

BRECKWOLDT AND COMPANY LIMITED

v

SAMOA IRON & STEEL FABRICATION LIMITED

Supreme Court Apia
 20, 21 September, 14 October 1977
 Nicholson CJ

CONTRACT (Sale of goods) - Conditions of Sale specified on confirmations of orders forming part of original contract for sale - Purchaser bound by Conditions to pay for goods before pursuing claims against seller for defects in goods.

SALE OF GOODS (Merchantable quality) - Galvanised steel of "first class prime quality" - Whether "white rust" caused by poor quality galvanising or by damp storage - Failure to discharge burden of proof.

ACTION claiming payment of balance of money owing for goods sold and delivered and counterclaim for damages for loss of profits and goodwill. Judgment for plaintiff on both claim and counterclaim.

Drake for plaintiff.
 Retzlaff for defendant.

Cur adv vult

NICHOLSON CJ. The plaintiff claims from the defendant the sum of US\$34,839.39 or WS\$28,150.23 plus interest, being the balance due on three drafts. The defendant denies liability and counterclaims for WS\$43,242.00 damages for loss of profits and goodwill.

It is common ground that in late 1974 the defendant ordered from the plaintiff a quantity of coils of galvanised steel, to be used in the manufacture of corrugated iron sheets, ridging, spouting and spouting brackets, to the value of US\$90,302.26. The defendant Company executed several drafts in favour of the plaintiff securing payment within ninety days of date of arrival of the consignments.

The material, set out in the plaintiff's invoices B/27.374/1 and 2 and B/27.457, arrived in two separate shipments ex "Nederbeck" on 15 February, 1975 and ex "Madison Lloyd" on 31 March, 1975. The steel was packed in tar paper and metal containers strapped with steel. On arrival, delivery was accepted by the defendant from the shipping agents as being in good condition but as the coils were opened for use at the defendant's premises they were found to be substantially affected by white rust, a type of corrosion of the zinc galvanised surface of the steel. The specified description of goods to be delivered set out correctly in the order confirmation of the plaintiff dated 19 November, 1974 is as follows:-

1. first class prime quality galvanised coils suitable for production of corrugated iron sheets, zinc coating 1.25 oz/sq. ft., in coils of about 2.5 m/tons under second choice sheets....940 mm x 26 gauge;
2. first class galvanised steel coils, zinc coating 1.25 oz/sq. ft. suitable for production of ridging, soft drawn quality in coils

- of about 1,000 kilos under second choice sheets....380 mm x 26 gauge;
3. first class galvanised steel coils, zinc coating 1.25 oz/sq. ft. suitable for production of spoutings, soft drawn quality in coils of about 1,250 kilos under second choice sheets.... 250 mm x 26 gauge;
 4. first class galvanised coils, zinc coating 1.75 oz/sq. ft. suitable for production of spouting brackets in coils of about 25 kilos, bound together in one bundle under second choice sheets....1.1/8" x 14 gauge;
 5. first class prime quality galvanised coils suitable for production of corrugated iron sheets, zinc coating 1.25 oz/sq. ft. in coils of about 2.5 m/tons under second choice sheets735 mm x 26 gauge.

The Managing Director of the defendant, Mr Metzler, called in the then representative of the plaintiff in Apia, Mr Gruenberg, and as a result of their discussion Mr Gruenberg cabled the plaintiff's headquarters in Hamburg on 5th May, 1975 in the following terms:-

Attention shipment coils corrugated sheet ridging guttering charged first quality 26 gauge or 0.46 mm delivered second quality at best and real strength corrugated sheets 0.51 mm others 0.63 mm thereby ten percent respectively twenty percent raising of price recable and make supplier liable for loss involved.

On 25th June, 1975 Mr Metzler wrote to the Hamburg office of the plaintiff setting out his complaints regarding the shipments and claiming a reduction in the price of US\$33,790.88. His complaints were:-

1. galvanising for the whole shipment was below the quality specified;
2. gauges of items 1 and 2 were 24 instead of 26 as specified;
3. width of items 3 and 4 were 740 mm instead of 735 mm.

Small samples of all the items were sent to Hamburg for testing by two laboratories, one on behalf of each party. The laboratory engaged by the defendant declared the samples were below or partly below the quality of the zinc coating specified, and the other laboratory engaged by the plaintiff reported that due to the onset of white rust it was impossible to define the original quality of the zinc coating. Both laboratories agreed that the onset of white rust was due to external factors beyond the point of manufacture, such as dampness during transport or storage.

On 11th September, 1975 Mr Metzler, while in Hamburg, paid US\$66,511.38 to the plaintiff in respect of the consignments. These matters as I have said are not in dispute.

