IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1992] SGHC 307

Adm in Rem 586/1990

Between

Fast Marine Supply Pte Ltd

… *Plaintiff*

And

The Owners of the Ship or
Vessel "Mosgulf"

… *Defendant*

GROUNDS OF DECISION

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Fast Marine Supply Pte Ltd v The Owners of the Ship or Vessel "Mosgulf"

[1992] SGHC 307

Adm in Rem 586/1990
G P Selvam J
09 December 1992

1 **JUDGMENT:**

2 **Cur Adv Vult**

3 **The defendants hire a generator from plaintiffs**

4 The principal question in this case is whether a term should be implied in a contract for the hire of an auxiliary generator for use on board an ocean going ship. If so what term should be implied? These are the facts.

5 The defendants were the owners of the bulk carrier "MOSGULF". The ship was managed by a London based company - Hudson Steamship Co Ltd ("the managers").

6 In September 1989 problems had developed in one of the ship's own generators. The ship's classification society required an auxiliary generator to be placed on board until the ship's own generator was repaired. The ship at that

time was on her way from Rotterdam to Taichung via Singapore. At Singapore a generator could be easily obtained.

7 On 29 September 1989 the managers asked their agents (Barwil Agencies) in Singapore whether they could supply a portable generator for the "MOSGULF" and gave the specifications of their requirement. The plaintiffs, an associate company of Barwil Agencies took on the responsibility of supplying the generator and they had "one unit portable generator ready for hire". The generator they offered was not their own. Their intention was to hire a generator from Yeow Kong Electric Co (Pte) Ltd and hire it out to the defendants.

8 Later the plaintiffs gave a quotation and communicated a list of "additional attachments" which went with the generator. The list ended with this item: "Consumables - to be billed separately."

9 Further there was a telephone conversation between Captain Frank Davies of the managers and a Mr Steven Lee of the plaintiffs. Captain Davies wanted to ensure that the generator the plaintiffs were providing "was the correct type for the vessel in all respects - suitable for the tasks intended i.e. shipboard use on a vessel trading worldwide." Captain Davies wanted a "Aggreko" generator which was a marinised version of the "Caterpillar" generator. "Aggreko" had worldwide service stations. So the managers were comfortable with it. Captain Davies told Mr Steven Lee that the ship would be trading worldwide and the generator should be suitable for the task for which it was hired. He could not be sure whether the generator could be redelivered to the plaintiffs.

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10 It was finally agreed that the defendants would hire the generator from the plaintiffs and it would be installed on board the ship at Singapore. The monthly hire for a bare generator was S$24,450. There were additional charges for mobilisation, insurance and accessories. As agreed a generator was installed on board on 11 October 1989. Various accessories and consumables also accompanied the generator. The consumables included three drums of lubrication oil at a cost of $1,999.95.

11 **Generator breaks down and plaintiffs substitute**

12 Later that month when the ship was in South Korea the generator broke down as its dynamo insulator was burnt out. The plaintiffs decided to replace the generator. The plaintiffs were notified that the ship was bound for Greece for discharge via Singapore. Eventually the plaintiffs replaced the damaged generator outside Singapore with another generator of the same make and specifications. The ship then proceeded to Europe. This was at the end of November 1989.

13 In January 1990 while the ship was at the Black Sea Russian port of Yushny the ambient temperature fell to around minus 20x C. In consequence the cooling water of the generator froze causing cracks to the cooling pipes and casings. In consequence the generator became unworkable. Eventually the generator was returned to Singapore in April 1990 as cargo on board another ship - the "NEDLLOYD SEOUL".

14 **Arrest of the defendant's ship**

15 In those circumstances the plaintiff commenced an admiralty action in rem against the "MOSGULF" alleging negligence in damaging the generator.

