Morten Innhaug *v* Sinwa SS (HK) Co Ltd and others
[2011] SGHC 20

Case Number : Originating Summons No 22 of 2010

Decision Date : 24 January 2011

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Tan Wee Kong Joseph (Legal Solutions LLC) for the plaintiff; Gopinath Pillai and Tan Kian Hong Aloysius (Eldan Law LLP) for the defendants.

Parties : Morten Innhaug — Sinwa SS (HK) Co Ltd and others

Contract

24 January 2011 Judgment reserved.

Lai Siu Chiu J:

1 In this Originating Summons ("the OS"), Morten Innhaug ("the plaintiff") applied to court for a determination of the meaning of a clause in a Shareholders' Agreement dated 4 July 2007 ("the Agreement") that he had signed with Sinwa SS (HK) Co Ltd ("the company"), Sim Yong Teng ("Sim") and Tan Lay Ling ("Tan") who are the first, second and third defendants respectively.

2 The plaintiff incorporated a British Virgin Islands company called Nordic International Limited ("NIL") on 16 January 2007 and was initially the sole director and shareholder holding 50,000 shares. The plaintiff also incorporated a Singapore company called Nordic Maritime Pte Ltd ("NMPL") of which he was both a director and shareholder.

3 At the material time, NIL had purchased a fishing trawler which was initially named BGP Atlas before it was renamed Nordic Venturer ("the Vessel"). When the Agreement was signed, NIL was in the process of converting the Vessel to a seismic survey vessel to perform a time charter to a company called BGP Geoexplorer ("BGP") for three years commencing 15 June 2007 ("the Time Charter"). Earlier in December 2006, BGP had entered into an agreement with TGS-NOPEC Geophysical Company SA ("TGS") to provide seismic acquisition services.

4 The plaintiff sought financial assistance to convert and equip the Vessel to perform the Time Charter. He approached the second defendant with a view to getting the second defendant's company Sinwa Limited ("Sinwa") to become a joint venture partner. It was envisaged that Sinwa would purchase shares in NIL which would be the joint venture vehicle. Eventually, the plaintiff and Sinwa signed the Agreement on 4 July 2007.

5 After the Agreement was signed, the plaintiff transferred 50% (*ie*, 25,000) of his shares in NIL to Sinwa in exchange for a cash injection of US$2m into NIL by Sinwa. Pursuant to cl 6.1 of the Agreement, the second and third defendants were appointed directors of NIL as nominees of Sinwa while the plaintiff and Kjell Gauksheim ("Gauksheim") were appointed directors as the plaintiff's nominees.

6 On 28 August 2007, the rights and obligations of Sinwa under the Agreement were novated to the company, which is incorporated in Hong Kong.

7 At this juncture it would be appropriate to look at cl 8 of the Agreement. The parties' differing interpretation of it led to the present dispute. The clause reads as follows:

> 8.1 Parties agree that:-
>
> 8.1.1 all technical and economical matters relating to the operations and management of the Vessel, and/or matters related to the time charter party and/or matters related to the client BGP and end user TGSN, shall be solely decided by the directors appointed by [the plaintiff] (whose decision shall be final);
>
> 8.1.2 all matters relating to the account and/or management and/or auditing of the accounts and books and financing of the Vessel and/or matters relating to the Credit Facilities shall be solely decided by the directors appointed by SINWA (whose decision shall be final); and
>
> 8.1.3 save as aforesaid, all other decisions in respect of any other matters shall carry the unanimous agreement of both parties.

8 Clause 3.4 of the Agreement states:

> A shipmanagement on terms agreed by the Parties shall be entered into between NIL and NMPL in respect of the seismic and marine management of the Vessel at an agreed price of United States Dollars Eight Hundred Only (USD$800.00) per day for the duration of charter.

Pursuant to cl 3.4, NMPL was indeed appointed the manager of the Vessel by an agreement dated 1 Jan 2007 ("the ship management contract"). The defendants' stand was that only the plaintiff benefited from the ship management contract.

9 The conversion of the Vessel was funded partly by a loan from Oversea-Chinese Banking Corporation Limited ("OCBC") to NIL ("the loan") evidenced by a charge dated 10 October 2007 in favour of OCBC. The loan was guaranteed by the company ("the Guarantee"). The defendants asserted that because of the Guarantee, it was understood by the parties that matters within the purview of Sinwa's nominee directors (pursuant to cl 8.1.2 of the Agreement) would include the collection of charter hire from BGP as the same would be used to service the monthly payment of interest on the loan. The plaintiff was also aware that all charter hire collected was paid into an account with OCBC from which the monthly payments of interest on the loan were deducted. The persons who dealt with OCBC on the loan were the company's/Sinwa's nominee directors and not the plaintiff or Gauksheim.

