The "Hyundai Fortune"
[2004] SGHC 45

Case Number : Adm in Rem 169/2003/K, RA 374/2003/H

Decision Date : 01 March 2004

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Liew Teck Huat (Niru and Co) for plaintiffs; Bazul Ashhab Bin Abdul Kader (T S Oon and Bazul) for defendants

Parties : —

Conflict of Laws – Choice of jurisdiction – Exclusive – Stay of action – Whether strong cause was shown – Whether there was real question of liability to be tried in jurisdiction of choice – Factors to be considered

Conflict of Laws – Choice of jurisdiction – Exclusive – Whether action in Singapore should be stayed in favour of jurisdiction of choice in bill of lading – Whether owners of vessel entitled to jurisdiction clause in bill of lading

1 March 2004

Belinda Ang Saw Ean J:

1 On 20 November 2003, I allowed the appeal against the decision of the assistant registrar who had on 13 October 2003 granted a stay of this action on the ground that the parties had agreed to refer the dispute in question to the Seoul Civil District Court in Korea. The defendants have appealed against my decision. I now publish my reasons.

2 The plaintiffs, Uni-Fruitveg Suppliers, are wholesale fruit merchants carrying on business at Pasir Panjang Wholesale Centre, Singapore. They had imported from China a consignment comprising 1,473 cartons of hami-melons which were shipped to Singapore in a 40ft reefer container. On arrival at Singapore on 7 July 2002, some 1,232 cartons of hami-melons were found badly damaged. The plaintiffs attributed the damage to the defendants' failure to provide a reefer container that was capable of maintaining the requisite pre-set temperature of 3°C throughout the transit.

3 The plaintiffs, as cargo owners, consignees and/or holders of bill of lading no HDMU YNSG3043853 dated 5 July 2002, commenced *in rem* proceedings against the defendants as owners of *Hyundai Fortune* claiming damages for loss and damage to the consignment of hami-melons. The *Hyundai Fortune* was arrested on what appeared, from the affidavit of Lim Lay Ping of the plaintiffs filed in support of the warrant of arrest, to be a claim founded on tort. At the material time, the owners of the *Hyundai Fortune* were EMF International SA. The managers of the vessel were reported in *Lloyd's List of Shipowners 2002-03* as Hyundai Merchant Marine Co Ltd. The latter company was also named in bill of lading no HDMU YNSG3043853 as the carriers, that is to say, the contracting carriers. As such, the owners of the *Hyundai Fortune* were the performing carriers and seemingly, they would not be entitled to claim the benefit of the jurisdiction clause in the bill of lading unless the bill of lading terms expressly provided or conferred the benefit of the jurisdiction clause on the defendants.

4 However, this was not a point raised in arguments either below before the assistant registrar or on appeal. Somehow, the parties were content to proceed as given that the dispute in this action arose out of the contract of carriage contained in or evidenced by bill of lading no HDMU

YNSG3043853 and the parties to this action were bound by the terms of the bill of lading. Even with this approach, I was equally satisfied that in the particular circumstances of this case, the action should not be stayed in favour of Korea.

5 The contract of carriage contained the following clause:

> **30. GOVERNING LAW AND JURISDICTION**
>
> The claim arising from or in connection with or relating to this Bill of Lading shall be exclusively governed by the law of Korea except otherwise provided in this Bill of Lading. Any and all action concerning custody or carriage under this Bill of Lading whether based on breach of contract, tort or otherwise shall be brought before the Seoul Civil District Court in Korea.

6 The defendants' case for a stay of the Singapore action for Seoul was, on its face, simple. There was a jurisdiction clause in the bill of lading and there was no reason why a stay of proceedings should not be granted.

7 It is settled law that the court would grant a stay of the action in aid of the jurisdiction clause unless the claimant is able to establish that exceptional circumstance amounting to strong cause exists to warrant a refusal to stay the proceedings. In other words, the claimant has to justify why he should be allowed to act contrary to his agreement. He would have to demonstrate with cogent facts that to require him to adhere to the terms of the clause would, in the circumstances, not be reasonable or just. This approach is clear from the line of authorities beginning with *Amerco Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd* [1975–1977] SLR 258 to *Golden Shore Transportation Pte Ltd v UCO Bank* [2004] 1 SLR 6.

