SUPREME COURT OF QUEENSLAND

CITATION:	*Carbonworks International Ltd v Teschner Technologies USA Pty Ltd* [2011] QSC 386
PARTIES:	**CARBONWORKS INTERNATIONAL LTD** (Plaintiff) v **TESCHNER TECHNOLOGIES USA PTY LTD** **ACN 124 371 053** (First Defendant) and **CONCEPT SPORTS AUSTRALIA PTY LTD** **ACN 134 652 547** (Second Defendant) and **PETER TESCHNER** (Third Defendant)
FILE NO/S:	BS 851 of 2010
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	9 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	24 and 25 November 2011
JUDGE:	McMurdo J
ORDER:	**1. Judgment for the plaintiff against the first defendant in the sum of USD$456,948.17.** **2. Judgment for the plaintiff against the second defendant in the sum of USD$1,607.31.** **3. The plaintiff's claim against the third defendant be dismissed.**
CATCHWORDS:	SALE OF GOODS – REMEDIES FOR BREACH OF CONTRACT – REMEDIES OF SELLER – ACTION FOR PRICE – IN GENERAL – where the plaintiff supplied goods to companies associated with the third defendant – where the goods were not paid for – where the plaintiff argues there was a compromise of the debt owing – where the plaintiff seeks to enforce that compromise or, alternatively, judgment for the

debt owing by the first defendant – whether there was a compromise of the debt

Supreme Court Act 1995 (Qld)

400 George Street (Qld) Pty Ltd v BG International Ltd [2010] QCA 245, cited
Lym International Pty Ltd v Marcolongo [2011] NSWCA 303, cited

COUNSEL: EJ Goodwin for the plaintiff
No appearance for the first defendant
The third defendant appeared on his own behalf and for the second defendant

SOLICITORS: Hickey Lawyers for the plaintiff
No appearance for the first defendant
The third defendant appeared on his own behalf and for the second defendant

[1] The plaintiff is a company incorporated in the Marshall Islands and part of the Goodtec Group, which manufactures carbon bicycle parts in China. For some years the plaintiff supplied parts, such as bicycle frames and forks, to one or more companies associated with the third defendant, Mr Teschner. The buyer failed to pay for what was supplied over the first five months of 2008 leaving an amount owed to the plaintiff of, in total, USD$356,410.98.

[2] The plaintiff's case is that in December 2008 there was a compromise of that debt. The plaintiff agreed to accept USD$150,000 from a new company, now the second defendant ('CSA'), which was to pay it from its future sales. A further term of this compromise was that Mr Teschner and CSA would cause the plaintiff to become an owner of 18 per cent of the shares in CSA.

[3] The plaintiff's primary case is to enforce that compromise. Nothing has been paid by CSA towards the agreed sum of USD$150,000 and no shares in CSA have been issued or transferred to the plaintiff. It remains a company with but 10 issued shares, each of them held by Mr Teschner.

[4] The plaintiff's alternative case is that if there was no compromise as it alleges, the debt of USD$356,410.98 remains owing and the debtor is the first defendant.

[5] By their Defence, each of those alternative claims is disputed. The defendants admit that the plaintiff came to be owed USD$356,410.98 by the middle of 2008. But they plead that this was owed by another company controlled by Mr Teschner which has now been wound up. Its name was Teschner Technologies Pty Ltd ACN 121 694 924. Administrators were appointed to it on 23 December 2008 and it went into liquidation on 10 February 2009. The defendants deny that there was any concluded compromise agreement. Accordingly, they deny that CSA owes anything to the plaintiff or that it is entitled to any of CSA's shares.

[6] The defendants are without legal representation. At the commencement of the trial, Mr Teschner appeared and was given leave to appear on behalf of CSA. He made it clear that he was not seeking to appear for the first defendant, although an ASIC search of that company shows that he is the sole director. Mr Teschner told me that he wished to make a statement to the Court and then to withdraw. The statement was that he and CSA were prepared to cause the plaintiff to become the holder of 18 per cent of the shares in CSA. But at the same time he did not concede that this was the plaintiff's entitlement. He told me that due to his financial circumstances he was unable to afford legal representation and that he did not intend to participate in the hearing. He was then allowed to withdraw.

