

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MKR INTERNATIONAL LTD.)
A FOREIGN CORPORATION)
)
) Plaintiff,)
)
) v.)
)
ROSEWOOD MARKETING SERVICE,)
INC. AND GLENN COLLARD)
)
) Defendants.)

C.A. No. 2001-01-153

Submitted: March 13, 2002

Decided: May 21, 2003

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DECISION AFTER TRIAL

Plaintiff, MKR International Ltd., (“MKR”), a Delaware Corporation filed a Complaint against Defendants, Rosewood Marketing Service, Inc. (“Rosewood”), a Delaware Corporation and Glenn Collard (“Collard”), individually alleging Defendants unjustifiably refused to pay for Plaintiff’s shipments of ginger and seeking the balance

due on the ginger shipped in the amount of \$30,080.32 plus interests, costs and reasonable attorney's fees.

Defendants, in their Answer to the Complaint, raised six affirmative defenses and counter-claimed for damages suffered alleging the ginger shipped was non-conforming and that further, the bill of lading was defective and mishandled due to Plaintiff's negligence.

Trial was held on February 28, 2002. At trial, parties' stipulated into evidence 47 exhibits, being admitted as joint exhibits ("J.E."). Also admitted into evidence by stipulation of the parties were three telephonic depositions, being the deposed testimony of Roger H. Niebolt ("Niebolt"), Minh Q. Voss ("Voss") and Tony Leung, ("Leung"). At the close of Plaintiff's case-in-chief, Defendant moved to dismiss Glenn Collard individually from suit. Court reserved decision and requested that counsel provide points of authority on the motion. On March 13, 2002, Plaintiff withdrew its claim against Glenn Collard individually and thereby making Defendant Collard's Motion to Dismiss moot.

At the close of all evidence, the Court reserved decision. Based on the testimony and evidence in the record, the Court's findings and conclusion are as follows:

FACTS

Plaintiff MKR is a Brazilian ginger grower and exporter. Defendant Rosewood is a domestic entity engaged as an importer, being wholly owned by Glenn Collard. Prior to the two shipments at issue, the parties had no dealings between them in the shipment of ginger between Brazil and the United States ("US").

In June 2000, through a friend's referral, Collard went to Brazil and met Ivanna Cabral ("Cabral"), CEO of MKR, to discuss Rosewood's prospective importing of MKR's ginger into the US. MKR did not agree to make Rosewood a consignment agent, but as a result of the meeting, agreed to sell ginger to Rosewood.

On or about July 5, 2000, Rosewood ordered a container of Grade A (a/k/a Grade "1") and Grade B (a/k/a Grade "2") ginger from MKR for shipment to Philadelphia ("Philadelphia shipment" or "first shipment"), and sent MKR a check in the amount of \$21,000.00 as a revolving guaranty for shipments to be made during the season. *See* J.E. 2, 4 & 37.

Testimony indicated that the purchase order ("P.O.") for the Philadelphia shipment called for "prompt shipment in July" and they orally agreed that the price for the shipment was adjustable based on US market price at the time. *See* J.E. 4. The US market price at that time was \$14.00 per box.

Several communications were made between MKR and Rosewood regarding which shipping line should be employed for the Philadelphia shipment. Issues discussed were the amount of freight, the payment method for the freight acceptable to the shipping company, i.e., whether the shipping company required prepaid freight charge prior to shipping, or was willing to ship and collect the freight charge upon arrival at the port of destination. *See* J.E. 16. As a result, Crowley American Transport ("Crowley Lines") was selected to be the shipping line for the Philadelphia shipment, and Crowley Lines accepted freight payment on "freight collect". *See* J.E. 4,5 & 17.

Testimony indicated that the Philadelphia shipment was loaded onto the "Sea Puma", a vessel of the Crowley Lines on July 14, 2000, about eight days after

Rosewood's initial P.O. *See* J.E. 4. As to MKR's loading process, Cabral testified that once MKR receives a purchase order, they immediately take refrigerated containers to their farm. At the farm, MKR workers pick, clean, and pack the ginger into containers and transport the containers by truck to the port for shipment.

