

HONG KONG / JUDGMENT

TECH-TRANS SYSTEM LTD v. ELM COMPUTER TECHNOLOGIES LTD

COURT

District Court

DECIDED

21 August 2007

CASE / FILE NUMBER

DCCJ1200/2005

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bjbj DCCJ1200/2005 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION CIVIL ACTION NO. 1200 OF 2005

BETWEEN Tech-Trans System Limited Plaintiff And ELM Computer Technologies Limited (by
original action) Defendant AND BETWEEN ELM Computer Technologies Limited Plaintiff And
Tech-Trans System Limited Tech-TransTelecom Limited (by counter-claim) Defendants

Coram : H. H. Judge Chow Dates of Hearing : 6th and 8th June, 2007 Date of handing down
Judgment : 21st August, 2007

JUDGMENT

This is the claim by Tech-Trans System Limited (TT System) against ELM Computer Technologies Limited () for loss of profit in the sum of \$70,809.50 in the sub-sale of certain computer software (the goods) to Ocean Technology (Asia) Limited (Ocean). On the other hand ELM counterclaims against Tech-Trans Telecom Limited (TT Telecom), and alternatively TT System, for the sum of US\$98,641.86 for the sale of the goods. On 21 June 2004, a Miss Phoebe Lam of IBM Hong Kong phoned up Mr. Machine Chan of TT System/TT Telecom, saying that she would introduce a client (Ocean) to him. She told him that Ocean had approached them for the purchase of certain products. She had asked Ocean to order the products through TT System, and the products had to be ordered by TT System through ELM. Phoebe Lam emailed to Machine Chan a list of items to be ordered by Ocean, namely, software licences for 7 different IBM software programs. On 25 June 2004 she sent to ELM the same list of the 7 software licences, as well as the details of Ocean. Based on this list, ELM prepared a quotation, in which the name Tech-Trans was used. Upon receiving the quotation, Machine Chan sent a e-mail to Martin Yung of ELM, asking him to include media packs (CD-Rom for the software) and documents packs (user manual for the software) for the 7 software programs in the quotation. Martin Yung prepared a revised quotation

and faxed it to Machine Chan for his signature. Then Machine Chan faxed it back to Martin Yung. On the revised quotation, Machine Chan put down the words System Ltd after the words Tech-Trans . On 25th June, 2004 ELM placed a purchase order with IBM Singapore for all the goods. On 28 June 2004, a further revised quotation for the goods was signed by TT Telecom in place of TT System. By 28 June 2004, IBM delivered the 7 software licences to Ocean directly by e-mail in the form of a document called Proof of Entitlement on which it was expressed that the software maintenance period covered from 26 June 2004 to 30 June 2005. On 23 July 2004, ELM delivered to TT Telecom the media packs and document packs for the 7 software licences, as well as a hard copy of the 7 software licences for their record. TT Telecom rejected the goods and refused to settle ELM s invoice. It is the evidence of Machine Chan that on or about 25 June 2004, Martin Yung contacted him over the phone. During the telephone conversation, they agreed that ELM would supply the goods, and: (a) that delivery for the goods should only be made upon the request of TT System, and (b) ELM should procure software maintenance service of the goods covering a period of 12 months from the date of delivery. During cross-examination, Martin Yung denied that term (a) had been reached but conceded that during the telephone conversation Machine Chan did request that ELM should not deliver the goods unless requested to do so, and it was agreed that ELM should procure software maintenance service of the goods covering a period of 12 months from the date of delivery. Later on, Martin Yung sent a draft quotation to Machine Chan. When he saw that the delivery date on the quotation was to be approximately 4 - 6 weeks , Machine Chan requested Martin Yung to put down the agreed term on delivery in writing. Martin Yung rejected the request, explaining that it was against the policy of his company to agree to such a term. But eventually Martin Yung agreed that delivery would be made upon Machine Chan s direction. On 23 July 2004, Machine Chan sent a e-mail to Martin Yung, stating, We do not accept the delivery of software on your D.O. DN2004-0182. As we did not issue delivery instruction to your company before. Please collect back asap. Martin Yung said that he called up Machine Chan after receiving this e-mail. This was not mentioned in his two witness statements. The evidence relating to the e-mail sent on 23 July, 2004 is consistent with Machine Chan s evidence that a term on the delivery of the goods had been reached during the conversation between the two of them on or about 25th June, 2004. I accept the evidence of Machine Chan in this respect. However Martin Yung simply did not have the authority to enter the agreement. So whatever he agreed in this respect cannot be binding upon his employer ELM. Further this verbal agreement is a piece of inadmissible evidence because it contradicts the written term of the contract. Even if such an agreement was binding upon ELM, did TT Telecom rely on such a breach to reject the goods? In its first official reply letter (dated 16th September, 2004) to ELM, TT Telecom no longer complained that the goods were delivered before any request had been made, as indicated in its e-mail dated 23 July, 2004. The letter reads:- Referring to your Quotation (Q2004/06/S0425) dated 25 June 2004. We will not agree to settle your invoice (CT2407043) as what your delivered are not consistent with the goods we ordered. We find that the Quotation was signed and faxed to us on 28 June 2004, therefore the contract was concluded on 28 June 2004. You delivered the products on 23 July 2004 while all the 1 year software licenses maintenance coverage period commenced on 26 June 2004 which are much earlier than the concluded contract date and the delivery date. In this circumstance, please clarify with our Sales Manager Mr.

Machine Chan for the dispute and replace the goods with proper maintenance coverage period. The emphasis of this letter is on the insufficiency of the maintenance period.

