COURT OF APPEAL FOR ONTARIO

CITATION: Solea International BVBA v. Bassett & Walker International Inc., 2019 ONCA 617
DATE: 20190725
DOCKET: C66182

Feldman, Hourigan and Brown JJ.A.

BETWEEN

Solea International BVBA

Plaintiff (Respondent)

and

Bassett & Walker International Inc.

Defendant (Appellant)

Geoff R. Hall and Amanda D. Iarusso, for the appellant

Assunta Mazzotta and Timothy J. Law, for the respondent

Heard: July 2, 2019

On appeal from the judgment of Justice Andra Pollak of the Superior Court of Justice, dated October 23, 2018, with reasons reported at 2018 ONSC 4261.

BROWN J.A.:

I. OVERVIEW

[1] The respondent, Solea International BVBA ("Solea"), a trader of seafood products, sold two containers of frozen shrimp to Bassett & Walker International Inc. ("BWI"), a Toronto-based company. Solea sourced the shrimp from an

Ecuadorian supplier, Castromar S.A. Under the terms of its sales contract with BWI, Solea was to deliver the shrimp CIF – Cost, Insurance and Freight[1] – to the Mexican port of Manzanillo.

[2] The shrimp arrived at the port and was off-loaded on June 13, 2014. By mid-August, BWI still had not been able to pass the goods through Mexican customs. Although first assuring Solea that it would pay the invoice, ultimately BWI refused to pay Solea's invoice for the contract price of the shrimp. The shrimp was returned to Ecuador.

[3] Solea commenced this action for payment of the purchase price of U.S. $228,604.50 plus interest at 8%. BWI initially asserted a counter-claim for lost profit, but later abandoned that claim.

[4] The motion judge granted judgment to Solea for the full amount of the purchase price, together with pre-judgment interest. BWI appeals. For the reasons that follow, I would dismiss the appeal.

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[1] Cost, Insurance and Freight (CIF) means that the seller delivers the goods on board the vessel. The risk of loss of or damage to the goods passes when the goods are on board the vessel. The seller must contract for and pay the costs and freight necessary to bring the goods to the name port of destination. The seller also contracts for insurance cover against the buyer's risk of loss of or damage to the goods during the carriage. When CIF is used, the seller fulfills its obligation to deliver when it hands the goods over to the carrier in the manner specified in the chosen rule and not when the goods reach the place of destination: Incoterms 2010: ICC rules for the use of domestic and international trade terms (Paris: International Chamber of Commerce, 2010), at p. 105.

II. PROCEDURAL HISTORY

[5] Two rounds of summary judgment motions have taken place in this proceeding.

[6] In Round One, Pollak J. granted summary judgment to Solea for the contract price: 2016 ONSC 4860. This court set aside that judgment on the basis that the parties and the motion judge had failed to consider whether the *International Sale of Goods Act*, R.S.O. 1990, c. I.10 (the "*ISGA*"), now titled the *International Sales Conventions Act*, S.O. 2017, c. 2, Sch. 8, s. 2,[2] and its Schedule 1, the *United Nations Convention on Contracts for the International Sale of Goods* (the "*Convention*"), applied to the transaction: 2017 ONCA 886. On that appeal, the parties agreed that the *ISGA* and its schedule, the *Convention*, applied. This court remitted the matter back for a new hearing on the parties' competing summary judgment motions.

[7] In Round Two, by order dated October 23, 2018 Pollak J. again granted Solea summary judgment, ordering BWI to pay the Canadian dollar equivalents of US$228,604.50 and US$79,817.40 for the contract price and prejudgment interest respectively: 2018 ONSC 4261. The motion judge applied a prejudgment interest rate of 8% per annum.

[2] The new title, the *International Sales Convention Act*, came into effect on March 22, 2017, upon royal assent.

[8] On the summary judgment motion, BWI took the position that it was not required to pay the invoiced purchase price because: (i) Solea failed to comply with a term of the contract that required it to provide proper import documents, specifically a health certificate and certificate of analysis; (ii) by reason of that lack of proper documentation, BWI did not accept the shipment on delivery in Mexico; and (iii) Solea accepted the return of the shipment to Ecuador.

