Salcon Ltd v United Cement Pte Ltd
[2004] SGCA 40

Case Number : CA 3/2004

Decision Date : 07 September 2004

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Tan Lee Meng J; Yong Pung How CJ

Counsel Name(s) : Jimmy Yim SC (Drew and Napier LLC) for appellant; Philip Jeyaretnam SC, Paul Wong and Goh Peng Fong (Rodyk and Davidson) for respondent; Andrew Phang SC, amicus curiae

Parties : Salcon Ltd — United Cement Pte Ltd

Damages – Measure of damages – Appellant engaged to construct concrete silo – Appellant's negligence and breach of contract resulting in various defects – Third party's novus actus interveniens causing silo to collapse before repairs could be made – Whether respondent entitled to claim for consequential losses during notional repair period – Whether respondent entitled to claim for diminution in value of notionally repaired silo – Whether respondent entitled to claim alternative measure of damages

7 September 2004 *Judgment reserved.*

Tan Lee Meng J (delivering the judgment of the court):

1 This appeal relates to an arbitrator's ruling that the appellant, Salcon Limited ("Salcon"), a construction company, was liable to the respondent, United Cement Pte Ltd ("UCL"), for certain heads of consequential losses resulting from the former's negligence and breach of contract regarding the construction of a cement silo.

Background

2 The facts in this case, shorn of details, are as follows. UCL, a Singapore company in the cement business, wanted to build a reinforced concrete silo ("the silo") at Pulau Damar Laut to store cement that was to be packed for sale. On 18 August 1993, UCL appointed Cheang Jen Boon ("Cheang"), a professional engineer, to design the silo, which comprised seven cells within two concentric cylindrical walls, with the central cell ("Cell 1") surrounded by six smaller cells ("Cells 2 to 7") of varying sizes. Cheang's task was also to supervise the construction of the silo.

3 On 16 November 1994, UCL appointed Salcon as the main contractor for the construction of the silo for a sum of $7,796,123.22. By December 1995, the construction work was substantially completed and by March 1996, the silo was fully operational.

4 The silo was neither well designed nor well constructed. By March 1997, a number of defects appeared. After these defects were rectified, Cheang issued the Certificate of Completion of Work and the Defects Liability Certificate on 26 June 1997. However, UCL continued to face problems with the silo. Between November 1997 and February 1998, chunks of concrete and rebars were flushed through the discharge valves of Cell 4, which had to be emptied for repairs. Cracks and spalling along the inner wall of the silo were also discovered.

5 On 3 February 1999, a site inspection was carried out by officers from the Building Control Division in the presence of all the parties. After this inspection, Cheang advised in his evaluation report of 13 February 1999 that the silo should not be operated beyond 70% of its capacity. This

meant that each of the cells was not to be loaded beyond 70% of its capacity. By then, UCL had appointed Mr Tan Ee Ping of M/s Tan Ee Ping & Partners ("TEPP") as its consultant. In two reports dated 4 May 1999 and 17 May 1999, TEPP recommended that the silo be shut down for repairs to be carried out. The silo ceased operating by 7 June 1999.

6 Although TEPP knew that Cheang had advised that the silo should not be operated beyond 70% of its capacity, orders were given for Cell 4 to be loaded to full capacity on 24 June 1999 so that stresses could be monitored by strain gauges. Some 6,000 tons of cement were poured into Cell 4. This resulted in Cell 4 being filled up to 97% of its storage capacity. On the following day, while cement was being discharged from Cell 4 between 3.30pm and 4.00pm, a large vertical crack appeared around Cells 3 and 4, after which the whole silo collapsed. As a result, rectification work was no longer possible as the silo had to be demolished and entirely reconstructed. Reconstruction work has since been completed.

7 UCL instituted proceedings in the High Court against Cheong and Salcon for negligence and/or breach of contract. UCL asserted that the silo was wholly defective, unfit for its purpose and/or unsafe. By an order made on 2 March 2000 pursuant to s 22 of the Arbitration Act (Cap 10, 1985 Rev Ed), the dispute was referred to a panel of three arbitrators. The arbitrators were Mr C R Rajah SC, Mr Teh Hee Seang and Mr Tan Chee Meng.

The arbitration proceedings

8 Cheang and Salcon did not seriously dispute UCL's right to damages for defective design and workmanship. However, they submitted that TEPP's negligent advice to load Cell 4 to full capacity on 24 June 1999 was a *novus actus interveniens* that broke the chain of causation and that, as such, the damages payable by them should be based on the cost of rectifying the defects resulting from the design and construction of the silo before it collapsed.