8 When exercising its discretion, the court has to undertake an inquiry into the specific matters set out in the principles formulated in *Amerco Timbers* as well as other matters to be considered under the broad heading of "all the circumstances of the particular case" of the principles. Lai Kew Chai J in *The Eastern Trust* [1994] 2 SLR 526 at 534, [16] said:

> How exceptional the circumstances must be in each particular case will turn on the facts of that case. It is always a question of fact and degree.

The court has to also have in mind the strong bias adopted in the authorities in favour of enforcing the agreement. What amounts to a strong cause for refusing a stay depends upon the facts of each particular case, but guidance can be obtained from the authorities as to certain circumstances which should be accepted as sufficient and those which should not be. An example is where there is no arguable defence to the claim. As it is the claimant who is seeking to break his contractual promise upon where to sue, the burden is on him to show why a stay should not be granted.

9 It was not in dispute that the action brought by the plaintiffs fell within the scope of the agreement to litigate in Korea. The plaintiffs' principal reason for resisting a stay was that the claim was indefensible as the Partlow chart clearly showed that the reefer container was not able to maintain the requisite refrigerating temperature throughout the transit. I would explain that a particular carrying temperature was agreed to and inserted on the bill of lading. Added to that, counsel for the plaintiffs, Mr Liew Teck Huat, argued that the defendants' intransigent attitude towards the claim gave the plaintiffs the impression that there was no arguable defence. And since the defendants were unable to show that there was a real dispute or arguable defence to the claim, it would be difficult for the defendants to contend that they seriously desired trial in the agreed

forum. It would be right in the circumstances for the court to doubt the genuineness of the defendants' insistence that the claim be tried in the agreed forum.

10 Furthermore, Mr Liew pointed to some strong connecting factors in the case with Singapore. The dispute had no or little connection with Korea. The *Hyundai Fortune* was a Panamanian flagged vessel. The shippers were from Hong Kong. The reefer container was received for shipment at Shenzhen, China, for overseas shipment from Hong Kong to Singapore. Hyundai Merchant Marine Co Ltd, the vessel's managers in Korea, have a Singapore office, Hyundai Merchant Marine (S) Pte Ltd. George Lee Hon Kwong ("Lee"), who had affirmed two affidavits on behalf of the defendants, is the general manager of Hyundai Merchant Marine (S) Pte Ltd. Singapore was the port of discharge and is the place of business of the plaintiffs. The cargo damage survey was carried out by surveyors based in Singapore. The evidence and witnesses are therefore located in Singapore. The documents relating to this consignment in the English language would not require translation into the Korean language if the litigation continued in Singapore. There would also be no need for the services of a Korean interpreter. I would add that whilst the managers of the vessel were a Korean company with a Seoul address, the claim would most likely be handled and considered by the London based managers of the vessel's protection and indemnity club.

11 After the survey of the consignment on 9 July 2002, the plaintiffs submitted a claim for their losses and expenses in the total sum of US$8,396.92. They first wrote to Hyundai Merchant Marine (S) Pte Ltd on 21 August 2002 with supporting documents. Prior to that, the plaintiffs had on or about 9 July 2002 notified Hyundai Merchant Marine (S) Pte Ltd of the cargo damage and called for a joint survey. In that same message, the carrier and ship were held responsible for the plaintiffs' loss and damage. The Partlow chart is a chart that records the temperature of the reefer container. It showed that at certain stages of the transit, the consignment was not refrigerated at the pre-set temperature of 3°C. There was no response at all to the plaintiffs' demand letter of 21 August 2002. That prompted the plaintiffs to instruct M/s Niru & Co to pursue the claim. M/s Niru & Co wrote on 7 December 2002 to Hyundai Merchant Marine Co Ltd in Korea. They explained the nature of the damage and loss. Hyundai Merchant Marine Co Ltd kept quiet about the claim despite the plaintiffs' threat to arrest the *Hyundai Fortune*. They were invited to disclose the name of solicitors authorised to accept service of process if liability was disputed. No reply was forthcoming. So, the claim was neither admitted nor disputed. A reminder was sent on 8 March 2003. In that reminder, M/s Niru & Co asked for a response either way by 11 March 2003. Again, there was no reply from the defendants or Hyundai Merchant Marine Co Ltd.

