Hyundai Engineering and Construction Co Ltd v Sembawang Kimtrans (S) Pte Ltd [2000] SGHC 282

Case Number : OM 8006/2000

Decision Date : 30 December 2000

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : CR Rajah SC (instructed) and Edmund A Hendrick (Edmund Hendrick & Partners) for the plaintiffs; Yang Lih Shyng and Yeo Hui Leng (Khattar Wong & Partners) for the respondents.

Parties : Hyundai Engineering and Construction Co Ltd — Sembawang Kimtrans (S) Pte Ltd

Admiralty and Shipping – Carriage of goods by sea – Charterparties – Duty of shipowners to insure vessel – Whether shipowners under duty to effect policy benefiting both charterers and shipowners – Whether right of subrogation waived

Arbitration – Award – Leave to appeal against award – Interpretation of 'one-off' clauses – Applicable principles

Arbitration – Award – Leave to appeal against award – Arbitrator's decision on question of fact – Whether arbitrator's decision so obviously wrong – Whether appeal against decision may be lodged

: The plaintiffs, who chartered a dumb barge from the defendants, sought leave to appeal against the decision of the arbitrator, to whom they referred their dispute with the defendants with respect to, inter alia, their liability for damage to the barge and for unpaid charter-hire.

Background

On 30 October 1996, the plaintiffs chartered the defendants` dumb barge, the `Kimtrans Taurus`, for the purpose of transporting rocks and stones in Sabah. The charterparty, which was on the basis of a bareboat charter, was for a period of three months, commencing on or about 30 October 1996.

The defendants, who conceded that they had a duty to insure the barge, effected an insurance policy with AGF Insurance (Singapore) Pte Ltd.

The barge was towed from Singapore to Sabah and was transporting rocks and stones along the Jerundong River in Brunei when she ran aground and was damaged. After the accident, the defendants made a claim against their insurers, who repudiated liability on the ground that it was a term of the policy that the insurance cover would cease if the barge was chartered on a bareboat basis. Apparently, the defendants had not realised this when they applied for the insurance policy.

As the defendants were unable to seek an indemnity from their insurers for their loss, they looked towards the plaintiffs for compensation on the ground that the damage in question had resulted from the plaintiffs` negligence and that the plaintiffs had breached a condition of the charterparty by failing to redeliver the barge to them in the same condition as when they took delivery, fair wear and tear excepted.

The plaintiffs, who denied that they had caused the damage to the barge, asserted that the said damage had been caused by perils of the sea. Furthermore, they contended that whatever may have been the cause of the damage, the loss would have been covered by the insurers if the defendants had fulfilled their obligation under Addendum 02 of the charterparty to take out an effective policy. As

such, the plaintiffs denied any liability to the defendants for the damage to the barge.

The defendants contended that even if they had effected a valid policy, the policy would only have been for their own benefit. As such, if they had been indemnified by the insurers for their loss, the plaintiffs would have been liable to the insurers, who would have been entitled to exercise their right of subrogation against the plaintiffs. The plaintiffs retorted that the question of subrogation would not have arisen because the policy which was to have been effected by the defendants was intended to benefit both parties to the charterparty.

Apart from the question of liability for damage to the barge, the parties also had differing views as to when charterparty hire ceased to be payable. The charterparty required the plaintiffs to redeliver the barge at Singapore at the end of January 1997. The plaintiffs failed to do this and the barge, which had to be towed by the defendants from Jerundong to Singapore, was redelivered to the defendants in mid-April 1997. The plaintiffs asserted that the parties had agreed that the obligation to pay charter hire ceased on 31 January 1997. As this was denied by the defendants, a question arose as to whether or not charter hire continued to be payable after January 1997, and if it was, when it ceased to be payable.

As the charterparty provided that all disputes between the parties arising out of the charter were to be referred to arbitration in Singapore, the dispute between the parties was accordingly referred to an arbitrator.