[9] The motion judge found against BWI. Based on her review of the evidence, she found that:

- The shrimp was delivered at the Mexican port on June 13, 2014;
- On August 11, 2014 BWI advised Solea that it would not pay for or accept the shrimp;
- The shrimp was returned to the original supplier, Castromar, in Ecuador on September 21, 2014.
- Solea made no representation, promise or agreement that it would not require BWI to pay the purchase price if the product was returned to Ecuador; and
- In the arrangement to return the goods from Mexico to Ecuador, title to the shrimp was not reconveyed by BWI to Solea and BWI was obliged to pay the purchase price.

[10] The motion judge found that BWI: (i) did not declare the contract avoided pursuant to Art. 49 of the *Convention*; and (ii) had not established the

applicability of either estoppel or unjust enrichment as a defence to paying the purchase price. In the result, the motion judge found BWI liable for the purchase price, together with prejudgment interest at 8% in accordance with the terms of the invoice.

[11] The evidence before the motion judge also disclosed that: (i) by mid-August 2014, when BWI asked Solea to take the containers back, the price of shrimp in Mexico had dropped by approximately 25% from BWI's contracted purchase price with Solea; and (ii) the margin on BWI's resale deal for the shrimp was about $6,500, which adds context to BWI's mid-August 2014 complaint to Solea about the "bleeding" it was suffering by paying demurrage, electricity, and storage charges on the containers stuck in the Mexican port, which the evidence indicated were close to US$40,000.

III. ISSUES ON APPEAL

[12] On this appeal, BWI does not challenge the motion judge's conclusion that it breached the contract by failing to pay the purchase price. BWI advances two discrete grounds of appeal:

(i) the motion judge committed an error of law by concluding that the *Convention* did not impose on Solea a duty to mitigate; and

(ii) the motion judge erred in awarding prejudgment interest at the rate of 8% per annum.

IV. DUTY TO MITIGATE

The applicability of Art. 77 of the *Convention*

[13] In her reasons, the motion judge found that "[t]he duty to mitigate is not relevant to Solea's claim for payment of the purchase price of the shrimp." It appears that the motion judge accepted the respondent's argument that the provisions in the *Convention* on mitigation apply only to claims for damages (Art. 61(1)(b)) but not to an action for judgment in the amount of the purchase price.

[14] BWI submits the motion judge erred in law in so interpreting the *Convention*, arguing that Art. 77 imposes a duty to mitigate in the circumstances.

[15] Art. 77 appears in Ch. V of the *Convention* dealing with "Provisions common to the obligations of the seller and of the buyer"; section II of that chapter concerns "Damages". Art. 77 states:

> A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

[16] Ch. III of the *Convention* deals with the obligations of the buyer. Section III concerns "Remedies for breach of contract by the buyer". Arts. 61(1) and (2) state:

> (1) If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may:

> (a) exercise the rights provided in articles 62 to 65;
>
> (b) claim damages as provided in articles 74 to 77.
>
> (2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.

[17] Article 62 states that the "seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement."

[18] The commentary on Art. 77 consistently takes the position that the duty to mitigate contained in that article does not apply to an action for the purchase price by a seller under Art. 62: see, for example, Stephan Kroll, Loukas Mistelis & Pilar Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG), A Commentary*, (Munchen: C.H. Beck, 2011) (the "*CISG Commentary*"), at p. 1035; Peter Riznik, "Some Aspects of Loss Mitigation in International Sale of Goods", 2010 VJ 267, at p. 270.

[19] The motion judge evidently regarded Solea's action claiming judgment for the amount of the purchase price as a requirement by the seller that the buyer pay the purchase price within the meaning of Art. 62 of the *CISG*.

