Penguin Boat International Ltd v Royal & Sun Alliance Insurance (Singapore) Ltd [2008] SGHC 83

Case Number : Suit 145/2007

Decision Date : 06 June 2008

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Yap Yin Soon, Leona Wong and Clara Feng (Allen & Gledhill LLP) for the plaintiff; Richard Kuek and Adrian Aw (Gurbani & Co) for the defendant

Parties : Penguin Boat International Ltd — Royal & Sun Alliance Insurance (Singapore) Ltd

Insurance – Shiprepairers policy – Indemnity for legal liability for loss or damage to third-party property occurring in the course of or arising from shiprepairing operations – Exclusion clause containing reporting requirement – Shiprepairers building cradle for transportation of vessel – Loss of vessel during voyage due to failure of cradle – Owners notifying insurers – Whether loss covered by shiprepairers policy – Whether reporting requirement fulfilled

6 June 2008 Judgment reserved.

Kan Ting Chiu J:

1 The plaintiff, Penguin Boat International Ltd which carried on the business of shipbuilding and shiprepairing, obtained insurance coverage from the defendant, Royal & Sun Alliance Insurance (Singapore) Limited. The policy was a Shiprepairers Legal Liability Insurance policy ("the shiprepairers policy"). Under the policy, the defendant undertook to:

> [I]ndemnify the [plaintiff] for all sums which the [plaintiff] shall become liable to pay by reason of the legal liability of the [plaintiff] as shiprepairers for … loss of or damage to third party property occurring in the course of or arising from the shiprepairing operations of the [plaintiff].

2 The scope of the indemnity is the primary issue in dispute in these proceedings.

3 The other major issue in dispute between the parties was the effect and construction of the exclusion clause in the policy which provided that the policy shall not cover any loss or damage:

> … unless discovered and reported in writing to the [defendant] within 6 months of the delivery to Owners or within 6 months after work is completed by the [plaintiff] whichever may first occur.

4 The policy was issued by the defendant on 5 March 1999. In July 1999, YTC Yachts (SEA) Pte Ltd ("YTC") sent a yacht *MY Paesano* for repair works to be carried out. In addition to the repair, the plaintiff also supplied, at YTC's request, a cradle for the *Paesano* the fabrication of which was undertaken by the plaintiff's sub-contractor. After the *Paesano* was repaired and the cradle was constructed, the *Paesano* was loaded on a seagoing vessel, the *Gertrude Oldendorff*, on the cradle for intended delivery to Vancouver to its owner Goodman Yachts LLC, and the yacht was insured with the defendant under a marine cargo policy for this purpose. During the voyage to Vancouver, the *Gertrude Oldendorff* encountered a severe storm during which the cradle broke and the *Paesano* was lost. The owner sued the plaintiff and other parties. The owner's claim under the marine cargo policy was paid by the defendant, with the result that the owner's interest in that action was subrogated to the defendant. The plaintiff eventually settled that suit with the payment of US$150,000, and sought indemnity from the defendant under the shiprepairers policy, and the defendant denied that the

plaintiff's loss was covered under the policy.

The coverage issue

5 It is to be noted that there were no complaints over the repairs to the *Paesano* itself. The loss of the *Paesano* was not attributed to the repairs to the *Paesano*, but to the failure of the cradle which was secured to the deck of the *Gertrude Oldendorff*. When the *Gertrude Oldendorff* came into rough sea the cradle failed, and the *Paesano* was washed off the deck.

6 The *Paesano* was sent to the plaintiff's yard without any cradle. In a note issued by YTC listing the work required to be done on the *Paesano*, there was an item "Build Shipping Cradle".[note: 1] The plaintiff issued a quotation for the construction of a *support* cradle for the *Paesano*. In its statement of claim in the present action, the plaintiff referred to the cradle simply as a "steel cradle framework".[note: 2]

Was the construction of the cradle shiprepair?

7 The parties were at issue whether the construction of the cradle for the *Paesano* came within the description of shiprepair. The plaintiff took the position that it did, but the defendant did not recognise that as shiprepair.

8 In a situation where there is no agreement that a loss is covered by a policy, the burden is on the insured to show that the loss is covered: see Poh Chu Chai's *Principles of Insurance Law* (LexisNexis, 6th Ed, 2005) p 665, *Regina Fur Co Ltd v Bossom* [1958] 2 Lloyd's Rep 425 (cited by Assoc Prof Poh at p 665 fn7), and *Maratz Ltd v New India Assurance Co Ltd* [1998] 2 SLR 909 at [23].

