Citation: Sel Group v.M & R
2001 BCSC 585

Date: 20010420
Docket: C981195
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

SEL GROUP INTERNATIONAL, INC.

PLAINTIFF

AND:

M & R DISTRIBUTORS INC.

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE ALLAN

Counsel for the plaintiff:	Paul G. Kent-Snowsell
Representing M & R:	Rod Will
Date and Place of Trial:	April 9-12, 2001
	Vancouver, B.C.

The claims of the parties:

[1] The plaintiff, Sel Group International Inc. ("Sel Group"), is a wholesale supplier in New York that buys PVC corrugated roofing panels from the factory. Between 1990 and 1997, Sel Group supplied the defendant, M & R Distributors Inc. ("M & R"), with PVC panels. M & R, a company owned and operated by Mr. Rod Will, sold the PVC panels to lumber and hardware stores in the Lower Mainland. Sel Group alleges that the terms of their business relationship, as evidenced by the invoices rendered by the plaintiff, required M & R to pay for the goods in full within 30 days from the date of delivery and pay interest at 1.5% on past due invoices.

[2] As a result of the alleged failure of M & R to make timely payments, Sel Group claims the amount of $75,244.29 (U.S.) was due as at April 1, 2001. That amount includes a large component of interest as the outstanding balance on January 30, 1998 is said to be $48,859.89 (U.S.) and no payments or deliveries were made after that date.

[3] Until shortly before trial, M & R was represented by counsel who filed a statement of defence and counterclaim and exchanged lists of documents with counsel for Sel Group. Mr. Will, who represented M & R at trial, sought to introduce numerous documents that had not been disclosed in a timely

fashion to the plaintiff. For the most part, those documents were not admissible.

[4] The statement of defence and counterclaim alleges that between 1988 and November 1997, M & R was the exclusive Canadian distributor for Sel Group's PVC panels. Their business relationship included the following terms:

- That the goods were to be of merchantable quality and fit for the purpose;
- There would be no inconsistencies in the goods;
- Any goods which contained faults and defects would be returned for credit;
- There would be no short shipping;
- The goods would be in metric and bar coded; and
- Sel Group would pay for all taxes, duties, customs and truck to M & R's place of business.

[5] There was no written agreement between the parties. I think it fair to say that the first four alleged terms were implied into the contract between them. The last two alleged terms were the subject of some discussion or debate between the parties at various times.

[6] M & R's pleadings assert the following complaints:

- It received some PVC panels which were damaged, not bar coded and short-shipped;

- Sel Group breached the contract between the parties by changing the measurement of the PVC panels from metric to imperial and refusing to pay the GST and custom taxes;

- M & R never agreed to pay 1.5% interest per month on past due invoices; and

- Sel Group failed to credit M & R the sum of $62,182.56 (U.S.) with respect to returned material, short shipments, damaged goods, costs related to bar coding, GST and customs taxes and interest.

[7] Shortly before trial, in the defendant's reply to the plaintiff's notice to admit, Mr. Will claimed that as of February 28, 1998, Sel Group owed M & R the sum of $92,473.49 (U.S.) plus interest.

Background:

[8] Ms. Benham, the President of Sel Group, testified that her company commenced a relationship in 1988 with R & R (a partnership between Mr. Will and another person) and then continued with Mr. Will's company, M & R. For the first four years, the PVC panels were prepaid by R & R or M & R. In November 1992, the arrangement changed and payment was due, at first 10 days net delivery, and then 30 days net delivery.

[9] M & R ordered PVC panels by faxing a purchase order to Sel Group, setting out the type and quantity of the product desired. The purchase order identification numbers would be reflected on the plaintiff's invoice that accompanied the

panels. Until September 1994, Sel Group supplied PVC panels in metric measurements that were manufactured in England and shipped by sea to M & R. After that date, Sel Group supplied PVC panels in imperial measurements that were manufactured in the U.S. and shipped by truck to Tideline Distributors, a warehouse facility utilized by M & R. By letter dated September 8, 1994 to Mr. Will, Sel Group confirmed the conversion and enclose a price list with a price decrease in effect from September 30, 1994 to June 30, 1995. The letter stated: "The price decrease is intended to help you facilitate the transition of inventory due to the profile change and slight color differences." Ms. Benham testified that she agreed to reduce the price by 15% in 1995, 7% in 1996 and 7% in 1997 (not cumulative). There is no evidence that Mr. Will protested the conversion, at least until he returned his entire old stock in January 1998, when he referred to the metric panels as "slow-moving" and obsolete. Mr. Will testified that he passed the price decrease on to his customers and was stuck with the old panels. Ms. Benham's response was that it was up to him whether he took the advantage of the price decrease himself or passed it on.