9 In their Interim Award I, the arbitrators found as follows:

(a) Cheang was negligent and had breached his design and supervision contract with UCL.

(b) Salcon was negligent and in breach of its construction contract with UCL.

(c) TEPP's advice to UCL to load Cell 4 on 24 June 1999 to full capacity was a *novus actus interneniens* which broke the chain of causation.

(d) UCL was not guilty of contributory negligence or of a failure to mitigate its losses.

(e) Both Cheang and Salcon were liable to UCL for "damages arising from their negligence and breach of contract for the design and construction deficiencies in the silo prior to 24 June 1999".

(f) The liability of Cheang and Salcon was apportioned at 30% and 70% respectively.

10 In para 243 of their Interim Award I, the arbitrators directed as follows:

> [Cheang] and [Salcon] are jointly and severally liable to [UCL] in damages for the cost of rectification of all design and construction defects in the silo in its state prior to the loading of Cell 4 on 24 June 1999 and consequential loss arising therefrom, in the proportion of 30% and 70% respectively, such damages and loss to be assessed at a separate hearing, if not agreed.

11 Salcon and UCL appealed against the findings of the tribunal. After both appeals were dismissed by this court, the assessment of damages was, for the purpose of saving costs, fixed before a single arbitrator, Mr Tan Chee Meng.

Assessment of damages

12 That UCL is entitled to claim damages for the actual expenses incurred on or before 24 June 1999 ("Claim A") to rectify defects as well as the cost of rectification works for the remaining defects in the silo in its state prior to 24 June 1999 ("Claim B") was not in doubt and these two claims need not be further considered. The present appeal arose because UCL also claimed for other losses that would have arisen during the notional period of repair after the silo's collapse. The term "notional" is used because the contemplated rectification works necessitated by Cheang's defective design and Salcon's defective construction work could no longer be carried out after the collapse of the silo. As a question arose as to whether UCL was entitled in law to claim for losses during the notional repair period because the tribunal had found that the silo collapsed as a result of TEPP's *novus actus interveniens*, the parties jointly framed the following preliminary questions of law on 3 November 2003 for the arbitrator's decision:

> Preliminary Question 1
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> In addition to [Claims A and B] …, whether the Plaintiffs are entitled to recover damages for:
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> (C) consequential loss incurred during the rectification period … ["Claim C"] and/or
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> (D) consequential loss due to the loss of capacity of the silo so rectified … ["Claim D"].
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> Preliminary Question 2
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> In addition to [Claim A] … and as an alternative to claim (B), whether the Plaintiffs are entitled to recover damages for:
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> (E) consequential loss measured by discounted cash flow of the defective silo as compared to a sound silo (see Item No 23 of the 2nd Statement of Claim) ["Claim E"]
>
> Preliminary Question 3
>
> In addition to [Claims A and B] above, whether the Plaintiffs are entitled to recover damages for:
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> (F) consequential loss measured by the depreciated replacement cost to reinstate the silo (see Item No 24 of the 2nd Statement of Claim) ["Claim F"]

13 The arbitrator made the following findings in his Interim Award II:

> i. Preliminary Question 1 - CLAIM C:
>
> UCL is entitled to claim for consequential losses during the notional period of repairs;
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> ii. Preliminary Question 1 - CLAIM D:
>
> UCL is not entitled to claim for consequential losses due to the loss of capacity of the silo so rectified.

iii. Preliminary Question 2 - CLAIM E:

UCL is entitled to be compensated for the diminution in value of the silo measured by the "Discounted Cash Flow" method.

iv. Preliminary Question 3 - CLAIM F:

UCL is entitled to be compensated for the diminution in value of the silo measured by the "Depreciated Replacement" Cost method.

14 Salcon appealed against the arbitrator's findings in relation to Claims C, E and F.

The appeal

15 The main issue in this appeal by Salcon against the arbitrator's findings in relation to Claims C, E and F concerns the effect of TEPP's negligent advice on 24 June 1999 to load Cell 4 to full capacity, which was regarded by the arbitrators as a *novus actus interveniens* that broke the chain of causation. Salcon contended that as the *novus actus interveniens* caused the silo to collapse, it is not liable to UCL for any consequential loss during the period of notional repairs to the silo (Claim C) or any hypothetical diminution in the value of the silo measured by the two methods of assessment of loss referred to in Claims E and F. In coming to his decision in favour of UCL's Claims C, E and F, the arbitrator relied on two English authorities, *The Haversham Grange* [1905] P 307 and *Baker v Willoughby* [1970] AC 467. If both cases are examined, it will be found that they do not lend any support to UCL's case.