On July 19, 2000, the Brazilian Agricultural Department inspected the Philadelphia shipment at the Paranagua port in Brazil and issued a document certifying that the shipment had been inspected and was free from "quarantine pest and practically free from other injurious pests. *See* J.E. 8.

On or about July 20, 2000, Rosewood ordered another container of Grade "A" ginger from MKR for shipment to Miami ("Miami shipment" or "second shipment"). *See* J.E. 9. The parties agree that the Miami shipment was set at a fixed price of \$13.00 per box by Rosewood and again, the P.O. for the shipment called for "prompt shipment in July". *See* J.E. 9. Cabral testified that MKR informed Rosewood that it intended to do a "bank collection" with the Miami shipment and needed to forward the B/L and invoice to its bank in Brazil for the process. Cabral's testimony is corroborated by an email sent to Collard on August 4, 2000. *See* J.E. 33.

The shipping line selected by the parties for the Miami shipment was Lykes Lines ("Lykes Lines") and the bill of lading ("B/L") issued for this shipment contained the term "freight collect New York", which differs from "freight collect" term indicated on the B/L for the Philadelphia shipment. *See* J.E. 6, 11 & 12. According to Cabral, Lykes lines had first refused to accept freight collect and demanded freight to be prepaid prior to shipping. Through negotiations MKR and Lykes Lines agreed to collect freight in US but required the freight to be paid in New York, prior to the second

shipments' arrival at the Miami port. At trial, Collard did not dispute that Rosewood had agreed to pay for freight for both shipments from Brazil, but insisted that for both shipments the freight was payable upon arrival at each respective port of destination, not before.

On July 25, 2000, the Miami shipment was fumigated (*See* J.E. 14) and on July 28, 2000, it was delivered to the Paranagua port in Brazil awaiting shipment. On July 31, 2000, the Brazilian Agricultural Department inspected and certified the shipment at the port. *See* J.E. 11 & 15. This shipment was to be by the Lykes Lines' ship, "Sea Ocelot".

On August 1, 2000, Cabral notified Collard by email that the estimated time of departure ("ETD") was July 28, 2000 for the Philadelphia shipment and August 1, 2000 for the Miami shipment, and provided him with related shipping line information for both shipments. *See* J.E. 17 & 18. On August 2, 2000, Cabral notified Collard again by email that the estimated time of arrival ("ETA") was August 20, 2000 for the Philadelphia shipment and August 21, 2000 for the Miami shipment. Again, the B/L and other tracking information was provided for both shipments. *See* J.E. 19 & 25.

Cabral gave unconverted testimony that, as a matter of practice, MKR informs its customers of the date the containers are loaded onto the vessel and the estimated time of departure ("ETD") date for the vessel, as well as other tracking information for the shipment. Also, regarding the frequency of vessels departing Brazilian ports, Cabral testified that vessels do not depart for the US daily. Further, the actual departure date is often a few days before or after the ETD date. According to

Cabral, vessel schedules and the exact date of arrival at destination are outside of MKR's knowledge and control.

Testimony revealed that, on August 3, 2000, MKR sent a faxed copy of the B/L for the Philadelphia shipment issued on July 28, 2000 to Rosewood and its custom broker, Barthco International Inc. ("Barthco"). *See* J.E. 6. Based on testimony, the B/L is a receipt of goods given by the shipping line, which serves as an indication of carrier's loading and delivery of goods, as well as a bill for freight charges. It is a crucial document in the import\export business because it indicates that the shipment has taken place and it allows the buyer's custom broker to locate and receive the shipment. In order for the buyer to take possession of the goods shipped, the buyer's customer broker must have the original B/L to "custom clear" the shipment and take possession of the goods shipped.

On the B/L for the Philadelphia shipment, (J.E. 6), the respective names of the shipper, the consignee, and the "notify party" (in this case the custom broker, Barthco) are listed without their respective addresses and telephone numbers. Cabral testified that the reason MKR left the contacting information of the parties out of the B/L was to protect its business from potential interference by other Brazilian ginger growers and to prevent competitors from snatching its US customers away. Additionally, Cabral testified that in a "non letter of credit" transaction, such as the one with Rosewood, there is no requirement for the B/L to contain more specific information with regard to the identity of the parties.