[7] There was no appearance for the first defendant. Undoubtedly, it was given due notice of the trial date. As I have said, Mr Teschner is its only director.

[8] The trial then continued with three witnesses being called in the plaintiff's case. Each gave her or his evidence orally, and for the most part with the assistance of an interpreter. A trial book of documents had been prepared. But only about half of those documents became part of the evidence as they were identified by one or more of the witnesses.

The first defendant's debt

[9] The first defendant is a company incorporated on 12 March 2007. Its current shareholders are shown by an ASIC search as Teschner Investments Pty Ltd and a company called Occassio Pty Ltd, the address of which is that of Mr Teschner. Previously its shareholders were Teschner Investments Pty Ltd and companies called Savoy Investments (Qld) Pty Ltd and Active Investments Aust Pty Ltd, each holding one-third of the issued shares. The previous directors were Mr Teschner, a Mr Kevin Jury and a Mr Grant Hutchings. Mr Hutchings was a director until 3 July 2008 and Mr Jury until 9 March 2009. Each of those previous shareholders was a company controlled by one or the other of those previous directors.

[10] The invoices for the relevant goods were addressed to Teschner Technologies Pty Ltd. That is explained by the fact that earlier supplies by the plaintiff to Mr Teschner's enterprises were to that company (as well as perhaps to another company controlled by him). But the plaintiff's case is that the supplies the subject of these invoices, from January through May 2008, were made to the first defendant.

[11] On 7 January 2009, Mr Teschner wrote a letter to Mr Troy Yu of the plaintiff. This was shortly after Mr Teschner's meeting with Mr Yu and Mr Oliver Kuo of the plaintiff, in which, on the plaintiff's case, the compromise agreement was made. The particular purpose of this letter was to request a letter or email from the plaintiff which would confirm that Teschner Technologies Pty Ltd, and another company which had previously done business with the plaintiff, did not owe any money to the plaintiff or the Goodtec Group. As I have mentioned, administrators had been appointed to Teschner Technologies on 23 December 2008. In that context, Mr Teschner wrote on 7 January:

> "As you know we have been trading under Teschner Technologies (USA) Pty Ltd since 1st Oct 2007. However I notice that all carbonWorks Invoices still come addressed to Teschner Technologies Pty Ltd. This is not correct. These invoices should be addressed to Teschner Technologies (USA) Pty Ltd. We record all invoices in our computer under Teschner Technologies (USA) Pty Ltd."[1]

Mr Yu acceded to this request and on the same day an email was sent saying that the plaintiff wished to make it clear that it traded only with the company which is the first defendant and that Teschner Technologies Pty Ltd and the other company did not owe the plaintiff any money.

[12] This letter constitutes a clear admission by the first defendant that it was the company which had acquired the goods the subject of the 2008 invoices. Unambiguously, Mr Teschner wrote that it was the company which had been trading under his direction from 1 October 2007.

[13] Further, on 19 June 2008, Mr Hutchings sent a memorandum to the plaintiff's Mr Yu, which advised that Mr Teschner's trading was no longer through the "old company", but instead through the first defendant and he asked for new invoices to be addressed to it. Mr Hutchings was then a director of the first defendant.

[14] There is no contrary evidence, except that the plaintiff's invoices were addressed to Teschner Technologies Pty Ltd. I accept the evidence for the plaintiff that this resulted simply from a continuation of its previous billing practice. I find that any order for the goods the subject of these invoices was placed on behalf of the first defendant. The result is that it is the first defendant which was liable to the plaintiff and which, subject to the alleged compromise, remains so liable.

Was there a compromise?

[15] Prior to the trial, the plaintiff's pleaded case was that the compromise was made on or about 26 December 2008, by an oral agreement made between Mr Kuo on behalf of the plaintiff and Mr Teschner on his own behalf and the other defendants. It was alleged that this conversation occurred during a conference via Skype. However, at the commencement of the trial (and before Mr Teschner withdrew), the plaintiff was allowed to amend its statement of claim to plead that the compromise as made on 18 December 2008, in a conversation between Mr Yu on behalf of the plaintiff and Mr Teschner, in the course of their meeting at the offices of the Goodtec Group in China.