16 The first case, *The Haversham Grange,* must be viewed in the context of a number of other shipping cases. To begin with, in *The Glenfinlas* [1918] P 363, the plaintiff's vessel was involved in a collision as a result of the negligence of the defendant's vessel. Before permanent repairs could be effected, the plaintiff's vessel sank after hitting a mine. Apart from the repair costs, the plaintiff also made a claim for consequential losses, namely damages for detention that would have resulted had the vessel been repaired. The registrar, who dismissed the claim for damages for detention during the notional period of repair, said that this purely consequential loss stood on a different footing from the cost of repairs to the plaintiff's chattel. In his view, the principle to be applied was *restitutio in integrum*, and the question of awarding damages for loss of time when there was no such loss did not arise.

17 The reasoning in *The Glenfinlas* was approved by the English Court of Appeal in *The York* [1929] P 178. In the latter case, the plaintiff's vessel, which was damaged in a collision by the defendant's vessel, was able to continue trading without being repaired as the damage did not render her unseaworthy. Before the repairs were effected, the plaintiff decided to sell the vessel. As such, when the vessel reached Antwerp, her engines, boilers and tanks were opened for the buyer's inspection. While the vessel was idle and awaiting inspection, the plaintiff took the opportunity to repair the collision damage. The plaintiff's claim for damages for the detention of the vessel during the period of repair was rejected. Scrutton LJ explained at 184:

> In this case there was no work which she would otherwise have done during the time, for the reason that by her contract of sale she had incapacitated herself from doing any work at the time; and that being so, it appears to me that the shipowner fails to prove that the wrong of laying the ship idle was the result of the collision. His ship was idle because of the contract of sale and purchase, and the work which had to be done under it.

18 The facts in the above-mentioned shipping cases are very different from those in *The Haversham Grange.* In that case, the plaintiff's vessel was damaged during a collision with another vessel and was further damaged within a day in a subsequent collision with the defendant's vessel. Both the collisions rendered the plaintiff's vessel unseaworthy, which meant that she had to be repaired immediately. The repairs for the damage caused in both collisions were effected simultaneously and the damage caused by the defendant's vessel was repaired within the time required for repairing the damage caused in the first collision. The plaintiff agreed to share the responsibility for the first collision with the owners of the other ship involved in that collision. After paying half the costs of the dock dues and demurrage, the plaintiff claimed these amounts from the defendant. The English Court of Appeal accepted that the defendant had to share the cost of dock dues, which were part of the cost of repairs. However, in the case of consequential losses during the period of repair, namely demurrage, it was held that the first tortfeasor, and not the defendant, was liable for it. Collins MR explained that as it turned out, the plaintiff's vessel was detained the whole time in dock by the repairs which had to be executed in consequence of the damage done by the first tortfeasor's vessel and although the repairs occasioned by the defendant's vessel were effected simultaneously, the plaintiff's ship was not detained an hour longer by reason of that fact. In view of this, the defendant was not liable for demurrage.

19 The decision in *The Haversham Grange* cannot be applied to the present case. To begin with, i n *The Haversham Grange,* the damage to the plaintiff's ship was actually repaired and the consequential loss, namely demurrage, was actually incurred by the plaintiff. However, in the present case, repairs to the cement silo could no longer be carried out because it collapsed as a result of a *novus actus interveniens*. If the shipping cases are of any assistance, the collapse of the silo may be compared to the sinking of a ship and the principle enunciated in *The Glenfinlas* would be more relevant when considering UCL's claim for consequential losses.

20 We now turn to *Baker v Willoughby* [1970] AC 467 ("*Baker*"), a personal injury case that was criticised but not overruled by the House of Lords in *Jobling v Associated Dairies Ltd* [1982] AC 794 ("*Jobling*"). In *Baker*, the defendant motorist negligently injured the plaintiff's left leg. Subsequently, the plaintiff's left leg was hit by a bullet during an armed robbery at his work place. As a result of the second injury, the plaintiff's leg had to be amputated. The House of Lords held that the defendant motorist remained liable for the plaintiff's pain and suffering after the shooting that led to the amputation. Their Lordships took pains to stress that if this was not the case, the plaintiff would be prejudiced as the armed robbers, who found him in an injured state, were only liable for any additional damage that resulted from the shooting itself.