Regarding the sufficiency of the B/L information, Collard disputed Cabral's proposed reason for leaving out the parties' addresses and telephone numbers on

the B/L. According to Collard, there was no need to hide any information for fear of competition interference and customer snatching by competitors since, by simply looking in a “Trade Book”, i.e. directory for the import/export business, one can easily find information regarding any company and its customers worldwide. Also, Collard believes that the import/export business is an industry where everyone knows everyone.

Cabral’s testimony on the sufficiency of the B/L information is also contradicted by a memo sent by Lykes Lines on September 15th. The memo informed MKR, after confirming Lykes’ acceptance of freight payment to be “collect”, that it was of “extreme importance that the name/address/telephone of [MKR’s] consignee be reflected in the body of the B/L so that Lykes in Tampa, USA, may advise the [consignee] of the arrival of vessel.” *See* J.E. 31.

On August 4, 2000, Cabral emailed an invoice to Collard requesting that Collard pay the freight for the Philadelphia shipment in order to facilitate the release of the original B/L to Rosewood. In her email, Cabral provided Collard with Crowley Lines’ telephone number in the US and instructed Collard to contact Crowley directly to arrange freight payment and find out about the arrival of the shipment. *See* J.E. 33.

Cabral testified regarding her other email, transmitted on the same day to Collard (a translation of which appears in J.E. 34), that she tried to explain to Collard that the freight was not prepaid even though so indicated on the shipping document, and further, that Collard needed to pay the freight charge to Crowley Lines in order for Crowley to release the container to Rosewood. Cabral also testified that in her email she promised to send the original B/L to Rosewood once freight was paid, and that she requested that Collard make total or partial payment for the Philadelphia shipment to

MKR as soon as possible. Cabral also indicated, in her email, that the parties had agreed to a fixed price for the Miami shipment, and that Collard must pay for the freight for that shipment in the US, in order that MKR could go ahead with the intended bank collection and release the B/L to Rosewood afterwards.

Regarding the payment of freight, Collard testified that he did not believe the payment of freight had anything to do with the issuing of the B/L. Collard believed that his entitlement to the B/L was not subject to payment of freight, and that industry standards are that the B/L is issued by the carrier the minute the cargo is loaded onto the vessel.

As to MKR's intended bank collection, Collard vaguely recalled that Cabral mentioned MKR's intention to do a bank collection for the Miami shipment, but did not agree that B/L is needed to do the bank collection. Also, Collard believed that it was in the shipping line's interest to affirmatively contact him and give the B/L to the consignee (i.e., Rosewood). Thus, he saw no need for him to voluntarily contact the shipping line and offer payment of freight in exchange for the B/L.

Cabral testified that on August 9, 2000, MKR notified Rosewood about the arrival of the Philadelphia shipment. However, Collard insisted that Rosewood was not notified of the arrival of the Philadelphia shipment at that time, since neither he nor his custom broker had heard from the shipping company directly about the arrival.

On August 16, 2000, MKR forwarded to Rosewood its invoice for the Miami-shipment. *See* J.E. 11. Subsequently, on or about August 21st or August 22nd, the Miami shipment arrived at port. There was some confusion about the freight payment for this shipment. Collard testified that Lykes Lines informed him that the freight was

already paid by MKR and that he need not pay for freight. It is interesting to note that Lykes Lines' internal shipping document indicated that the freight was prepaid New York. *See* J.E. 13. Cabral testified that MKR had not paid for the freight since the freight was "collect", as agreed between the parties and accepted by Lykes. According to Cabral, in order to clean up the confusion regarding the freight, MKR authorized Lykes Lines to release the original B/L to Rosewood once freight was paid and, therefore, had to forgo its intended bank collection for the Miami-shipment.

On August 30, 2000, Rosewood paid \$5,325.20 in freight charges to Crowley Lines, J.E. 22, and \$1,996.00 in freight charges to Lykes Lines, J.E. 27. Upon the payment of freight, MKR instructed Crowley Lines and Lykes Lines to release the original B/L to Rosewood. *See* J.E. 20 & 26.

On August 31, 2000, without informing MKR, Collard stopped payment on the July 5, 2000 guaranty check issued to MKR in the amount of \$21,000.00. *See* J.E. 37. MKR did not learn of the "stop payment" until its attempted deposit on October 5, 2000.