[20] The motion judge's view finds support in the commentary about Art. 62. For example, the *CISG Commentary* states, at p. 858: "Art. 62 grants the seller the right to demand the specific performance of any obligation owed to him by

the buyer, including the payment of the price … Art. 62 adopts, at least in principle, the position of the civil law tradition – specific performance is available as of right for any breach of any obligation of the buyer, including the obligation to pay the price." Professor Jacob S. Ziegel has observed that: "Whatever else it is, an action for the price is not an action for damages": "The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives", Ch. 9 in Galston & Smit eds., *International Sales: The United Nations Convention on Contracts for the International Sale of Goods*, (New York: Matthew Bender 1984), at p. 9-41.

[21] While Art. 61(b) applies Art. 77's duty to mitigate to a claim for "damages" and not to an action by a seller pursuant to Art. 62 to "require the buyer to pay the price," the commentary on Art. 62 in the *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, 2016 (the "*Digest*") recognizes that this principle cuts against the grain of common law remedial principles stating, at p. 287:

> Article 62 entitles the seller to require the buyer to perform its obligations. This remedy is generally recognized in civil law systems, whereas common law systems generally allow for the remedy (often under the designation "specific performance") only in limited circumstances.

[22] The *CISG Commentary* explores this tension between Art. 62 and common law jurisdiction remedies in its section on “The right to demand payment”. It states, at p. 859:

> The right to demand the specific performance of the obligation to pay the price is probably the most controversial part of this provision. During the negotiations of the Convention the delegation of the USA proposed that the buyer may require payment unless “in the circumstances the seller should reasonably mitigate the loss resulting from the breach by reselling the goods”. This would have made the CISG similar to the law in most common law jurisdictions. This was in fact also effectively the solution adopted by the ULIS, the predecessor of the CISG.
>
> In the end, however, the US proposal and the approach adopted by the ULIS were rejected and there is, therefore, no need for the seller to mitigate his loss – he is entitled to ask for the payment of the price without having to try to sell the goods to a third party. The CISG adopts a pure civil law formulation of the rule. In practice, however, it is very likely that in the vast majority of cases where the seller has possession of the goods and there is a market for these goods, the seller will opt to cut his losses, attempt to avoid the contract as soon as possible (Art. 64) and resell the goods (maybe even using Arts 85 and 88) rather than seek an order for specific performance of the obligation to pay that would have to be enforced in the buyer’s country. In practice, therefore, the theoretical differences between the civil law and the common law may not be as important as they may seem. *In addition, Art. 28 will often mean that sellers will have to mitigate their loss by reselling the goods. There will however be instances where the seller will prefer to seek the specific performance of the obligation to pay*. [footnotes omitted, emphasis added]

[23] The reference to Art. 28 in the last portion of this extract from the *CISG Commentary* is significant. Art. 28 states:

> If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

[24] As explained in the *CISG Commentary*: "Art. 28 is a compromise position between the common law's preference for money damages in the event of a breach of contract and the civil law's preference for performance … To the extent that [Art. 28] applies, it restricts the ability of the parties to demand performance": at pp. 370 and 375. The *CISG Commentary* observes in its section on Art. 62: "In practice, however, the general availability of specific performance under the CISG will be limited, particularly in common law jurisdictions by Art. 28": at pp. 858-859. This point is picked up in the *Digest* which notes, at pp. 283 and 298, that the right to require performance under Art. 62 is limited by Art. 28:

> As was the case with the provisions on the buyer's remedies, the articles governing the seller's remedies operate in conjunction with a variety of provisions outside [Section III of Part III, Chapter III]. Thus, the seller's right to require performance by the buyer is subject to the rule in article 28 relieving a court from the obligation to order specific performance in circumstances in which it would not do so under its own law.
>
> …

> The second limitation derives from article 28 of the Convention, under which a court is not bound to order specific performance in the seller's favour, even if that would not otherwise be required under article 62, if the court would not do so under its domestic law in respect of similar contracts not governed by the Convention.