The arbitrator`s award

The arbitrator came to the conclusion that the damage to the barge was `partly caused by the negligent use of the barge by the plaintiffs and aggravated or further caused by the heavy weather encountered at Jerundong on 25 December 1996`.

The arbitrator, who noted that the insurance policy effected by the defendant on their vessel was ineffective, rejected the plaintiffs` contention that the policy which the defendants were contractually bound to effect was intended to benefit both the shipowners and charterers. As such, he took the view that the plaintiffs were not entitled to rely on the defendants` failure to effect a valid policy to refuse to pay for the loss which was partly caused by their negligent use of the barge.

As for the defendants` claim for charter hire after the three-month period of charter, the arbitrator rejected the plaintiffs` assertion that it had been agreed that their obligation to pay charter hire ended on 31 January 1997. As such, he took the view that the defendants were entitled to charter hire for the period 1 February 1997 to the date of actual delivery, which was, in his view, 15 April 1997. The additional charter hire amounted to $32,500.

The appeal

As has been mentioned, the plaintiffs sought leave to appeal against the award of the arbitrator on two counts. The first relates to whether or not the plaintiffs were not liable for the damage caused to the vessel in view of the fact that the defendants were obliged to insure the vessel. The second relates to whether or not charter hire ended on 31 January 1997.

For the purpose of determining whether leave should be granted to a party to appeal against the award of an arbitrator, much depends on whether the dispute in question concerns the interpretation of `one-off` clauses or standard terms. Rather less strict criteria have to be met in the case of an application for leave to appeal where standard term clauses are concerned. In this case, both the

plaintiffs and the defendants accepted that the clauses which governed their rights were `one-off` clauses. As far as such clauses are concerned, the following words of Lord Diplock in **The Nema; Pioneer Shipping v BTP Tioxide** [1982] AC 724, ought to be borne in mind:

> *Where ... a question of law involved is the construction of a `one-off` clause the application of which to the particular facts of the case is an issue in the arbitration, leave should not normally be given unless it is apparent to the judge upon a mere perusal of the reasoned award itself without the benefit of adversarial argument, that the meaning ascribed to the clause by the arbitrator is obviously wrong: But if on such perusal it appears to the judge that it is possible that argument might persuade him, despite first impression to the contrary, that the arbitrator might be right, he should not grant leave; the parties should be left to accept, for better or for worse, the decision of the tribunal that they had chosen to decide the matter in the first instance ...*

The plaintiffs` liability for damage to the vessel

It is common ground that the defendants were obliged to insure the vessel and that they failed to effect a valid policy because the policy effected by them afforded no cover to a vessel chartered on a bareboat basis. As such, whether or not the plaintiffs are liable to the defendants for the damage sustained by the dumb barge as a result of their negligence depends on the nature of the defendants` obligation in relation to the effecting of insurance on the vessel. If the plaintiffs` assertion that the defendants were obliged to effect a policy that benefited both the shipowners and the charterers is correct, the defendants had no basis for their claim against the plaintiffs for damage to the barge.

Much depends on the effect of Addendum 02 of the charterparty, which is the only clause governing insurance cover for the barge. Addendum 02 provides as follows:

> *Owners shall be responsible for hull/machineries insurance coverage however, if any accident occurred during the period of hire, insurance excess clause to be for Charterers` account.*