9 Although the policy issued by the defendant was named a shiprepairers legal liability policy, there was no definition of 'shiprepairer', or 'shiprepair' in the policy. There appears to be no general understanding on the meanings of these terms in the insurance industry.

10 The defendant referred to the general definition of 'repair' in *The Shorter Oxford English Dictionary* (Clarendon Press, 3rd Ed):

> To restore … to good condition by reversal or replacement of decayed or damaged parts, or by refixing what has given way

to argue that only work done which come under one of the three 'R's, restoration, renewal or replacement of parts can be considered as repair. [note: 3]

11 It would have been helpful if the plaintiff, who had the onus to prove that cradle construction is shiprepair, had adduced evidence from parties knowledgeable in the shipbuilding and shiprepairing and insurance industries in Singapore on the understanding of those terms in these industries. However, the plaintiff did not adduce evidence from any person with any special knowledge on these matters.

12 The plaintiff's sole witness, its executive director Cheng Yee Seng deposed that the plaintiff did not carry out fabrication of cradles as a stand-alone business nor undertake such work as part of its shiprepairing operations.[note: 4]

13 I do not think that it is feasible to have an exhaustive description of shiprepair as it is not a term of art. Shiprepair can be a single job, e.g. to mend a hole in a hull or it may involve extensive

work on the hull, engine, generator, crew and passenger accommodation and other facilities on the vessel. While restoration, renewal and replacement are common forms of repairs, they are not exhaustive. Reasonable improvements and additions such as the fitting of a larger generator or of additional handrails can be properly considered as a part of the overall repair of a vessel.

14 However, when the *Paesano* was sent to be repaired, the construction of a cradle for it can hardly be a repair to the *Paesano*. This is so because the cradle, unlike a generator or a handrail, is not a part of the *Paesano* and the *Paesano* does not sail while it is attached to the cradle.

15 A caution should be raised against an over-restrictive construction. The policy covered loss or damage occurring in the course or arising from shiprepairing *operations*, not just the repairs made to ships. If a crane used in the course of repairs collides with the vessel under repair, the resultant damage would have arisen from shiprepair operations even though the crane was not intended to be part of the repairs to the vessel. The damage would be covered even if the crane was not used for the repairs to the damaged vessel, but for the repair of a vessel nearby.

16 As I understand from counsel, there are two main types of cradles. A support cradle is used to support a vessel when it is out of the water, e.g. when it is under repair, or is in storage. A shipping cradle is used to hold a vessel when it is transported on board another vessel ("the carrying vessel").

17 There is some confusion whether the cradle that was constructed was a support cradle or a shipping cradle because different descriptions were used in the order and the quotation, but this is not material for two reasons. Firstly, the different descriptions do not necessarily mean different cradles; a cradle can be constructed to serve as both a support and a shipping cradle. Secondly, in my analysis, the conclusion is the same whether the cradle is a support cradle or a shipping cradle.

18 If a support cradle fails when the vessel it holds ("the vessel held") is undergoing repairs, the failure and the resultant damage would have arisen in the course of the repairs to the vessel held. If the cradle fails while it is holding the vessel on land for storage, it cannot be said that any damage should be considered to have arisen from shiprepairing operations. In a situation where a vessel undergoes repairs, and is subsequently placed on a cradle for storage, the conclusion is the same: that any damage incurred from the failure of the cradle during storage would not be considered to have arisen from shiprepairing operations.

19 In another situation, where the vessel held and the cradle are placed on board a carrying vessel for transportation rather than storage, without there being any repairs to the vessel held, or subsequent to the completion of repairs to the vessel held, any damage resulting from the failure of the cradle should not be considered to have arisen from shiprepairing operations on the vessel held.

20 There is yet another variation to the situation. If a shipping cradle is supplied and installed onto the carrying vessel as a part of the repairs to the carrying vessel, it may be argued that any damage caused to the vessel held as a result of the failure of the cradle can be considered to have arisen from the shiprepairing operations on the carrying vessel.

21 In the present case, the evidence was that it was constructed at the request of YTC. The plaintiff did not plead in its Statement of Claim that the cradle was used in the repairs to the *Paesano* and Cheng Yee Seng did not depose to that in his affidavit of evidence-in-chief as he was not involved with the technical operations of the shiprepairing activities of the plaintiff and has no direct knowledge of them.[note: 5] He mentioned in re-examination that the yacht was placed on the cradle sometime in September 1999 to do some undocumented and unspecified "touch-up work", without disclosing the source of the information.[note: 6] I find that the loss of the *Paesano* from the failure of

the cradle did not arise from the plaintiff's shiprepair operations.

