- [58] I find as a fact that Mr. Dodd, on behalf of the defendant, did make representations that the product would clear Japanese customs. I further find that these representations were accepted and relied upon by the plaintiff.
- [59] It is accepted law that a contract may be partly written and partly oral. I find it to be an implied term of the agreement between the parties that the goods would be able to be imported into Japan.
- [60] As noted by G.H.L. Friedman in *The Law of Contracts*, 6th ed. (Toronto: Thomson Carswell, 2011) at 463:

The law has long recognized that it is not always possible to confine the terms of a contract, whether written, oral, or partly written and partly oral, to those which have been expressly stipulated between the parties. There are circumstances in which a court is entitled to conclude that everything agreed by the parties is not contained in the written document or documents, or the oral statements of the parties, that appear to make up the contract. Some additional term or terms must be implied. The acceptance of what Duff J. once called "an unexpressed incident" requires more than that a court might think it reasonable to make such an implication. It is

firmly based on the idea that courts are seeking to discover what the parties intended, not what a court thinks reasonable. As Ayles J. A. said in *Mr. Convenience Ltd. v. 040502 N.B. Ltd.* [[1993] N.B.J. No. 451], the implication of a term "is a matter of law, arising where parties would have intended the stipulation in question".

[61] Accordingly, the Court must determine what exactly the parties intended to be the bargain at the time it was created - not what may be reasonable to construe with hindsight.

[62] I find that from the outset it was clear that the plaintiff and the defendant struck a bargain that the plaintiff would buy from the defendant cookies that would have a clean declaration to pass through customs and be saleable in Japan. By producing and selling a product that was not saleable in Japan, Gizella's breached a term of their contract for sale with the plaintiff Nikka Traders.

C. Claim pursuant to the Act

[63] In addition to the breach of a term of the parties' contract, the defendant has breached an implied warranty under s. 18(a) of the Act.

[64] Section 18(a) of the Act states:

18 Subject to this and any other Act, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale or lease, except as follows:

(a) if the buyer or lessee, expressly or by implication, makes known to the seller or lessor the particular purpose for which the goods are required, so as to show that the buyer or lessee relies on the seller's or lessor's skill or judgment, and the goods are of a description that it is in the course of the seller's or lessor's business to supply, whether the seller or lessor is the manufacturer or not, there is an implied condition that the goods are reasonably fit for that purpose; except that in the case of a contract for the sale or lease of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;

[65] Accordingly, three factors must be satisfied on a balance of probabilities to establish a claim under s. 18(a) of the Act:

- (1) that the buyer has made known to the seller the purpose for which it requires the goods;
- (2) the dissemination of that purpose shows that the buyer relies on the seller's skill or judgment; and
- (3) the goods are of a description that is in the course of the seller's business to supply.

[66] Reliance does not need to be specifically expressed. I adopt the statement of Lord Wright on behalf of the Australian Privy Council in *Grant v. Australian Knitting Mills*, [1936] A.C. 85 (P.C.) at 99 as cited in *T-Bar Contracting Ltd. v. Woodland Equipment Inc.*, 2010 BCSC 1036 at para. 104 [T-Bar Contracting]:

It is clear that the reliance must be brought home to the mind of the seller, expressly or by implication. The reliance will seldom be express: it will usually arise by implication from the circumstances.

[67] I find on a balance of probabilities that all three of the factors required to prove breach of s. 18(a) were satisfied.

[68] First, the evidence shows that Mr. Lytton described precisely the purpose for which the cookies were to be made.

[69] Second, I find by implication from the circumstances, that on behalf of the plaintiff company, Mr. Lytton relied on Mr. Dodd's skill or judgment, namely his expertise in the sale of items into Japan.

