MISC Bhd v Griffin Kinetic Pte Ltd and Another
[2008] SGHC 153

Case Number : Suit 67/2007

Decision Date : 16 September 2008

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Liew Teck Huat (Niru & Co) for the plaintiff; M P Kanisan and Bhajanvir Singh (M P Kanisan & Partners) for the defendants

Parties : MISC Bhd — Griffin Kinetic Pte Ltd; Griffin Kinetic Sdn Bhd

Personal Property

Credit and Security – Lien

16 September 2008 Judgment reserved.

Kan Ting Chiu J:

The parties

1 The plaintiff company, MISC Berhad, incorporated in Malaysia, carries on business as ship owners and managers. One of the plaintiff's vessels, the *Tenaga Empat*, suffered engine failure on a voyage, and the plaintiff wanted the damaged turbine transported from Malta to Singapore and then to Pasir Gudang, Johor, Malaysia.

2 The plaintiff requested the first defendant, Griffin Kinetic Pte Ltd, a company incorporated in Singapore carrying on the business of freight forwarders and warehouse operators to quote for the job. The first defendant submitted its quotation, following which the turbine was shipped from Malta and stored in the first defendant's warehouse. It has remained there as no instructions were issued for the turbine to be sent to Pasir Gudang.

3 The first defendant did not seek payment from the plaintiff for the services rendered. Instead, it issued an invoice to the second defendant, Griffin Kinetic Sdn Bhd, a company incorporated in Malaysia. The second defendant in turn issued an invoice for the shipping charges to the plaintiff, and the plaintiff made payment under the invoice.

4 The two defendant companies were involved because of the close relationship between them. The first defendant had been engaged as freight forwarders for the plaintiff since 1998, and these two companies had entered into a spare parts forwarding contract in 1999. In 2004, the plaintiff adopted a policy of dealing with registered bumiputra companies. As the first defendant was not a bumiputra company, the second defendant, a registered bumiputra company, came into the picture. As the similarity of their names indicates, the first defendant and second defendant have close connections, sharing common shareholders and director/s. These two companies entered into an agency agreement whereby the second defendant appointed the first defendant as its agent for its surface forwarding services.

5 With this arrangement in place, the second defendant would secure jobs from the plaintiff and the first defendant would execute them.

6 The plaintiff did not object to this arrangement, and facilitated it. This was demonstrated by its acceptance of the second defendant's invoice for the carriage of the turbine even though the invitation to quote was issued to the first defendant and the quotation was submitted by the first defendant, and the fact that it sought to negotiate a settlement of the dispute over storage charges with the second defendant, which I shall refer to.

7 The relationship between the plaintiff and the defendants was affected negatively when a restructuring of the plaintiff's business resulted in a significant drop in business with the defendants. The deterioration in the relationship came to a head when the plaintiff requested for the turbine to be released from the second defendant's warehouse, to be sent to another warehouse. Although the shipment costs of the turbine had been paid, the second defendant refused to release the turbine to the plaintiff unless the plaintiff pays the storage charges for the turbine and other spares, which amounted to about MYR2.5million.

The action

8 When negotiations for a settlement failed, the plaintiff instituted this action against the first defendant for failing to deliver up the turbine in breach of contract, and for special damages of $147,400 which it had paid for spare parts meant for the repair of the turbine which were not used. In its claim, the plaintiff pleaded that the turbine was carried on the condition that no storage charges were payable.

9 The first defendant in its defence contended that it did not contract with the plaintiff but was engaged in the carriage of the turbine as the agent of the second defendant.

10 When this defence was raised, the plaintiff could have joined the second defendant in the proceedings, and make its claims against the second defendant in the alternative to the first defendant. The plaintiff did not do that and was content to direct its claim against the first defendant only.

11 The second defendant applied to be joined as a party in the action. When the application was granted, the plaintiff was ordered to amend its statement of claim to add the second defendant. The plaintiff did that and changed the references to "Defendants" to "1st Defendants". The result was that the amended statement of claim referred to two defendants, with allegations of acts and omissions against the first defendant, but not the second defendant, save that at the concluding paragraph the plaintiff sought against the defendants an order for the delivery up of the turbine or damages for detention or conversion, and damages for breach of contract.

12 The second defendant filed a defence and counterclaim after the plaintiff amended the statement of claim. It pleaded that the plaintiff had transferred ownership of the spares to it, and also that it had a lien over the spares. In the counterclaim, it claimed MYR2,590,245.60 as storage charges for the spares.

The contracting parties issue

13 The plaintiff's case was that the first defendant was the contracting party because it was the party invited to give a quotation, and it had given the quotation. This argument did not take into account the fact that the second defendant issued the invoice, and was paid by the plaintiff for the carriage.

