IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1996] SGHC 244

Suit 1123/1994

Between

Penguin Engineering & Construction Pte Ltd

… *Plaintiff*

And

Titan Logistics (S) Pte Ltd

… *Defendant*

And

Pioneer Offshore Enterprises Pte Ltd

… *Third Party*

GROUNDS OF DECISION

Contract — Contractual terms — Conditions; Contract — Contractual terms — Conditions; Contract — Contractual terms; Contract — Contractual terms — Fundamental breach; Contract

Version No 1: 29 Oct 2026 (23:45 hrs)

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Penguin Engineering & Construction Pte Ltd v Titan Logistics (S) Pte Ltd (Pioneer Offshore Enterprises Pte Ltd, Third Party)

[1996] SGHC 244

Suit 1123/1994
S Rajendran J
25 October 1996

1 Esso Singapore Pte Ltd (Esso) had a contract with Sembawang Engineering (Pte) Ltd (Sembawang) to fabricate a pentane tank known as TK-2216. Sembawang was to deliver TK-2216 by barge to the jetty at Pulau Ayer Chawan (PAC) and Esso was to off-load and take delivery of TK-2216 thereat.

2 The plaintiffs, Penguin Engineering & Construction Pte Ltd, were the contractors employed by Esso to off-load TK-2216 at PAC, transport it to a worksite at PAC and install it thereat. It was a term of the contract between the plaintiffs and Esso that lifting procedures in respect of TK-2216 were to be reviewed and approved by Esso (ESY-1, p 17).

3 Sembawang had engaged the defendants, Titan Logistics (S) Pte Ltd (Titan), to transport TK-2216 from its yard to PAC. Sembawang introduced Karamjeet Singh (Singh), the managing director of Titan, to Eng Swee Yeng (Eng), the managing director, and Tan Ngerng Heng (Tan), a director of the plaintiffs. From what Singh told the plaintiffs and from the contents of the brochure on Titan supplied to the plaintiffs, the plaintiffs accepted that Titan

were experts in the lifting of equipment. Eng testified that as the plaintiffs had no experience in this area, the plaintiffs decided to use the services of Titan for the lifting and transportation of TK-2216 to the worksite when the barge carrying TK-2216 reached the jetty at PAC. The plaintiffs accordingly invited Titan to quote for off-loading TK-2216 from the barge and transporting it to the worksite. On 26 May 1992, Singh met the plaintiffs` representatives and, after surveying the site, submitted a quotation. The quotation contained the following clause:

> *Insurance:To be arranged against all risks in joint name with Titan Logistics with `waiver of subrogation` clause to include Titan Logistics, their subcontractors and/or subassigns.*

4 Singh testified that it was his practice to include such a requirement in his quotations and that such clauses were common in the trade. The quotation also specified that a 300-ton hydraulic crane would be used to lift the vessel (1 x 60T) off the barge.

5 There was delay in the fabrication of TK-2216. The plaintiffs therefore did not respond to Titan`s quotation. On 10 August 1992, there was another meeting with Singh at the plaintiffs` office where the proposed contract was again discussed. The same day Titan submitted another quotation. This quotation again specified that Titan would use a 300-ton hydraulic crane to lift the 60-ton vessel off the barge. It contained the same insurance clause as that specified in the quotation of 26 May 1992.

6 By fax dated 13 August 1992 the plaintiffs confirmed acceptance of the quotation and asked Titan to produce the relevant lifting certificate for the equipment involved in the job. These were provided by Titan. By fax dated 7 September 1992 Singh informed the plaintiffs that as the weight of TK-2216

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was 72 metric tons and not 60 metric tons as previously indicated, Titan would have to adjust their price upwards to $53,000 `all other terms and conditions remaining in force`. The plaintiffs by letter dated 15 September 1992 accepted this revised quotation and informed Titan that the operation was scheduled for 20 September 1992.

7 Titan had arranged with Tiong Woon Crane & Transport Pte Ltd (Tiong Woon) to hire a 300-ton hydraulic crane for the lifting operations at Sembawang and at PAC. On 19 September 1992 after TK-2216 had been loaded on to a barge at Sembawang and whilst Tiong Woon were in the process of transporting the 300-ton hydraulic crane to PAC for the off-loading operation, the crane caught fire and was rendered unusable. Singh immediately notified Tan about what had happened and informed Tan that until Titan secured an alternative crane for the job, the lifting operation at PAC would have to be postponed. Tan agreed but wanted the job to be completed as soon as possible.

