



IN THE SMALL CLAIMS TRIBUNAL

Adjudicator: Dr. Philip M. Magri LL.D; M.A. (Fin.Serv); M.Phil (Melit)

Sitting of Thursday, 13th July, 2017.

Claim Number: 197/2016PM1

**Dr. Carlo Bisazza as special mandatory of foreign company FastMetals S.C.
registered in Poland (Reg Nr. PL 953-246-42-346)**

Vs

Steel Eagle Commerce Limited (C46938)

The Tribunal,

Having seen the notice of claim in the above-captioned names dated 20th May, 2016 whereby plaintiff requests the payment of the sum of three thousand nine hundred and thirty-eight euros and fifty-seven cents (€3938.57) from respondent company due by the same respondent company by way of refund of deposit paid in connection with the sale of goods by defendant company to the plaintiff company with costs, including those of the garnishee order filed together with this court case and with legal interest from the

date of payment of the said deposit, that is from the 13th November, 2015 against the defendant company.

Having seen that, by reply to the above-mentioned claim, dated 5th August, 2016 defendant company raised the following pleas:

1. That, preliminarily, proceedings should be heard in the English language in terms of Chapter 189 of the Laws of Malta.
2. That, also preliminarily and without prejudice to the aforementioned plea, plaintiff company has to prove that it is regularly constituted in terms of law and vested with the necessary powers to proceed with the current case.
3. That plaintiff has to also prove that he is also vested with the necessary powers to represent plaintiff company
4. That plaintiff company has to prove its juridical interest.
5. That plaintiffs have to prove the basis for the rescission of the contract of sale of goods
6. That plaintiffs should also prove that they are entitled to the refund claimed
7. That, in any case, claims are not founded in law and fact.
8. Saving other pleas

With costs to be borne by plaintiff company.

Having seen that by decree dated 10th October, 2016 the Tribunal ordered that proceedings be heard and decided in the English language.

Having reviewed the affidavits of Dariusz Gorak, Magdalena Gorak and Marek Gorak filed by plaintiff company (fol. 19 et. seq.).

Having heard the testimony of Michael Shuliak produced by defendant company.

Having seen the power of attorney filed by plaintiff company (fol. 32 et seq.)

Having reviewed all the evidence filed in this case by the respective parties.

Having seen that the case was put off for the delivery of judgment.

Having taken into consideration all the circumstances of the case.

Having considered

That the court case concerns the refund of a deposit effected by plaintiff company to defendant company in connection with the purchase of metal fasteners on the basis of the fact that these goods were never delivered to the plaintiff company

That, in reply to such request, the respondent company has raised a number of preliminary pleas that will be considered and decided in the order in which they were raised by the same respondent company.

1. That, in the first place, defendant company pleaded that proceedings should be heard in the English language given that none of the representatives of respondent company are Maltese citizens and although they understand and can communicate in the English language they do not understand and cannot communicate in the Maltese language. In view of this, and failing any opposition on the part of plaintiff company, the Tribunal acceded to this request as per verbal dated 10th October, 2016. Hence the Tribunal will abstain from considering further this preliminary plea.
2. That, in the second instance, the defendant company pleaded that plaintiff company should prove that (a) it is regularly constituted in terms of law and is therefore vested with the right to proceed with these proceedings and (b) plaintiff nomine should prove that he is duly vested with authority to represent plaintiff company in these proceedings and (c) that plaintiff company has the necessary juridical interest to proceed with this case in terms of law.

Having taken note of the fact that, as per the power of attorney (filed at fol. 33) it is declared that plaintiff company has been duly registered in Poland with registration number PL 953-264-42-34 (which registration number is also confirmed on oath through the affidavits of Dariusz Gorak (fol. 23); the affidavits by Marek Gorak (fol. 24) and Magdalena Gorak (fol. 25) do not appear to have been duly confirmed on oath or otherwise sworn and hence the Tribunal will not

consider the last two affidavits for the purpose of these proceedings) and that, by the same power of attorney the same company authorized plaintiff nominee as its true and lawful attorney to represent it in any matter concerning the refund of the sum to the same plaintiff company by respondent company representing a refund due for the non-supply of prepaid merchandise;

Having taken note that, during the sitting of the 16th May, 2017, Michael Shuliak produced by and in representation of defendant company itself, confirmed that “*we were entrusted with the sale to Fast Metal (of) a number of metal fasteners such as bolts and nuts. I can also confirm that with regards to this sale (defendant company) in actual fact effected the deposits which are mentioned and indicated in the affidavits sworn by the representatives of the said Fast Metal Company*”

Having noted that at no point in time did defendant company oppose the validity or the content of the said power of attorney.

The Tribunal finds that plaintiff company was regularly vested with the right to proceed with this claim as duly registered in Poland and that plaintiff nominee was also duly authorized to act as mandatory of plaintiff company for the purpose of these proceedings.