On September 1, 2000, Collard informed Cabral that Rosewood was having difficulty meeting MKR's payment terms, i.e., 10 days upon arrival, due to a cancellation of Rosewood's potential ginger buyer, Sanwa Growers Inc. ("Sanwa") in Florida. The cancellation was a result of the delay in Rosewood's taking possession of the ginger caused by the confusion over the freight payment, according to Collard.

Tony Leung from Sanwa testified by stipulated deposition that the reason Sanwa cancelled the deal was because Sanwa was never given the B/L for the shipment in order to take possession of the ginger purchased from Rosewood. Leung testified that

the B/L always confirms the quantity and amount of the goods shipped in a particular container. Also, Sanwa needed the B/L in this case in order to pay for the shipping company's freight charges, which would result in the release of the goods to its possession. Since Sanwa was never given the B/L and Leung had not seen the ginger after waiting for almost a month for it, Sanwa cancelled the deal with Rosewood and purchased ginger from other suppliers. *See Leung's Depo.*, pgs. 4-7.

Collard also informed Cabral on September 1st that he was going to fly to Miami to examine the ginger in a few days. Also, Collard said that he intended to sell the ginger shipped at the best market price and was willing to release ginger to Cabral if MKR wanted to resell it to some other buyer. *See J.E. 28 and Leung's Depo.*, pgs. 6 & 7. In spite of his expressed difficulties with the resale of the ginger, Collard transported the Miami shipment to cold storage on September 7, 2000. *See J.E. 29.*

Based on the deposition of Roger H. Niebolt ("Niebolt's Depo") and Collard's trial testimony, the ginger should be kept at an ideal condition of 55° F, in compliance with the industry standards at the Miami cold storage. Niebolt testified in his deposition that cold storage at 55° F retards the onset of decay, but does not prevent it. Like other produce, if there is an extended period of storage, decay will continue. Niebolt further testified that Grade "A" ginger, if harvested and handled well, will keep for an extended period (up to six months) in cold storage at 55°F with the correct humidity. However, if the ginger is of marginal quality when it's put into that kind of storage, it may not last as long as superior quality ginger. In short, the storage life of less than top-quality ginger is much shorter than six months. *See Niebolt's Depo.* pgs 6-8 and J.E. 29

On September 29, 2000, Collard sent a memo to Cabral complaining about the quality of the ginger and his inability to find buyers for it. As to the Philadelphia shipment via the Sea Puma vessel, Collard complained that the quality was so bad that no buyers would take it even when he had offered them a substantial price reduction. As to the Miami shipment via the Ocelot vessel, Collard complained that the ginger was shriveled and moldy, J.E. 30, and as result of its poor quality, he was able to sell only two pallets. Further, he could not sell the entire lot after having suffered a 33% re-packing loss. *See* J.E. 32. Based on Cabral's testimony, Collard also attributed his inability to sell the ginger to the bad market conditions, then existing, the delay in Rosewood obtaining the possession of the containers caused by the freight confusion, and the missing information on and the mishandling of the B/L.

As to the quality of the ginger, Niebolt testified in his deposition that his company, Christopher Ranch ("Ranch"), a large California based agricultural business, contacted Rosewood through its Florida branch and ordered a single pallet, i.e. 49 boxes (at \$10 per box) from Rosewood on September 22, 2000. After the ginger was picked up from Rosewood's Miami storage and transported by Ranch's truck to Niebolt's office, Niebolt inspected the ginger and saw the ginger was in the beginning stages of decay. He found that there were some indications that mold was beginning to grow on certain parts of the ginger, and upon breaking a piece of the ginger off, he noticed that the ginger was very fibrous in texture, indicating that it was beginning to rot. *See* Niebolt's Depo. pg. 7.

According to Cabral, Collard did not complain about the quality of the ginger until late September 2000. Cabral testified that Collard told her in an email on

September 9, 2000, that while he was at the cold storage in Miami examining fifteen boxes of ginger at random, he found the ginger was “good”. However, no written evidence of this email was submitted, either in the joint exhibits binder or otherwise, to corroborate Cabral’s testimony. Cabral admitted that she was aware that Collard did find “a few molds and rotten roots here and there” during his inspection on the 9th of September. However, Collard did admit during his testimony that some of the ginger inspected at the New Jersey storage on September 18, 2000 was still good. *See* J.E. 23.