The exclusion issue

22 The policy specifically stated that any liability of the insured is not covered:

> unless discovered and reported in writing to the [defendant] within 6 months of the delivery to Owners or within 6 months after work is completed by the [plaintiff] whichever may first occur.

23 The significant time periods in respect to the issue are:

14/8/1999	Cradle constructed and was ready for collection.[note: 7]
15/1/2000	Cradle and the *Paesano* loaded on board the *Gertrude Oldendorff*.[note: 8]
20/1/2000	The *Paesano* was lost.
21/1/2000	The defendant was notified by the owner of the *Paesano* of the loss under the marine cargo policy covering the yacht.
15/2/2000	The owner of the *Paesano* instituted legal proceedings in Canada.
3/12/2000	The rights of the owner of the *Paesano* were subrogated to the defendant.
29/10/2001	The plaintiff was served with the statement of claim in the Canadian proceedings.[note: 9]
21/2/2002	The plaintiff notified the defendant of the claim.[note: 10]
12/3/2002	The defendant denied liability under the policy.[note: 11]

24 From the chronology we can take the date for notification to be six months from 14 August 1999 or 15 January 2000. On this basis, the notification of 21 January 2000 was given within the six-month period, and the notification of 21 February 2002 was outside the period.

25 The issue is the application of the reporting requirement in the exclusion clause. The plaintiff took the position that the requirement was satisfied on 21 January 2000 when the defendant was notified by the owner of the *Paesano*, whereas the defendant regarded that there was no report till 21 February 2002 when the plaintiff gave notice outside the six month period for the report to be made.

26 Each party cited one case in support of its contention. The plaintiff cited *Bowling v Weinert* [1978] 2 NSWLR 282 ("*Bowling*"). The defendant relied on *Adamson & Sons v Liverpool & London & Globe Insurance Co Ltd* [1953] 2 Ll L Rep 355 ("*Adamson*").

27 In *Bowling*, Weinert insured his power boat with Norwich Union against third party liabilities. Clause 13 of the policy provided that:

> In the event of any occurrence which may give rise to a claim under this insurance, prompt notice shall be given to the Underwriters.

28 Weinert also had public liability insurance coverage with another company, Lumley's. In

December 1972, while Weinert towed Bowling on his power boat, there was an accident, and Bowling fractured his leg. In November 1974, Weinert gave notice of the accident to Lumley's. In March 1976, Bowling commenced an action against Weinert. In August 1976, Lumley's gave to Norwich Union a copy of Weinert's notice of accident addressed to Lumley's. Weinert sought an indemnity from Norwich Union. The insurers contended that he was in breach of Clause 13. Lee J found on the basis that the clause did not expressly state that the notice shall be given by the insured, that the supply of the notification of accident by Lumley's could be treated as notice, although he found that it was not "prompt notice" as required by the clause.

29 In *Adamson*, the claimant company was insured under a "cash in transit" policy which contained a clause that:

> The company shall be under no liability hereunder in respect of any loss which has not been notified to the company within fourteen days of its occurrence.

The claimant made a claim on the policy for loss resulting from systematic embezzlement by an employee over two years. In arbitration proceedings, only the losses reported within 14 days from an occurrence were allowed, and the arbitrator's award was upheld by Lord Goddard CJ.

30 Why is timeous reporting a condition for recovery? Two reasons come to mind. An insurer wants to be informed of the potential claims it is exposed to, and it wants to be able to investigate the potential claims promptly. Since the insurer does not have control over the property insured, it needs to be notified of occurrences that can lead to potential claims.

31 In some clauses (as the one in *Adamson*), the burden of reporting is specifically placed on the insured. On the other hand, in the clauses in *Bowling* and in the present case, that is not specified.

32 It can be argued that if the clause is construed in the context of the insurer/insured relationship, the report is to be made by the insured, or on its behalf, as the insurer cannot be looking to other parties to report loss or damage under the policy.

33 However, a purposive approach may be taken. If we proceed on the basis that the purpose for reporting is to protect the insurer's interests, and not to deprive an inattentive insured of protection, it is arguable that it is not necessary that the notification comes from the insured as long as the insurer receives the necessary information to take steps to protect its interest.