The defendants contended that Addendum 02 did not require them to effect a policy that benefited the plaintiffs as well as themselves. This contention was accepted by the arbitrator, who thought that this case was akin to **Walter Wright Mammoet (Singapore) Pte Ltd v Resources Development Corporation Ltd** [1995] 1 SLR 528 . In ***Walter Wright*** `s case, the defendants were the main contractors of the Mass Rapid Transport Corporation of Singapore for the construction of the eastern track. They engaged the plaintiffs to lift pre-cast concrete viaduct beams for the raised railway track. The plaintiffs were required by cl 5 of the contract to `provide insurance for the beam, all equipment, machinery and personnel`. During a lifting operation, one of the cranes was damaged because the ground under the said crane subsided. It was the defendants` responsibility to prepare the ground for the works in question. The plaintiffs were duly compensated by their insurers, who exercised their right of subrogation to sue the defendants for the amount paid to the plaintiffs. One of the defences relied on by the defendants was that the plaintiffs were, by virtue of cl 5 of the contract, not entitled to pursue a claim against them and this barred the insurers from making a claim against them. It was held by the Court of Appeal that the plaintiffs` undertaking in cl 5 of the contract to provide insurance was, by itself, not sufficient to imply that the insurance which was to be effected was intended to enure to the benefit of both the contracting parties, such that the liability of the other party for his negligence or breach of contract would be displaced by such

insurance coverage. LP Thean JA explained that it could not be said that unless cl 5 was construed to have such an effect, it would have no subject matter to bite. It was of interest and concern to the defendants that the plaintiffs take out adequate insurance to cover the risk of damage to the beams and equipment and injury to their personnel, whether caused accidentally or by their own negligence or negligence of others so that, in the event of any damage or injury sustained, the plaintiffs should have the necessary financial resources to discharge their main obligation under the contract.

Counsel for the plaintiffs had urged the arbitrator to follow **Penguin Engineering & Construction Pte Ltd v Titan Logistics (S) Pte Ltd** [1997] 2 SLR 126 where ***Walter Wright*** `s case was distinguished and not followed. However, the facts in ***Penguin*** `s case were rather different. In that case, the plaintiffs were contractors who were employed by Esso to off-load a pentane tank from a barge, transport it to a work site and install it there. The plaintiffs engaged the defendants for the lifting and transportation of the tank to the work site. The plaintiffs agreed to take out an all-risks policy and their obligation was worded in the following exhaustive terms:

> *Insurance: to be arranged against all-risk in joint names with Titan Logistics with `waiver of subrogation` clause to include Titan Logistics, their sub-contractors and/or sub-assigns.*

While the defendants were carrying out their task, the tank dropped on to the jetty and rolled on the sea bed. The plaintiffs, who breached the contract by failing to effect an insurance policy, claimed from the defendants the cost of retrieving and repairing the tank. Rajendran J accepted that had the plaintiffs not breached the contract by failing to effect an insurance policy, they would have been able to recover their losses from the insurers and the insurers would not have been able to sue the defendants in view of the waiver of subrogation clause, which was supposed to have been in the policy. Evidently, it was the way the plaintiffs` obligation to insure was worded that enabled the judge to distinguish the case before him from cases such as ***Walter Wright*** . He explained at p 137:

> *The insurance clause in the present case provided that the plaintiffs were to take out an `all-risk` insurance policy in the `joint names` of the plaintiffs and [the defendants] with `waiver of subrogation`. In all the cases quoted by the plaintiffs, the insurance was to cover only one party to the contract and there was no requirement to waive subrogation rights.* ***The requirement in the present case that the insurance was to be in joint names with waiver of subrogation made those cases distinguishable. The presence of these requirements in the insurance clause here, in my view, was a clear indication that the benefit of the insurance clause was intended to inure to the benefit of [the defendants]****.[Emphasis added.]*

In the present case, there was no requirement that the policy was to be in the joint names of the shipowners and charterers and there was no reference whatsoever to the question of waiver of subrogation. As such, the arbitrator was entitled to take the view that the facts in this case are more akin to ***Walter Wright*** `s case than to ***Penguin*** `s case.