10 Unbeknownst to the defendants, the plaintiff entered into an agreement with BGP, TGS and NMPL on 23 August 2008 ("the Assignment") to assign the Time Charter to another company called Nordic Geo Services Limited ("NGS"). NGS is a wholly-owned subsidiary of NMPL, which latter company the defendants contended the plaintiff owned/controlled. In so doing, the defendants contended, the plaintiff breached his fiduciary duties as a director of NIL. Notice of the Assignment dated 22 September 2008 was given by BGP to NGS to which the plaintiff gave an acknowledgement on 23 September 2008.

11 In addition to the Assignment, BGP, TGS and NMPL had on the same day entered into a Memorandum of Understanding ("the MOU") wherein BGP and TGS agreed that BGP will transfer to NMPL its rights and obligations in the Time Charter as well as in the seismic acquisition service agreement, see *supra*[3].

12 The defendants claimed they were unaware of the Assignment or the MOU as no notice of the same was given to any of them. They only became aware of the documents on or about 9 September 2008, when Gauksheim emailed the second and third defendants informing them that NMPL had taken over the seismic operations of BGP, and he and the plaintiff would be liaising with TGS regarding the operation of the Vessel. When queried, Gauksheim informed the two defendants of the Assignment.

13 The two defendants immediately asked for details of the Assignment as the same would be required by OCBC. They pressed Gauksheim again when he failed to respond within a week. Finally, Gauksheim replied on 16 September 2008 to say that there would be no changes to the Time Charter save that NGS would carry out the seismic surveying operations in place of BGP, and NGS would replace BGP to pay charter hire to NIL.

14 Gauksheim then dealt with OCBC directly on the change of name of the Vessel without informing the second or third defendants. The second and third defendants found out only when OCBC forwarded (on 8 October 2008) to the third defendant a copy of Gauksheim's email to OCBC dated on 25 September 2008. The plaintiff was, however, copied in all of Gauksheim's email correspondence with OCBC.

15 The defendants did not recognise the Assignment due to its financial implications for the company. They were also not informed by the plaintiff or Gauksheim as to the reasons for the Assignment to an entity (*viz*, NGS), whose background and creditworthiness were unknown to the defendants. They only found out the reason from the plaintiff's affidavit filed on 10 November 2009 in Originating Summons No 960 of 2009 ("OS 960") wherein the company applied to court for leave to bring an action on behalf of NIL against the plaintiff. In his aforesaid affidavit filed in OS 960, the plaintiff explained he consented to the Assignment because of the many concerns that BGP had with the condition of the Vessel, particularly with respect to its compressors and generators.

16 The defendants maintained that if the Assignment was indeed necessary, it should first have been discussed by the board of NIL, and the plaintiff should have informed the board of BGP's concerns given the financial implications on the joint venture. Had the plaintiff done so, the defendants would have objected to the Assignment. The defendants accused the plaintiff of preferring his own interests over those of NIL in unilaterally assigning the Time Charter to NGS. They pointed out that the plaintiff was in a position of conflict as he was both the charterer and the owner of the Vessel. In order for the plaintiff to have acted in the interests of NIL, he should have incorporated a wholly owned subsidiary of NIL to take over the Time Charter so that NIL would have benefited.

17 Consequently, the company issued a formal letter to the plaintiff on 23 October 2008 to put on record his various breaches and required him to remedy his breaches within 60 days. These included reinstating BGP as the charterer of the Vessel. The plaintiff neither responded nor complied with the defendants' request. This prompted the company to file OS 960 (which was dismissed by another court on 17 December 2009).

18 On 7 April 2009, the solicitors for NIL demanded charter hire amounting to US$3,403,097.90 from BGP, being the outstanding charter hire for the period of January to February 2009 and related charges. BGP's solicitors responded on 22 April 2009 maintaining that its rights and obligations under the Time Charter had been transferred and assigned to NMPL since 23 August 2008. Consequently, BGP denied liability for NIL's claim for hire. NIL did not accept BGP's position in further correspondence between its solicitors and BGP's solicitors.

