

BETWEEN

Khoon Fen Company

Appellant

AND

**LTS Real Estate & Development (sued as a firm)
Mohammad Louis Bin Abdullah @Louis Lim Kim Huat
Hajah Jamilah Binti Haji Omar
Dayang Rosiah Binti Alah
Melen Lim @Melen Ebert**

**1st Respondent
2nd Respondent
3rd Respondent
4th Respondent
5th Respondent**

**(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 19 of 2005)**

**Power, P; Mortimer and Litton, JJ.A
21st May, 2007.**

Appeal allowed. Claim for goods sold and delivered. Items of small value sold and delivered over a long period of time. Course of dealings based upon written orders and acknowledgements of receipt. Admissibility of documentary evidence. Shifting of the evidentiary burden to the defendant. Waiver of objection to admissibility by the defendant.

Mr. Matthew Chiew of Messrs. MCSK Advocates & Solicitor for the Appellant.
Mr. Lee K B of Messrs. Fathan, Rudi Lee and Associates for the Respondent.

Litton, J.A.:

Introduction

In this appeal the respondents (the defendants) were builders engaged in various building projects. The appellants (the plaintiffs) were suppliers of building material.

On 24 July 2000 the plaintiffs issued a writ claiming the sum of \$85,837.45 being the balance of sums due from the defendants for goods supplied by the plaintiffs between 18 September 1995 and 25 September 1996. It is regrettable that, over a decade later, this matter should still be in litigation.

After trial in the Intermediate Court (Judge Lim) in September and October 2005 the plaintiffs' claim was dismissed except for the sum of \$7,292.85 by way of admission, and the costs of the action were awarded to the defendants.

The plaintiffs now bring their appeal to this court.

The Facts

The course of dealings between the parties went back some considerable time. It was in essence as follows.

Whenever the defendants required material at their various building sites they would send to the plaintiffs a document called a "Purchase Request" itemizing the material required. The plaintiffs' staff members would procure the items concerned, have them packed and sent to the site. Copies of invoices itemizing the material and showing the quantity and the unit price would go with the goods. The details would be checked by the defendants' representatives and the copy of the invoice to be retained by the plaintiffs would be signed by the person receiving the goods on the defendants' behalf against the date of receipt. The bulk of the items were small quantities of little value individually: For example, four dozens of hacksaw blades costing \$1.50 each or several elbow joints costing a few dollars each. Over the years there would have been thousands of items involved. No one on either side could be expected to remember the details of these transactions. Years later, the only way the transactions could be traced would be through the contemporaneous documents.

Take for example a Purchase Request dated 14 September 1995 relating to the "Tung Gulian project". On the face of the defendants' own document the request was made by a person called "Mario R. Lomeda" and purportedly countersigned by him. This Purchase Request also bore the signature of someone signing as "Manager". The order, on the face of the photocopy before the court, was filled by the plaintiffs who then made out an invoice setting out the items and the total price. This invoice is No. 82808 dated 15 September 1995 amounting to \$358.00. It was paid in full by the defendants: late, it is true: not till 9 March 1998. But satisfied nevertheless. This amounts to an admission of regularity by the defendants in the way that purchase request was dealt with, and the further admission that the facts stated on the face of the documents are prima facie true: That is to say, that the goods purportedly sent had complied with the request, and were in fact received by the defendants. Invoice No. 82808 is the last invoice paid by the defendants. Invoices spanning the period 18 September 1995 to 25 September 1996, totalling \$85,837.45 remained unpaid, up to the trial.

Winding the clock back slightly, to 30 August 1995 when the defendants, again through "Mario Lomeda", made out a Purchase Request for eleven items of material (which included one set of wood chisels of various sizes), relating also to the "Tung Gulian site". This order was, on the face of the copy invoice No. 82803, filled on the same day (30 August 1995) by the plaintiffs. This invoice totalling \$118 bore an acknowledgement of receipt and was likewise paid by the defendants.

Winding the clock back still further, to mid-August 1995. There are before the court three Purchase Requests dated respectively 14, 15 and 16 August 1995: One of them related also to the "Tung Gulian project". The copy invoice No. 57300 for these

Purchase Requests amounted to \$824.00, bore an acknowledgement of receipt and was likewise paid by the defendants.