34 Looking at the exclusion clause in this light, prejudice to the insurer will be a relevant factor. Lord Denning MR had this in contemplation when he held in *Barrett Bros (Taxis) Ltd v Davies* [1966] 1 WLR 1334 at 1340:

> [The notification condition] was inserted in the policy so as to afford a protection to the insurers so they should know in good time about the accident and any proceedings consequent on it. If they obtain *all the material knowledge* from another source so that *they are not prejudiced* at all by the failure of the insured himself to tell him, then they cannot rely on the condition to defeat the claim. [Emphasis added]

35 In the present case, the owner of the *Paesano* which reported the loss to the defendant had insured the *Paesano* with the defendant under a marine cargo policy,[note: 12] and the notification made no reference to the shiprepairers policy. It was unclear whether the report alerted the defendant to the possibility that it may be facing a claim from the plaintiff under the shiprepairers policy so as to enable the defendant to prepare for a claim from the plaintiff under this policy. If it did

not, it would not satisfy Lord Denning's "all the material knowledge" requirement. But it would not have made a difference even if all the necessary information was given.

36 Doubt over the need for the insurer to show prejudice was expressed in subsequent decisions. This started with the decision of the English High Court in *Farrell v Federated Employers Insurance Association Ltd* [1970] 1 WLR 498 where MacKenna J did not adopt Lord Denning's reasoning, and said at p 502:

> I do not regard Lord Denning MR's judgment as authority for the wider proposition that an insurer cannot rely on a breach of condition unless he has suffered actual prejudice

His statement was endorsed by Bingham J in *Pioneer Concrete (UK) Ltd v National Employers Mutual General Insurance Association Ltd* [1985] 1 Lloyd's Rep 274 at 281, which was in turn approved by the Privy Council in *Motor and General Insurance Co Ltd v John Pavy* [1994] 1 WLR 462 and the English Court of Appeal in *Pilkington United Kingdom Ltd v CGU Insurance plc* [2005] 1 All ER (Comm) 283. Our High Court has come to the same conclusion in *Stork Technology Services Asia Pte Ltd (formerly known as Eastburn Stork Pte Ltd) v First Capital Insurance Ltd* [2006] 3 SLR 652.

37 In the circumstances, the plaintiff's reliance on the notification given by the owners of the *Paesano* runs into two difficulties: firstly, that the notification was not shown to have given the defendant all the material knowledge and secondly, that even if it did, it was not given by the plaintiff. The plaintiff had therefore failed to report the loss within the six-month period as required in the exclusion clause.

My decision

38 Having found that the construction of the cradle was not part of the repairs of the *Paesano* and that the loss of the *Paesano* did not arise from shiprepairing operations, and that the defendant's liability for the loss of the *Paesano* was excluded, the plaintiff's claim is dismissed.

39 Having discussed the two primary issues and disposed of the matter, I will refer to three of the other issues raised by the parties i.e. estoppel, the premium received and the legal costs.

Estoppel

40 The plaintiff pleaded in its Reply that the defendant was estopped from denying liability. The estoppel was alleged to have arisen from the defendant's letter of 12 March 2002 after it received the plaintiff's notification dated 21 February 2002. The letter reads:

> We refer to your email notification dated 21 February 2002 in respect of a potential claim against Penguin Boat International involving a vessel 'Paesano' belonging to Goodman Yachts LLC.
>
> We wish to inform you that we are the subrogated insurers of the plaintiff, i.e. Goodman Yachts LLC in this case and therefore advise that you should be careful with regard to the content of any further correspondence on the matter to us.
>
> Based on our understanding of the case, Penguin Boat were the manufacturers of a new cradle for holding the yacht 'Paesano' and it is the construction and design of this cradle which is being potentially called into question. As such, we do not consider that the liability if any, of the yard would be covered under the above policy which covers shiprepair activities and the policy would not appear to cover the manufacturer of a new cradle for a yacht.

There is also exclusion of the case under Exclusion VIII (no notification to Underwriters within 6 months of the delivery to Owners or the completion of the work (whichever occurs first)).

Therefore, we are formally denying liability under the SRLL policy and recommend that Penguin Boat act as a prudent uninsured.

41 The plaintiff pleaded in para 4 of its Reply:

[T]he Plaintiff had defended itself in the Canadian proceedings and entered into the reasonable settlement in reliance upon the Defendant's representation in its fax dated 12 March 2002 to the Plaintiff that the Plaintiff should act as a prudent uninsured, and, in doing so, acted to its detriment. In the circumstances, the Defendant is estopped, by representation and/or by convention, from denying liability to indemnify the Plaintiff for any payment pursuant to the settlement reached.

but did not expand on this in its submissions.