[16] There was such a meeting. It was attended also by Mr Kuo and by a Mr Raymond Chen, who was a consultant assisting Mr Teschner. Mr Kuo and Mr Yu gave evidence of their recollection of that meeting. Each did so with the benefit of a document written by Mr Teschner on 18 December 2008, which was entitled

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1 Exhibit 122.

"confirming meeting notes". It is convenient to go first to that document. On or about that day, it was addressed to Mr Yu and copied to Mr Kuo and Mr Chen.

[17] The document began as follows:

> "Following on from our meeting with Raymond and Oliver for TTG and Goodtec difference of opinion, I wish to confirm the points that we discuss and agree on.
>
> 1. TTG and Goodtec agree that best solution is to work step by step on future and not go back over the past
> 2. TTG and Goodtec agree to work on relationship for better co-operation
> 3. For solution TTG suggest that common value for invoices be decided between TTG and Goodtec. Current value of invoices U$352,000"

Clearly, this was an agreement as to the outstanding debt to the plaintiff. The sum referred to was USD$352,000 rather than the total of the invoices which was USD$356,410.98. But Mr Yu and Mr Kuo confirmed that what was discussed was the debt outstanding in respect of the invoices.

[18] The document then continued as follows:

> "TTG suggest the following:-
>
> | | | |
> |---|---|---|
> | 1. | Value for extra cost of freight be determined at | U$ 20,000 |
> | 2. | Value for QC problems be determined at | U$ 32,000 |
> | 3. | Value for recognition of investment in new company Concept Sports | U$150,000 |
> | | TOTAL VALUE OF ADJUSTMENT | U$202,000 |
>
> | | |
> |---|---|
> | TOTAL INVOICES | U$352,000 |
> | Value of adjustment | U$202,000 |
> | NEW INVOICE VALUE | U$150,000 |
>
> The balance of Invoices for U$150,000 to be paid as follows:-
>
> 1. 10% of future monthly sales of new company Concept Sports Australia Pty Ltd (Concept Sports Group – CSG)
>
> 2. Portion of all OEM Sales as follows:-
>
> OEM Sales Price $
>
> Less Agent % on factory price
>
> Less product price to Goodtec to cover new product sale
>
> Less 20% of difference between factory price and OEM price to CSG
>
> Balance to Goodtec to reduce adjusted invoice price.

Example:-

DF44 TRACK PRO		
OEM Sales Price	U$900	
Goodtec Factory Price	U$515	
BALANCE		U$385.00
Less Concept Sports 20% of balance		U$ 77.00
Less Agent Fee 10%		U$ 51.50
BALANCE TO GOODTEC		U$256.50
		(To reduce invoice total)"

According to the oral evidence, "QC problems" was a reference to complaints which had been made by the Teschner side about some of the product. The "value for extra cost of freight" was a reference to a complaint from the Teschner side as to a change in the freight arrangements which had increased its costs. It can be seen from this passage that it was at least proposed (if not agreed) that the then existing debt be compromised so that only USD$150,000 would be paid. It was also at least proposed that this would be paid from sales by the new company. There were two stipulated sources of funds: one being 10 per cent of monthly sales of the new company CSA and the other from a "portion of all OEM Sales".

[19] It is notable that what was in this passage, as I have set out in the previous paragraph, was expressed by Mr Teschner as a suggestion, rather than as something which had been agreed. In that respect, it can be compared with the passage set out at [17] above, which was said to contain the points which had been agreed.

[20] In another part of this document, Mr Teschner referred to the fact that in preparing this note, he had realised that there were certain practical problems with the accounting for OEM sales which he had not understood at the time of the meeting.

[21] At a further point in the document Mr Teschner wrote this about the proposed shareholding in CSA:

"NEW AUSTRALIAN COMPANY STRUCTURE – Concept Sports Australia Pty Ltd

Peter R Teschner	40%
CarbonWorks	18%
RaySolution	5%
Balance of Share	37%
TOTAL	100%

Until such time as Company in good position to sell equity, the balance of Share% to be allocated as follows:

Peter R Teschner	40% + 20%	= 60%
CarbonWorks	18% + 17%	= 35%
RaySolution	5%	= 5%
TOTAL		=100%"

The reference to "RaySolution" was to Mr Chen. The witnesses said that it was agreed at the meeting that Mr Chen should have five per cent of CSA. Notably, Mr Teschner was proposing that at first, the plaintiff have not 18 per cent but 35 per cent "until such time as Company in good position to sell equity".