[10] Initially, Sel Group agreed to pay freight, taxes and duties on the PVC panels. On one or more occasions, Sel Group

sought to have M & R pay duty, GST and customs fees but M & R declined. Sel Group continued to pay those charges except for the last three shipments, for which M & R paid the GST.

[11] Ms. Benham testified that credit notes could be issued if there were damaged goods or short shipments, or if the goods were the wrong description. Backup documentation was required to determine the validity of the claim.

[12] During their nine year relationship, Sel Group provided some credits to compensate M & R for damaged goods and, if goods were shipped without bar codes, sent the bar codes and paid for the labour to affix them.

[13] The relationship soured in January 1997 when Sel Group pressed for payment of overdue invoices totalling $115,261.14 as of December 31, 1996. Mr. Will acknowledged the bulk of that indebtedness in a fax sent to Sel Group February 4, 1997. He estimated the present account at approximately $113,000 (U.S.) and proposed a payment schedule that would satisfy the debt by May 10. In response, Sel Group required M & R to provide promissory notes dated March 10, April 10, and May 10 as a condition of shipping further goods requested by M & R.

[14] Ms. Benham testified that by December 31, 1997, M & R's account balance was $69,525.45 (U.S.). She was unable to

contact M & R to discuss their account. Sel Group received a further purchase order dated December 10, 1997 but did not fill it, pending a satisfactory resolution of M & R's account.

M & R's return of PVC panels:

[15] On January 5, 1998, a truck arrived in New York with a load of PVC panels that M & R proposed to return. Ms. Benham described the load as poorly loaded, uncovered, and in terrible shape. She testified she had received no warning from M & R that the truck would be arriving. Mr. Will testified that he had notified her beforehand and dispatched the truck on December 12 with instructions to arrive in New York before Sel Group shut down its warehouse facility between December 19 and January 5. Mr. Will also testified that the truck was properly loaded and he had his own complaints about the condition of goods received from New York in the past.

[16] Much of the stock was in metric measurement and, therefore, at least 3 ½ years old. Ms. Benham testified that M & R had not previously complained about the quality of those goods. Mr. Will's daughter, who was employed in the office at the time, was adamant that M & R had returned only damaged goods. However, Mr. Will conceded that he had returned all of the PVC panels in the warehouse because he was angry. He testified that he had heard from a reliable source that Sel

Group intended to cancel his distributorship and confronted Ms. Benham with that information. Although Ms. Benham denied that she was looking for a new distributor, he did not believe her. He told her that he was going to return the goods he had in stock and she replied “who is going to pay the freight?” Ms. Benham agreed that she asked that question but said she was joking.

[17] On his examination for discovery, Mr. Will testified: “I thought if she’s going to drop me I’m not going to get stuck with a bunch of crapola” and “I threw up all of the claims and all the rest of it that had been sitting there for a while.” He agreed that he was “cleaning house” and that the goods were not defective.

[18] Prior to December 1997, Mr. Will had described the old metric PVC panels, the last of which he received in August 1994, as “slow moving” but he had never sought to return them or receive any credit. He took advantage of the reduced pricing on the new PVC panels.

[19] Mr. Will seeks to justify his return of the PVC inventory on the basis that he was about to be dumped by Sel Group. However, by that time, he already had in place a new supplier who would commence shipments in February 1998. It is obvious that he wished to eliminate his account balance, end his

relationship with Sel Group without remitting payments for goods received, and begin again with a new supplier.

[20] After the truckload of old inventory arrived in New York, harsh words were spoken between Ms. Benham and Mr. Will. When she refused the goods, the truck driver threatened to dump them on the street. Ms. Benham finally agreed to allow the truck to unload on condition that she would inspect the goods and accept the saleable items, subject to a 20% restocking fee and 11% entry charges. She testified that the restocking fee was a standard charge for unloading the truck and going through all of the panels individually. The entry fee represented 7% GST and 4% duty that Sel Group had previously paid on the goods. She testified that Mr. Will verbally agreed to those terms although he never signed a letter incorporating them. Ms. Benham testified that the whole load remains in Sel Group’s warehouse as it is not fit for resale.