19 NIL took the stand that notwithstanding the Assignment, BGP remained liable to NIL for charter

hire until the termination of the Time Charter because of cl 17(a) thereof which states:

> The Charterers shall have the option of subletting, assigning or loaning the Vessel to any person or company not competing with the Owners, subject to the Owners' prior approval which shall not be unreasonably withheld, upon giving notice in writing to the Owners, but the original Charterers shall always remain responsible to the Owners for due performance of the Charter Party…

20 Subsequently, the defendants, on behalf of NIL, commenced arbitration proceedings against BGP for outstanding charter hire since January 2009. The arbitration proceedings have since been stayed pending the outcome of these proceedings.

21 On his part, the plaintiff complained that the arbitration proceedings were commenced without his consent as neither he nor Gauksheim had approved any resolution to commence arbitration proceedings against BGP. Consequently, the plaintiff's solicitors wrote to NIL's solicitors to state the latter did not have the requisite authority to act for NIL. The plaintiff opined it was commercially unwise for NIL to commence arbitration proceedings against BGP since NGS was willing to pay charter hire to NIL subject to agreement being reached on laid-up rates. Substantial and unnecessary legal costs would also be incurred by NIL. Unfortunately, because of the allegations of breach of fiduciary duties levelled against him, the plaintiff was unable to reach agreement on behalf of NGS with NIL on the laid-up rates. Consequently, after paying the charter hire for three months, NGS stopped payment.

22 The impasse between the plaintiff and the defendants prompted the plaintiff to file the OS. In the OS, the plaintiff sought *inter alia* the following reliefs:

(a) that on a true and proper interpretation of cl 8.1.1 of the Agreement, the directors appointed by the plaintiff have the sole discretion to grant consent on behalf of NIL to an Assignment of the Charter Party dated 8 June 2007 from BGP to NGS;

(b) that the directors of NIL appointed by the plaintiff shall have the power and authority to execute any documents and to ratify any acts as may be necessary in order to give effect to the Assignment of the Charter Party from BGP to NGS;

(c) that on the true and proper construction of cl 8.1.1 of the Agreement, the directors appointed by the plaintiff shall have sole discretion in deciding whether or not to commence arbitration against BGP in respect of any purported breach(es) of the Charter Party;

(d) that on a true and proper construction of cl 8.1.1 of the Agreement, the directors appointed by the Company are not authorised to instruct solicitors or give instructions on behalf of NIL in relation to any claims against BGP arising from or in connection with the Charter Party;

(e) that all instructions given by the second and third defendants to NIL's solicitors in relation to the arbitration between NIL and BGP be declared null and void;

(f) that the defendants indemnify NIL for any costs incurred by NIL or which may be ordered

against NIL in relation to the arbitration between NIL and BGP.

23 Pursuant to an order of court dated 28 April 2010, the defendants were given leave to cross-examine the plaintiff on his affidavits limited to the factual issue of whether there was an agreement that the company would be responsible for the collection of the charter hire.

24 Cross-examination took place in this court not only of the plaintiff but also of the third defendant. In this regard, the plaintiff had filed two affidavits while one was filed by the third defendant.

The evidence

25 During cross-examination, the plaintiff's position was that he and Gauksheim had the sole right to determine all matters relating to the Assignment and all matters relating to the Vessel, based on cl 8.1.1 of the Agreement (*supra*[7]). Counsel for the defendants however pointed out that under cl 3.4 of the Agreement, the company's consent was also needed for the management agreement between NIL and NMPL with which the plaintiff agreed.

26 The plaintiff's attention was then drawn to cl 6.7 of the Agreement which reads:

> Any decision of the Board shall be made by a majority vote of the directors present at a duly constituted meeting provided that the following matters shall require the unanimous consent of all the directors of the Board:
>
> 6.7.1 entering into any contract (other than in the ordinary course of the Joint Venture Project), arrangement, commitment, or transaction of any nature whatsoever that is of an aggregate value in excess of USD1,000,000.00
>
> …
>
> 6.7.3 appointment of the bankers of NIL;
>
> …
>
> 6.7.5 making any loan or advance or giving credit (other than normal trade credit) to any person;
>
> …

The plaintiff agreed with counseI for the defendants that even if matters fell squarely within the management and operation provision under cl 8, cl 6.7.1 of the Agreement required the unanimous approval of the board of NIL if such matters involved contracts exceeding US$1m in value.