2 1 *Baker* must now be viewed in the light of the subsequent decision of the House of Lords in *Jobling.* In *Jobling*, the plaintiff was injured at his workplace as a result of his defendant employer's negligence. After the injury and before the trial, it was discovered that the plaintiff's own medical problems with his back would have curtailed his working life in any event. The House of Lords held that the defendant was only liable for the pain, suffering and loss of earnings suffered by the plaintiff up to the time the plaintiff's own illness effectively overtook the effects of the injury at the workplace. The plaintiff's illness was regarded as part of the vicissitudes of life which ought to be taken into account to reduce the damages awarded to the plaintiff. In coming to this conclusion, the House of Lords cast doubt on its previous decision in *Baker.*

22 Often enough, attempts have been made to reconcile *Baker* with *Jobling* on the basis that the supervening factor in the former case was a tort whereas the supervening event in the latter case arose from natural causes. This is far from satisfactory for as Prof John Fleming rightly pointed out, the risk in *Baker* of being shot was at least as random as the chance of disease in *Jobling* and a claim against criminals is as forlorn as blaming fate for the disease: see "Probabilistic Causation in Tort

Law" (1989) 68 Can Bar Rev 661 at 672.

23 We were invited to rule on whether *Baker* is applicable in Singapore in personal injury cases and if so, whether the effect of that decision may be extended to commercial disputes such as the present, as the arbitrator had done. In our view, whether *Baker* is applicable in Singapore in personal injury cases is a question that ought to be considered on another occasion when that question directly arises. What is clear for present purposes is that whether or not *Baker* is applicable in personal injury cases, its effect should not be extended to commercial disputes such as the one presently being discussed. After all, in *Jobling*, Lord Wilberforce took pains to stress at 804 that the rationalisation of the decision in *Baker*, as to which he at least had doubts, "need and should not be applied to other cases", while Lord Keith of Kinkel made it clear at 814 that the weakened *ratio decidendi* of *Baker* "must lead to the conclusion that in its full breadth it is not acceptable". It should also be noted that Lord Edmund-Davies said at 808–809 that he could "formulate no convincing juristic or logical principles supportive of the decision" in *Baker* while Lord Bridge of Harwich took the view at 821 that the *ratio decidendi* of *Baker* could not be sustained. Finally, Lord Russell of Killowen declared at 811 that the reliance in *Baker* by Lord Reid on a workman's compensation case for his conclusion was unsound and that the reasons given in *Baker* did not persuade him to take a further step to allow the workman in *Jobling* to claim with respect to the period when his own back problems made it impossible for him to work. In view of the aforesaid, the arbitrator erred when he relied on *Baker* in the context of a commercial dispute.

24 We are of the view that the issue in the present appeal should be considered in the context of the legal effect of a *novus actus interveniens.* The relevant question in this case is whether the losses in respect of which UCL has made claims were caused by Salcon or by the *novus actus interveniens*, namely TEPP's order to load Cell 4 to full capacity on 24 June 1999. That causation must be established before the question of quantification of damages arises is obvious. In *Carslogie Steamship Co Ld v Royal Norwegian Government* [1952] AC 292 at 300*,* Viscount Jowitt explained:

> [A]t the outset I think it is well to bear in mind the elementary principle that it is for the plaintiff in an action of damages to prove his case to the satisfaction of the court. He has to show affirmatively that damages under any particular head have resulted from the wrongful act of the defendant, before he can recover those damages.

25 In our view, the facts in the present case may be compared to those in *Beoco Ltd v Alfa Laval Co Ltd* [1994] 4 All ER 464 ("*Beoco*"), a decision of the English Court of Appeal. In that case, the first defendant installed a heat exchanger at the plaintiff's factory, which produced refined edible oils. Some 20 months after the installation, a leak, which resulted from a crack in the outer surface of the casing, was discovered in the heat exchanger. The plaintiff employed the second defendant to repair the crack. The repair work was not altogether successful and the heat exchanger failed a pressure test conducted by the plaintiff's engineers. Notwithstanding this, the plaintiff's engineers decided to put the whole system back into operation again before a proper inspection of the heat exchanger, which would have shown that it was still defective and that the crack was now even more extensive. It was the plaintiff's responsibility to arrange for such an inspection. Two months later, the defective heat exchanger exploded, causing damage to the plaintiff's plant and loss of production.