[25] In its statement of claim, Solea does not expressly seek specific performance of the sales contract. It simply claims "$228,604.50 U.S. dollars or the Canadian equivalent at the date of judgment." The commentary on the Convention would permit characterizing Solea's action as one by the seller to require the buyer "to pay the price" within the meaning of Art. 62. However, any ultimate characterization of Solea's claim for the purpose of determining whether an Art. 77 duty to mitigate applies would need to take into account the availability of an Art. 62-based specific performance remedy in a common law jurisdiction such as Ontario in view of the limitation placed by Art. 28.

[26] The parties did not address what effect, if any, Art. 28 may have on any duty for Solea to mitigate in its Ontario action for the purchase price. As a result, the motion judge did not express a view on the matter.

[27] While it would be open to the panel to ask the parties to provide further submissions on this point, I do not think it appropriate or necessary in the specific circumstances of this case. It is not appropriate because: Solea claims a modest amount, utilizing the Simplified Procedure; its action is now over four years old; and this is the second trip to the Court of Appeal. An end needs to be brought to

this action. Further submissions are not necessary because this appeal can be decided without expressing a definitive view on whether a duty to mitigate under the *Convention* applies to Solea's action.

Mitigation

[28] Although the motion judge did not make specific findings on the issue of mitigation, some of her other factual findings bear directly on the issue. As well, the written record enables this court to make any necessary additional findings on the issue: *Courts of Justice* Act, R.S.O. 1990, c. C.43, ss. 134(1) and (4). Taking BWI's case at its highest by assuming (without deciding) that Solea was subject to a duty to mitigate, as I will now explain Solea satisfied any such duty.

[29] BWI argues that Solea failed to establish that it took reasonable measures to mitigate its loss. Having returned the shrimp to Solea, BWI contends that Solea either resold, could have resold, or should have resold the shrimp. As a result, BWI submits that Solea's damages are zero.

[30] The motion judge found that BWI breached the contract by failing to pay the purchase price. Her reasons disclose that she found title had passed to BWI upon delivery of the goods at the Mexican port and BWI's subsequent problems clearing the goods did not alter the fact that title had passed to it. The motion judge reviewed the evidence about the discussions between the parties in mid to

late August, 2014 following BWI's disclosure that it had encountered import problems. She found that:

- Solea did not make any representation, promise or agreement that it would not require BWI to pay the purchase price if the product was returned to Ecuador;
- The arrangement to return the goods to Ecuador was not a new transaction in which title to the shrimp was recoveyed to Solea; and
- The bill of lading for the shipment to Ecuador named Castromar, the original supplier, as consignee, which led the trial judge to find that there was no evidence that title to the shrimp had passed from BWI to Solea.

[31] Those findings of fact take this case out of the common situation where at the time of the buyer's breach of contract, the seller still had title to or possession of the goods that are the subject of the contract. On the motion judge's findings, when BWI breached the contract in August 2014 by refusing to pay the invoice, it had title to and possession of the goods, circumstances that limited the reasonable measures Solea could take to mitigate its losses caused by BWI's breach.

[32] The record contains other evidence concerning the mitigation issue. An email exchange between the parties on August 13, 2014 discloses that Solea offered to take the goods back but only if BWI covered Solea's related costs, which it estimated to be in the range of US$25,000-30,000. BWI refused.

[33] Although Solea provided some assistance to BWI to arrange the return of the two containers of shrimp to Ecuador, the consignee named on the bill of lading for the return shipment was Castromar, the original vendor of the shrimp to Solea. The containers containing the shrimp arrived back in Ecuador on September 21, 2014 and were returned, empty, to the shipping company on October 1, 2014. Solea's managing director, Adriaan de Leeuw, deposed that Solea never received the returned shrimp, never sold the shrimp, and was not aware what Castromar did with the shrimp. He also deposed that Solea was never aware of or involved in any sale of the shrimp to China, as suggested in some email correspondence, or otherwise once the shrimp was returned to Ecuador.