Course of Dealings

The instances set out in paras 7, 8 and 9 above are three amongst scores of similar transactions prior to 15 September 1995. Such examples can be multiplied many times over. What is accordingly established by the plaintiffs, at least on a prima facie basis, is a course of dealings between the parties, evidenced by the bundle of documents before the court. Authenticity of the documents has never been challenged. Unless, on the face of the photocopied bundle, there is something to indicate that the course of dealings had materially changed after 15 September 1995 when the defendants ceased payment, or something on the face of the documents raises a suspicion of irregularity, the defendants are bound by their admission. The burden shifts to the defendants to show that the goods were not ordered or, having been ordered, were not received.

Take invoice No. 82809 dated 18 September 1995: Three days after invoice No. 82808, which was the last invoice paid by the defendants. This invoice is for \$430.30 and relates to Purchase Request dated the same day (18 September 1995) for thirteen items of material including, for example, three hammers and 2 spirit levels. The invoice (No. 82809) lists 3 hammers at \$6.00 each and two 36 inch spirit levels at \$24.00 each. On the face of the invoice the goods were received on 5 October 1995: The same day as the goods covered by invoice No. 82808 and acknowledged apparently by the same person. There can be no doubt that the admission of regularity relating to invoice No. 82808 covers also invoice No. 82809 which, on its face, bears the signature of the same representative of the defendants acknowledging receipt of the goods.

Admission of Liability

The matter goes further. At trial the defendants admitted liability in relation to eight transactions done after September 1995, totalling \$7,292.85. Judgment for this sum was awarded in the plaintiffs' favour. Take one of them: Invoice No. 88279 dated 18 July 1996, for \$1,063.00. This relates to a Purchase Order dated 16 July, for a range of material including boxes of welding rods, paint rollers etc. The defendants' Purchase Order says that the material was "requested by Mario Lomeda for Tunggalian Project". The invoice No. 88279 has the same acknowledgment of receipt as similar copy invoices in the bundle for this project. The defendants admitted liability at trial for this order because, counsel says, Mr Lim, one of the partners of the firm, recognized his own signature on the Purchase Order. But this is beside the point: The defendants, having established a long course of business dealings whereby they caused the plaintiffs to accept orders on other persons' signatures, could not turn round and unilaterally limit authorization to a single partner. If that was how they were proposing thereafter to do business it was incumbent upon them to give due notice to the plaintiffs, to enable the plaintiffs to decide whether they wished to continue business on that footing. At trial, there was some suggestion that the defendants had sent a letter saying that only Mr Lim had authority to order goods from the plaintiff. Such a letter, if it existed, was never

produced. The real point, for the purposes of this appeal is this: Having admitted liability to pay the sum of \$1,063.00 as stated in Invoice No. 88279 the defendants have admitted in effect that the goods were received by them. There is no other basis upon which they could sensibly have admitted liability.

The transaction evidenced by the documents referred to in para 12 above constitutes one in a whole series of transactions. There is no rational way whereby a court could conclude that liability based upon one set of documents was established but not on another similar set, where there was nothing to distinguish between them.

In the course of cross-examining the plaintiffs' sales executive, Mr. Liew Joon Cho, counsel for the defendants referred extensively to the bundle of documents. Mr. Liew was asked by counsel to go through the bundle and identify those pages of invoices which had been prepared by him. He was asked whether he could identify transactions shown in the documents. Mr. Liew said that the documents were prepared by his staff, not by him and the only transaction he could personally identify was that appearing on page 10 of the bundle: Invoice No. 57268 dated 10 April 1995 for a total of \$878.00 of which \$750 was for a Yamaha petrol driven generator. He was able to speak to that because he remembered that the plaintiffs did not have such a generator in stock and had to order one from elsewhere. If the case for the defendants was that the bundle produced in court had no evidential value whatever and should in law be excluded, which was how eventually the case was put, it is odd that the witness should have been asked to examine the bundle for its contents.