The plaintiff's case consists almost entirely of the testimony of Mr Wellmann, who replaced Mr Gruenberg as the plaintiff's Apia representative in June, 1975. He pointed out that the order confirmations (Exhibits 1 and 2), which were forwarded from Hamburg direct to the defendant, were in consequence of preliminary orders placed with Mr Gruenberg. The confirmations included details of payments, delivery, insurance, and referred to the orders being "as per specification below and General Conditions overleaf." On the back of each confirmation form is printed a set of "General Conditions of Sale", which includes a statement that any risk whatsoever involved in the transport of the merchandise from warehouse to warehouse is for buyer's account. Further, there is a condition that claims are to be made not later than eight days after arrival of goods at final destination, must be accompanied by an official certificate and claims do not entitle buyers to withhold payment of goods wholly or partly.

Mr Wellmann conceded that there had been a wrong gauge supply and pointed out that a credit of US\$1,834.27 had been given by the plaintiff as recompense. He seemed a little unsure of the basis upon which the

credit was calculated, but the credit note suggests that it has a basis of weight difference between what was due and what was supplied. Mr Wellmann suggested that its basis was really that a shorter length of steel was supplied because of the thicker gauge.

Mr Wellmann described the shareholding arrangements of the defendant, the plaintiff being a shareholder, and he particularly referred to a resolution of the defendant's directors to pay the plaintiff's account prior to registering a debenture for a loan by one Dr Schwick. Pursuant to that resolution, Mr Metzler visited the plaintiff's offices in Hamburg but paid only a portion of the outstanding account. Mr Wellmann complained that no proper survey of the quality of the whole shipment had ever been carried out, no official certificate thereon provided, and that no proper basis for the very large claim made by Mr Metzler had been formulated. He characterised the terms of Mr Gruenberg's cable as illustrating the normal tendency of local agents of firms such as the plaintiff to identify with local customers' interests. He took the attitude that there was no satisfactory evidence of poor quality, that the variation in widths was acceptable by trade custom, and that the plaintiff had given proper credit for the gauge variation.

Mr Metzler gave evidence that when he first complained to Mr Gruenberg, he had told him to take the goods back as not up to specification. He said Mr Gruenberg persuaded him to accept the consignments on the basis that the defendant could make up for the defects by a claim against the plaintiff. He told Mr Metzler that the plaintiff would look favourably on such a claim because it had a shareholding in the defendant.

Mr Metzler had not noticed the Conditions of Sale on the confirmation of order forms until he actually formulated his claim. He said he received these some time after placing the order. He was not claiming for the white rust but attributed its onset to poor quality galvanising. However, the laboratory reports produced do not support this contention. He complained that the difference in gauge caused certain technical problems with one machine and that there were some coils with damaged edging. He acknowledged that no complete survey or record of the extent of the defects or rust was prepared. He said it was not practicable to completely unroll each coil. He also acknowledged that he had not kept a record of sales of the steel in question as a basis for his claim for loss of profits and goodwill. There was no suggestion that he had rejected the credit passed by the plaintiff in respect of the wrong gauge being supplied. Mr Metzler said that on the occasion of his visit to Hamburg he had paid the sum of US\$66,511.38 in full settlement of all claims. He acknowledged that the receipt he obtained did not specify this. The defendant called accounting witnesses to explain the basis of its claim for loss of profits and goodwill arising out of its manufacture and merchandising of articles from the steel in question. In addition, the defendant's foreman gave evidence as to the appearance of and problems associated with the steel.

The first issue before me is whether or not the conditions of sale appearing on the confirmation of order forms are binding upon the defendant. Mr Retzlaff for the defendant argues that they do not form part of the contract which he suggests was concluded between the parties at the time the order was first placed. I find this argument difficult to accept, given the geographical situation of the parties. The plaintiff's representative would of necessity be expected by both parties to obtain confirmation from his head office in Hamburg that this quite large order for steel could be met. In addition, the defendant in its pleadings admits that the date of the order was the date of the confirmations. I conclude that the terms of the confirmation formed part of the original contract. Nevertheless, Mr Metzler's meeting with Mr Gruenberg, which I infer must have taken place at the end of April, or in early May, 1975, and Mr Gruenberg's reaction to it, and indeed, the reactions of the plaintiff's head office in Hamburg, strongly suggest a waiver of the requirement that a claim must be made within eight days. I find that that condition was waived by the plaintiff but that the other conditions applied. Thus the defendant was bound to pay for the goods

and pursue its claim for a refund.

