

HONG KONG / JUDGMENT

CROYDEX LTD v. TUNG SHING PLASTIC FACTORY LTD

COURT

District Court

DECIDED

9 March 2007

CASE / FILE NUMBER

DCCJ1348/2005

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bjbj DCCJ 1348/2005 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION CIVIL ACTION NO. 1348 OF 2005

BETWEEN CROYDEX LIMITED Plaintiff TUNG SHING PLASTIC FACTORY LIMITED Defendant

Coram: Master K.W.Wong in Court Date of Hearing: 30th January 2007 Date of Handing Down of
Assessment of Damages: 9th March 2007 ASSESSMENT OF DAMAGES

1. The is an assessment of damages suffered by the Plaintiff in respect of goods sold and delivered. The goods, when delivered to the Plaintiff, were found to be defective. On 26th May 2006, Deputy District Judge Wong entered interlocutory judgment against the Defendant with damages to be assessed.

Background

2. The Plaintiff is a supplier of bathroom fittings based in the United Kingdom. The Defendant is a Hong Kong manufacturer with associated factory in mainland China. In September 2004, the Plaintiff placed two purchase orders with the Defendant referenced as Order Nos. 39181 and 39182 and have been accepted. The contracts in question are for production of 10,000 resin toilet seats (10,002 delivered by the Defendant). After shipment and the purchase price duly paid, it was found out that 3,133 pieces were defective and were rejected, breakdown of which are as follows: Order reference No. of defective toilet seats
39181 1,984 39182 1,149

3. According to the written decision of the learned Deputy Judge, interlocutory judgment was entered against the Defendant based on admission by Mr. Calvin Chow Ka Fai, the sales manager of the Defendant in his contemporaneous e-mails exchanged with the Plaintiff. The question before me is how much can the Plaintiff recover. Directions Subsequent to Interlocutory Judgment
4. Subsequent to the interlocutory judgment, H.H. Judge Chow directed that affirmations already filed by the parties in the summary judgment application do stand as evidence in chief of the parties in the assessment. The learned Judge further directed the Plaintiff to file and serve affidavit evidence in support of the quantum of damages it then claimed with leave to the Defendant to file affirmation evidence in opposition.
5. Additional affirmations were filed and served by the Plaintiff pursuant to the Court's directions. At the assessment hearing, the Plaintiff relied on the following affirmations: three affirmations by Nick Nickson respectively dated 21st October 2005, 22nd May 2006 and 11th October 2006; affirmation of Audrey Field dated 11th September 2006; affirmation of Richard Littlehales dated 11th September 2006; and affirmation of Valerie Kent dated 11th September 2006. Mr. Nickson also attended the assessment to testify and for cross-examination.
6. However, the Defendant files no further evidence pursuant to the Court's directions. Only the affirmation of Chow Ka Fai, Calvin affirmed on 13th January 2006 is relied on. Mr. Chow did not show up to testify. Therefore, there is virtually no evidence on the part of the Defendant to challenge the quantum evidence put in by the Plaintiff, such as the costs of airfreight charges, the 100% resorting exercise, its related evidence on man-hour incurred and the hourly rate.
7. In fact, in the middle of the cross-examination of Mr. Nickson by Mr. Fung, solicitor acting on behalf of the Defendant, he made an application to put in supplemental evidence to rebut what Mr. Nickson had said. Counsel for the Plaintiff strenuously opposed this application. I have no hesitation to reject such application on the simple reason that it comes just too late. Heads of Claim of the Plaintiff
8. It is the Plaintiff's case that they did a pre-shipment inspection of the toilet seats in the factory of the Defendant for the first shipment in question. Quality problems were identified. The toilet seats under the two purchase orders were then shipped by two shipments. The Plaintiff did sample checks when the two batches of goods arrived in the United Kingdom. The same quality problems with the goods were found. As such, Mr. Nickson ordered a 100% resorting of the two batches of goods. Extra manpower, and thus expenses, were incurred as a result.
9. It is also the Plaintiff's case that the Defendant has knowledge that the toilet seats were to be supplied to a large UK mail-order retailer, Argos Ltd (Argos), who is a big customer of the Plaintiff. It is therefore within the Defendant's contemplation that defects in the toilet seats may lead to Argos withdrawing future custom from the Plaintiff, resulting in damages for

loss of profits on potential repeated orders from Argos. These losses are recoverable as a matter of law. So in order to mitigate this potential loss it is justifiable for the Plaintiff to buy from alternative supplier and ship some of the substitute toilet seats to United Kingdom by air instead of by sea in order to make up for the shortage caused by the rejection of part of the Defendant's goods.