[22] Towards the end of the document Mr Teschner wrote this:

> "… This week my Accountant has now already registered new company "Concept Sports Australia Pty Ltd" and I will start new Business Name of Concept Sports Group when I go back to Australia. So new Company can start as soon as Goodtec and Grant and Kevin agree on all points.
>
> FURTHER DISCUSSION – SKYPE CONFERENCE CALL
>
> I think good to have confirmation of discussion notes from all parties from when we meet last Monday so suggest Skype Conference Call on next Monday afternoon 22nd December at 4pm China Time to discuss. When all agree I will talk with Grant, Kevin and John for their opinion. Grant and Kevin want to stop working with Company but have to be happy with all arrangements for new company to move ahead."

[23] I come then to the oral evidence of this meeting, the first of which was given by Mr Kuo. He said that Mr Teschner proposed the compromise of the debt and an 18 per cent shareholding in the new company. Mr Teschner also proposed that the debt be paid from 10 per cent of the new company's monthly revenue. He recalled Mr Yu suggesting that Mr Chen have five per cent of CSA and that Mr Teschner agreed. He was asked whether Mr Yu also agreed with the other proposals from Mr Teschner and answered "yes". He was then shown the document of 18 December 2008 and asked as to whether Mr Yu had agreed to the deductions by which the figure of USD$150,000 was reached, and to the various shareholding percentages set out in that document. He said that these were agreed.

[24] He was asked whether there was a subsequent Skype conversation. He said that he recalled such a conversation during which Mr Teschner told him that the other shareholders of "TTG" had agreed to close that company. He was also taken to another version of the document of 18 December, to which Mr Teschner had attached an email to him from Mr Hutchings. Mr Hutchings there wrote that he and "Kevin" (an apparent reference to Mr Jury) "…would be happy to tidy up and move on without any shareholding involvement…".

[25] Mr Yu is the general manager of the Goodtec Group. Mr Yu's evidence as to the critical meeting was as follows. Mr Teschner proposed a "solution in terms of the method to solve the outstanding payment", which was a proposal for a new company named Concept Sports Group to be established which would pay the (reduced) amount of USD$150,000. He described the various deductions which would result in that figure, which accorded with the calculation shown in Mr Teschner's document of 18 December 2008. And he referred also to the

proposal that "I will obtain 18% of the new company's shares".[2] At one point, he said that Mr Teschner "prepares two options to repay the rest US$150 – US$150,000. The first option is that they provide me with 10% of the new company monthly revenue plus the benefit – plus the profits earned from the OEM".[3] When asked whether there were two options, he answered "so actually it's a combination of the two options".[4] That seems to be consistent with Mr Teschner's document.

[26] Mr Yu said that "we agreed on the proposal" but that he told Mr Teschner that he would have to report to his board and that he would give him a formal reply or confirmation the next day.[5] He said that he subsequently told Mr Teschner that he had the agreement of the board.

[27] At the end of his evidence I asked him whether he had ever asked Mr Teschner to issue the shares in CSA. He answered: "Well, yes. We kept asking Peter to carry out the agreements, however, he failed to do so. That's why we lodged this application – law suit".[6] He was then asked by the plaintiff's counsel to consider a letter dated 23 November 2009, from the plaintiff's lawyers to the first and second defendants, in which there was a demand for payment of USD$150,000 and for an 18 per cent shareholding in CSA with a threat of legal proceedings. That letter was tendered.[7] But there is no other evidence of any complaint by the plaintiff of the non-performance of this alleged compromise. That lawyer's letter, of course, was written some 11 months after the agreement was said to have been made. The same letter also refers to a demand having been made by the first defendant upon the plaintiff, in June 2009, in the sum of USD$490,000 "for compensation for alleged late delivery and poor quality".[8] Clearly the parties were dealing with each other during 2009 and yet no evidence of a demand for performance of the compromise agreement was made until late November.