Dealing with the issue of quality, I have found the evidence on this topic less than satisfactory but I am bound to say this is mainly caused by the isolated position of Western Samoa. Counsel have by consent introduced a good deal of correspondence which might otherwise not be admitted and have agreed to admit the two laboratory reports by consent without the authors giving evidence. The Court is placed in the difficult position of deciding which of two written expert reports should be accepted. A further difficulty is that one report is based on only five samples and the other on only two samples from this large shipment of steel, and for that reason I approach both reports with a deal of caution. The report of the State Material Testing Office at the Professional College, Hamburg, expresses the view that on the basis of two samples affected by white rust it cannot give an accurate finding of the original galvanising quality. The report of the Max Planck Institute for Research on Iron Metals Limited purports to reach a finding that two of five samples are below the specified quality and the other three partly below when measured at unaffected or less corroded points. I cannot help but question the accuracy of findings which are in part based upon measurement of corroded points and I am strengthened in this doubt by the report of the State Testing Office that in its opinion accurate findings cannot be made from corroded samples. Moreover the report of the Max Planck Institute does not clarify which findings were based on unaffected parts of the samples and which on the affected parts. I have not overlooked the terms of Mr Gruenberg's cable which appear to amount to an admission on the plaintiff's part of inferior quality. However, on the evidence, I am unable to ascribe any expertise on the subject to him and I infer that the terms of his cable were based upon the appearance of white rust on the steel. As for the difference in width complained of, Mr Metzler did not pursue this in evidence. The difference in gauge has been dealt with by the plaintiff with a credit note dated 25th August, 1975, which the defendant appears to have accepted. The reference in the evidence to torn edges is new. It was not in the original claim in June of 1975 and no attempt has been made to record what amount of the shipment was affected in this way. I conclude, therefore, that the issue has narrowed to the question of the quality of the galvanising, only.

Because the plaintiff's action is essentially based upon the drafts produced and admitted by the defendant, and because of the Conditions of Sale which I have found apply here, I conclude that the plaintiff is prima facie entitled to payment of its account, and that the burden is upon the defendant therefore to prove its claim that the steel supplied was not of the specified quality on the balance of probabilities.

Given the conflicting and less than satisfactory laboratory reports and given the evidence of widespread white rust, which must have played a considerable part in reducing the quality of this consignment, I conclude that the defendant has failed to prove that the consignment was below the standard of galvanising specified.

The defendant does not seek to rest its claim upon the incidence of white rust and, indeed, the terms of the contract as I have found them make it difficult for the defendant to place the responsibility for this upon the plaintiff. The laboratory reports show that the white rust is probably due to outside influences such as damp storage, and bears no relation to the quality of the galvanising.

In the issue of whether the sum paid over by Mr Metzler to the plaintiff in Hamburg was in full settlement of all claims or not, I conclude that this allegation is not established. If this had been the case, one would certainly have expected the receipt to record the fact. Moreover, the correspondence produced shows that an immediate protest against the part payment was registered by the plaintiff's Hamburg office to the defendant by a letter dated the day after the payment. This is inconsistent with the alleged settlement that Mr Metzler invites the Court to find was reached. I find, therefore, that the plaintiff is entitled to be paid for the balance of the drafts. However, I find on examining the plaintiff's statement of account Exhibit 5 at page 2

and comparing it with the plaintiff's Statement of Claim that credit has not been given in the Statement of Claim for the US\$1,834.27 comprised in the credit note issued in respect of the supply of the wrong gauge of steel. This sum must therefore be deducted from the plaintiff's claim of US\$33,790.88 contained in paragraph 6(a) and (b) of the Statement of Claim.

The defendant raised the issue of interest and financing charges included in the invoices at the hearing, but this was not raised by the pleadings and indeed paragraph 3 of the Statement of Defence admits the promise to pay the sum of US\$90,302.26, which included the 5% charge. I do not feel that the defendant should be entitled to raise this issue at this stage, particularly when the plaintiff is obliged to prepare much of its case at long range, as it were.

The claim for eleven per cent. interest is not in issue, since the defendant admits the provision for it in the pleadings, and will be allowed as set out in the Statement of Claim.

As a result of my findings, it follows that the counterclaim must fail, the defendant having failed to prove the allegation of poor quality galvanising, which it says resulted in loss of profits and goodwill.

The plaintiff will have judgment as claimed less US\$1,834.27, with interest at the rate claimed, after allowing for the amount of the credit. The plaintiff will also have judgment on the counterclaim. The plaintiff will have costs and witnesses' expenses on both claim and counterclaim to be fixed by the Registrar. I direct counsel to furnish the Registrar with the appropriate figures converted into Western Samoan tālā for entry of judgment.

NOTE

This Judgment was affirmed by the Court of Appeal 1 November 1978, post p. 213.