27 However, the plaintiff disagreed that if a matter involved both operational and financial aspects, as in this case, that the unanimous decision of the board of NIL was required. He opined that if the financial aspects of a matter touched on the charter of the Vessel, he and Gauksheim were entitled to decide under cl 8.1.1without the need to consult the other two directors notwithstanding cl 8.1.3 which stipulated that apart from the matters in cll 8.1.1 and 8.1.2, all other decisions in respect of any other matters must have the unanimous decision of both sides.

28 The plaintiff pointed out that the Time Charter preceded the Agreement and the company was therefore fully aware of the same before it entered into the Agreement.

29 The plaintiff agreed that the Assignment of the Time Charter to NGS was a transaction involving more than US$1m because the Time Charter gave an option to BGP to buy over the Vessel for US$5m at the end of the charter. However, he disagreed that he was thereby required to obtain the unanimous approval of the board of NIL under cl 6.7.1 of the Agreement.

30 At this juncture, it would be appropriate to look at the Early Termination clause under cl 26 of the Time Charter which sub-clause (a) states:

> For Charterer's Convenience – The Charterers may terminate this Charter Party at any time by giving the Owners written notice as stated in Box 15 and by paying the settlement stated in Box 14 and the demobilisation charge stated in Box 16, as well as Hire or other payments due under the Charter Party

31 The plaintiff agreed that BGP was not entitled to exercise the early termination clause. The plaintiff further agreed that NIL was neither a party to nor was it told of the MOU dated 23 August 2008 between BGP, NMPL and TGS.

32 The plaintiff had written on behalf of NGS to the company on 29 January 2009 to request a reduction in the charter hire because the Vessel had been laid up since 19 December 2008, and was not producing income as a result of the cancellation of the seismic surveying contract by TGS. The third defendant on behalf of the company rejected the request pointing out that the defendants did not recognise the Assignment and there was therefore no question of NIL discussing the reduction in hire rate with NGS.

33 I should add that when the third defendant on behalf of the company wrote to the plaintiff on 23 October 2008 listing out his breaches of the Agreement, it was stated in para 6 thereof that the plaintiff was either to reinstate the Time Charter or assign the same to a party acceptable to the company. However, the plaintiff's reply thereto dated 29 October 2008 was written on behalf of NMPL as its CEO. He reiterated that the Assignment fell within cl 8.1.1 of the Agreement together with the subject of the change of name of the Vessel (which was notified to OCBC by Gauksheim). The plaintiff stated he saw no conflict of interest in the Assignment (to NGS) nor in the fact that NGS was assigned the right to the seismic surveying contract with TGS in place of NIL.

34 When the third defendant took the stand, she explained that the defendants' opposition to the Assignment sprang from the fact that the company invested in NIL because of the Vessel, and the company's joint venture with the plaintiff was to last for the duration of the Time Charter, *viz*, for three years. She referred to the Agreement which cll 14.1 and 14.2 stipulate:

> 14.1 The Joint Venture Project set out within the Agreement shall be for a minimum duration of three (3) years, after this Agreement shall terminate and Parties shall be released hereunder, except in respect of accrued rights, the Parties shall not be under any further obligation to each other.
>
> 14.2 Following termination in accordance with clause 14.1 above, the Joint Venture Project shall come to an end and SINWA shall exit from NIL in the manner as follows:
>
> …

In addition, the company had provided the Guarantee to OCBC for US$16m on behalf of NIL. Hence, all matters touching on the financing of the Vessel were the company's responsibility under cl 8.1.2 of the Agreement.

35 In order to address the defendants' concerns of the creditworthiness of NGS whom the plaintiff/his counsel claimed was a subsidiary of NIL, counsel for the plaintiff drew to the third defendant's attention that NGS paid the charter hire for three months from September to December 2008. This claim was incorrect as NGS and NIL had a common shareholder in the plaintiff, not that NIL held all the shares in NGS. The plaintiff had concluded his reply of 29 October 2008 in [33] with a request for a board meeting of NIL to be convened, which request the defendants rejected. However both sides met with OCBC's representatives in November 2008 to successfully allay the bank's concerns on the Assignment.