12 In the light of the persistent silence of the defendants which the plaintiffs had interpreted as a refusal to pay their legitimate claim, the plaintiffs issued *in rem* proceedings on 2 July 2003 and caused the arrest of the *Hyundai Fortune* on 19 July 2003. The vessel was released from arrest upon security for the claim being furnished on 21 July 2003. After an appearance was entered on behalf of the owners of the vessel on 24 July 2003, the plaintiffs filed and served their statement of claim on 7 August 2003. On 15 August 2003, it was suggested for the first time that the claim should be brought in Seoul instead of Singapore. The defendants filed their stay application on 20 August 2003.

13 The defendants contended that they have a valid defence to the claim. The Court of Appeal in *The Hung Vuong-2* [2001] 3 SLR 146 confirmed that the court was entitled to look into an alleged defence to see whether there was any real substance in it. Counsel for the defendants, Mr Bazul Ashhab, in his affidavit in support of the stay application, stated in vague terms that "evidence will be heard to show whether or not the damage to the cargo was due to the [d]efendants' breach of contract or negligence". He said that "the [d]efendants' liability, if any, can only be ascertained after trial and after the cause and extent of the alleged damage to the cargo has been established at

trial". As Mr Liew pointed out, Mr Ashhab had simply asserted in his affidavit that the defendants have defences without actually identifying them. He did not say what evidence would be led and who would give the evidence. It is necessary to at least identify the witnesses and indicate what they might say with regard to the issues likely to arise in the action. In particular, they have to be able to give evidence which provides the defendants with a defence. Moreover, the plaintiffs had in correspondence invited the defendants to either admit to liability or appoint solicitors to accept service of process if they denied liability. The defendants chose to ignore the letters of demand. I would add that in the course of the hearing, counsel for the defendants pointed to some clauses in the bill of lading as possible defences even though affidavits filed on behalf of the defendants did not allude to any facts in support of the suggested defences. The unsatisfactory state of affairs, quite naturally, undermined the credibility of the defendants' suggested defences to the claim.

14 On specifics, it was argued that the consignment was not damaged whilst the reefer container was in the defendants' custody. The reefer container was loaded on board the vessel on 5 July 2002 at Hong Kong. It was pointed out at the hearing of the appeal that under the contract of carriage, responsibility for the reefer container was assumed earlier in time than what counsel on both sides had thought. The bill of lading exhibited in Mr Ashhab's affidavit and that of Lee indicated that the reefer container was received for shipment at "Shenzhen China Door" for overseas shipment at Hong Kong and for delivery at "Singapore CY". It was not disputed that the reefer container in question was supplied by the defendants. It was irrelevant that the reefer container maintained the requisite temperature during the ocean voyage. The refrigerating temperature was not at 3°C from the outset. On 3 July 2002, the refrigerating temperature rose from 3°C to as high as 25ºC. It then dropped to 22.5°C. The next day, the refrigerating temperature went from 25ºC to 17ºC. On 5 July 2002, the refrigerating temperature from 25ºC dropped to 3ºC and remained at 3ºC until arrival at Singapore CY on 8 July 2002.

15 As the bill of lading was claused "Shipper's Load & Count", the plaintiffs were required to *prima facie* establish the apparent good order and condition of the hami-melons at the time they were stuffed in the reefer container. The plaintiffs would be able to establish this matter with documents. Basically, the photographs exhibited in the affidavit of Lim Lay Ping showed that the hami-melons were each individually protected with a net-like polystyrene wrapping. The individually wrapped hami-melons were placed in compartments made out of cardboard strips. It was reasonable to infer from these facts that the hami-melons were apparently in good order and condition at the time of packing. Fruits apparently in good order and condition at time of packing may show signs of rot after a certain time. In general, the higher the temperature the fruits are stowed in, the greater the likelihood of rot or disease development. For a longer shelf life, in this case, the hami-melons were required to be stowed in an ambient temperature of 3°C. The tone of the survey reports was not so dissimilar to what I have stated. Here, the hami-melons were transported in a reefer container at too high a temperature. That accounted for the recommendation by the plaintiffs' surveyor that a claim for the damage be made against the ship.