[21] Although Sel Group did not receive the backup documentation they required to issue credit notes, they did issue credit notes in the amount of $15,755.29 for returned goods, $70.72 for material shortage, $178.91 for a customer claim, and $360 for labour charge for applying missing barcodes.

[22] In January 1998, additional credit notes totalling $6,923.19 were issued to M & R relating to damaged goods shipped through Los Angeles in August 1996. Ms. Benham had travelled to the New Westminster warehouse where the goods were stored to verify the damage.

[23] After returning the truckload of PVC panels, M & R claimed credits totalling $60,358.22 (U.S.). Mr. Will testified that he was attempting to square away all of the credits that had accumulated over the years.

The amount of Sel Group's claim:

[24] The statement of claim alleges that the total balance owing as of February 28, 1998, was $49,592.79 (U.S.). Two different documents issued by Sel Group indicate that, after issuing a number of credit notes to M & R, the defendant's balance due was either $49,229.50 or $49,903.11. Ms. Benham testified that the amounts would have differed on the basis of when the credit notes were applied to the overdue account. M & R has made no payments since that date.

Did Sel Group breach its contract with M & R?

[25] At trial, Mr. Will sought to establish deficiencies in the PVC panels received from Sel Group. He testified that he had, on several occasions received defective goods and been overcharged. He said some of the material he ordered had not

been available when he wanted it. He suggested that M & R may have been invoiced in 1997 for full skids of product when only partial lifts were delivered. He also raised the issue of whether some of the goods invoiced varied in description from those delivered.

[26] Mr. Will also complained that the thickness of the PVC panels changed from 5 oz. To 4.3 oz. Ms. Benham's response was that the standard measurement in the industry was thickness, which did not change, and not weight.

[27] Insufficient evidence was adduced at trial to substantiate any of the defences pleaded. More importantly, few if any of those issues were raised in a timely fashion. With the exception of the damaged shipment from L.A., M & R apparently raised few complaints as to the quality or the quantity of the goods shipped until the relationship broke down.

[28] The photographs taken by the plaintiff of the truckload of returned inventory demonstrate that the PVC panels had been improperly loaded and not secured or protected from the elements. There is no basis to M & R's claim that when they received them, the panels were defective, not merchantable, or unfit for their purpose.

[29] There is no evidence that would support M & R's claim for credits additional to those provided by Sel Group for defective goods and missing barcodes.

[30] The evidence did not suggest that M & R was out of pocket as a result of the payment of GST, customs and trucking fees and duties, regardless of the parties' ongoing discussions as to who should pay them. Sel Group remitted the GST, raised its price to M & R accordingly, and then M & R claimed the tax credit from Revenue Canada. Apparently, M & R paid the GST on the last three shipments. Mr. Will introduced documents that indicated Sel Group shipped goods to itself in care of the Tideline Warehouse at a much lower price than they were subsequently sold to M & R. Sel Group may have done so to reduce the GST payable but there was no evidence that M & R was out of pocket as a result.

[31] Mr. Stewart, the owner of the Tideline Warehouse, testified that on several occasions, goods had arrived from Sel Group in a damaged condition although the damage was usually minimal. He produced some photographs of damaged goods that he took sometime between 1990 and 1997 but he was unable to relate them to a specific load. He always notified Mr. Will of the damage, even if it was discovered some months after the shipment had been delivered.

[32] Ms. Benham testified that no claims were made in respect of receiving damaged goods (except the shipment from L.A.). Her practice was to have photographs taken of each departing truckload stored in the customer's file for accountability purposes. Had such a complaint been made, Sel Group would have been able to deal with it on the basis of the photographic evidence relating to the truck's departure in New York and its arrival in B.C.

[33] Mr. Will's daughter, Deborah Will, began working for M & R in February 1992. She testified that on her father's instruction, she disregarded interest on the invoices from Sel Group. Her assertion that the purchases and invoice orders did not match up was not supported by the documents in evidence. Her evidence that she found the accounting confusing is not surprising given that M & R was invoiced in U.S. funds and payment was made in U.S. funds but in the interval, the exchange rate would have varied. I cannot place any weight on her evidence that the dates shipped and invoiced were often inaccurate because Ms. Benham was not questioned on that issue.

[34] Ms. Will also testified that M & R had faxed requests for credits from time to time with respect to goods that had arrived damaged or short-shipped. In response to a question

during cross-examination, she produced three documents dated March 6, 1996, February 24, 1997 and June 11, 1997 describing missing, damaged or incorrect goods. They were not accompanied by any facsimile confirmation sheets. The defendant's complaints presumably formed part of M & R's claim for credits totalling $60,358.22 (U.S.) that was apparently faxed to Sel Group on January 30, 1998.