26 The Court of Appeal held that the plaintiff was responsible for the explosion which resulted from its decision to put an inadequately repaired heat exchanger into service. It further held that while the first defendant was liable for the cost of replacing the defective casing of the heat exchanger as well as the loss of production while it was actually being repaired, it was not liable for hypothetical damages for lost production for the additional period required to repair the defective heat exchanger if it had not exploded after having been put back in service. The reason for this was

that such further repair work was not carried out and had been subsumed within the more extensive repairs required because of the explosion caused by the plaintiff's own negligence.

27 Reference may also be made to the decision of the House of Lords in *Carslogie Steamship Co Ld v Royal Norwegian Government* ([24] *supra*) ("*Carslogie*"). In that case, the defendant was responsible for a collision with the plaintiff's vessel. As permanent repairs were not immediately required, the vessel sailed again after some temporary repairs were effected. During the voyage, heavy weather damaged the vessel to such an extent as to render her unseaworthy. As a result, she had to be in dry dock in New York for repairs. Both the collision damage and the heavy weather damage were repaired concurrently. As 30 days were required for repairing the damage caused by heavy weather and only ten were required to repair the damage caused during the collision, it followed that the defendant did not cause the vessel to be detained any longer than was necessary to repair the damage caused by the heavy weather during the voyage. It was thus held by the House of Lords that the defendant was not liable for the ten days of detention that were allocated for repairs for the collision because these ten days were subsumed within the much lengthier period of time needed to repair the damage caused by heavy weather.

28 The situation in the present case is similar to that in *Beoco* and *Carslogie*. Before Salcon could complete the required repairs to the silo, there was an overloading of Cell 4 on TEPP's orders. This *novus actus interveniens* necessitated the complete reconstruction of the silo itself. As legal effect must be given to a *novus actus inteveniens*, UCL's Claim C, which concerns consequential losses during the period of notional repairs to the silo, did not rest on solid ground and should have been dismissed. The *amicus curiae*, Prof Andrew Phang, rightly explained the position in para 86 of his submissions as follows:

> [S]uch reconstruction necessarily encompasses and incorporates whatever repairs which were hitherto required, but which cannot now be effected and which have now, in fact, been subsumed within the much larger enterprise of reconstruction. And the cause of the need for such reconstruction was … the *novus actus interveniens* for which [TEPP] was responsible. In other words, the chain of causation insofar as the repairs (and resultant consequential loss flowing [therefrom]) are concerned had been broken by the *novus actus interveniens*. Hence, the appellant was – and is – no longer liable for the consequential loss flowing from the notional repairs.

29 Claim F will next be considered. UCL attempted through Claim F to recover the diminution in the value of the cement silo, as measured by the depreciated replacement cost method. It is true that while the general measure of loss in situations such as the present is the cost of repairing the damaged chattel, there may be occasions where a diminution in market value may merit some compensation in addition to the cost of repairs. In *Payton v Brooks* [1974] RTR 169 at 176, Roskill LJ explained:

> [W]here the evidence justifies a finding that there has been, on top of the cost of repairs, some diminution in market value – or, to put the point another way, justifies the conclusion that the loss to the plaintiff has not been fully compensated by the receipt of the cost of complete and adequate repairs, because of a resultant diminution in market value – I can see no reason why the plaintiff should be deprived of recovery under that head of damage also.

30 The facts in the present case do not warrant an award of damages for diminution in value for the simple reason that what UCL eventually had was not a repaired silo with a lower value due to defects but a totally new silo that had to be built because of the *novus actus interveniens.* UCL cannot be allowed to claim damages for the loss of value of a hypothetically repaired silo as that

would result in compensating it for a loss that it has not suffered and will not suffer. Salcon thus succeeds in its appeal against the arbitrator's finding in relation to Claim F.

31 As for Claim E, which concerns damages for the diminution in the value of the silo measured by the discounted cash flow method, we agree with Prof Phang that in the circumstances of this case, "there is no legal impediment to allowing [this claim] to succeed in place of [Claim B], provided that [UCL] is not put in a better position [than] it would have been had it recovered under [Claim B] instead". However, as Salcon has already accepted liability for Claim B and UCL cannot be put in a better position under Claim E than under Claim B, it would be an exercise in futility for the parties to continue to spend time arguing whether the discounted cash flow method adopted by UCL's accounting expert is a reasonable alternative as well as an accurate measure of the loss resulting from Salcon's negligence. That being the case, the arbitrator's finding that UCL may proceed with Claim E has no practical significance and the parties ought to take no further steps with respect to this matter.

Costs

32 Salcon is entitled to the costs of the appeal.