They claimed arrears of hire until the damaged generator was returned to Singapore, accessories and incidentals - all in, the claim was for $103,580.60. The basis of the plaintiffs' case was stated in their telefax as follows :

16 Since, vessel had to divert to the cold ports it is very common practices, duties and responsibilities for the c/e and officers/crews to have to check and ensured that the remaining water in the generator have to be drained off. Prior to the operation, the generator need to fill with anti-freeze and engine oil for cold weather.

17 The defendants on the other hand contended that the plaintiffs were in breach of "an implied term of the agreement to provide a portable generator suitable for the demands of a foreign going vessel whose ports of call included those in the colder temperate regions." The defendants made a counterclaim for the recovery of expenses paid by them in connection with the exchange of generators off Singapore and the return of the damaged generator. The counterclaim was for US$22,081.45.

18 **Implied Term (Common Law)**

19 English law has long conceived and applied to contracts the doctrine against derogation : A grantor may not derogate from his grant. In simple terms it means that he who gives must give completely and not in half measure. Bowen LJ in Birmingham, Dudley And District Banking Co v Ross (1888) 38 Ch D 295 CA stated the principle in these words: "A grantor having given a thing with one hand is not to take away the means of enjoying it with the other." Initially the doctrine was applied to land related contracts. "A person who sells or lets land, knowing that the purchaser intends to use it for a particular purpose, may

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not do anything which hampers the use of the purchaser's land for the purpose which both parties contemplated at the time of the transaction." See The Law of Real Property by Megary and Wade, 4th Ed p 420. Again, "Where a house is let furnished, the landlord impliedly undertakes, and there is an implied condition, that it is fit for human habitation when let": Megary and Wade at p 680. The doctrine thus provided the basis to imply terms to give completeness and efficacy to contracts of all kinds.

20 It was applied to contracts for the sale of goods and services, carriage of goods and hire of chattels. In Sutton v Temple (1843) 152 ER 1108 Lord Abinger said:

21 The letting of the goods and chattels, as well as the house, implies that the party who lets it so furnished is under an obligation to supply the other contracting party with whatever goods and chattels may be fit for the use and occupation of such a house, according to its particular description, and suitable in every respect for his use. Where the party has had an opportunity of personally inspecting a ready-furnished house by himself or his agent before entering on the occupation of it, perhaps the objection would not arise; but if a person take a ready-furnished house upon the faith of its being suitably furnished, surely the owner is under an obligation to let it in a habitable state. Common sense and common law justice concur in that conclusion.

22 In the classic case of the "MOORCOCK" (1889) 14 PD 64 where a berth was let out it was held that in an agreement for the use of a discharging berth by a ship there was an implied undertaking by the owners of the berth "that they have taken reasonable care to find out that the bottom of the river is reasonably fit for the purpose for which they agree that their jetty should be used, that is,

they should take reasonable care to find out in what condition the bottom is, and then either have it made reasonably fit for the purpose, or inform the persons with whom they have contracted that is not so". In that statement Lord Esher MR spoke of two distinct forms of duty :

23 (a) to apply reasonable care and skill to provide a safe berth; or

24 (b) to provide the information that it was not safe.

25 In Reed v Dean < 1949 > 1 KB 188 Lewis J held that a contract for the hire of a launch contained an implied obligation to provide proper fire fighting equipment on board.

26 **Implied Terms under Statute**

27 The English Sale of Goods Act 1893 and subsequently the Sale of Goods Act 1979 replaced the common law relating to implied terms in a contract for the sale of goods. As regards implied terms in a contract for the hire of goods the common law was in an unsatisfactory state until 1982. The Law Commission in its Report on Implied Terms identified three lines of authority governing the liability in respect of the quality of goods hired out. They were :

28 (i) the owner is strictly liable for ensuring that the goods are reasonably fit for the purposes for which they are required; see Chew v Jones (1847) 10 LT OS 231; Jones v Page (1867) 15 LT NS 619; Francis v Cockrell (1870) LR 5 QB 501; Hyman v Nye (1881) 6 QBD 685 and Vogan & Co v Oulton (1898) 79 LT 384;