[28] In evidence there is no document which is from the plaintiff's side which can be said to be a record of the compromise agreement for which it contends.

[29] On 2 January 2009, Mr Teschner wrote to Mr Yu.[9] He referred there to an apparent problem with a product called "DF42" and complained that the plaintiff appeared to not want to resolve "this issue". In the same letter he wrote:

> "For future, the new Company arrangement of CSG and Goodtec, Goodtec will now start to get back U$150,000 and for CSG, CSG can move ahead and sell product and start to send money to Goodtec. Please remember that before I come to China I tell you the truth about how Goodtec would probably not receive any money from

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2 T 1-57.
3 T 1-58.
4 T 1-59.
5 Ibid.
6 T 1-63.
7 Exhibit 145.
8 Ibid.
9 Exhibit 115.

> TTG, but now under new arrangement with CSG it will start to receive money.
>
> I give Carbonworks 18% of new company and show my trust to have CarbonWorks as partner so as to pay you $150,000. We must work together for benefit of both companies. But it seems that for DF42 recall issue that Goodtec/Carbonworks do not want to resolve this issue. Seems no co-operation for this issue.
>
> Already I give you OEM orders for Interjet and EDCO so money already start to come back to Goodtec/Carbonworks. I also place new shipping order for DF42 and want to pay for the shipment before sending. I want to work together with Goodtec/Carbonworks for best outcome but if not trust me to work with you even before we start new company CSG, future does not look good for future co-operation.
>
> What is problem with replacing DF42? It is right thing to do. Product is not good QC with chainstay breaking. Goodtec think replacement request not reasonable request? TESCHNER continue to get bad name if problem not fixed. Bad name means no sales … no sales means Goodtec not get any money from CSG."

[30] On 7 January 2009, there was that email from Mr Teschner requesting a letter or an email from the plaintiff confirming that nothing was owed the companies which had been placed under administration.[10]

[31] On 14 January 2009, Mr Teschner wrote a document headed "Notice to our valued dealers & suppliers".[11] The effect of this document was that Mr Teschner's group was not in financial difficulty although two companies had been placed in voluntary administration. He there wrote the decision to close those "…two non-trading companies did not affect our normal trading activities in Teschner Technologies USA Pty Ltd". However, nothing was said there which supports the plaintiff's case about the compromise.

[32] In early 2009, the plaintiff made some further supplies to Mr Teschner's business. There were eight invoices, from 23 February to 1 April, issued by the plaintiff to CSA. It is common ground on the pleadings that there is a debt owed by CSA to the plaintiff from these transactions in an amount of USD$1,322.40, being the balance of the total of the invoices of USD$18,551.20 allowing for payments of USD$17,228.80. Notably, nothing was paid at the same time as a percentage of CSA's sales.

[33] The real question here is whether a contract was formed. In this respect, it is legitimate to consider conduct after the date of an alleged contract: *400 George Street (Qld) Pty Ltd v BG International Ltd*.[12] Post-contractual conduct is likely to

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10 To which I have already referred at [11] above.

11 Exhibit 126.

12 [2010] QCA 245 at [58].

be more relevant in the case of an alleged oral agreement: *Lym International Pty Ltd v Marcolongo*.[13] The evidence of the parties' conduct after 16 or 18 December 2008 is scant. But as I have discussed, it seems none of the parties did anything which was an act of performance of this alleged agreement. There was no change to the capital of CSA. Its issued shares remained as the 10 shares held by Mr Teschner. There is no evidence of any documents passing between the parties with respect to sales made by CSA or even any query by the plaintiff of the Teschner side as to whether there had been any sales. As I have said, when prompted for evidence of that kind, the plaintiff offered only its lawyers' letter of demand, written almost a year later and at a time when a demand had been made by the first defendant against the plaintiff for a considerably larger amount. The absence of any evidence of a step taken by any party strongly suggests that the parties had reached some common ground but had not made a concluded contract.

[34] It is remarkable that there is not one document, even an email, which came from the plaintiff's side and which confirms its agreement to the terms proposed by Mr Teschner. As that memorandum stated, some of those suggestions within it had not been the subject of discussion at the meeting. Yet there was no written response to them and nor was there oral evidence as to anything said in response to those points.