12. It is clear from paragraph 10 of the witness statement of Machine Chan that his real intention was not to reject the goods, on the ground that no delivery instruction had been given to ELM. Paragraph 10 reads: -
10. Upon receipt of the Products from ELM, I contracted OTAL to ascertain whether they had completely installed their computer system. I was told by OTAL that they had received a copy of the Proof of Entitlement from IBM direct and noted that the software maintenance period had already started on 26th June 2004, i.e. about a month prior to the delivery of the Products to TT System. I was told by OTAL that they would not accept the Products unless the software maintenance period was amended. Thereafter, I contacted Martin Yung by telephone and told him to amend the software maintenance period so that the same would only start to run from the date of delivery. Martin Yung told me that he would see what he could do and would revert to me. I sent Martin Yung an email to protest on the same day, i.e. 23rd July 2004. It is clear from this paragraph that Machine Chan did not really intend to reject the goods as indicated in the e-mail dated 23rd July, 2004, because Ocean had not yet rejected the goods. If he really had had the intention to reject the goods right away he would not have told Martin Yung to amend the software maintenance period. Ocean would accept the goods if the software maintenance period was amended. It is under such circumstances that he sent the e-mail.
13. The IBM s Passport Advantage Express includes a maintenance feature, which includes product upgrades and technical support. It is a benefit collateral to the software license. Therefore the duration of the maintenance period must be a warranty. Section 55(1) of the Sales of Goods Ordinance provides:-
 - (1) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not, by reason only of such breach of warranty, entitled to reject the goods; but he may set up against the seller the breach of warranty in diminution or extinction of the price; or
 - (b) maintain an action against the seller for damages for the breach of warranty. Under this section, nether Ocean nor TT Telecom was entitled to reject the goods because of insufficient maintenance period. Did Ocean reject the goods?
14. There is a letter dated 9 November 2004 from Ocean to Lau Kwong & Hung, Solicitors, which reads:- Referring to our contract with supplier (Tech-Trans System Limited) on 25th June 2004, we have agreed with our supplier alternatively instead of the previous payment method. Please release our deposit with HKD420,108.00 held on your stakeholder s account to Tech-Trans System Limited upon you received this letter.

15. Ocean's deposit (\$420,108) in relation to the purchase of the goods were stakeheld by a firm of solicitors, Lau Kwong & Hung. The deposit was to be transferred from that law firm solicitors to TT System. If Ocean had rejected the goods, it would be under no duty to make any payment for the goods, and therefore it would not have asked that law firm to release the its deposit to TT System. So it must have accepted the goods, and the deposit to TT System as payment. This is in line with the internal e-mail issued by IBM china/HK Ltd. On 11th November, 2004, which reads: - Please note Tech-trans is working out with Ocean Technology an acceptable payment terms to have this resolved in stead of cancelling the order. Tech-trans has drafted the letter for Ocean Technology's review and signature to release the fund HKD420K held by legal firm for this project. This is about half the full payment. Douglas just talked to Ocean Technology and Ocean Technology agrees to release the above fund to Tech-trans first in stead of canceling the order. Ocean Technology will fax the signed letter today to me first and then I will give that to Machine to ensure and help facilitate the payment. I will keep you posted on this progress and then you can help work out an something between ELM and Tech-trans in stead of canceling the order.
16. TT Systems claims against ELM for loss of profit from the sub-sale of the goods to Ocean because Ocean rejected the goods, and as a result the sub-sale did not go through. But there is no evidence that Ocean rejected the goods. Instead Ocean accepted the goods. Therefore its claim must fail.
17. It is TT Telecom which signed the final version of the quotation of the goods issued by ELM, stating Confirmed and Accepted by Tech-Trans Telecom . Its company chop was stamped next to the signature. The goods were in fact delivered to TT Telecom. Hence it is TT Telecom which assumed the rights and obligations of TT System under the agreement. Therefore the proper plaintiff in the original action is TT Telecom and not TT System.
18. For these reasons I dismiss the claim of the Plaintiff (TT System) in the original action.
19. As for ELM's counterclaim for the full price of the goods, there is no claim in the pleading of TT System or TT Telecom and no evidence has been adduced to show that there is a diminution in the value of the software licences because of insufficient maintenance period. Therefore this court will not make any reduction in this regard.
20. I enter judgment in favour of the Plaintiff (ELM) in the counterclaim against Tech-Trans Telecom Limited in the sum of US\$98,641.86, with interests thereon at judgment rate, commencing from 12th April, 2005, until satisfaction. Costs
21. I make an order nisi, to be made absolute in 14 days time, that (1) the costs in the original action be borne by Tech-Trans System Limited, to be taxed, if not agreed, with certificate for Counsel; (2) ELM Computer Technologies Limited is to bear the costs of the counterclaim against Tech-Trans System Limited, to be taxed, if not agreed, with certificate for Counsel; (3) Tech-Trans Telecom Limited is to pay to ELM Computer Technologies Limited costs of the counterclaim, to be taxed, if not agreed, with certificate for Counsel. (S. Chow) District Judge The Plaintiff by original action and the Defendants by counterclaim: represented by

Mr. Jenkin Suen, instructed by Messrs. Cheung & Yip, Solicitors. The Defendant by original action and the Plaintiff by counterclaim: represented by Mr. Jonathan Chang, instructed by Messrs. A.M. Mui & Kwan, Solicitors. PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T 1udk 1udk F G H I J K L M N O P Q R S T U V (#p# &`#\$:i#z *\mT zo/< xC&1 ({m8 fX-Jz P0} W~7gb W~7g xC&1 ({m8 fX-J & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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