

JUDGMENT

The Plaintiffs and the Defendants have their core business in the ceramics industry. The plaintiffs are suppliers of raw materials for the manufacture of ceramics, while the defendants manufacture ceramic wares.

Transparent Glaze . Opaque Glaze .. these two raw materials are the key players of the claim and the defence of this suit. This court understands that glaze is a layer or coating of a vitreous substance which has been fired to fuse to a ceramic object to colour, decorate, strengthen or waterproof it.

The common and relevant undisputed facts are as follows:

The plaintiffs say that they supplied the defendants with raw materials for ceramic manufacturing from the year 2006 till October 2007 at the request of the defendants. The defendants had apparently made payments in December 2006 till October 2007 totalling RM 578,820.00 as part payment for the raw materials supplied by the plaintiffs. After October 2007, it seems the defendants did not make any payments, leaving an outstanding balance of RM 247,636.00 due and owing to the plaintiffs.

The defendants vehemently deny and say that the amount RM 578,820.00 paid by them to the plaintiffs is based on the total monthly consumption of the raw materials and justify their non payment after October 2007, the sum of RM 247,636.00.

Before the court, for the plaintiffs were the bundle of pleadings, bundle of documents, supplementary bundle of documents, statement of agreed facts and four (4) witnesses. The defendants had their bundle of documents and the administrative manager, their sole witness, taking the witness stand.

Plaintiffs' Version:

The plaintiffs produced twelve (12) purchasing orders, twenty four (24) delivery orders and twenty four (24) invoices at the trial to substantiate that the raw materials were duly supplied and delivered to the defendants from December 2006 till October 2007 which

amounted to RM 826,456.00. Towards this amount, the defendants had paid RM 578,820.00 leaving the outstanding sum of RM 247,636.00.

Defendants' Contention:

Before the trial commenced, the defendants abandoned their counterclaim against the plaintiffs.

The defendants deny owing the sum of RM 247,636.00 and state that it had been agreed mutually with the plaintiffs by a letter dated 5th September 2006 that payment was to be based on a monthly consumption, out of a total consignment of 10 containers from the plaintiffs.

Further, the defendants allege that commencing April 2007, the glaze supplied by the plaintiffs were defective, and/or unfit and/or unsuitable in the manufacture of ceramic wares and as such, the plaintiffs were negligent. The cracks and/or defects were particularised as:

- (a) After firing, the finished wares were found warping;*
- (b) The finished wares were crazed, i.e. sustained fine cracks on the glaze;*
- (c) Glaze crawls/jumps were encountered; and*
- (d) Difficulty in getting the right colour to the wares.*

The defendants allege that these problems surfaced as a result of a different glaze delivered by the plaintiffs instead of the type ordered by the defendants. This defective glaze apparently tantamount to a fundamental breach of contract, causing the defendants to suffer loss and damages which are still ongoing, as customers are returning the ceramic wares to the defendants. The defendants raise the doctrine of *res ipsa loquitur*.

The defendants state categorically that they had urged the plaintiffs to study/ investigate the glaze supplied, requested and/or introducing new formulation with the slip used in the manufacture of the wares but it was futile and the problem remained.

As such, the defendants aver that the glaze remains unused and is still in the defendants' stock, thus not liable to pay.

Court's Findings:

Having heard the five witnesses in this trial and perusing the twenty four (24) invoices issued and signed by both parties, this court is of the considered opinion that it indicates goods sold and delivered for which payment is required based on a monthly consumption.

In this suit, the court not only looked at the purchasing orders, delivery orders and invoices but the surrounding circumstances in coming to the conclusion that there was a contract between the plaintiffs and the defendants. In doing so, this court was guided by the words of Chong Siew Fai FCJ (as he then was) in *Chooi Siew Cheong v Lucky Height Development Sdn Bhd [1995] 1 MLJ 513* at page 522:

“We were of the view that in the construction of an agreement, it would not be right to look at one clause in isolation. All the other relevant clauses in the joint venture agreement and in the trilateral agreement must also be considered in the context of the whole of the transaction. Regard must also be had to any surrounding circumstances, if any, which might legitimately be taken into consideration. “

In Sabah and Sarawak, by virtue of Section 5(2) of the Civil Law Act 1956 the applicable law for this dispute pertaining to the sale and purchase of goods is the equivalent English law at the corresponding time, namely the United Kingdom Sale of Goods Act 1979 (SOGA 1979).