[70] The reliance exhibited by Nikka Traders is similar to the plaintiff's reliance in *Syncrude Canada Ltd. v Hunter Engineering*, [1989] 1 S.C.R. 426. In *Syncrude*, the plaintiff contracted for the purchase of gearboxes for use in a mining project in Northern Alberta. After a short period of time, cracks developed in the gearboxes which required significant repairs. The plaintiff then brought a claim that the gearboxes were not fit for the purpose of mining due to their faulty design. Syncrude left the design of the gearboxes solely to the defendant, Hunter, although Syncrude did provide some specifications for the design of the product. The Supreme Court of Canada held that despite the provision of specifications by the plaintiff, it was reliant on the defendant to create a product that would meet those specifications. Here in analogous circumstances, despite the fact that Nikka Traders approved the use of margarine in the cookies, they continued to rely on Gizella's to ensure that the margarine used would not inhibit the importation of the cookies into Japan.

[71] In respect of the third requirement, it is not disputed that Gizella's is a manufacturer of baked goods that have previously been sold in Japan.

[72] As the plaintiff accepted the cookies and shipped them, there can only be a breach of warranty, rather than a breach of condition, pursuant to s. 15(4) of the Act, which states:

(4) If a contract of sale is not severable and the buyer has accepted the goods or part of them, or if the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract, express or implied, to that effect.

The implied term, accordingly, under s. 18(a) is an implied warranty.

- [73] The defendant argues that s. 18(a) of the Act does not apply to the export of goods to a foreign country, and rather merchantability under s. 18(b) of the Act applies to the current case. In support of the argument, the defendant relied upon *Sumner Permain & Co. v. Webb & Co.*, [1922] 1 K.B. 55 C.A. (Eng.) at 55. This authority only stands for the proposition that saleability in a foreign country is not a condition of merchantability. It does not suggest that merchantability is the only applicable implied term.
- [74] I adopt the English Court of Appeal's interpretation of the interplay between merchantability and fitness for purpose stated in *Teheran-Europe Co. Ltd. v. S.T. Belton (Tractors) Ltd.*, [1968] 2 Q.B. 545 C.A. (Eng.). In *Teheran*, the Court of Appeal applied the fitness for purpose rule to the purchase of air compressors in England for resale in Iran in tandem with the test for merchantability. In discussing the relationship between the two provisions, Sachs L.J. explained at 562:

I would make it clear that I see no reason why a buyer may not be able to establish upon the same set of facts that he has concurrent rights under the provisions of section 14(1) [fitness for purpose] and section 14(2) [merchantability]...of the Sale of Goods Act.

- [75] Section 18(b) consequently does not supplant s. 18(a) of the Act in cases where the purpose of purchase is export to a foreign country.
- [76] The defendant further argues that the Kona pie cookies were sold under a trade name, and thus s. 18(a) is inoperable. This argument cannot succeed. The English Court of Appeal in *Baldry v. Marshall*, [1925] 1 K.B. 260, 261 C.A. (Eng.), as cited at para. 39 in *Wharton v. Tom Harris Chevrolet Oldsmobile Cadillac Ltd.*, 2002 BCCA 78, [Wharton] held:

That the mere fact that an article is sold under its trade name in the sense that the trade name forms part of the description of the things sold, does not necessarily...exclude the implication of the condition of fitness. If the buyer, while asking to be supplied with an article of a named make, indicates to the seller that he relies on his skill and judgment for its being fit for a particular named purpose, he does not buy it "under its trade name" within the meaning of the proviso; and the Court, being satisfied upon the facts that the plaintiff relied on the defendants' skill and judgment, held that the proviso did not apply.

[Emphasis in the original.]

- [77] Accordingly, the mere fact that these goods were sold to Nikka Traders as "Kona pie cookies" does not preclude the protections provided by the Act under the meaning of s. 18(a).
- [78] The defendant also submits that because the Kona pie cookies were saleable in Canada, they cannot be unfit for their intended purpose. This argument also fails. The fact that an item is suitable to another purpose, other than the specific purpose of the buyer, does not render s. 18(a) inoperative. In *Wharton*, the British Columbia Court of Appeal held that a luxury automobile sold to the plaintiff was unfit for its purpose due to a buzzing sound emanating sporadically from the sound system of the vehicle. Despite the fact that the car otherwise ran smoothly, s. 18(a) was still breached. Similarly, in *Fording Coal Ltd. v. Harnischfeger*

Corp of Canada (1991), 8 B.C.A.C. 250, the Court of Appeal held that a defect on one roller of the swivel assembly rendered an entire mining shovel unfit for its purpose.