29 (ii) the owner is liable unless the goods are as fit for the purposes for which they are required as reasonable skill and care can make them; see Reed v Dean < 1949 > 1 KB 188,, < 1949 >LJR 852; White v John Warrick & Co Ltd < 1953 > 2 All ER 1021, < 1953 > 1 WLR 1285, CA; Vendair (London) Ltd v Giro Aviation Co Ltd < 1961 > 1 Lloyd's Rep 283; and Astley Industrial Trust Ltd v Grimley < 1963 > 2 All ER 33, 107 Sol Jo 474, CA;

30 (iii) the owner is liable for the unfitness of the goods hired out to the extent that he has been negligent: see Jones v Page, cited above, at 620 per Piggott B.

31 The Law Commission recommended that liability in respect of fitness of goods should be strict as it is in the case of sale of goods. This recommendation was adopted and it is now reflected in s 9 of the English Supply of Goods and Services Act 1982. The relevant provisions of this Act are as follows :

32 (1) Except as provided by this section and section 10 below and subject to the provisions of any other enactment, there is no implied condition or warranty about the quality or fitness for any particular purpose of goods bailed under a contract for the hire of goods.

33 (2) Where, under such a contract, the bailor bails goods in the course of a business, there is (subject to subsection (3) below) an implied condition that the goods supplied under the contract are of merchantable quality.

34 (3) There is no such condition as is mentioned in subsection (2) above -

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35 (a) as regards defects specifically drawn to the bailee's attention before the contract is made; or

36 (b) if the bailee examines the goods before the contract is made, as regards defects which that examination ought to reveal.

37 (4) Subsection (5) below applies where, under a contract for the hire of goods, the bailor bails goods in the course of a business and the bailee, expressly or by implication, makes known -

38 (a) to the bailor in the course of negotiations conducted by him in relation to the making of the contract, or

39 (b) to a credit-broker in the course of negotiations conducted by that broker in relation to goods sold by him to the bailor before forming the subject matter of the contract.

40 any particular purpose for which the goods are being bailed.

41 (5) In that case there is (subject to subsection (6) below) an implied condition that the goods supplied under the contract are reasonably fit for the purpose, whether or not that is a purpose for which such goods are commonly supplied.

42 (6) Subsection (5) above does not apply where the circumstances show that the bailee does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the bailor or credit-broker.

43 (7) An implied condition or warranty about quality or fitness for a particular purpose may be annexed by usage to a contract for the hire of goods.

44 On a true construction of s 9, there is an implied condition that the goods bailed under a contract for the hire of goods are reasonably fit for that purpose if the particular purpose for which the goods are hired is made known to the bailor in one of the following situations, namely where :

45 (i) The goods required serve only one particular purpose which can be inferred from the nature of the goods.

46 (ii) The hirer expressly or by implication makes known the particular purpose for which they are required.

47 (iii)The usage of the trade would manifest the particular purpose and the fitness for it.

48 Sub-section (3)(a) of the Act, which excludes the implied term of fitness if the owner advises the hirer of the defect, gives statutory effect to the second rule in the MOORCOCK case.

49 **The Construction against the hirer**

50 An adjunct to the principle against derogation states that in the absence of words clearly indicating the intention of the parties, the language of the contract must be construed more strongly against the grantor and more beneficially for the grantee: See Windham's Case (1589) 77 ER 58.

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51 In William Neill and Michael Fenton v Duke of Devonshire (1883) 8 App. Cas. 135 Lord Selborne L C said:

52 It is well settled that the words of a deed, executed for valuable consideration, ought to be construed, as far as they properly may, in favour of the grantee.

53 The principle is not confined to deeds and grants but applies to all contracts where one party for valuable consideration agrees to transfer property or provide services. Thus it applies to leases: See Windham's Case. It has also been applied to insurance policies: See Tierney v Etherington (1743) cited in Pelly v Royal Exchange Assurance Company (1857) 97 ER 347 and Houghton v Trafalgar Insurance Co Ltd < 1954 > 1 QB 247. This rule of construction has been applied in innumerable cases where parties have included exception clauses in contracts. Unquestionably the rule applies to all contracts of hire.