16 The surveyors for the plaintiffs and the defendants could easily explain their respective reports. As stated, the pre-shipment condition could be established with documents. It would be unrealistic to expect the packers from China to remember the condition of the hami-melons which they saw nearly a year and a half ago. Their evidence was not likely to be of much assistance as compared to the degree of certainty offered by documentary evidence. In any event, the plaintiffs would have to prove that the damage was caused by the defendants and if they could not do that, their claim would fail. The prejudice was on the plaintiffs rather than on the defendants. Overall on the evidence, I was satisfied that there was no real question of liability which ought to be tried in Korea.

17 It was common ground that the claim was already time barred. The defendants argued that the plaintiffs had themselves to blame for not protecting the claim from being time barred in Seoul and that the defendants should not be deprived of a defence that had accrued to them.

18 It seemed to me that as time bar was the only viable defence, it was really for a juridical advantage that the defendants had sought litigation in the agreed forum. The defendants were unwilling to waive the time bar defence in the agreed forum. Without the concession, the cargo damage could not realistically be determined in Korea. It was a factor that had to be taken into account in the exercise of the court's discretion. In addition, the defendants were not willing to voluntarily transfer the security obtained here to cover Korean proceedings.

19 It was also contended that the plaintiffs had not satisfactorily explained why no protective writ was issued in Korea. I did not think that was crucial. Firstly, as pointed out by Chao Hick Tin JA in *Golden Shore Transportation Pte Ltd v UCO Bank* ([7] *supra*), if the plaintiffs could not or did not explain why no protective writ was issued, that did not mean that the plaintiffs could not rely on other factors to show strong cause. Secondly, like in *Golden Shore Transportation Pte Ltd v UCO Bank*, strong cause had been shown in this case. Thus, the plaintiffs' omission to issue parallel proceedings in Korea to protect the claim from being time barred is inconsequential. Moreover, I did not think that it was unreasonable of the plaintiffs to have sued in Singapore. It was the lack of response from the defendants and Hyundai Merchant Marine Co Ltd that triggered the proceedings in Singapore. The defendants had not proffered any satisfactory reason for ignoring the correspondence of both the plaintiffs and their solicitors. I was not impressed at all with Lee's explanation that he was advised that the defendants were not under a duty to reply to the plaintiffs. If the defendants had an answer to the claim put forward in correspondence, they could have said what that answer was.

20 The address in Korea relied upon by Mr Ashhab in his affidavit as the defendants' was that of the managers. To downplay the connection in Singapore, counsel relied on *The Asian Plutus* [1990] SLR 543 to illustrate the point that location of witnesses, and the need for interpreters and for documents to be translated into Korean language were all neutral factors.

21 Mr Ashhab further argued that since the governing law was Korean law, the Korean courts would be best placed to adjudicate the plaintiffs' claim. The construction of the contract contained in or evidenced by the bill of lading is a matter for the law applicable to that contract. However, there was no evidence before me that Korean law was different from Singapore law in that regard. I therefore proceeded on the basis that Singapore law was the same when applied to the construction of cl 30 and the other terms in the bill of lading, in particular, the construction of the clause paramount where the Hague-Visby Rules were incorporated into the contract as contractual terms notwithstanding the absence of the Hague-Visby regime in Korea. In any event, the contract provided for the Hague-Visby Rules to apply where they were applicable at the place of shipment, that is to say, Hong Kong. It was not disputed that the Hague-Visby Rules applied to shipments out of Hong Kong.

22 Lai J in *The Eastern Trust* ([8] *supra*) at 534 quite rightly pointed out that the court will take a cumulative approach and give each circumstance due weight. A single circumstance may not itself be sufficient to justify refusing a stay. However, taken together, the circumstances may be found to be sufficiently exceptional. The small size of this claim in the sum of US$8,396.92 when considered in isolation and individually would not amount to sufficient cause. However, I did accord weight to the small size of the claim after having been already satisfied in the inquiry that strong cause had been shown. So as not to be misunderstood, I am not here talking about costs being disproportionate to the size of the claim: see generally the *dicta* of Waller and Chadwick LJJ in *Baghlaf Al Zafer Factory*

Co BR For Industry Ltd v Pakistan National Shipping Co [1998] 2 Lloyd's Rep 229.

23 At the end of the day, I was satisfied that the overall justice of the case fell on the side of the plaintiffs. There was no corresponding prejudice to the defendants if the stay was refused. I accordingly allowed the appeal with costs of the appeal and below fixed at $6,000.