SAMOA IRON & STEEL FABRICATION LIMITED

v

BRECKWOLDT AND COMPANY LIMITED

Court of Appeal Apia
30, 31 October; 1 November 1978
Henry P, Donne and Coates JJ

APPEAL (Hearing and determination) - Appeal dependent on reversal of findings of fact by trial Judge - Incumbent on appellant to satisfy appellate Court such findings demonstrably wrong and not supported by the evidence - Appellant seeking reversal of judgment for payment of drafts given in payment for galvanised steel purchased from respondent - Appellant alleging steel defective by reason of "white rust" resulting from poor sub-standard galvanising and claiming damages for loss of profits and goodwill - Review of evidence disclosing adequate support for trial Judge's finding that appellants had failed to prove the defect had been caused by poor galvanising.

PRACTICE AND PROCEDURE (Appeal) - Leave to adduce new evidence, s 57 Judicature Ordinance 1961 - Motion to introduce new translation of German report considered at trial - New translation including sentence not in original report - Apart from reflecting on the credibility of the author, while the added sentence might have lent some support to appellant's case it was not of "such weight and significance" as to have affected the conclusion of the trial Judge - Leave refused on the ground that two years elapsed between the date of the report and the trial and there had been ample time to obtain a correct translation.

APPEAL from judgment of Nicholson CJ 14 October 1977 ante p. 150 allowing respondent's claim for payment of a balance of moneys owing for goods sold and supplied and dismissing appellant's counterclaim for loss of profits and goodwill.

Appeal dismissed.

Retzlaff for appellant.
Lockhardt and Mrs Drake for respondent.

Cur adv vult

HENRY P, DONNE AND COATES JJ. This is an appeal against the judgment of Nicholson, C.J. delivered on the 14th day of October, 1977 wherein judgment was given for the respondent on its claim and on the appellant's counterclaim. After hearing submissions from the parties, the learned Chief Justice on the 2nd day of February, 1978 entered judgment for $32,818.00 with interest at 11 per centum per annum to the date of payment, together with costs at $1,800.00 and disbursements of $36.00.

The substance of the claim and counterclaim are succinctly set out by the learned Chief Justice as follows:-

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.

At the commencement of the appeal, counsel for the appellant applied for leave under clause 57 of the Judicature Ordinance 1961 to adduce new evidence at the hearing. The evidence sought to be introduced was a new translation in the English language by a Dr Horstman of a report under his hand on behalf of an organisation known as the Max Planck Institute for Research on Iron Metals Limited of Dusseldorf Germany dated the 30th September, 1975, which had been put in evidence by consent of the parties at the trial.

The report was in the German language and was translated into the English language for the appellant at the hearing by a Mr Lochmann. Dr Horstman's translation contained a sentence which did not appear in the former translation.

This Court has an unfettered discretion to admit new evidence by virtue of clause 57 of the Ordinance which reads:-

> 57. Evidence on appeal - Every such appeal shall, so far as it relates to any question of fact, be determined by the Court of Appeal by reference to the evidence heard at the trial as certified under the seal of the Supreme Court, and no further evidence shall, without the leave of the Court of Appeal, be heard or admitted.

We consider, however, that this is not an appropriate case for granting leave. We accept the submission of Mr Lockhardt that even if the new translation correctly records the said report, it should not now be submitted, because Dr Horstman's report was made in 1975, the trial did not take place until two years later and so there was ample time for the appellant to ensure that it was correctly translated. Furthermore, while the new sentence added by Dr Horstman may tend to strengthen his report, we consider that it is not of "such weight and significance" as to allow us to conclude that the learned Chief Justice would have changed his view concerning the value of the report and reached a different decision. Apart from this, however, while we do not presume to be competent translators, it appears patently obvious to us on comparison of the German report adduced at the trial with the translations of both Mr Lockmann and the doctor that the latter has added in his translation a sentence of three lines which he did not include in his original report. If that should be the case, and we believe it is, then the doctor's credibility must be questioned. However, we let the matter rest here and dismiss the motion.

Turning now to the appeal, counsel for the appellant addressed us firstly on the counterclaim and then on the claim. We propose to consider similarly his submissions. We would observe that the appeal

is solely confined to challenging the findings of fact by the learned Chief Justice and, therefore, it is incumbent upon the appellant to satisfy us that such findings are demonstrably wrong and cannot be supported on the evidence.

The Counterclaim

The basis of the counterclaim is that the steel supplied by the respondent differed fundamentally in quality and description from that ordered by the appellant. This requires a consideration of the contract. On that the learned Chief Justice found that the terms of the confirmations of the orders placed by the appellant (Exhibits 1 and 2) formed part of the contract. On these documents appeared "Conditions of Sale". The relevant Conditions were as set out in the judgment (pages 3 and 4) as follows:-

> 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.

The Chief Justice found that the condition as to the time within which claims were to be made was waived by the respondent, but that the other conditions in the confirmation applied. He has given his reasons for these findings. They are clearly supported by the evidence, and we are satisfied they cannot be impeached.

As to the quality of the steel supplied, the Chief Justice held that the issue narrowed down to the question of the quality of the galvanising. The appellant challenges this finding and submits that the real issue is whether the steel was "First Class Prime Quality" and that all defects must be considered including the white rust which, it contends, on the evidence is shown to be the result of poor sub-standard galvanising. It complains the judgment appealed against did not contain reference to the evidence of certain witnesses called by the appellant and suggests that this demonstrates the Chief Justice did not take this evidence into account. This latter submission is not acceptable. The Court receives the evidence, it hears and sees the witnesses and in doing so forms its conclusions as to the worth of such evidence.