54 **Questions of Law and Fact**

55 Questions often arise whether evidence is permissible to determine the implication of a term in a contract. Salmon LJ said in O'Brien v Associated Fire Alarms Ltd < 1968 > 1 WLR 1916 at 1925 :

56 Whether a term should be implied into a contract is a question of law. Whether the implication should be made in law no doubt depends upon the facts.

57 It was stated by Leggatt J in Insurance Co of Africa v Scor (U.K.) Reinsurance Co Ltd < 1983 > 1 Lloyds Rep 541 at 558 that the problem of implication of terms, though in essence a question of law, is one which falls to be resolved by reference to surrounding circumstances. Lord Wilberforce in

Reardon Smith Line v Hansen-Tangen < 1976 > 1 WLR 989 at 995-6 gives elucidation on receiving evidence of surrounding circumstances:

58 No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as "the surrounding circumstances" but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

59 **Application of the Principles**

60 I was clear that the English Supply of Goods and Services Act 1982 should be applied to this case under s 5 of the Civil Law Act (Cap 43). It was common ground between the parties that the Civil Law Act imports the English Act into Singapore.

61 The surrounding circumstances of the case are these: The defendants required an adventitious mobile generator on a temporary basis for an ocean going ship. At first the ship called at Singapore on a voyage from Northern Europe to Taiwan. Later the ship came to Singapore on her way to Europe where the ship would operate in winter. The plaintiffs were given clear notice of these matters.

62 The generator was required for only one particular purpose, namely to generate electricity. Furthermore, the particular purpose for which it was required was made known to the plaintiff when Captain Davies advised them

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that he needed a generator - that is a machine to produce electric power for a ship trading worldwide. He thus impliedly if not explicitly advised the particular purpose for which the defendants were hiring it. The plaintiffs failed to supply a suitable generator fit for that purpose. The generator they furnished was not fit for the purpose of producing electricity in winter conditions which a vessel trading worldwide could be reasonably expected to encounter.

63 The plaintiffs would have furnished a generator fit for the purpose if adequate information and instructions on the use of anti-freeze together with adequate supply of anti-freeze had been given. They failed to do this. In this case the suppliers had detailed information on anti-freeze in a separate manual called "Know your Cooling System". This book contained more details and specifications on water and the cooling system but it was not given to the ship. Additionally it must be emphasized that without an adequate supply of anti-freeze the information and the generator would have been useless. I therefore hold that the plaintiffs were in breach of the implied term.

64 The plaintiffs under sub-section (3) could have avoided the implied term of fitness by specifically drawing to the hirer's attention before the contract was made that the generator was not fit for winter conditions. They did not do so.

65 I reject the plaintiffs' stance that if the defendants had asked for anti-freeze they would have supplied it. I have held that the plaintiffs were under duty to provide the anti-freeze as well as proper and adequate information and instructions. I also reject the assertion that the plaintiffs were told that the vessel was trading in the tropics. The plaintiffs were told that the ship on the first occasion was on her way to Taiwan. On the second occasion she was going to

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Greece. Both are temperate countries. It would be winter by the time the ship reached Europe.

66 Finally, I reject the plaintiffs' evidence that the chief engineer was told to use anti-freeze. He could not have done this as no anti-freeze was supplied to the ship along with the generator. Additionally Captain Davies ought to have been told of this during the negotiations.

67 In my judgment, for the reasons I have given, the plaintiffs' claim fails and the defendants' counterclaim succeeds. The plaintiffs shall pay the costs of the action and the counterclaim. The judgment shall include interest at 8% p.a. from 1 September 1990 till date of judgment.

G P Selvam J

Judy Benny with Jessie Phua for the plaintiffs
Tan Siew Tiong with R Govintharasah for the defendants

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