[79] Therefore, it is clear that the defendant's argument fails because saleability in Canada does not make the product fit for Nikka Traders's purpose, namely sale in Japan.

[80] In any event, the goods were already packaged for sale in Japan. I accept Mr. Lytton's evidence that entirely different packaging is required for sale of a product in Canada, and therefore, the Kona pie cookies were not actually saleable in Canada as they were packaged.

[81] The defendant argues that s. 23(7) of the Act precludes the breach of s. 18(a). Section 23(7) states:

(7) If there is a contract for the sale of unascertained or future goods by description, the property passes to the buyer as follows:

- (a) when the buyer signifies approval or acceptance to the seller or does any other act adoption the transaction;
- (b) if the buyer does not signify approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been set for returning the goods, at the end of that time, and, if no time has been set, at the end of a reasonable time.

[82] No authority was cited as to why this section of the Act precludes the operation of s. 18(a). I note that this was not a case of a sale by description. I find that s. 23(7) has no application in this case.

[83] The defendant also argued that any contract term or implied warranty between the parties came to an end upon the sale of the Kona pie cookies from Nikka Traders to Cheena Japan, citing s. 39 of the Act as authority. Section 39 of the Act states as follows:

39 The buyer is deemed to have accepted the goods when

- (a) the buyer intimates to the seller that the buyer has accepted them,
- (b) the goods have been delivered to the buyer, and the buyer does any act in relation to them which is inconsistent with the ownership of the seller, or
- (c) after the lapse of a reasonable time, the buyer retains the goods without intimating to the seller that the buyer has rejected them.

[84] The defendant asserts that the sale of Kona pie cookies to Cheena Japan was an act inconsistent with its ownership and that pursuant to s. 39 any implied warranty no longer applies.

[85] I do not agree that s. 39 suggests resale of a product precludes the plaintiff's claim for breach of s. 18(a) of the Act. The defendant has provided no authority why acceptance of the goods should extinguish an implied warranty or condition under s. 18(a). In *Foley v. Piva Contracting Ltd.*, 2005 BCSC 651, the defendant salesman of a defective tractor was found to

have breached s. 18(a) despite the fact that the plaintiff purchasers had already resold the defective tractor to another person. I dismiss the defendant's argument that, by operation of s. 39, the plaintiff is precluded from asserting a breach of an implied warranty of a product's fitness for the buyer's purpose.

- [86] Gizella's failed to provide a product to the purchaser Nikka Traders that was fit for export to Japan. Nikka Traders was relying on the expertise of Gizella's to create a product for that stated purpose, and Gizella's knew it was being relied upon. I therefore hold that Gizella's breached s. 18(a) of the Act and is liable for damages to the plaintiff Nikka Traders.

V. Decision

- [87] According to the Japanese authorities, the goods were not admitted to Japan consequent on testing. As a result, the goods were incapable of importation and sale into Japan. I find the defendant in breach of the contract and also in violation of s. 18(a) of the Act. The plaintiff is entitled to damages.

VI. Damages

- [88] The plaintiff seeks damages for the cost of the detained products plus incidental costs, including storage fees, disposal of the product, testing for TBHQ, Cheena Japan's labour addressing the problem, and the difference in cost in having to air freight the replacement product to Japan, rather than to transport by container ship. I accept the evidence of Wayne Lytton and his son, Mr. Lytton, respecting the amounts of the heads of damages for these costs. This amount claimed is the Canadian currency equivalent of ¥3,284,089 purchased at a chartered bank in British Columbia at the close of business on the conversion date under the Foreign Money Claims Act, R.S.B.C. 1996, c. 155.
- [89] The plaintiff also seeks certain items of damages notably for the airfare of Mr. Lytton to Japan to address the issue. It also seeks interest on this total pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79.
- [90] The defendant asserts that this valuation of damages is too high, as Gizella's does not have an obligation to supply Cheena Japan. It argues Cheena Japan's costs with regard to air freight and other matters in Japan were not foreseeable to Gizella's.
- [91] The defendant also alleges that the plaintiff should have mitigated their damages by returning the Kona pie cookies to Canada for resale.
- [92] It is settled law that damages in this type of case shall be determined based on the principle restated by Lord Scott in *Farley v. Skinner*, [2001] UKHL 49, at para. 76:

The basic principle of damages for breach of contract is that the injured party is entitled, so far as money can do it, to be put in the position he would have been in if the contractual obligation had been properly performed. He is entitled, that is to say, to the benefit of his bargain: see *Robinson v. Harman* (1848), 1 Exch. 850, 859.