In *Low Hock Jee v Mayban Finance Berhad [1996] 2 CLJ 479*, Suleiman Hashim J held:

“.....The Malaysian Sale of Goods Act 1957 is not applicable to Sabah and Sarawak. By reason of Section 5(2) of the Civil Law Act 1956, reference has to be made to Section 12 of the United Kingdom Sale of Goods Act 1979, being the law applicable to Sabah and Sarawak with effect from 1 January 1980.”

These monthly consumption reports had been regularly sent till September 2007. Commencing October 2007, these reports stopped being furnished to the plaintiffs. In fact, exhibit B87, the letter dated 17th January 2008 from the plaintiffs to the defendants, spelt in no uncertain terms that the failure to furnish the said monthly reports would result in the full sum becoming payable within 14 days of the said letter.

Three (3) letters from the plaintiffs, i.e. exhibit B85, B86 and B87 to the defendants have not been disputed but a mere denial to the sum outstanding on a flimsy ground that the defendants are not responsible to pay the sum demanded as the glaze was defective, and/or unfit and/or unsuitable for the manufacturing of ceramics.

The defendants are deemed to have accepted the glaze, as they should have intimated to the plaintiffs, within a reasonable time, that they wish to reject the glaze as held in *Ganda Edible Oils Sdn Bhd v Transgrain BV [1988] 1 MLJ 428*.

This failure to intimate is deemed as an acceptance pursuant to Section 35 of the Sale of Goods Act 1979 (UK) as contracts for the sale of goods in Sabah and Sarawak are governed by English law by virtue of Section 5(2) of the Civil Law Act 1956.

Having heard the plaintiffs' witnesses, this court was enlightened on the clay body and glaze interaction problems. It is surmised as follows:

Many Glaze defects are the result of a problem in the way that the clay and glaze interact. The most common problem is when the clay body and the glaze do not physically fit each other.

Crazing . This appears in the glazed surface of fired ware as a network of fine hairline cracks. This can be seen as an aesthetic flaw. Some glazes are intentionally formulated to cause this flaw for its aesthetic qualities. These are known as crackle glazes. Crazing is caused by the glaze being under too much tension. The tension occurs when the glaze contracts more than the body during cooling in cases where the glaze material has a higher coefficient of thermal expansion than the body. The different thermal expansion or shrinkage properties of the clay body and the glaze will determine if the glaze crazes.

Be that as it may, sometime in April 2007, the defendants who were supplied with opaque and transparent glaze by the plaintiffs vide a delivery order dated 7th November 2006, encountered difficulties at the trial production stage. The plaintiffs sent their technician who resolved the problem in respect of the opaque glaze. The transparent glaze problem could not be resolved and the plaintiffs suggested that the defendants refer back to their previous supplier.

The defendants by their email dated 25th July 2007, confirmed that they had ceased to utilize the transparent glaze. The supply of opaque glaze from the plaintiffs continued as the defendants kept ordering and using it in substantial quantity beginning October 2006 till October 2007.

In early September 2007, the defendants requested the plaintiffs' advice to solve a problem with the clay body. Out of sheer goodwill and business ethics, the plaintiffs brought a body expert to the defendants' factory and it was revealed that the defects were in fact clay body cracks and not glazes cracks. Two formulas were given by the body expert and the defendants were supposed to revert back to the plaintiffs, in response to an email dated 1st October 2007. Till to date, there had been no response from the defendants.

The plaintiffs, as suppliers of the opaque glaze had exercised reasonable skill and care in ensuring that the opaque glaze was in accordance to the defendants requirement, thus they were deemed fit and suitable.

The defendants contention that the glaze supplied by the plaintiffs was defective appears to be a tactical move, to deflect and avoid payment for the remaining transparent glaze which remained unused with the defendants.

The defendants did not liaise with the plaintiffs in respect of any changes in the raw materials utilised for the clay body, as these would have adverse effect on the glaze, colour pigments and carboxyl methyl cellulose (CMC) which were supplied by the plaintiffs. Any defects displayed at the trial production stage, should have been rejected by the defendants and refrained from utilising it, in further production of ceramic wares.