In connection with the issue of juridical interest, it has been decided that the necessary juridical interest should be direct, legal and derived from an actual breach of plaintiff’s right (“*Huwa risaput li sabiex persuna tirradika d-dritt li tistwitwixxi proceduri gudizzjarji kontra terz trid qabel xejn turi l-interess guridiku biex tistitwixxi dik l-azzjoni liema interess irid ikun dirett, legittimu u kif ukoll attwali u jrid johrog minn stat attwali ta' ksur ta' jedd, liema ksur ikun jikkonsisti f'kundizzjoni pozittiva jew negattiva li xxejjen jew tipprowa ggib fix-xejn dritt li jappartjeni lid-detentur jew li lili jkun misthoqq.*” (decided by the Court of Appeal (Superior Jurisdiction) in the names of **Cecil Pace pro. et noe. v. Emanuel Bonello pro. et noe.** on the 24th September, 2004). The Tribunal thus also finds that plaintiff company is vested with the necessary juridical interest to proceed with these proceedings and to thus claim the re-imburements of deposits effected by it, as confirmed by Michael Shuliak himself, to respondent company in connection with the purchase of metal fasteners which were never delivered to the same plaintiff company.

All the preliminary pleas raised by defendant company are thus being rejected with costs to be borne by defendant company.

3. With regards to the merits of the case, defendant company pleaded plaintiff company is required to prove on what basis the contract of sale had to be rescinded and that they are entitled to claim the refund of the deposit effected by them. Through his affidavit, Dariusz Gorak confirmed that after plaintiff company placed an order for metal fasteners with defendant company, *“we received information that they were not in a position to send the good ordered in accordance with the date indicated on the contract. The deadline had to be delayed for two months. The company FASTMETAL could not wait that long. We had no option but to cancel the order, based on the fact that they did not meet the deadline of implementation (...) I received information from Adam Kazberuk that (sic) are able to accept the order cancellation, but they were not able to determine the date of refund.”* Although no documents were attached to Dariusz Gorak’s affidavit even though reference is made therein to a number of appendices, Gorak’s version is largely confirmed by Michael Shuliak who testified to the effect that *“I can confirm that the delivery of these supplies which (sic) were in fact delayed. This was a problem which we had encountered not only with regards to this particular case but also with regards to other cases involving this particular supplier. I can also confirm that no delivery whatsoever was affected of the supplies which were ordered even to date we asked our supplier not to deliver these goods from the very date on which we received the notification of court proceedings against us by Fast Metal.”* He also continues to the effect that *“our company is facing some financial difficulties and for this reason the company is not in a position to affect the refund being requested by Fast Metal Sc”*

That in this regard art. 1385 of the **Civil Code** (Chapter 16 of the Laws of Malta) expressly provides that:

“If the seller fails to make delivery at the time agreed upon, the buyer may elect either to demand the dissolution of the contract or to demand that he be placed in possession of the thing sold, provided the delay has been caused solely by the seller.”

4. In view of the above it is clear that respondent company was in breach of its agreement in view of the non-delivery of the requested supplies within the stipulated time-period as confirmed by Michael Shuliak himself. No evidence was

raised by defendant company as to reason behind such delay. Defendant company itself decided to cancel the order once these proceedings were instituted. Hence, in line with the above-quoted case, it is clear that plaintiff company is entitled to claim the refund of the deposit effected in order to be placed in the *status quo ante* also for the purposes of art. 1404 of the **Civil Code** which requires the seller to refund the price when the buyer repudiates the contract. In this case it is clear that, in view of the non-delivery of goods within the stipulated timeframe, the buyer opted to repudiate the contract which repudiation was then also accepted by the defendant company. The plaintiff is thus entitled to the refund of the full deposit paid by it in connection with the purchase.

5. The Tribunal will thus proceed to uphold plaintiff's request for the reimbursement of the sum claimed with legal fees and judicial expenses in connection with these proceedings to be suffered by the defendant company, including those in connection with any precautionary measures taken including the relative garnishee order. With regards to the claim for interest, the Tribunal deems that interest on the sum claimed should also be due by defendant company with such interest running from the second (2nd) of March, 2016, date on which, according to Dariusz Gorak's affidavit, plaintiff company was informed that defendant company could not abide with the stipulated deadline and on which plaintiff company first claimed refund of the deposit claimed in these proceedings.

The Tribunal thus determines and decides this case by abstaining from considering further the first preliminary plea raised by defendant company, rejecting all other preliminary pleas by respondent company, upholding plaintiff's claim, rejecting all other pleas raised by defendant company and thus orders defendant company to pay to plaintiff the sum of three thousand, nine hundred and thirty-eight euros and fifty-seven cents (€3938.57) together with interest on the same running from the second (2nd) of March, 2016. Costs in connection with these proceedings, including those in connection with the garnishee order filed by plaintiff company, are also to be borne by defendant company.

Av. Dr. Philip M. Magri