In this case, there is no question but that the substance of the appellant's complaint is the incidence of what is called "white rust" or "wet storage corrosion", which it attributes to poor galvanising. We agree with the Chief Justice that the evidence on this topic was less than satisfactory. To have before him vital reports of experts as to the quality of the steel, none of which were put into the test by viva voce evidence from the authors thereof, undoubtedly made his task difficult. However, the parties chose to use this method of presentation, and they must accept the consequences. The Court was obliged to decide the case as it was presented with its obvious shortcomings. On this evidence, and bearing in mind that the burden of proof in this regard was on the appellant, the Chief Justice was not satisfied that the white rust was the result of poor galvanising. Indeed, nowhere in the reports of the experts is this stated to be the case. It is noted that in the answers to questions submitted to it by the respondent the Max Planck Institute, whose report (Exhibit "O") was obtained by the appellant, expressly states:-

> The formation of "white rust" is dependent on the media affecting the material. The thickness of the zinc coating has nothing to do with it.
> [See letter dated 28 November, 1975 from the Institute to the respondent.]

The Chief Justice has said at pages 7 and 8 of his judgment:-

> Given the conflicting and less than satisfactory 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.

After carefully considering the evidence, both oral and documentary, we are satisfied that these are proper and justified conclusions.

The appellant further submits that the course of action resulting in the respondent's Manager in Apia, Mr Gruenberg, handing a copy of the cable (Exhibit "R") to appellant's Manager constituted an admission of liability by the respondent. We consider this submission to be untenable. The evidence is not extensive on this point but all that is available supports the contrary view that it was a communication by the respondent's Manager in Apia to his Head Office in Hamburg. Certainly there is no evidence from the appellant's Managing Director, Mr Metzler, or any other of the appellant's witnesses, to suggest it was regarded as an admission. Mr Metzler produced the cable without comment (see page 5 of the Notes of Evidence). We can find no evidence that Mr Gruenberg intended his action to be regarded as an admission of liability on the part of his employer; nor was there any evidence of his authority to make any admission binding his employer.

After considering the appellant's submissions on the counterclaim, we hold that the appeal in respect thereof cannot succeed.

The Claim

The appellant's submission on the claim is confined to the allowance of the five per centum financial charges and the interest payable at the rate of eleven per centum per annum. On this, the Chief Justice at page 8 of his judgment says:-

> 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 11% 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.

We find it difficult to understand the appellant's submission hereon. Firstly, as to the finance charges, as the Chief Justice has said these are admitted in the pleadings. Since by reason of the complex state of these pleadings there could be some confusion as to what was admitted, we point out as follows:-

1. In the Statement of Claim of the 4th February, 1977 it is alleged by the respondent in paragraph 3 as follows:-

   3. That in accordance with Bills of Exchange issued the defendant promised to pay US$90,302.26 within 90 days after sighting the said Bills of Exchange.

2. In answer to that allegation in its Statement of Defence dated 28th March, 1977 the appellant says:-

> 3. Save and except that the defendant repeats the document was not a "Bill of Exchange" the defendant admits paragraph 3 of the plaintiff's Statement of Claim.

3. In an Amended Statement of Claim dated the 5th May, 1977 the respondent states in paragraph 1:-

> 1. THAT it repeats the allegations contained in paragraphs 1 to 6 of the Statement of Claim dated the 4th day of February, 1977.

4. In its Amended Statement of Defence to the Amended Statement of Claim the appellant says in paragraph 1:-

> 1. THAT the defendant (appellant) repeats paragraphs 1 to 9 of the Statement of Defence filed herein.

Clearly, the admission in paragraph 3 of the Statement of Defence is incorporated in the Amended Statement of Defence in its paragraph 1, supra. The matter of the financial charges was never in issue at the trial, and therefore the Chief Justice correctly allowed them.

As to the judgment relating to interest, we accept the submission of counsel for the respondent that by acceptance of the Bills of Exchange on which were endorsed conditions as to the payment of interest after a specified date, the appellant has admitted liability for the payment of interest. In addition, the pleadings include an admission of liability. Paragraph 4 of the Statement of Claim states:-

> 4. The Bills of Exchange were subsequently amended to provide for the payment of interest at the rate of eleven per centum per annum from 25th May, 1975 until arrival of the remittance in Hamburg on any amounts outstanding.

The Statement of Defence in answer to that allegation states:-

> 4. The defendant (appellant) admits paragraph 4 but denies liability to pay the amounts, whether capital or interest, shown in the purported Bill of Exchange.

As mentioned above, the subsequent Amended Statement of Claim and the Amended Statement of Defence incorporate the above mentioned allegation and the reply thereto. The denial of liability to pay relates to the amount rather than to the obligation to pay and is made in view of the appellant's counterclaim.

For the above reasons we are satisfied the learned Chief Justice correctly allowed these financial charges at 5 per centum and interest at the rate of 11 per centum per annum on the amount owing to the respondent by the appellant.

Therefore the appeal in respect of the claim cannot succeed.

Accordingly, appeals both on the claim and counterclaim are dismissed with costs to the respondent in the sum of $500.00, disbursements (if any) to be fixed by the Registrar.

Solicitor for the appellant: Retzlaff, Apia.
Solicitors for the respondent: Jackson & Clarke, Apia.