10. Mr. Thomas Lee, counsel for the Plaintiff, submitted at the assessment that the Plaintiff should be entitled to damages under the following heads: costs of the rejected toilet seats (those seats having been paid for): US\$31,016.70; wasted delivery charges applicable to the rejected toilet seats: US\$4,069.76; costs incurred in resorting the rejected toilet seats: US\$11,683.80; difference between the prices of the rejected toilet seats and the substitute toilet seats; and airfreight charges for delivering the substitute toilet seats: 43,743.48.
11. Although it is stated in Mr. Lee's written submission that the Plaintiff reserves its right to recover the amount under the 4th head set out in the preceding paragraph, it is Mr. Lee's oral submission at the assessment that the Plaintiff would like to claim the price difference between the substitute and the rejected goods for 2,000 toilet seats which are all of marble pattern design. Mr. Fung for the Defendant did not appear to raise issue particularly on this point, although I understand that the Defendant generally disputes the entitlement of the Plaintiff to all heads.
12. It is also noted that the Plaintiff does not specifically pleaded in the Re-Re-amended Statement of Claim the loss in respect of the price difference of the goods. However, the Plaintiff did state therein (paragraph 19) that equivalent goods were shipped and the Plaintiff asked for further damages for breach of contract. I therefore do not think the absence of such particular in the pleadings affects the Plaintiff's right to claim under that head.

Evidence of the Parties

13. Mr. Nickson gave evidence at the assessment and adopted all the evidence in his three affirmations. He was cross-examined by Mr. Fung. Having observed him in the witness box at the assessment hearing, I have no doubt that he is a truthful, reliable and honest witness. His evidence is logical, sensible and coherent. I find that there are no major discrepancies in his evidence and the documents exhibited by affirmations. He was unshaken in the cross-examination. He is that kind of a truth witness. Since the Defendant adduces no evidence to challenge the amounts claimed and calls no witness to testify, subject to the discrepancies which I have identified in the following paragraphs and his admission that 3, 311 pieces of rejected goods in paragraph 25 of his affirmation dated 21st October 2005 is a typo-error for 3,133, I accept all the evidence of Mr. Nickson. I consider all these discrepancies minor and immaterial. As the Defendant files no evidence to rebut the affirmation evidence of Audrey Field, Richard Littlehales and Valerie Kent, nor have requested these witnesses to attend Court for cross-examination, I accept their evidence for the purpose of this assessment.