Cabral insisted that the ginger shipped by MKR was of top quality and had no molds or decays. She pointed out that the US Department of Agriculture had inspected the ginger on September 18th and found it to be “mostly firm”. *See* J.E. 23. In addition, she testified that in 2000, MKR shipped between 14 to 20 containers of ginger to buyers worldwide and received no complaints about the quality from anyone except Rosewood.

There also is dispute as to whether Rosewood had done anything to frustrate MKR’s effort to inspect the ginger while stored in Miami’s cold storage. Cabral testified that, upon hearing Collard’s complaints about the quality of ginger shipped, she told him that she would fly to Miami to inspect the ginger herself. However, Collard had sold the ginger before she had a chance to inspect it. Collard had a different version of the facts. He testified that he was the one who offered to fly Cabral to Miami, at Rosewood’s expense, to inspect the ginger herself, but that Cabral declined the offer.

Collard, in support of his testimony regarding Rosewood’s willingness to have MKR inspect the ginger shipped, presented an October 20, 2000 email he wrote to MKR’s US contact, Paul Kierkiewicz of Mauna Kea Agronomics Inc. in Hawaii. In the

email, Collard informed Kierkiewicz the location of the Miami-storage and the fact that he had given instructions to the storage personnel to anticipate Kierkiewicz' visit. *See* J.E. 24.

However, Kierkiewicz did not perform the inspection on behalf of MKR. Instead, a person named "Craig" from Juniors Produce Inc. had contacted Rosewood and picked up two sample pallets from Rosewood on behalf of MKR. Craig inspected the samples and informed Cabral in Brazil that the samples were bad. Cabral does not believe that the samples given to Craig were taken from the ginger shipped by MKR. Cabral believes that Rosewood "deliberately prevented MKR's representatives from going to inspect the ginger shipped by MKR".

Between September 22, 2000 and November 9, 2000, Rosewood sold out the Philadelphia shipment at \$5.51/box, and lost money in the sale. *See* J.E. 40. Between October 24, 2000 and November 24, 2000, Rosewood sold out the re-packed Miami shipment at \$13.64/box and forwarded \$8,599.68 to MKR as payment for the ginger after deducting \$100.00 as the commission for the sale. *See* J.E. 38 & 39. In early October 2000 MKR deposited the July 5, 2000 check from Rosewood for \$21,000.00, to find that payment had been stopped on August 31, 2000. *See* J.E.37.

DISCUSSION

At the beginning of trial, the Court asked each of the parties what legal standard the Court should use to measure the actions of the parties. The Court asked whether any international trade agreement standards applied and the parties each replied in the negative. The Court then asked if the Uniform Commercial Code applied and again the answer was "no".

The parties did seem to agree that the matter should be decided by “industry standards”. When the Court admitted to no knowledge of the “industry standards” for the importing and exporting of ginger, neither party offered then, nor during testimony, nor closing argument, any source other than their own conflicting testimony. The only possible exception was some of the deposition testimony stipulated into evidence, although the sources of such testimony were not disinterested parties.

Defendant Glenn Collard suggested that the case turn on “business common sense”. Plaintiff’s counsel suggested during opening remarks that the matter was one concerning “industry standards” but with “UCC overtones”.

Given those amorphous standards the Court begins its analysis. The Court, not being bound by any particular body of law, will analyze the matter by choosing, whenever necessary for the fair and equitable resolution of the matter, to apply relevant sections of the Uniform Commercial Code, as adopted in 6 Del. C. § 1-101 et. seq., as well as appropriate case law in Delaware and elsewhere.

The court finds that the Philadelphia shipment, shipment number 1, aboard the “Sea Puma”, was an agreement for the purchase/sale of a specified quantity (1,400 boxes) at a variable, or “market price” in the US. The Miami shipment, shipment number 2, aboard the “Sea Ocelot” was for a specified quantity (1,360 boxes) at a fixed price (\$13.00 per box).

The first issue involves the Bill of Lading (B/L), the document from the shipper, MKR, to the consignee, Rosewood. As to the B/L, there are two pertinent issues before the Court: the first regarding the sufficiency of the information contained therein; the second regarding the delivery of the document.