14 The plaintiff and its solicitors had the occasion give thought to this matter. In a letter dated

10 October 2006,[note: 1] its Senior Legal Executive, Legal & Corporate Secretarial Affairs informed the second defendant, he stated:

> Kindly be informed that *we had on 5th October 2005, instructed you to deliver our turbine rotor* ("the Turbine") to our subsidiary Malaysia Marine and Heavy Engineering Sdn. Bhd. at Pasir Gudang, Johor ("MMHE") and to charge us accordingly for the said service. However, we regret to note that in breach of our expressed instruction to you, you had instead delivered the Turbine to your warehouse in Singapore where it has been kept since.
>
> Despite our repeated requests for you to release the Turbine to us or to deliver the same to MMHE, you had failed and/or refused to release or to deliver the Turbine as instructed.
>
> We were further made to understand that your refusal to release the Turbine stems from the fact that there are some outstanding storage payment issues pertaining to some spare parts currently stored in your warehouse ("the Issue").
>
> We are of the view that the Issue and our request for the release of the Turbine are independent from one another in that the former concerns items that are already being stored at your warehouse whereas the latter concerns an item stored at your warehouse by your own action in breach of our instruction for you to deliver the same to MMHE.
>
> As such, your refusal to release the Turbine despite our repeated requests based solely on the reasoning above is totally baseless and unlawful.
>
> [Emphasis added]

15 The plaintiff's solicitors, Niru & Co, wrote on 1 November 2006[note: 2] to the first defendant to state that:

> On 5.10.05, *our clients entered into a contract of carriage with Griffin Kinetic Sdn Bhd* under which contract Griffin Kinetic Sdn Bhd were to deliver the Turbine to our clients' subsidiary Malaysia Marine & Heavy Engineering Sdn Bhd.
>
> We were instructed that instead of complying, Griffin Kinetic Sdn Bhd delivered the Turbine to you. Griffin Kinetic Sdn Bhd had no authority to deliver the turbine to you. You had no corresponding authority to receive it. Insofar as Griffin Kinetic Sdn Bhd chose to store the Turbine with you, all charges in respect thereof, if any, are due from Griffin Kinetic Sdn Bhd to you.
>
> Our clients wrote to Griffin Kinetic Sdn Bhd on 10.10.06 to demand that the Turbine be released from to be delivered to Malaysia Marine & Heavy Engineering Sdn Bhd within 7 days of the date of that letter. Griffin Kinetic Sdn Bhd have wrongfully refused to comply.
>
> We have now been instructed to give notice that the Turbine was delivered to you without our clients' authority and that your continued retention of the Turbine therefore amounts to conversion in respect of which our clients reserve all their rights.
>
> That apart, our clients demand its immediate release and delivery to them at your own or Griffin Kinetic Sdn Bhd's costs. Either way, the costs is of no concern to our client.
>
> [Emphasis added]

16 These two letters are significant in that they unequivocally named the second defendant as the contracting party against the background of the involvement of each defendant. While the plaintiff is entitled to change its position if there is a good reason for it to go back on its considered conclusion, no reasons were offered for the turnabout.

17 The defendants, on the other hand, have explained the background and development of their dealings with the plaintiff, and produced the agency agreement where the second defendant appointed the first defendant as its agent for its surface forwarding services.[note: 3]

18 On the face of the quotation and invoice, the agency agreement, the defendants' explanation, and the two letters, I find that the plaintiff had contracted with the second defendant, and that the first defendant was involved in the transaction as the agent of the second defendant.

19 Consequently, the plaintiff's case against the first defendant for breach of contract must fail. Its claim for the $147,400 also fails for two further reasons, firstly, because it still has possession of the parts, and secondly, the first defendant did not prevent it from using the parts.

20 There were two other matters raised during the trial which I should refer to. First, there was the plaintiff's contention that there was an understanding that no charges were payable for the storage of the spares. Abdul Malek bin Ahmad, a manager and the principal witness of the plaintiff deposed in his affidavit of evidence-in-chief:

> As far as I know, [the first defendant] did not keep goods in storage for the Plaintiffs in the earlier stages of the relationship. However, [the first defendant] wanted its business with the Plaintiffs to be secured and also to increase business dealings. In my position as the manager of the procurement department, I am aware that because [the first defendant] wanted more business from the Plaintiffs, [the first defendant] gave the Plaintiffs an incentive. This was free storage of goods. In another words, *whenever storage was required for any of the Plaintiffs' goods in the course of transit, [the first defendant] will absorb the storage charges.* This is confirmed in an email dated 7.12.05 from the Defendants to the Plaintiff.
>
> [Emphasis added]

The email reads[note: 4]:

> [W]e hope for your understanding that all the shipment was stored in our warehouse with free storage out of goodwill for MISC *as at the end of the day the delivery of shipment on board will be awarded to us*. Please understand that in fact we have absorded [*sic*] the all the storage fee in Japan, Singapore as well as Korea.
>
> In view that you have requested for our assistance to re-name (as we have done) the vessel name and release the cargo to TDS [a warehouse not operated by the defendants], we would have no alternative but to hold the cargo for a little longer in order for our Accounts Dept to compute the total storage charges before we can transfer the shipment to your desired location. This is the procedure that our Accounts Dept required in order to release the shipment to another party.
>
> [Emphasis added]

21 The affidavit and the email do not show that there was an agreement that no storage charges were payable. The reference to goods "in the course of transit" is significant. Shipped goods are

stored for different reasons. They can be stored in the course of transit. Such storage will be short term storage, between legs of an extended voyage and this may be treated as a part of the shipment, without additional charge. For shipped goods which have arrived at their destination and are ready for collection, the carrier's obligations are completed. It is unreasonable for the shipper to expect the carrier to store the goods indefinitely without charge at this stage.

22 A proper reading of the affidavit and the email leads to the conclusion that the defendants did not charge the plaintiff for the transitional storage of goods in the course of transportation, but this did not extend to the storage of goods for which carriage has concluded. Counsel for the plaintiff was in general agreement with this analysis.[note: 5] In the case of the turbine, shipment had concluded because no instructions were issued for it to be sent to Pasir Gudang as originally contemplated.

23 The second issue is lien. The second defendant in its defence asserted that it had a lien over the turbine and the other spares of the plaintiff under the terms of its quotation. The nature of the claimed lien which was not specified appeared to be a legal lien, also described as a possessory or common law lien. This averment led to arguments over whether the second defendant could have a lien over the spares which were stored in the first defendant's warehouse.

24 Is the lien defence appropriate? A legal lien is a right of defence, not a right of action – see *Halsbury's Laws of England*, (4th Ed Vol 28 Reissue) at para 719; *Silvertown, Law of Lien*, (Butterworths, 1988), p 5. In the first case, it is open to argument whether there was a claim made against the second defendant as there was no allegation of any wrongful acts or omissions made against it. In any event, this issue has no place if the primary defence that title to the spares had been transferred to the second defendant succeeds. As the defence is upheld, the issue of lien does not arise.

The counterclaim

25 It is a challenge to understand the basis of the counterclaim. In the defence and counterclaim, the second defendant pleaded that:

> 18. In July 2006, the Plaintiffs transferred the ownership of all their spares stored on their behalf to the 2nd Defendants, as a settlement of their claim.

and

> 16. As at the time of filing this defence [14 June 2007], the outstanding amount owing [for storage charges] is MYR2,590,245.60.

26 These two assertions are irreconcilable. The background to the alleged transfer is a letter dated 10 July 2006[note: 6] from the plaintiff to the second defendant which stated:

> In view of Griffin Kinetic Sdn Bhd's (GKSB) [the second defendant] refusal to release the spares including the unreasonable and unsubstantiated amount of charges that GKSB wishes to impose, we are left with no choice but to serve GKSB with this notice that we hereby give our ownership of the spares and all our rights relating thereto to GKSB.
>
> GKSB, now being the owner of the spares, may at its liberty exercise all rights whatsoever over the spares as it deems fit which include among others, disposing the spares to any party and on any terms or conditions that GKSB wishes.

The above transfer of ownership and all rights relating thereto including any sum that GKSB may receive from the spares disposal *shall be deemed as the full and final settlement of any amount of the spares storage charges we owe to GKSB.*

[Emphasis added]

This letter formed the basis on which the second defendant claimed that the ownership of the spares was transferred to it. But the proposed transfer was on the condition that it was in settlement of the storage charges. When the second defendant assumes ownership of the spares, it must also relinquish its claim for storage charges.

27 The plaintiff agreed that there has been a transfer of spares, but it took a curious position on its scope and effect in its reply and defence to counterclaim that the offer of transfer of the spares under the letter dated 10 July 2006 did not include the turbine.

28 There is little merit in this construction. Up to and at the time the letter was written, the issue of storage charges was taken as a whole, i.e. it did not distinguish between storage charges for the turbine and storage charges for the other spares stored. The letter referred specifically to the "2nd defendant's refusal to release the spares" (which includes the turbine) and consistently mentioned "the spares" with no limitation or qualification. On a fair and objective reading of the letter, the plaintiff was offering to give up all the spares on the condition that the second defendant waived all the storage charges.

29 In the circumstances, the parties are bound by the terms of the letter. The second defendant is the owner of all the stored spares, and its claim for storage charges is taken to be settled.

Conclusion

30 The plaintiff's claim against the first defendant is dismissed with costs, and the second defendant's claim against the plaintiff is also dismissed with costs.

[note: 1]DB149

[note: 2]DB150-151

[note: 3]DB42-46

[note: 4]DB113

[note: 5]Notes of Evidence pages 274-275

[note: 6]DB139