Costs of Rejected Toilet Seats

15. Sections 55 and 53 of the Sales of Goods Ordinance, Cap 26 () respectively provides for measures of damages for breach of warranty, i.e. defective quality and for non-delivery. In a nutshell, for breach of warranty the measure of damage is prima facie the difference between the value of the goods at the time of the delivery to the buyer and the value they would have had if they had fulfilled the warranty: Section 55(3) of SGO. Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the measure of damages is prima facie to be ascertained by the difference between the contract price and the price of the substitute: Section 53(3) of the SGO.
16. The Plaintiff's case is simply this: the defective toilet seats were paid for and they are entitled to reject the goods. For rejection of goods, the measure of damages is the same as that for non-delivery rather than for defective quality. As such they are entitled to have a full refund of the goods plus the price difference between that of the substitute and goods originally contracted for.
17. By an email dated 31st January 2005 from Mr. Calvin Chow to the Plaintiff, the Defendant said: Dear Mr. Nickson, we are actually waiting for the results for inspection of the first shipment. As we have agreed with you we will make replacement goods upon receipt of the rejected goods (3133 pieces) and ship you back by sea. However, we cannot accept any other incurred costs. Could you please ask your forwarder contractors for the goods returned. We will pay for the sea freight costs. I sincerely hope this is agreeable with you. (my emphasis)
18. It is clear from the above evidence of the Defendant that it agreed to accept rejection of the goods. In fact, the above email was also relied on by the learned Deputy District Judge when he entered judgment on liability. I accept Mr. Lee's submission that the Plaintiff's damages should be based on rejection of goods.
19. In paragraph 17-047 [page 1067] of Benjamin's Sale of Goods, 17th edition (2006), the learned author has this to say: Where the buyer is entitled to and does reject the goods on the ground that they do not measure up to the contractual description or standard, the buyer's damages are assessed on the basis that the seller has failed to deliver the goods I consider that it is the correct proposition of law and accordingly, accept Mr. Lee's submission that the measure of damage for rejection of goods is the same as that for non-delivery of goods and not breach of warranty.
20. It is not in dispute that the unit price for the resin toilet seat is US\$9.9. I accept the Plaintiff's evidence that the total number of rejected toilet seats being 3,133 pieces. The damages recovered under this head is therefore: $US\$9.9 \times 3,133 = US\$31,016.70$. Wasted Delivery Expenses
21. The Plaintiff's case is that they have placed orders for 10,000 toilet seats: see page 54 of the assessment bundle. They have incurred delivery expenses and those for the rejected goods have been wasted. The Defendant's position is that a total of 10,002 pieces have been delivered: see pages 105 and 106 of the assessment bundle. According to the two bills of lading issued by Shanghai JAS International Cargo Transport Co. Ltd, the agent for the

carrier and produced by the Plaintiff [pages 202 and 206 of the assessment bundle], a total of 10,002 toilet seats were shipped in the two shipments. There is no explanation by both parties of the discrepancy. It may be the case that the Plaintiff placed orders for 10,000 pieces but 10,002 were actually shipped because these toilets seats were packed in cartons each containing three. 10,002 is a multiple of three whereas 10,000 is not. On a balance, as a finding of fact I find that a total of 10,002 toilet seats were delivered, although the discrepancy does not affect my assessment in any material respect.

22. It is the Plaintiff's evidence that the shipping costs together with land transport and other related expenses for the two shipments of 10,002 toilet seats amounted to 7,293.47, being the sum total of 4,563.56 [page 201 of assessment bundle] and 2,729.91 [page 205 of assessment bundle].
23. I see no reason why the Plaintiff should not be entitled to recover the wasted transport expenses. The Plaintiff's case is that the rejected toilet seats is about 31% of the ordered goods and therefore asks for a sum on pro-rata basis, but in US currency in the sum of US\$4,069.76. However, the Plaintiff adduced no evidence on the conversion rate between sterling and US dollar. I consider that there is insufficient basis to order the wasted transport expenses in US dollars. The wasted transport expenses in British pound are as follows:
 $3,133/10,002 \times 7,293.47 = 2,284.59$. Costs Incurred in Resorting the Rejected Toilet Seats
24. As I have said in the preceding paragraphs, I accept the Plaintiff's evidence that it has conducted a pre-shipment check before the goods were shipped to UK. It was done by the Plaintiff's staff, one Mr. Calvin Lee, stationed in the PRC who visited the factory associated with the Defendant, one Tung Po Plastic Toys Factory in the PRC. Quality problem was found out. According to the evidence of Mr. Nickson in Court and other Plaintiff's witnesses, Audrey Field, Richard Littlehales and Valerie Kent, they conducted routine sampling of the two batches of goods when they arrived at UK. They found out that the quality problems identified in the PRC factory had not yet been fixed. Bubbles, dents marks on surface, moulding marks were found out on the surface of the resin. Accordingly Mr. Nickson ordered a 100% resorting and 3,133 toilet seats were rejected in this exercise.
25. I also accept Mr. Nickson's evidence that 100% resorting is unusual and was only ordered when the Plaintiff identified a quality problem. Furthermore the Plaintiff cannot afford to lose an important client Argos on quality problem, who may stop future orders from them and may impose penalty on them for profit loss.
26. It is also Mr. Nickson's evidence in Court that the Plaintiff has to engage additional temporary labour to do the resorting. Ms. Audrey field was the one responsible for recording the man-hours. According to the Plaintiff's record, about 315 man-hours at 15 per hour have been incurred.
27. I accept that these expenses are directly and naturally resulting from the Defendant's breach of contract and are recoverable. Although there is no documentary evidence produced by the Plaintiff on the recorded man-hours and the payment of these extra expenses, the