[35] Mr. Will raised numerous issues in his cross-examination of Ms. Benham but no defence to the claim arose as a result. Ms. Benham either did not recall conversations he described or she agreed they had discussed Mr. Will's concerns from time to time but he continued to order goods and Sel Group continued to ship them until the end of 1997.

Was M & R contractually obligated to pay interest?

[36] Mr. Will described a dinner at a restaurant in Vancouver, attended by himself and his wife, Ms. Benham, and Larry Dawes, her business partner, in the fall of 1990. M & R had taken over R & R's responsibility for two containers of PVC panels that had been sitting in Seattle for a couple of months and Sel Group had invoiced M & R $2,000 for interest charges. When he objected to the interest, Ms. Benham told him the notation regarding interest payable on the invoices was "to keep the bank happy" and that they had just been "pulling his

chain." He was adamant that the assurance that no interest was payable applied to future invoices as well as the two shipments outstanding at that time. Mrs. Will verified the conversation but was unclear as to whether Ms. Benham's statement was intended to apply to interest on future transactions.

[37] I conclude that Sel Group did waive the interest charge on the Seattle shipments. In the circumstances, it would have been unreasonable for Sel Group to charge M & R interest for those two containers of panels that had been languishing in Seattle through no fault of its own. However, it would also be unreasonable to interpret that concession as an agreement to waive all future interest charges. It would confound commercial practice for a seller to agree to deliver goods without any means to procure timely payment.

[38] The critical issue is whether the parties actually agreed that M & R would pay interest of 1.5% per month on accounts that remained unpaid 30 days after delivery. The applicable law was reviewed by the Court of Appeal in ***Mackin Mailey Advertising Ltd. v. Budget Brake & Muffler Distributors Ltd.*** [1987] B.C.J. NO. 2268 (B.C.C.A.). Interest is payable if the party charged has expressly or impliedly agreed to pay

interest. Such an agreement may be inferred from mercantile usage or a course of dealings between the parties.

[39] In ***Irving Oil Limited*** (1979), 33 N.S.R. (2d) 92 (N.S.S.C.T.D.), Cowan C.J. stated at 96:

> … statements [sent out in the usual course of business] included the usual statement received by purchasers of similar goods from the plaintiff, and from companies carrying on similar business, to the effect that a service charge or interest charge would be made on overdue accounts, overdue beyond a certain period, such as 60 days. It is quite clear that, by receiving such a statement, and continuing to deal with the company sending out the statement, there is an implied agreement on the part of the customer to pay the service charge or interest charge on overdue accounts, at the rate stated from time to time in the statements set out by the creditor.

[40] Sel Group's accounting documents from 1994 demonstrate that interest was charged from time to time on overdue accounts and paid by M & R. The computer software utilized by Sel Group applies any payment to the oldest outstanding account (which is standard business practice.) There was no suggestion that M & R ever directed that its payments be applied to particular accounts. Accordingly, I conclude that M & R did agree, at least impliedly, to pay interest on overdue accounts.

Conclusion:

[41] It is regrettable that the straightforward issues in this case required a four-day trial to resolve. The issues in the plaintiff's case are straightforward: it delivered goods and rendered invoices; payment of the outstanding balance was not made and it was forced to pursue this litigation. I accept Mr. Will's evidence that the switch from metric to imperial PVC panels in 1994 caused M & R economic hardship and inconvenience and that it resulted in some inventory of virtually unusable merchandise. However, M & R chose to continue its business relationship with Sel Group and those difficulties cannot form a defence many years later to the plaintiff's claim for payment for subsequent goods ordered and delivered.

[42] The statement of defence and counterclaim raise spurious defences and claims, at least in the absence of cogent supporting evidence. Unfortunately, Mr. Will has expended an inordinate amount of time and money resisting this claim and, having lost, M & R is liable for the balance owing, substantial interest, and the costs of this litigation.

[43] Sel Group is entitled to judgment in the amount of $49,229.50 (U.S.) as at February 28, 1998 and interest at 1.5% from that date to the present time. The total amount in U.S. funds will be converted to Canadian funds at the rate of

exchange prevailing on the date of this judgment. Thereafter, court order interest will accrue until payment. The plaintiff is entitled to its costs at scale 3. The defendant's counterclaim is dismissed.

"M.J. Allan, J."
The Honourable Madam Justice M.J. Allan