The issue

36 The entire case turned on the scope and extent of both sides' rights under cll 8.1.1 and 8.1.2 of the Agreement.

37 The plaintiff relied on the Court of Appeal's decision in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich's* case") for his submission that no extrinsic evidence should be allowed to interpret the clear wording of cll 8.1.1 and 8.1.2 of the Agreement. In other words, the court should give no weight to the defendants' contention that because the charter hire collected from BGP was used to service the loan, it was understood that the consent of the second and third defendants was also required for the Assignment.

38 Conversely, the plaintiff argued, the clear wording of cl 8.1.1 meant that he and Gauksheim were the only directors who had the power and authority to decide for NIL whether the Time Charter should be assigned to NGS and whether arbitration proceedings should be commenced against BGP for breach of the Time Charter. In that regard, they and not the defendants had the right to appoint/instruct solicitors on behalf of NIL.

The decision

39 While cll 8.1.1and 8.1.2 clearly delineated the respective subject matters of each camp's responsibilities, the position is less clear where, as in this case, there was an overlap of the subject matter.

40 To elaborate, the Assignment of the Time Charter undoubtedly was a matter that related to the Vessel's operation as well as to BGP and consequently fell within cl 8.1.1 of the Agreement, which was the sole responsibility of the plaintiff and Gauksheim. The decision to enter into the MOU with BGP, TGS and NMPL arguably also came within the ambit of cl 8.1.1, even though NMPL was not mentioned in cl 8.1.1. I should point out too that BGP had the right under cl 17(a) of the Time Charter assign the Time Charter with the consent of NIL, which consent was not to be unreasonably withheld.

41 While the defendants were not entitled to rely on extrinsic evidence to interpret cll 8.1.1 and 8.1.2 of the Agreement, *Zurich's* case and s 94(*f*) of the Evidence Act (Cap 97, 1997 Rev Ed) allow the court to look at the context in which the Agreement was entered into. Section 94(*f*) states:

> **Exclusion of evidence of oral agreement**
>
> 94 When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 93, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying,

adding to, or subtracting from its terms subject to the following provisions:

…

(f) any fact may be proved which shows in what manner the language of a document is related to existing facts.

42 It was common ground that the company entered into the Agreement with the plaintiff as the financier of NIL. Because of that premise and the loan to NIL for which the company furnished the Guarantee, the defendants were very concerned with NIL's financial position. It was also not in dispute that the charter hire received from BGP was utilised to service the interest on the loan. While it was the plaintiff and/or Gauksheim who issued the monthly invoices to BGP for hire due and payable, the payments received were credited directly to NIL's account with OCBC and came within the purview of the second and third defendants' responsibility under cl 8.1.2. The creditworthiness of BGP's assignee, *viz* NGS was therefore a matter of concern to the three defendants. Should there be a default in payment by NGS of charter hire, the loan would not be serviced. In the worst case scenario, OCBC would recall the same and look to the company under the Guarantee to make good any shortfall/default in the payment of interest as well as repayment of the loan itself.

43 Consequently, although I would answer in the negative the question whether there was an agreement that the company would be responsible for the collection of charter hire, because of the factual matrix under which the Agreement was executed, the plaintiff nonetheless was obliged to consult the company and the second/third defendants, should payment of charter hire from BGP cease as it did after the Assignment was executed.

44 It is my view therefore that the matter of the Assignment and the MOU overlapped under cll 8.1.1.and 8.1.2. For that reason, cl 8.1.3 came into play. The plaintiff should have informed if not consulted the second and third defendants on the matter, and the parties were obliged to come to a unanimous decision both on the Assignment and the MOU as well as on appointing lawyers to pursue NIL's claim against BGP. The plaintiff should also have demonstrated the creditworthiness of NGS in order to persuade the second and third defendants to accept NGS as the substitute charterer in place of BGP.

45 If there was no unanimity on the issue, the parties were obliged to proceed to arbitration under cl 16.2 of the Agreement which states:

Any and all dispute arising out of or in connection with this Agreement including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration at the Singapore International Arbitration Centre ("SIAC") in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force at the commencement of the arbitration, which rules are deemed to be incorporated by reference in this clause.

46 On their part, the defendants should not have been so hasty and instructed solicitors to pursue a claim against BGP for breach of the Time Charter without first consulting the plaintiff.

47 Consequently, in regard to the OS, I dismiss all six reliefs prayed for by the plaintiff. The dispute should have been referred to the SIAC for arbitration as provided for in cl 16.2 of the Agreement. The plaintiff shall pay the defendants their costs as one set which are to be taxed unless otherwise agreed.