

CITATION: Solea International BVBA v. Bassett & Walker International Inc., 2018 ONSC 4261

COURT FILE NO.: CV-15-527848

DATE: 20181023

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Solea International BVBA, Plaintiff

AND:

Bassett & Walker International Inc., Defendant

BEFORE: Pollak J.

COUNSEL: *Assunta Mazzotta and Timothy Law*, for the Plaintiff

Atrisha Lewis, for the Defendant

HEARD: July 3, 2018 with written submissions on July 27, 2018

ENDORSEMENT

[1] There are two motions for summary judgment brought by Solea International BVBA (“Solea”) and Bassett & Walker International Inc. (“BWI”). This Court granted Solea’s motion for summary judgment on December 7, 2016.

[2] On Appeal by BWI, the Court of Appeal raised the issue of whether the Contracts for the International Sale of Goods (“CISG”) [(Vienna, 1980) (CISG)] applies. The parties agreed that the CISG applies but argued on Appeal that such did not alter the result.

[3] The Court of Appeal directed this Court to rehear these motions applying the provisions of the CISG.

[4] Solea seeks judgment against BWI in the amount of \$228,604.50 U.S., pre-judgment and post-judgment interest from July 17, 2014 at a rate of 8% per annum.

[5] BWI’s main argument on these motions is that the provisions of CISG require a different interpretation of the relevant contractual terms than that of the common law.

[6] The evidence of BWI is that it intended that the Health Certificate would contain a statement guaranteeing that the shrimp was free of certain diseases. It is argued that a fundamental term of the contract was that Solea provide a Health Certificate with a statement guaranteeing that the shrimp was free of certain diseases. BWI argues that because Solea was in

breach of this fundamental term, it was entitled to declare the contract avoided. Solea is therefore not entitled to payment for the shrimp and summary judgment dismissing Solea's action therefore should be granted.

[7] As an alternate argument, BWI submits that Solea failed to act reasonably in mitigating its damage. It relies on the CISG provisions requiring mitigation of damage. It submits that a trial will be needed for the quantification of damages. Otherwise, the parties are agreed that as there are no genuine issues requiring a trial, this Court can resolve the dispute between the parties on these motions for summary judgment.

[8] Further, BWI pleads the doctrines of estoppel and unjust enrichment as follows:

“16. In any event, Solea is estopped from claiming damages on the basis of their representation that they would accept return of the Order. BWI relied on Solea's representation.

17. Moreover, and in any event, if BWI is found liable to Solea with respect to the Order, Solea has been unjustly enriched as a result of receiving payment for the Order through the re-selling the Order to a third party. BWI would suffer a corresponding deprivation in the form of any damages payable to the Plaintiff in the main action. No juristic reason would entitle Solea to receive double payment for the Order.”

[9] Solea's position is that the contract was based on the standard international shipping term: “CIF Manzanillo”, providing that Solea was responsible for the container of shrimp until it cleared the rail at the port of destination on June 13, 2014, and the risk with respect to proper import documents was to be assumed by BWI. Solea is owed payment for the shipment. Further, there is no evidence that BWI tried to import the shrimp into Mexico. The evidence is that BWI did not try to import the shrimp into Mexico because of its own importer permit problems. BWI did not object to Solea's demand that its invoice be paid. Rather, it promised to pay the invoice.

[10] Solea emphasizes that it was only after its action was commenced that BWI objected to a “defective” Health Certificate for its inability to import the shrimp. Further, there is no evidence that the Mexican authorities would not import the container because of a problem with the Health Certificate. As well, pursuant to their contract, BWI agreed to bear the risk with respect to any defective import documentation, as a contractual term.

[11] The CISG provides that if BWI fails to perform its obligations (pay the purchase price), Solea may:

- (a) require payment of the purchase price, and
- (b) claim damages pursuant to articles 74 to 77. The provisions on mitigation apply only to claims for damages but not to the demand for payment of the purchase

price. Alternatively, Solea argues that it took reasonable steps to mitigate its damages. (Solea did not claim damages in its claim).

[12] In the further alternative, Solea submits that even if the specific form of Health Certificate was a fundamental term of the contract, BWI was not entitled to avoid the contract for the following reasons:

- (a) Solea's breach was not the reason BWI was deprived of the benefit of the contract;
- (b) There was no fundamental breach because Solea did not violate a duty which deprived BWI of justified contract expectations in the circumstances;
- (c) **BWI did not make any declaration of avoidance, in accordance with the requirements of the CISG;**

(Solea relies on Article 49 of the CSIG which provides in part that:

"(1) The buyer may declare the contract avoided:

(a) if the failure by the seller to perform any of his obligations under the contract or this Convention amount to a fundamental breach of contract; or

(2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:

(b) in respect of any breach other than late delivery, within a reasonable time:

(i) after he knew or ought to have known of the breach;")

- (d) Or alternatively, BWI did not make the declaration of avoidance within a reasonable time after knowing or when it ought to have known of the alleged breach; and
- (e) the avoidance was not justified.