[35] Mr Teschner's email of 2 January 2009 does not provide much support for the plaintiff's case.[14] It does refer to what the plaintiff now says were the essential terms of the compromise agreement. But it also shows a degree of discord between the parties.

[36] Mr Teschner's memorandum of 18 December is not said by Mr Yu or Mr Kuo to be in any way an incorrect record of the position. On its face, it records that some matters were agreed but that other matters were still at the stage of suggestions by Mr Teschner. Mr Yu and Mr Kuo now say that these matters were agreed. Of course, there is no challenge to that evidence because Mr Teschner withdrew. Nevertheless it remains for the plaintiff to prove its case and to persuade the Court that this evidence should be accepted. Ultimately, I am unable to accept that there was a concluded agreement reached at this meeting. That is not because I find that there was an agreement but subject to conditions precedent which remained unfulfilled. Rather, it is because the clear terms of Mr Teschner's document together with the evidence of what the parties did, or more relevantly did not do, after December 2008, points to a higher likelihood that there was no concluded agreement.

[37] As Mr Teschner's document of 18 December made clear, his proposals also required the concurrence of a number of individuals on his side of the bargain. It is true that Mr Hutchings apparently approved the proposal, on behalf of himself and Mr Jury. However, the reference to their necessary concurrence indicates the likelihood that at the critical meeting, Mr Teschner made it clear that he was not in a position to then conclude an agreement. In turn, it was unlikely that the plaintiff's

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13 [2011] NSWCA 303 at [136] to [146].

14 Discussed above at [29].

representatives participated in that meeting in a way which showed an intention to be contractually bound as and from that meeting. According to the plaintiff's amended case, the agreement was made not following but during that meeting.

[38] In consequence, I am not satisfied that the plaintiff has proved the compromise agreement upon which it sues. I find that no concluded agreement was reached as it alleges. Therefore the existing indebtedness of the first defendant remained and the plaintiff is entitled to a judgment against that defendant. As I have said, the plaintiff is also entitled to a judgment against the second defendant in the admitted sum of USD$1,322.40. The claim against Mr Teschner must be dismissed.

[39] I should mention another point which would have been relevant had I found that there was a concluded agreement. Upon the basis of that agreement, the plaintiff sought judgment for USD$150,000 against the second defendant. Yet upon the contract for which it contended, that amount was to be paid from sales made by CSA. There was no evidence of even one such sale. The apparent explanation is that the plaintiff had not had disclosure from the second defendant. It was submitted that I could award the plaintiff something in the nature of damages to be assessed, to the end that there would be an inquiry as to what sales had been made so that the plaintiff could recover 10 per cent of their amount. However, the plaintiff's claim against the second defendant in that event would have been for an unpaid debt. It was incumbent upon the plaintiff to prove its case at this trial. Upon the agreement for which it contended, it had to prove that there had been sales in a certain amount from which it would have an entitlement to be paid. It failed to prove those matters. It was the plaintiff's decision to go to trial without insisting upon the disclosure of documents. Accordingly, I would not have granted any relief by way of a money judgment or, as was requested, some order for damages to be assessed. The relief would have been limited to an order that the second and third defendants take such steps as were necessary to cause the plaintiff to be a shareholder of the second defendant. But at that point, there would have been a further complication, because the agreement, according to Mr Teschner's memorandum, was for the plaintiff to acquire not 18 per cent, but 35 per cent "until such time as company in good position to sell equity". There was no evidence as to whether that point in time had been reached.

[40] There will be judgment for the plaintiff against the first defendant in the sum of USD$356,410.98 together with interest thereon, pursuant to s 47 of the *Supreme Court Act 1995* (Qld) at 8 per cent per annum from 31 May 2008 until the date of judgment, resulting in an amount of USD$456,948.17.

[41] There will be judgment for the plaintiff against the second defendant in the sum of USD$1,322.40, together with interest on that sum at 8 per cent from 1 April 2009 until the date of this judgment, resulting in an amount of USD$1,607.31. The plaintiff's claim against the second defendant will be otherwise dismissed.

[42] The plaintiff's claim against the third defendant is dismissed.