[34] Further, in its commentary on damages in Arts. 74-77, the Digest notes that some cases have interpreted the article to require that "the breaching party claiming a reduction in damages under Art. 77, will bear the burden of establishing his entitlement to … a reduction in damages"; see also, *CISG Commentary*, at p. 1036. In this regard, Art. 77 reflects the common law principle that while it is up to the plaintiff to establish what it has lost from the defendant's breach of contract, it is up to the defendant to show that the plaintiff could have avoided some, or perhaps all, of these losses: Angela Swan and Jakub Adamski, *Canadian Contract Law,* 3rd ed (Toronto: LexisNexis, 2012), at §6.275. Given

that onus on BWI, it is significant that it did not adduce any evidence about what Solea likely would have fetched on a resale of the goods at the material time.

[35] The findings of fact of the motion judge, taken together with the evidence set out in paras. 32 and 33, support the conclusion that even if Solea was subject to a duty to mitigate under the *Convention*, it took such measures as were reasonable in the circumstances to mitigate its loss, including loss of profit, resulting from BWI's breach of contract. Notwithstanding those measures, its loss resulting from BWI's breach of the contract remains the amount found by the motion judge – U.S. $228,604.50. Consequently, I would not give effect to this ground of appeal.

V. PREJUDGMENT INTEREST

[36] The motion judge found that Solea was entitled to interest on the amount owing at the rate of 8% per annum. She reached that conclusion based on an interest clause found on the reverse side of Solea's invoice and the "absence of contradictory evidence or submissions made by BWI on this issue."

[37] BWI argues that it did make submissions on this issue before the motion judge. Specifically, BWI contends that the General Terms of Sale on the reverse side of the invoice that Solea provided after the parties had entered into the sales confirmation did not afford a contractual basis for prejudgment interest at the rate of 8%. According to BWI, to apply the interest clause in the invoice would amount

to a variation of the contractual terms to which BWI had not consented. In BWI's submission, the pre-judgment rate of interest under the *Courts of Justice Act* should apply.

[38] I am not persuaded by this submission.

[39] While the May 12, 2014 Solea sales confirmation did not refer to interest payable on the amount billed, there was no dispute that the commercial practice for this type of international food commodity transaction first involved the formation of a sale contract, followed by the approval of other documentation required to perform the transaction. An email exchange between the parties on May 14, 2014 confirmed that one required document was a commercial invoice.

[40] On May 31, 2014 Solea sent to BWI by email a package of documents, which included an invoice of the same date. Term 11 of the "General Terms of Sale" on the back page of the invoice stipulated a minimum rate of interest of 8% on any amount unpaid on the due date, with interest otherwise calculated at a rate of 2% on top of the current Euribor rate.

[41] Although Solea sent BWI a package of original documents in the middle of June, Solea advised in a June 23, 2014 email that it still had the original invoice. Solea inquired whether BWI required the original invoice. On June 23, 2014 BWI emailed Solea that it thought it could process the invoice by using a copy of it.

[42] On this appeal, BWI acknowledged receiving the front page of the invoice. However, BWI took the position that there was no evidence that it had acknowledged receiving the General Terms of Sale on the reverse side of the invoice.

[43] I see no merit in this factual submission.

[44] First, BWI's affiant, Jose Barajas Andrade, swore two affidavits for the motions. In neither affidavit did he take the position that BWI was not aware of the General Terms of Sale on the reverse of the invoice.

[45] Second, by June 23, 2014 BWI had confirmed that it had received a copy of the invoice, would proceed on the basis of the copy, and had approved the acceptability of the invoice as a transaction document. The front page of the invoice contained the following language: "General Terms of Sale: see reverse side". Given the clear disclosure that the invoice contained additional terms, BWI's approval of the acceptability of a copy of the invoice bearing that language operated to incorporate those terms into the contract of sale.

[46] Accordingly, I see no error in the motion judge's holding that the appropriate rate of prejudgment interest was the contractual rate of 8%. I would not give effect to this ground of appeal.

VI. DISPOSITION

[47] For the reasons set out above, I would dismiss the appeal.

[48] Solea is entitled to its costs of the appeal fixed in the amount of $8,500, including disbursements and applicable taxes.

Released: “KF” JUL 25 2019

“David Brown J.A.”
“I agree. K. Feldman J.A.”
“I agree. C.W. Hourigan J.A.”