Defendant adduces no evidence to challenge the same. On a balance I accept the Plaintiff's evidence that 315 man-hour each at 15 have been incurred. However, there is no evidence that 15 is equivalent to US\$27. Furthermore, I fail to arrive at the figure pleaded by the Plaintiff and set out in paragraph 9 of the Mr. Nickson's 3rd affirmation by multiplying 315 man-hours by US\$ 27. There is no explanation on how the figure set out at left bottom part of the Plaintiff's debit note [page 199 of the assessment bundle] is arrived at. I therefore prefer not to accept the loss under this head being US\$11,683.80 as claimed by the Plaintiff in the Re-Re-Amended Statement of Claim under this head. Instead, my assessment of the Plaintiff's loss under this head is as follows: 15 per hr x 315 hrs = 4,725. Price Difference Between the Rejected and the Substitute Toilet Seats

28. According to Mr. Nickson, the goods under order 39181 were originally scheduled to arrive at the Plaintiff's warehouse by 1st December 2004 with a view to meet the Christmas selling period. The Christmas selling period is the period immediately after Christmas when department stores have their Christmas sales. Due to the quality problems, the deadline was extended to 20th December 2004. For the goods under 39182, they did not arrive until 14th January 2005 instead of the originally scheduled date of 3rd January 2005. In view of the quality problem, the Plaintiff has to order from another supplier, one Mighty Tact, Ltd (Mighty Tact), to catch up on stock availability. According to the two invoices dated 13th March 2005 and 10th May 2005, two batches of toilet seats respectively 2,500 and 2,000, totalling 4,500 at US\$10.5 each were ordered and delivered by Mighty Tact.
29. It is Mr. Nickson's evidence that the marble pattern of the toilet seats proved to be very popular. While the Plaintiff had sufficient backup stock to meet the demand of other patterns, it was not the case for marble. As such they have to ship by air the marble design to UK. It is Mr. Nickson's evidence that shipment by sea takes about four weeks while that by air takes about four to five days. As for the other patterns, they do it by conventional transport by sea.
30. In paragraph 17-037 [page 1056] of Benjamin's Sale of Goods, 17th edition (2006), the learned author states: Where the seller fails to deliver the goods, but there is an available market, the buyer should be able, by buying substitute goods, to avoid consequential losses flowing from the seller's breach. There may, however, be some incidental expenses in transport or handling: these are recoverable as part of the buyer's damages, in addition to the measure of damages in section 51(3) [the English equivalent to S.53 of SGO for non-delivery]
31. I have no doubt to accept the above passage being the correct position of the law that entitles the Plaintiff to buy from another supplier for substitute goods. Section 53(3) of the SGO also sets out the same measure of damages. It is Mr. Lee's submission that the Plaintiff only pursue the price difference for these 2,000 pieces with marble design. I accordingly order the Defendant to pay the following sum under this head: $(US\$10.5 - US\$9.9) \times 2,000 = US\$1,200$. Airfreight Charges for Delivering the Substitute Toilet Seats