8 Singh said that he tried to get a replacement 300-ton hydraulic crane but was unable to obtain one at such short notice. On Sunday, 20 September 1992, he spoke on the phone with a `Mr Lim` of Pioneer Offshore Enterprises Pte Ltd (the third party) and Mr Lim suggested that a crane barge fitted with `Favco MK IV` pedestal crane, which the third party had available, would be suitable and recommended its use. Singh invited Mr Lim to meet him at the jetty of PAC at about 2.30pm the next day so that he could explain to Mr Lim the operational requirements in greater detail.

9 On 21 September 1992, a meeting was held at the site office at PAC at which Eng, Tan, Singh as well as representatives of Esso were present. The third party had faxed to Titan`s office details of the proposed crane barge including

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its safe working load chart and its test certificate issued by the Ministry of Labour (ESY-45 to 47). These documents were in turn faced to Esso`s office at PAC and were available at the meeting.

10 Eng testified that, at that meeting, Singh referred to the distance calculations for the crane barge and on the basis of these calculations advised the plaintiffs that the crane barge was suitable for the lifting of TK-2216. Eng testified that as Titan were experts in the field of lifting equipment, the plaintiffs accepted Singh`s proposal to use the crane barge and it was arranged that the lifting operation would commence the next morning. The meeting at the site office on 21 September 1992 was a lengthy one. During the course of that meeting the third party arrived and inspected the site.

11 At about 10.30am on 22 September 1991 the lifting operation at the jetty at PAC commenced. The crane barge was operated by an employee of the third party. Whilst the crane barge was lifting TK-2216 it got into difficulties and as a result TK-2216 dropped on to the jetty and rolled on to the sea bed.

12 The plaintiffs claimed that it cost them the sum of $238,569.70 to retrieve and repair TK-2216. Although the contract between the plaintiffs and Titan called for the plaintiffs to take out an all-risk cover in the joint names of the plaintiffs and Titan with a `waiver of subrogation` clause, the plaintiffs had not taken out any such insurance and in this action the plaintiffs claimed from Titan the charges they had incurred in retrieving and repairing TK-2216.

13 Titan denied the plaintiffs` claim that the mishap happened because of Titan`s negligence and/or Titan`s failure to carry out the contracted work with proper and sufficient equipment. The main defence of Titan, however, was that

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the plaintiffs, in not taking out the agreed insurance cover for the lifting operation, were in breach of their contract with Titan. Titan`s position was that if the plaintiffs had insured the operations as agreed, then, even if Titan was liable for the accident, the plaintiffs would not have been able to commence and maintain the present action.

14 The plaintiffs, in their reply to Titan`s defence, pleaded that subsequent to Titan`s fax of 19 August 1992, Singh agreed that Titan would assume full responsibility for the work and would not rely on the term relating to the provision of insurance. It was also the plaintiffs` case that the term relating to the provision of insurance was one which was not intended by either party to be a term of the contract and that neither party had paid any attention to that term. The plaintiffs accordingly sought an order for the rectification of the contract by the deletion of that term.

15 Both Eng and Tan testified that Singh had orally agreed to waive the insurance clause in Titan`s quotation. Eng`s evidence-in-chief was that at a meeting at the site held after the quotation had been accepted, he raised the issue of the insurance clause and asked Singh who would be responsible for any damage caused by the use of wrong, unsuitable or inadequate equipment. According to Eng, Singh replied that Titan would be responsible. Eng claimed that this assurance was accepted by him and that it was then expressly agreed that the insurance was superfluous and therefore unnecessary and the plaintiffs would proceed on the basis that the insurance was not required.

16 Under cross-examination, Eng at first stated that he first discussed the question of the insurance clause with Singh at a meeting after 13 August 1992. This was consistent with his evidence-in-chief. Subsequently, however, Eng

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went further. He claimed that on 13 August 1992 Singh had pressed him for confirmation of acceptance of the quotation. He told Singh that he could not accept the insurance clause but Singh told him to give confirmation of acceptance first and they could discuss the insurance terms later. Eng claimed that it was because of this assurance by Singh that the plaintiffs sent the letter of acceptance.

17 It would appear from the evidence-in-chief of Eng and Tan that the discussion resulting in the alleged agreement to do away with the insurance clause took place between 22 August and 7 September 1992. In cross-examination, Eng confirmed that the deletion of the insurance clause was settled prior to 7 September 1992. The plaintiffs in para 3(c) of their reply had, however, stated that when Titan proposed to replace the 300-ton hydraulic crane with a crane barge they raised the question of insurance. Paragraph 3(c) of the reply was as follows:

> *... the defendants advised the plaintiffs that they were unable to use a 300 ton hydraulic crane as expressly agreed; the defendants proposed using a barge crane instead.* ***The plaintiffs thereupon enquired of the defendants what was to be the position as regards the application for the insurance (to include the defendants as insureds) since an essential equipment was to be changed****. [Emphasis mine.]*

18 Paragraph 3(c) was drawn to the attention of Eng and he was asked whether para 3(c) was correct. Eng denied the accuracy of para 3(c). However, the next day Eng would not confirm that answer. When asked again if para 3(c) was wrong, his answer was `I can`t recall`.