[13] There is no evidence that BWI declared the contract avoided as required by the CSIG. Therefore I find that BWI did not declare the contract avoided.

[14] Solea therefore relies on Article 53 of the CSIG which establishes BWI's duty to pay the price for the shrimp. The contract between the parties provides that interest of 8% accumulates when payment is due.

[15] Although the shrimp was delivered on June 13, 2014, on August 11, 2014, BWI advised Solea that it would not pay for or accept the shrimp. BWI asked Solea if it would take the shrimp back in exchange for future business. On August 14, 2014, Solea advised BWI as follows:

“Dear Cesar,

What you are writing is NOT good. To avoid further costs and losses I need the original BL [bill of lading] as soon as possible to the Evergreen office with a letter that you don't want the cargo anymore and you allow that it will be shipped back.”

[16] On September 5, 2014, the General Manager of Solea, wrote to representatives of Castromar (Solea's agent and supplier of shrimp) and TradeBay (Solea's Ecuadorean agent) instructing them that the full container load of the shrimp should be returned to Guayaquil, Ecuador, stating:

“Do it! Set it in motion. Ask Marcia to pay everything in order to be able to return the FCL [full container load] to Guayaquil.”

[17] The parties agree that tracking records show that the shrimp was discharged (FCL) on September 21, 2014 in Ecuador.

[18] On May 22, 2015, BWI contacted Evergreen and confirmed that Castromar (Solea's agent) received the shrimp upon its arrival in Ecuador on September 21, 2014.

[19] BWI believes that the shrimp was subsequently resold in China, but there is no evidence as to what happened to the shrimp.

[20] BWI argues that the shrimp was in the possession of Solea or its agents on September 21, 2014, and that Solea can therefore not recover the purchase price for the shrimp as it took the shrimp back from BWI.

[21] BWI submits that three doctrines are possibly applicable:

- The duty to mitigate under CISG;
- The doctrine of promissory estoppel, which does not arise under CISG but is not precluded by CISG; and
- The doctrine of unjust enrichment, which also does not arise under CISG but is also not precluded by CISG.

[22] BWI argues that possibly the return of the shrimp was a new transaction as the parties agreed that BWI (the title holder) would re-convey title to Solea in satisfaction of its outstanding obligation to pay the purchase price, in consideration of giving Solea future business. BWI therefore has no further liability to Solea. It delivered the shrimp as promised. For the reasons

set out below, on the basis of the conversations between the parties and the emails, I do not find that the evidence supports this argument.

[23] Alternatively, it is argued that the return of the shrimp was a step taken by Solea in mitigation of damages. Notwithstanding that Solea is not claiming damages but payment of the full purchase price, BWI argues that Solea's acceptance of the return of the shrimp was a reasonable step to mitigate damages. Solea could have resold the shrimp to minimize its losses. Solea had the obligation to try to mitigate its damages. The duty to mitigate is not relevant to Solea's claim for payment of the purchase price of the shrimp.

[24] Alternatively, BWI submits that it should not have to pay for the purchase price of the shrimp because it facilitated the shrimp's return to Solea. BWI argues that Solea did not warn it that even if the shrimp were returned, it would still be liable for the purchase price of the shrimp.

[25] BWI submits that Solea directed and facilitated the shrimp's return to Ecuador through its agents, Castromar, InCargo and TradeBay. It is submitted that Solea should not be able to claim that it does not know what happened to the shrimp and to succeed in its claim for the full purchase price of the shrimp.

[26] Solea, on the other hand, relies on the fact that evidence of the email exchanges and the transcripts of the parties skype conversations show that there was no discussion regarding nonpayment of the purchase price by BWI. There was no promise by Solea that if the shrimp returned, BWI would not have to pay the purchase price.

[27] Solea relies on its statements that it intended to hold BWI liable for the purchase price. In the Skype conversation on August 11, 2014 (and before the emails referred to above), Solea stated that it may have to claim on the credit insurance, prior to any Bill of Lading being requested or provided.