32. Mr. Nickson s evidence is that prior to the present two purchase orders, the Plaintiff have placed orders for about 35,000 toilet seats and over 90% of them were for Argos. The Defendant ought to have known that Argos would impose stiff penalties and stop future orders if there were quality problems. For the present two orders the Defendants knew that they were also for Argos. That is why in order not to attract penalty and to avoid loss of custom from Argos in future the Plaintiff has to ship some goods by air.
33. Mr. Fung for the Defendant submitted that the Defendant had no knowledge that the goods in questions were for Argos. The penalty to be imposed by Argos was only made known to the Defendant some time in January 2005.
34. However, in an e-mail from the Plaintiff to the Defendant dated 27th September 2004, the Plaintiff notified the Mr. Calvin Chow of the Defendant the detailed specifications by a document headed: Packaging Specification for Argos Brand Resin Toilet Seats Supplied to Croydex .
35. In paragraph one of the said specification, it is stated that All Argos brand resin toilet seats supplied to Croydex are subject to the requirements of this specification document
36. The above was informed to the Defendant at around the time the two purchase orders were placed. It is evident from the said specification that the goods in question are for Argos. I therefore do not accept the Defendant s contention that it does not know the end-purchaser of these batches of goods being Argos. I consider that the Defendant knew at the material time the toilet seats were for onward supply to Argos. It is therefore within the reasonable contemplation of the parties that defects in the goods supplied by the seller might lead to sub-buyers of the buyer withdrawing their future custom from the buyer. Whether the Defendant knew of the stiff penalty to be imposed by Argos is immaterial. In any event the Plaintiff is not seeking to recover any penalty paid to Argos.
37. I consider that damages are recoverable for the loss of profits on potential repeat orders from the sub-buyers: see GKN Centrax Gears Ltd v Matbro Ltd [1976] 2 Lloyd s Rep 555 at 573,574,579,580. It is therefore reasonable for the Plaintiff to take reasonable steps to mitigate its loss in order to avoid loss of repeat orders . I accept the transport by air of the 2,000 marble pattern toilet seats reasonable expenses incurred by the Plaintiff arising from the Defendant s breach: see also paragraph 17-037 of Benjamin cited in paragraph 30 above. However, the corresponding shipping costs by sea have to be deducted because the contract in question is a FOB one. The shipping costs by sea are the expenses that the Plaintiff has to incur anyway even when there was no breach.
38. According to the invoice issued by JAS Forwarding (U.K.) Ltd [page 114 of the assessment bundle], a sum of 23,383.39 was paid for the delivery of the first batch of 2,500 substitute toilet seats. The airfreight charges for 2,000 pieces is therefore: $23,383.39 \times 2,000/2,5000 = 18,706.71$.

39. In paragraph 23 above, the corresponding wasted shipping costs by sea for 3,133 toilet seats is 2,284.59 (3,133/10,002 x 7,293.47). So the shipping costs by sea for these 2,000 toilet seats are: 2,284.59 x 2,000/3,133 = 1,458.40.
40. The loss suffered by the Plaintiff under this head is: 18,706.71 - 1,458.40 = 17,248.31. Total Damages and Costs
41. The damages to which the Plaintiff is entitled are assessed at: US\$32,216.7 (US\$31,016.70 + US\$1,200); and 24,257.90 (2,284.59 + 4,725 + 17,248.31) or the Hong Kong dollar equivalent at the time of payment.
42. I order that the Defendant to pay interest on the above sums at half judgment rate from the date of the writ, i.e. 22nd March 2005 until date of interlocutory judgment, i.e. 26th May 2006 and thereafter at full judgment rate until full payment.
43. I also make the following order nisi as to costs: that unless either party applies to be heard on the question of costs within 14 days, the Defendant do pay the Plaintiff costs of the assessment of damages with a certificate for counsel, to be taxed if not agreed. (Signed) (K.W. Wong) Master of the District Court Mr. Thomas Lee instructed by M/s Haldanes for the Plaintiff Mr. Samuel Fung of M/s S.Y. Fung & Co. for the Defendant - PAGE A B C D E F G H I J K L M N O P Q R S T U V 1udk |!&< `fJ\$ ZNh` 6a!{ zC|~ 6a!{ Normal.dot setup Microsoft Word 9.0 Judiciary Hong Kong SAR Title Microsoft Word Document MSWordDoc Word.Document.8

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