19 Tan in his evidence-in-chief stated that on 10 August 1992 when the plaintiffs received the quotation from Titan he discussed the quotation with Eng

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and the plaintiffs` project engineer. His evidence on what transpired at the discussion, as contained in para 7 of his affidavit, was as follows:

> *On the basis of Mr Singh`s representation, we recognised the expertise of the defendants as lifting specialists. We had no doubt that the job should be awarded to them.* ***The only question was the contract price****. In any case, the plaintiffs confirmed appointment of the defendants to do the job by a fax dated 13 August 1992. [Emphasis mine.]*

20 His evidence, under cross-examination, was, however, quite different. In cross-examination, Tan said:

> *After the quotation was received Eng came to see me about the quotation and asked me what the quotation included.* ***I told Eng that the only question was the insurance clause****. The clause was not clear.*

21 When asked if he was saying that para 7 was not correct, his response was:

> *What I want to say was that we first look at contract price and decided that there was no problem with the contract price.*

22 **This answer struck me as being somewhat disingenuous.**

23 Tan, in his affidavit of evidence-in-chief, supported what Eng had said about Singh having, at a discussion held prior to 7 September 1992, agreed to waive the insurance clause. In cross-examination, para 3(c) of the reply filed was drawn to his attention and he was asked to explain why, if there had been such an agreement, the plaintiffs raised the question of insurance when Titan proposed using the crane barge. Tan`s initial reply was that Singh had said that since Titan had changed to a crane barge Titan would have to bear all expenses but Tan then went on to add that the reference to insurance in para 3(c) could be his mistake.

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24 Singh testified that on 10 August 1992, prior to his submitting Titan`s written quotation for the job, he had discussed the terms of the contract with Eng and Tan at the plaintiffs` office. Singh claimed that at this meeting he had told the plaintiffs that Titan would insist on the insurance clause as Titan would not want to be at risk if any damage was caused during the lifting of TK-2216 from the barge to the jetty or during the transportation to Esso`s site. He said that he left details of the amount of cover to take and which insurance company to use to the plaintiffs. Singh denied that he had ever told the plaintiffs that they need not take out the insurance stipulated in Titan`s quotation.

25 Titan, as part of its defence, called Sydney Campbell (Campbell), a director of Favelle Favco Equipment Ltd, to testify as an expert witness. I need not consider his evidence here. As counsel for Titan pointed out, Campbell was a witness primarily in connection with Titan`s claim against the third party.

26 **Waiver**

27 Having heard the evidence of Singh, Eng and Tan and having considered the documents tendered, I had no difficulty in rejecting the plaintiffs` claim that Singh had agreed to waive the insurance clause. Eng had said in his evidence that as Titan were experts in the field of lifting it was logical not to have such a clause. I could not see the logic. Having secured a contract with such a clause included I could not see why Singh would have agreed to waive it. The contract between Titan and the plaintiffs required the plaintiffs to take out a policy of insurance as stipulated in the quotation. This the plaintiffs had failed to do.

28 **Rectification**

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29 There was also no merit in the plaintiffs` claim for rectification of the contract by the deletion of the insurance clause. Although it was true that Titan did not press the plaintiffs to give them copies of the insurance policy or even press them for confirmation that the policy had been taken out, the insurance clause was, in my view, clearly a term of the contract and from Titan`s point of view a very important term. I note, in passing, that Semco Salvage & Marine Pte Ltd (the contractors used by the plaintiffs to retrieve TK-2216 from the sea bed after the accident) had, in their quotation (PB20), also required the plaintiffs to take out an insurance in similar terms; this supported Singh`s evidence that insurance clauses of this nature were common in the trade.

30 **Negligence**

31 As for the accident itself it was clear from the evidence that the accident was caused by the negligence or error of judgment on the part of Titan in using equipment for the lifting of TK-2216 which was inherently unsuitable. There was in any event no serious contest between the plaintiffs and Titan on this issue.

32 **Fundamental breach**

33 The contract required Titan to use a 300-ton hydraulic crane or comparable equipment. The plaintiffs submitted that this was a primary obligation and Titan by using equipment that was unsafe/unsuitable, namely, the crane barge, had breached a primary obligation. Such a breach, it was submitted, would constitute a fundamental breach of contract on the part of Titan. It was submitted that as Titan was in fundamental breach of contract, Titan could not rely on the insurance clause, a clause inserted, for Titan`s

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benefit, to escape liability. In support of this proposition, counsel quoted various cases which I will now consider.