42 I think there was little scope for elaboration because there is no merit in this issue. I say this because the defendant was acting correctly to inform the plaintiff that it did not accept the loss to be covered under the shiprepairers legal liability policy, and to give formal notice of denial of liability. Having done that, it was entirely proper for the defendant to recommend that the plaintiff act as a prudent uninsured, without giving any proposals or advice in connection with the owner's claim.

43 In the event, the plaintiff did not rely on the letter when it settled the case. It obtained advice from counsel in Singapore and Canada. The plea of estoppel is fundamentally and fatally flawed.

The premium paid

44 The plaintiff also pleaded in its Reply that the defendant cannot deny that the construction of the cradle was a part of the plaintiff's shiprepairing operations because it had accepted premium for the policy which was computed on 0.8% of the gross receipts of the plaintiff, inclusive of the charges for the construction of the cradle.

45 The gross receipts were declared annually in a global figure for the whole year.[note: 13] In Cheng Yee Seng's affidavit of evidence-in-chief, he deposed at [66] to [67] that for the year 1999, the declared turnover was $4,026,000 and the plaintiff paid a premium of $32,208.

46 As the figure of $4,026,000 was a global figure, there is no basis for the plaintiff to assert that the defendant was aware that $7,500 of that aggregate sum was for the construction of the cradle.

47 If the defendant accepted premium inclusive of the $60 for the $7,500 for the cradle in these circumstances, it is not debarred from asserting that the construction of the cradle did not come within the plaintiff's shiprepairing operations. The proper redress is for the plaintiff to seek a refund of the $60.

Legal costs incurred in the Canadian action

48 The plaintiff pleaded in [19] of its Statement of Claim:

As a result of the Defendant's breach, the Plaintiff has suffered loss and damage as follows:

Particulars of Loss/Damage

S/No.	Description	Amount
1.	Sum paid to Goodman Yachts LLC	US$150,000
2.	Legal costs and/or costs incurred in defending the Canadian proceedings	
	a. Singapore	S$146,848.24
	b. Canada	S$915,290.31

The legal bills produced were solicitor-and-client bills. The plaintiff did not incur any party-and-party costs as the US$150,000 payment was inclusive of interest and costs.[note: 14]

49 Under the policy, the defendant was to indemnify the plaintiff for all sums which the plaintiff shall become liable to pay *by reason of the legal liability* of the plaintiff.

50 The costs that the plaintiff was liable to pay by reason of the legal liability were the party-and-party costs paid to the claimant in the Canadian proceedings. If the defendant had not repudiated liability, it would have taken over the defence of the Canadian proceedings, and the plaintiff would not have to incur *any* legal costs, party-and-party or solicitor-and-client.

51 In this case, because the defendant repudiated liability, the plaintiff had to deal with the Canadian claim and incur legal costs. The solicitor-and-client costs the plaintiff paid to its lawyers in Singapore and Canada were costs that the plaintiff paid of its own volition pursuant to the terms of appointment of the lawyers, and were not costs it was liable to pay by reason of its legal liability to the claimant.

52 The defendant submitted that the plaintiff was not entitled to claim solicitor-and-client costs incurred in defending the Canadian action as the costs were not covered under the policy. While this argument is correct in the confines of the terms of the policy, it does not address the point that the plaintiff would not have incurred these costs if the defendant did not repudiate liability, and therefore *if* the repudiation was wrongful, such costs are recoverable as damages for breach of contract. In the event they are not recoverable as the repudiation was not wrongful.

[note: 1]Affidavit of Cheng Yee Seng, exh CYC-7

[note: 2]Statement of Claim para 5

[note: 3]Notes of Evidence 12 Nov 2007 page 146

[note: 4]Affidavit of Cheng Yee Seng para 12

[note: 5]Notes of Evidence 12 November 2007 page 61

[note: 6]Notes of Evidence 13 November 2007 pages 86-87

[note: 7]Affidavit of Cheng Yee Seng, exh CYC-10

[note: 8]1AB177

[note: 9]4AB929-930

[note: 10]1AB347

[note: 11]1AB372

[note: 12]1AB194-196

[note: 13]see 4AB462

[note: 14]Affidavit of Cheng Yee Seng, para 46