In this court's view, the defendants are now estopped from saying that they are not liable to pay the plaintiffs, when the defendants had been making payments from December 2006 until October 2007 amounting to RM 578,820.00 as part payment towards the price of the ceramic manufacturing goods supplied by the plaintiffs. In doing so, the defendants are trying to shift the blame on the glaze, when in reality; the culprit was the clay body.

If the defendants had no intention to pay the plaintiffs, then there is no reason for the defendants to write the letter dated 6th December 2007 to the plaintiffs, suggesting that future payments be placed on hold, while trying to cloak themselves by complaining about the glaze with the catch-all phrase *"because your company do not have intention to solve our company problem"*.

The defendants have not shown that the sum claimed by the plaintiffs is not legitimately due to the plaintiffs, given the fact that purchasing orders, delivery orders and invoices were agreed to as to authenticity and marked as exhibits.

In this suit, goods were sold and delivered; the emphasis is placed on the written documents, namely consumption records, purchasing orders, delivery orders and invoices. These documents would collectively constitute a contract reduced into writing as held in *Pernas Trading Sdn Bhd v Persatuan Peladang Bakti Melaka [1979] 2 MLJ 124*.

By virtue of Section 92 of the Evidence Act 1950, the defendants in this suit could not offer substantive oral evidence to contradict, vary, add or subtract from, the terms of any contract, as alleged by the defendants in the letter dated 5th September 2006 from the plaintiffs to the defendants.

The plaintiffs had sent delivery orders and invoices to the defendants. The fact was undisputed. Letters of demand were sent by the plaintiffs to the defendants and the defendants had neither protested nor questioned the plaintiffs on the delivery orders, invoices and the letters of demand.

It is alleged by the defendants that the plaintiffs were negligent in delivering the glaze which resulted in defective ceramic wares. The burden of proof lies on the shoulder of the party making the claim, i.e. the defendants.

Section 101 of the Evidence Act 1950 places the burden of proof on the defendants. The standard of proof is on a balance of probabilities and the defendants must also prove specific acts or omissions of the plaintiffs that are alleged to be negligent.

In the Affidavit/Witness Statement of the defendants sole witness, Raymond Lau Phong Hock, paragraph 5 reads as follows:

“My company reported the defects to the Plaintiff vide many emails sent by my company’s Purchasing Officer (Mdm Kelly Wong) to the Plaintiff and its principals who are the suppliers of the glaze to the Plaintiff. The Plaintiff and the principals also had replied to these emails sent by Mdm Kelly.” This is barking up the wrong tree.

The defendants were fully aware as to who the principals were . it was not the plaintiffs but P.T. Sicer, Indonesia, who were the actual manufacturers of the glaze supplied to the plaintiffs. As this question has been answered in the affirmative as to the principal, this court will not dwell into the arena of the so called negligence of the plaintiffs.

It is trite law that generally a person who asserts must prove his assertion on the balance of probability in order to succeed, unless a presumption operates in favour of the assertor wherein the evidential burden shifts in favour of the assertor.

In this suit, by its pleadings and the testimony of four (4) witnesses, the plaintiffs alleged that the defendants owed them a sum of RM 826,456.00 being the price of goods sold and delivered to the defendants at their request. The plaintiffs relied on the purchasing orders, delivery orders and invoices issued by them to the defendants. A total of twenty four (24) invoices were involved in the dealings.

Of the total amount involved in the invoices, the defendants had paid a sum of RM 578,820.00 leaving a balance of RM 247,636.00, the subject matter of this claim. During the trial, the plaintiffs witness, PW 1 testified that an amount of RM 11,660.00, the price of transparent glaze (Exhibit B16 and B40) should be deducted, leaving a final outstanding balance of RM 235,976.00.

It is again trite law that parties are bound by their pleadings. The submission for the defence was nevertheless a sham brought about by a figment of imagination, which was not supported by any substantive evidence, and was indeed an afterthought hatched for the purpose of denying the outstanding sum to the plaintiffs.

Having perused the pleadings, the oral evidence, and the written submission of the plaintiffs with authorities and having evaluated this action in totality, on the balance of probabilities this Court decides as follows:

Judgment is entered for the Plaintiffs in the following terms:

- (1) Defendants to pay the Plaintiffs the sum of RM 235,976.00;**
- (2) Interest thereon at the rate of 8% per annum from the date of judgment to the date of full and final payment; and**
- (3) Costs.**

Dated the 18th February 2010.

(M.RAJALINGAM)
Deputy Registrar
High Court
SIBU.