Regarding the sufficiency of information contained in the B/L, there is an indication, through Lykes' memo to MKR, that Lykes had a difficult time notifying MKR's consignee (i.e. Rosewood) due to a lack of contacting information provided on the B/L. However, under a commercial reasonableness or "business common sense" standard, the Court does not conclude that liability should be imputed to MKR based merely on the insufficiency of the B/L information. The Court finds that, as to each bill of lading Rosewood could have, but chose not to contact the shipping line. "Business common sense" should have motivated Collard to do so. Since Rosewood had all the information it needed to track the shipment down, the Court finds that, had Rosewood contacted the shipping line, there would not have been any notification issue as to the arrival of the shipment at the port. Since neither MKR nor Rosewood have met the business common sense standard here to facilitate the prompt notification of the shipment arrival, the Court finds both parties at fault. On one hand, MKR could have done more to provide an easier way for Lykes to notify Rosewood of the arrival of its shipments and, on the other hand, Rosewood could have contacted Lykes affirmatively to track down the shipment and find out the arrival status.

Regarding the B/L's delivery issue, the Court finds that, MKR's failure to give Rosewood's custom broker, Barthco, the original B/L, had contributed to the delay in the ginger delivery. Evidence showed that an original copy of B/L is necessary to custom clear the goods. Since custom brokers handle custom clearance, it would have been crucial and necessary to perfect a physical delivery of an original B/L to Barthco in a timely fashion, so that the goods could be allowed into the US. The deposition of Plaintiff's own witness, Mihn Q. Voss, confirmed this fact. *See Voss' Depo.* pgs. 9-10.

On the other hand, had Rosewood paid the freight to MKR and received the original B/L earlier than August 30, 2000, Rosewood would not have lost the sale of the Miami shipment to Sanwa. Rosewood, having a buyer at \$14.00 per box, in a bad market, and needing the original B/L as stated by Leung, could have cut his losses dramatically. If sold earlier the ginger may not have been rotten at that point. Again, neither party used business common sense and both are at fault.

The next issue involves the quality of the ginger shipped. The Court finds that, at some point during the transaction, the ginger rotted to some degree. The question is, what caused the rot? Rosewood said that power outages often occur in Brazil and the ginger could have rotted due to an outage while waiting to leave port. MKR stated that the bad ginger that Craig inspected was not the ginger the MKR shipped. Neither testimony established these positions as anything beyond mere speculation or suspicion.

MKR claimed that its ginger was of top quality and presented a certificate of inspection from Brazilian Department of Agriculture to indicate the quality. However, that does not establish that the ginger was of top quality when shipped from Brazil. *See* 6 Del. § 1-202. *See also Industria De Calcados Martini Ltda v. Maxwell Shoe Co., Inc.*, 36 Mass. App. Ct. 268,274 (Mass. App. Ct. 1994) (interpreting a similar Brazilian inspection certificate as prima facie evidence of the document's own authenticity but leaves to the court the ultimate determination of the facts when they are questioned).

If the ginger was of top-quality when shipped, it is unclear on the record what caused its process of deterioration to occur. There is no evidence that MKR had done anything improper or negligent to trigger the decay in the ginger. Ample evidence on the record shows that MKR had taken precaution to pick, clean and pack the ginger,

promptly loaded the ginger into containers, and fumigated the containers prior to shipping. However, there is no evidence on the record indicating how the ginger was actually maintained once it was on the vessel under the exclusive control of the shipping company. Again, the only testimony relevant to maintenance of containers on the vessel was pure speculation made by Collard, that while the vessel was docked at the port in Brazil, the reefer containers might not have been kept up to standards due to Brazil's known power outage problems. However, there being no substantive evidence on the record to support Collard's speculation, the Court cannot consider his testimony regarding this issue.

Based on the record, the Court acknowledges the fact that Rosewood had difficulty in selling the ginger due to the poor quality, however, neither party has established by a preponderance the cause for the deterioration of the ginger. The Court cannot come to a conclusion as to what caused the ginger to rot.

Regardless of whether the ginger rotted because it was not top quality ginger, and would not last six months under proper refrigeration conditions, or, whether the ginger rotted because the refrigeration failed, at this same point Rosewood had possession of poor quality ginger. The Court next must examine whether Rosewood acted properly regarding its disposition of the ginger shipped.