In construing the defendants` obligation in relation to the effecting of insurance cover, reference may be made to the fact that the BARECON 89 form used by the parties for their charterparty contained a clause which specifically provided for the effecting of insurance in the joint names of the shipowners and the charterers and for the waiving of subrogation rights. This clause, namely cl 13, had no effect unless if it was expressly agreed that it was applicable and this was so stated in Box 27. It is clear that the parties did not expressly agree that cl 13 was applicable and did not state in Box 27 that cl

13 was applicable. In the face of the non-acceptance of cl 13 as a term of the charterparty, it is difficult to see how Addendum 02 of the charterparty can, on the strength of the words contained therein, achieve the result intended by cl 13 of the charterparty.

The plaintiffs also tried to persuade the arbitrator that the defendants were obliged to effect a policy which benefited them as well because their managing director, Mr Peter Tan, had acknowledged that the defendants accepted that this was the nature of their obligation. They pointed to the following answers which Mr Tan gave during the arbitration proceedings:

> *Q: Any insurance for the charter, if the responsibility is for you to take out, you would have taken out the benefit of yourself and the charterers, isn`t that correct?*
>
> *A: But if the charterer is responsible to take out the insurance ...*
>
> *Q: If insurance is supposed to be taken out - let`s not say who - whichever will take out, whoever take out will take it out for the benefit of both parties, would that not be correct?*
>
> *A: Yes.*
>
> *Q: Isn`t that the intention?*
>
> *A: Yes.*

The arbitrator, who took into account the overall evidence of Mr Tan, did not share the plaintiffs` view. He pointed out that the following answer of Mr Tan should also be noted:

> *Q: OK. I will leave this to submission. I just suggest to you that you were responsible for taking up the hull and machinery insurance, and that you were suppose to pick up this insurance because of cl 13 as well, which is the only consistent clause; and the insurance that you were suppose to pick up were suppose to enure for the benefit of Hyundai. Would you agree?*
>
> *A: Don`t agree.*

In the circumstances, the arbitrator thought that Mr Tan`s answers were, at best, equivocal and did not support the plaintiffs` contention that the defendants ought to have effected a policy which would have benefited them with respect to the damage to the barge when she ran aground at Jerundong.

The arbitrator has provided acceptable reasons for his view of the scope of Addendum 02. On the basis of the principles laid down in ***The Nema*** for `one-off` clauses, there are no grounds for the granting of leave to appeal against the arbitrator`s findings on the liability of the plaintiffs for the damage caused to the barge.

Whether or not charter hire ceased on 31 January 1997

As has been mentioned, the arbitrator awarded the defendants $32,500 for unpaid hire for the period 1 February 1997 to 15 April 1997 because the barge was not redelivered to the defendants at Singapore at the end of the charter period.

The plaintiffs claimed that the decision of the arbitrator was wrong because the correspondence between them and the defendants clearly showed that the parties had agreed that the obligation to pay charter hire ceased on 31 January 1997. However, the defendants contended that they had agreed to the cessation of hire on 31 January 1997 on condition that the plaintiffs agreed to pay towage charges amounting to around $16,000. As the plaintiffs did not agree to pay the towage charges, there was no agreement that the obligation to pay charter hire ceased on 31 January 1997.

The alleged agreement on the termination of the plaintiffs` obligation to pay charter hire revolves around an exchange of letters between the parties. In their fax to the defendants dated 7 March 1997, the plaintiffs stated as follows:

> *Reference is made to your [proposal] in Singapore office dated 6 March 1997.*
>
> *We can accept the towing charges (50% AMT $8,000) of above voyage from Brunei to Singapore.*
>
> *In this regard, we agree that the charter contract shall be terminated from 31 January [1997]. You are accordingly required to take her back to Singapore by yourselves as soon as possible.*

In their reply to the plaintiffs, the defendants stated as follows:

> *Please refer to your fax dated 6 March 1997 ...*
>
> *We regret that we are unable to absorb the further loss of S$8,000 (50% of S$16,000) for the towage of the above. Our offer of S$16,000 per barge is based on pure cost. Should you be able to find another company to carry out the above tow at less than our quoted price, we strongly urge you to engage them to proceed without delay. However, our offer at S$16,000 per barge still stand.*
>
> *We confirm that charter contract for Kimtrans Taurus has ceased from January 31, 1997 per the meeting held at Hyundai Singapore office on March 6, 1997.*
>
> *Please let us have your confirmation on the above as soon as possible.*