Documentary Proof

But the real point is this: Counsel for the defendant had, unequivocally, treated the entire bundle of photocopied documents as evidence in the case. The bundle, in so far as it showed goods being ordered by the defendants, the orders being fulfilled by the plaintiffs and the receipt of goods being acknowledged by the defendants' representatives, constituted prima facie evidence of those facts. Having used the bundle in court in this way, counsel for the defendant could not turn round later and claim that only the *originals* from which the photocopies were made would, had they been produced, have constituted evidence in court.

As mentioned earlier, at no stage in the course of the trial was authenticity of the documents comprised in the bundle questioned.

No viva voce evidence was adduced by the defendants at the trial although, curiously, an affidavit constituting the evidence in chief of Mr Lim, the 2nd defendant, was put before the court; it was never withdrawn from the court record.

The Only Real Issue at Trial

The only real issue at trial, raised by a late amendment to the defence, was the authority of persons other than Mr Lim to order goods from the plaintiffs, in particular a

person called Ms Esther who was described as the defendants' manager: Most of the cross-examination of Mr Liew Joon Choo, the plaintiffs' sales executive, was directed to this issue. As to this the defendants failed totally.

Original Documents

Having reached this point, it might be asked: How did the plaintiffs fail at trial in relation to the bulk of their claim? As to this, it is necessary to go to the transcript of proceedings to see what happened.

When the trial opened, counsel for the plaintiffs produced in the usual way the bundle of documents, stating that the invoices and purchase orders were not in dispute. Counsel for the defendants Mr Lee intervened to say:

“Documents produced are only photocopy – We’ve not seen the original documents from the party. At best, it is secondary evidence, but I’ll leave that to submission.”

Pausing here, the intention of counsel for the plaintiffs must have been crystal clear to everyone in court. He was putting before the court the bundle of purchase orders and invoices to substantiate his case: There was no other way the plaintiffs' case could have been put. To suggest that counsel should, in September/October 2005, have witnesses to testify to the delivery of hundreds of items of material of small value, made a decade before, was absurd: But apparently not too absurd for that to be one of the planks of the defendants' case.

If it be the defendants' position that fairness required that the originals of those documents – over 350 pages of them – should be put in evidence, rather than the photocopies, then the trial should not have continued. But if an adjournment had been sought, then the exchange of correspondence between the parties (also copied and put in the bundle: see pages 365 to 396) would have become relevant. And if the matter were properly argued, the court might well have concluded that any objection with regard to the secondary nature of that bundle had been long since waived.

Exchange of Correspondence

As early as April 2003 the plaintiffs' solicitors wrote to the defendants' then solicitors pointing out that the “complete purchase orders” which the defendants had asked for had been made available “some time ago”. In July 2004 the plaintiffs solicitors wrote to the defendants' new solicitors and said that on 27 May 2004 they had sent “a thick bundle of documents containing purchase and delivery orders which [have] every detail of the items sold and delivered to your client” asking the defendants in effect to consent to judgment. The defendants' solicitors replied the next day (13 July 2004) saying that they were in the “process of verifying the thick bundle of documents” with their clients and would revert by 26 July 2004. On that day they wrote saying their

clients were still verifying the documents “on a without prejudice and without admission basis”. There the matter rested until the trial opened over a year later.

Before the Judge there was an affidavit by Mr Lim made a few days before the trial began, in September 2005, in which he said,

“I have examined the record of the plaintiff’s claim and found some purchases had been personally approved by me. However I have also found several orders which were not approved by me”.

Civil litigation is not a game. A trial does not proceed by ambush. It’s purpose is to resolve the real issues between the parties. The defendants had a set of photocopy documents in their possession well over a year before the trial opened. If it be said that the bundle was incomplete, or that there were irregularities in some other way, it was incumbent upon the defendants to say so at an early stage.

Order 27 r. 4

By s. 30 of the Intermediate Courts Act, Cap 162, the practice and procedure of the High Court in its civil jurisdiction applies in the Intermediate Courts.

By the provisions of Ord. 27 r. 4(1) of the Rules of the Supreme Court, Cap 5, a party on whom a list of documents is served in pursuance of any provision of Ord. 24 shall, unless the Court otherwise orders, be deemed to admit:

that any document described in the list as an original document is such document and was printed, written, signed or executed as it purports respectively to have been; and that any document described therein as a copy is a true copy.