One question is, did Rosewood properly reject the ginger shipped by MKR or has he accepted it? Under UCC, 6 Del. C. §2-602, a buyer may reject goods shipped by seller if its rejection is within a reasonable time after the tender or delivery and it had seasonably notified the seller of its rejection. The first shipment arrived in

Philadelphia on August 9, 2000. The second shipment arrived in Miami on August 21st or 22nd.

On August 31, 2000, Collard stopped payment on the revolving guaranty check it had given to MKR. The action on the check cannot be considered a rejection since MKR did not become aware of the stop payment until the check was deposited in October.

Even though Rosewood's check cancellation did not amount to a rejection, Rosewood did give written notice of its dissatisfaction with the ginger on September 29, 2000. *See* J.E. 32. The memo of September 29th says "The quality is definitely not what we expected..." and further "... we await your prompt suggestions as to the best manner for the disposal of these shipments." The court finds Joint Exhibit 32 to be a rejection under 6 Del. C. § 2-602 and further finds that the notification is "reasonable".

Since Rosewood properly rejected the ginger shipped by MKR, under UCC, §2-602, its only obligation was to hold the ginger with reasonable care for MKR while awaiting MKR's instruction for its removal and reclaiming. However, since there was no evidence on the record that MKR had given any instruction to Rosewood regarding its reclaiming of ownership, the Court finds that under §2-603, Rosewood was justified to sell the ginger for MKR's account and deduct the \$100 in commissions for the effort. 6 Del. C. §2-603 (2)

CONCLUSION

This case involves two parties vastly experienced in the international importing and exporting of ginger, who had never had previous dealings between them.

In an attempt to expand their respective businesses, they entered into two very unstructured transactions.

For reasons that neither party has been able to establish to the satisfaction of this Court, the product decayed and rotted to the degree that it could not be sold near the market price. The parties then raised, in their claim and counterclaim, accusations of misfeasance, malfeasance and nonfeasance regarding every aspect of the transactions.

At the trial, both parties objected to the absence of witnesses that they had expected or hoped would be at trial. Defendant objected to the absence of “Priscilla”. Plaintiff objected to the absence of the Custom Broker. As to each of these objections the Court finds that each of the parties had ample opportunity to depose these parties and have their deposition testimony admitted, as was done with Niebolt, Voss and Leung. Therefore, the Court rejects Defendant’s request for sanctions or presumptions regarding the likely testimony of the non-appearing witnesses.

The Court has carefully analyzed voluminous factual evidence and, as stated, has found fault with both parties as to every factual issue except the rejection and disposal of the goods by Defendant Rosewood.

The burden of proof on the Plaintiff as to its claim for damages is proof by a preponderance of the evidence. That same burden is required of the Defendant as to its Counterclaim. The side on which the greater weight of the evidence is found is the side on which the preponderance of the evidence exists. *Reynolds v. Reynolds*, 237 A.2d 708 (1967).

The Court finds that the Plaintiff has failed to meet its burden as to its claim for damages. The first shipment was sold for the US market price given the condition of the

product. The second shipment was sold for \$13.64 per box. However, the market had fallen and the product was inferior. Defendant properly objected and disposed of the product. The sale proceeds, less a reasonable commission of \$100.00, were paid to Plaintiff.

Defendant Rosewood counterclaims for damages based on a claim of a lost opportunity to sell the Miami shipment for \$14.00 per box. Sanwa had intended to buy the Miami shipment for \$14.00 per box but backed out when Rosewood could not produce the original B/L. The Court has stated that Defendant could have obtained the B/L by paying the freight charges earlier. The Court finds that Rosewood has failed to prove its Counterclaim by a preponderance of the evidence. Id.

Neither Plaintiff nor Defendant received the intended benefit of their bargains in these two transactions. However, neither party has established their right to damages for the reasons discussed.

Therefore, the Court directs the Clerk to enter judgment for the Defendant on the Complaint and to enter judgment for the Plaintiff as to the Counterclaim. Each party shall bear its own costs and attorney fees.

IT IS SO ORDERED.

Joseph F. Flickinger III
Judge