- [93] The plaintiff is entitled to all direct costs flowing from the breach, and any consequential indirect costs (see for example: *T-Bar Contracting* at para. 113). The plaintiff may only recover foreseeable costs (see: *T-Bar Contracting*, at para. 114).
- [94] The cost of the detained products and the incidental costs in Japan were all foreseeable to the defendant. Gizella's knew that the Kona pie cookies were destined for sale in Japan. They therefore could foresee that incidental costs such as testing the cookies in Japan and shipping replacement products by air would be necessary incidental costs in order to put the plaintiff in the position it would have been had no breach occurred - i.e. if the cookies passed Japanese customs.
- [95] The defendant argues that the plaintiff should have mitigated these costs by shipping the cookies back to North America for resale. I accept the plaintiff's evidence that this was not a viable option because they would have to be shipped to Canada and repackaged - when the packaging had not yet been created - before the food products expired. It cannot be forgotten these were perishable goods. Consequently, Nikka Traders was not required to mitigate damages by returning the cookies to North America for resale.
- [96] There was evidence before the Court, which I accept, that these expenses had to be incurred while the problem was sorted out. The communication on the issue of the detained cookies between the parties went on for weeks. During this time, the plaintiff advised the defendant they needed the product immediately for their Japanese client. Nikka Traders had to act quickly sending a suitable replacement shipment to their client. It was foreseeable that all of the above incidental costs were necessary to mitigate harm to the plaintiff and its client's reputations and to keep business running as smoothly as possible.
- [97] The additional expenses claimed by the plaintiffs, however, were not all foreseeable or directly tied to the incident.
- [98] It was foreseeable to the defendant that an issue with customs that affected the reputation of Nikka Traders and Cheena Japan would require a representative of Nikka Traders to fly to Japan to address the issue. Therefore, I award the cost of Mr. Lytton's airfare to the plaintiffs in the amount of \$943.65 CAD.
- [99] It is not, however, foreseeable that other products would need to be tested for their contents. This issue only involved the shipment of Kona pie cookies that used margarine. The testing of butter cookies was a separate cost incurred by the plaintiffs that cannot be claimed against the defendant for the breach of the contract in question.

[100] The plaintiff is therefore awarded the sum of ¥3,284,089 converted into Canadian currency at August 2, 2007 and \$943.65 CAD, plus the relevant interest.

[101] I find the plaintiff is entitled to ¥3,284,089, being the amount the plaintiff had to pay Cheena Japan for services to deal with the detained cookies plus the incidental costs such as storage, costs of disposal, testing for TBHQ, Cheena Japan's labour cost, and the difference in cost caused by the need to air freight the replacement product. I order this amount to be calculated as converted to Canadian dollars on August 2, 2007, pursuant to John James Rickard Noble Second Generation Family Trust (Trustee of) v. Heuson Pharmaceutical Corp, 2004 BCSC 482, at para. 46-47. I find it would be unfair to the defendant to order that the conversion rate be calculated pursuant to the Foreign Money Claims Act because the plaintiff paid out these claimed amounts in yen in 2007. The yen has fluctuated in its rate against the Canadian dollar, and any award in Canadian dollars made in 2012 would be nearly double what it would have been in 2007. I find that this would be a windfall to the plaintiff unwarranted in the circumstances.

[102] I also award prejudgment interest from August 2, 2007 to the date of judgment.

VII. Costs

[103] In the event that counsel is unable to reach an agreement respecting costs, counsel may within 30 days of the release of this judgment, speak to costs by advising the Registry.

____ "Maisonville J." ____

Maisonville J.

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