[28] It is submitted that the emails do not support a finding that there was an agreement that BWI was no longer responsible for the purchase price. Rather, BWI's emails dealt with its inability to pay the storage/demurrage/shipping costs. Further, Solea advised BWI that it intended to hold BWI liable for the purchase price of the shrimp.

[29] Solea therefore argues that it never took the position that BWI was not responsible for the purchase price. It emphasizes that it referred to claiming on the credit insurance and to bringing legal proceedings against BWI for payment of the purchase price. I agree with all of these submissions. There is no reference in the communications between the parties, to a representation, promise or agreement that Solea would not require payment of the purchase price by BWI.

[30] As well, in these communications, there is no discussion regarding a transfer of title to the shrimp from BWI to Solea between the parties. The evidence is that title to the shrimp was not conveyed to Solea. There was a discussion between Solea and BWI with respect to the documentation, including the Bill of Lading, in order to facilitate the goods being shipped from Ecuador to Mexico. Solea asked for necessary information from BWI - who the consignee was

and who would be notified. BWI stated that it was the consignee, but that another company it hired and that was acting for BWI was the party to be notified.

[31] BWI's evidence is that the consignee for the shipment from Mexico to Ecuador was Castromar, not Solea. There is no evidence that Solea requested that Castromar should be the consignee, as opposed to the notify party, on the Bill of Lading. It argues that based on the bill of lading provided by BWI, the title to the shrimp was not conveyed to Solea. Castromar was named as consignee. The parties did not make any other legal submissions on the legal effect of the fact that Castromar was the consignee and whether because it was Solea's agent, ownership of the shrimp was transferred to Solea or who was to bear the risk of loss of the shrimp. I cannot find on the basis of the evidence that title to the shrimp was transferred to Solea.

[32] I find that the legal requirements to justify the applicability of the doctrine of estoppel against Solea for the claim for unjust enrichment have not been established on the evidence. There is no evidence that Solea made a promise or assurance which was intended to affect the legal relationship between the parties and to be acted on. There was no evidence of a promise that BWI would be excused from the payment of the purchase price as a result of the goods being shipped back to Ecuador. To the contrary, Solea advised BWI that it would claim payment for the purchase price and would potentially commence legal action on August 11, 2014, before the container was returned and documentation regarding the return finalized. I cannot find, on the basis of the evidence that a promise or assurance was made to BWI by Solea that the purchase price was not to be paid as a result of any return.

[33] As well, there is no evidence to prove BWI's reliance on any promise or assurance. The evidence is that BWI could not pay the existing storage/demurrage expenses and wanted to avoid such expenses. The evidence supports the conclusion that the agreement to remove the container was made so that BWI would not have to pay for these expenses.

[34] I therefore find that BWI has not established the applicability of either estoppel or unjust enrichment as a defence to paying the purchase price for the shrimp.

[35] On the basis of the above-noted findings, I conclude that BWI is liable to pay the purchase price of the shrimp.

[36] With respect to the claim for interest, Solea provided the invoice for the shrimp to BWI by email. The invoice stated on its face that the general terms of sale were on the reverse side, and made reference to the CIF Incoterm. BWI accepted the invoice and subsequently confirmed that payment of the invoice was being sent. The invoice terms on the reverse are based on the EURIBOR rate, stating that interest shall accrue at the rate of the Euribor rate plus 2%, with a minimum interest rate of 8% per annum. There was no evidence or submissions made by BWI on the issue of the applicable interest.

[37] Solea submits that the interest rate was set out, and implicitly agreed to by BWI, which promised it would be paid. The interest is due pursuant to Article 78 of the CISG. Solea submits that the 8% per annum rate is based on the EURIBOR rate often adopted in CISG cases as a commercially reasonable rate, and should therefore apply to the \$228,604.50 U.S. due pursuant

to the invoice. In the absence of contradictory evidence or submissions made by BWI on this issue, I find that interest of 8% per annum is due on the purchase price of the shrimp from the date of the delivery of the shrimp to BWI on June 13, 2014.

[38] I therefore grant summary judgment to Solea and I award the amount of \$228,604.50 US\$ with interest at the rate of 8% per annum from the date of the delivery of the shrimp, to be paid by BWI to Solea.

Costs

[39] If the parties are unable to agree on costs, they may make brief written submissions to me no longer than three pages in length. The Plaintiff's submissions are to be delivered by 12:00 p.m. on October 30, 2018, and the Defendant's submissions are to be delivered by 12:00 p.m. on November 6, 2018. Any reply submissions are to be delivered by 12:00 p.m. on November 13, 2018.

Pollak J.

Date: October 23, 2018