The arbitrator accepted the defendants` argument that the correspondence did not evidence an agreement that charter hire was not payable after January 1997. In para 68 of his award, he stated as follows:

> *Having considered the evidence, I agree with [the defendants`] submission. In arriving at this view, I have taken into account that the respondents in their fax of 7 March 1997 state in the paragraph dealing with the alleged agreement that `in this regard [emphasis mine] we agree that the charter contract shall be*

> *terminated from the 31 January 1996`, thereby making reference to their proposal on towing fees in the previous paragraph. I also note that the claimants` response of 8 March 1997 is headed `towing of Kimtrans Taurus from Brunei to Singapore`. Accordingly, I find that the claimants` claim for charter-hire for the period 1 February 1997 to the actual delivery succeeds.*

With respect to the plaintiffs` assertion that the parties had agreed that the obligation to pay charter hire ceased on 31 January 1997, three points ought to be noted. First, although this assertion was considered by the arbitrator, he pointed out that it was not pleaded.

Secondly, counsel for the defendants submitted that it is clear from the decision of Chao Hick Tin J, as he then was, in **Invar Realty Pte Ltd v JDC Corp** [1988] SLR 414 that whether or not the correspondence between the parties revealed an agreement to terminate the obligation to pay charter hire on 31 January 1997 is not a matter in respect of which an appeal may be lodged against the decision of the arbitrator. In ***Invar Realty*** , one of the questions before the court was whether or not leave should be granted to appeal against the decision of the arbitrator with respect to whether or not the parties had agreed to extend the completion date for the construction of a building by ten and a half months. Chao J noted that the arbitrator had dealt with this issue by examining the contemporaneous documents and by hearing oral evidence from the parties. In view of this, he said that there could be no appeal to the High Court. In the present case, the arbitrator had also come to the conclusion that charter hire was payable until 15 April 1997 on the basis of the correspondence between the parties and the oral testimony of their witnesses. As such, the defendants` counsel rightly pointed out that the question of an appeal to the High Court with respect to whether or not charter hire was payable until 15 April 1997 did not arise in view of Chao J`s ruling in ***Invar Realty*** .

Even if the issue as to whether or not charter hire ceased to be payable on 31 January 1997 is one in respect of which leave to appeal against the finding of the arbitrator may be sought, such leave should not be granted. I may not have agreed with the interpretation which the arbitrator placed on the plaintiffs` letter dated 7 March 1997 and the defendants` reply dated 8 March 1997. All the same, I cannot, on the test enunciated in ***The Nema*** for `one-off` clauses, say that the construction which the arbitrator placed on the letters between the parties in relation to cessation of charter hire is so obviously wrong that leave to appeal against his decision should be granted.

Conclusion

Section 28 of the Arbitration Act is intended to promote greater finality in arbitration awards. In cases such as this, where the clauses to be interpreted are `one-off` clauses, it would be appropriate to note that in **American Home Assurance Co v Hong Lam Marine Pte Ltd** [1999] 3 SLR 682 Yong Pung How CJ summed up the position when he said as follows:

> *In the final analysis, the important question is whether an error can be demonstrated quickly and easily; if hours of legal argument are required, the applicant will not have succeeded in satisfying the court that the award is `obviously wrong`.*

In this case, it cannot be said that the alleged errors of the arbitrator can be demonstrated quickly and easily. If all the circumstances of this case are taken into account, there is no doubt that the

plaintiffs and the defendants should accept the decision of the arbitrator. As such, the plaintiffs` application for leave to appeal against the award of the arbitrator is dismissed with costs.

Outcome:

Plaintiffs` application dismissed.