Here, if the plaintiffs’ solicitors had laboriously prepared a document listing all the purchase orders and copy invoices by number, date etc and served such a list on the defendants’ solicitors the matter would have been conclusive: Order 27 r. 4(1) would have activated the deemed admissions. Here, the plaintiffs went one step further: They actually provided the defendants’ solicitors with a complete set of documents. This fact, standing alone, may not be conclusive in the plaintiff’s favour, but having regard to the fact that no objections were ever raised, and the conduct of the parties at the trial, admissibility of the bundle as evidence in proof of the plaintiffs’ case could not have been in doubt.

The Rules of the Supreme Court, by Ord. 34 r. 9, envisage that a trial of this nature proceeds upon copies of documents. Rule 9(2)(a) says that at least two clear days before the date fixed for the trial the plaintiff must lodge a bundle “consisting of one copy of ... those documents which the defendant wishes to have included in the bundle and those central to the plaintiff’s case”. Generally speaking the bundles of commercial documents used as evidence in court would be photocopies.

Of course, where authenticity of any document is in issue, then a photocopy would not be enough.

Sections 65 and 66 Evidence Ordinance, Cap 108

At trial, Mr Lee invoked the provisions of s. 64 of the Evidence Ordinance, Cap 108, which says quite simply: Documents must be proved by primary evidence except in the cases hereinafter mentioned. S. 65 then lists those instances where secondary evidence of the “existence, condition or contents” of an original document might be given. But in the context of this case, the reliance on s. 65 was misconceived.

Plainly, the “existence, condition or contents” of the defendants’ own purchase orders were never in dispute. As regards the invoices purportedly signed by the defendants’ representatives, and retained by the plaintiffs, their “existence” and “condition” were never in issue. Those documents undoubtedly existed. There was no problem about their condition. Were the contents in doubt? All that the defendants did at trial was to “put the plaintiffs to proof” of their case. If there had been some suggestion that the photocopies varied in some way from the originals then the *facts* evidenced by the bundle might not have been established. But that is not the case here. The question whether they were originals or photocopies was irrelevant.

As mentioned earlier, the defendants called no witnesses at the trial. In his closing submissions counsel for the defendants complained that “Ivy, Christina, Shirley and Francis, who were the alleged signatories of those documents” had not been called as witnesses. How their testimony might have been relevant in relation the sale of small items going back nearly one decade has not been explained.

Counsel for the defendants also complained that no notice under s. 66 of the Evidence Ordinance was ever served on the defendants. That section relates to documents *in the possession or power of the person against whom* the document is sought to be proved. Here the plaintiffs were not relying on documents in the *defendants’* possession. They had the originals of the purchase orders, and the originals of the counter-signed invoices.

At the beginning of the trial the judge had said to the plaintiffs’ counsel: “*Bring them all here to court*”. Counsel tells us that on the next hearing date he did bring all the originals to court, but the hearing was adjourned to 10 October 2005. At the resumed hearing the originals were, we are told, again brought to court: Presumably in anticipation of their being used by the defence to advance their case in some way. But counsel for the defendant elected to call no evidence and made a submission of “no case to answer in a civil sense”. There the matter rested.

Conclusion

Having regard to all the matters set out earlier in this Judgment we would allow this appeal, discharge the Intermediate Court's orders of 19 January 2006, give judgment for the plaintiff in the full sum as claimed together with interest.

As to interest, having regard to the dilatory way the claim has been prosecuted, we make an order nisi that interest accrues at the rate of 6% per annum from the date of the writ until judgment; thereafter at the judgment rates in Ord. 42 r. 12 RSC.

As to costs, it must be said that the plaintiffs have to some extent brought the unhappy outcome at trial upon themselves. If counsel for the plaintiffs had simply intervened, at any stage before the case closed, and said: "Here is the bundle", the outcome might have been different. We would accordingly make an order nisi that the defendants pay 2/3 of the plaintiffs' costs in the court below, plus the costs of the appeal.

The orders nisi in paras 37 and 38 are to be made absolute two days after the date of this judgment unless either party wishes to contend that some other orders should be made, in which event notice must be lodged and given to the other side by 3 p.m. on 24 May 2007; the court will then sit on Saturday 26 May 2007 9 a.m. to hear the parties further.