34 In ***Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd*** [1959] AC 576, the Rambler shipped goods from England to Singapore. The contract required the shipowner to deliver the goods, on production of the bill of lading, to the person entitled under the bill of lading. After the goods had been discharged in Singapore the carrier`s agents released the goods to the consignee against a written indemnity by the latter`s bank, but without production of the bill of lading. The consignee failed to pay for the goods and Rambler initiated proceedings against the carrier for damages for breach of contract or for conversion. The carrier brought in the consignee and the indemnity bank. Clause 2 of the bill of lading provided that the `responsibility of the carrier ... shall be deemed ... to cease absolutely after the goods are discharged` from the ship. The carrier sought to deny liability under cl 2.

35 Lord Denning in rejecting the attempt to deny liability by invoking the exemption under cl 2, said:

> *The exemption, on the face of it, could hardly be more comprehensive, and it is contended that it is wide enough to absolve the shipping company from responsibility for the act of which the Rambler Cycle Company complains, that is to say, the delivery of the goods to a person who, to their knowledge, was not entitled to receive them. If the exemption clause upon its true construction absolved the shipping company from an act such as that, it seems that by parity of reasoning they would have been absolved if they had given the goods away to some passer-by or had burnt them or thrown them into the sea. ...*
>
> *If such an extreme width were given to the exemption clause, it would run counter to the main object and intent of the contract. For the contract, as it seems to their Lordships, has,* ***as one of its main objects****, the proper delivery of the goods by the shipping company, ... against production of the bill of lading. It would defeat this object entirely if the shipping company was at*

> *liberty, at its own will and pleasure, to deliver the goods to somebody else, to someone not entitled at all, without being liable for the consequences. The clause must therefore be limited and modified to the extent necessary to enable effect to be given to the main object and intent of the contract. ...*
>
> *To what extent is it necessary to limit or modify the clause?* ***It must at least be modified so as not to permit the shipping company deliberately to disregard its obligations as to delivery****. For that is what has happened here. ...* ***they deliberately disregarded one of the prime obligations of the contract****. No court can allow so fundamental a breach to pass unnoticed under the cloak of a general exemption clause: see The Cap Palos. [Emphasis mine.]*

36 ***Smeaton Hanscomb & Co Ltd v Setty (Sassoon I) Son & Co*** [1953] 2 All ER 1471 concerned a contract for the sale of mahogany logs. The contract had a limitation clause which provided that `any claim must be made within fourteen days from the final discharge of the goods`. The buyer rejected the goods on the grounds that there was `a shortage in measure as well as a serious percentage undergrade` of the mahogany logs and sought the return of payments that he had made. As the buyer did not make his claim within the stipulated 14 days, the seller sought the protection of the limitation clause. The buyer argued that the seller could not avail himself of the protection of that clause as the seller had committed a fundamental breach of contract. Devlin J accepted that, if that were so, the seller could not avail himself of the limitation clause. This appears at p 1473 of the report where Devlin J said:

> *It is, no doubt, a principle of construction that exceptions are to be construed as not being applicable for the protection of those for whose benefit they are inserted if the beneficiary has committed a breach of a fundamental term of the contract, and that a clause requiring the claim to be brought within a specified period is to be regarded as an exception for this purpose.*

37 Both ***Sze Hai Tong Bank*** and ***Smeaton Hanscomb*** were cases where one party was seeking to deny liability by reason of an exemption clause in the

relevant contract. Was the insurance clause in the present contract of a similar genre? In my view it was not. It was not purporting to create situations where Titan would be exempted from liability for breach of contract and/or negligence. To the contrary, by requiring that clause to be in the contract, Titan was implicitly acknowledging that it could be liable to the plaintiffs if, during the course of its operations, damage was caused to TK-2216. All that the insurance clause sought to do was to place the obligation on the plaintiffs to obtain and bear the cost of an all-risk policy that would also cover Titan in the event of any such incident. As a matter of commercial reality, Titan need not have required the plaintiffs to take out the policy. It could have done so itself and made the necessary adjustments to the quoted price to reflect the costs of the insurance. The insurance clause in this case did not appear to me to be in the same category as the exemption clauses dealt with in the cases relied on by the plaintiffs.

38 Even if the insurance clause could be considered to be in the nature of an exemption clause, the plaintiffs would still have difficulty in establishing that by using a crane barge in place of a 300-ton hydraulic crane Titan was in fundamental breach of the contract. In this context, it would be useful to refer to Devlin J`s definition, in ***Smeaton Hanscomb*** , of the phrase `fundamental term of a contract`. Devlin J said:

> *I do not think that what is a fundamental term has ever been closely defined. ...* ***It is, I think, something which underlies the whole contract so that, if it is not complied with, the performance becomes something totally different from that which the contract contemplates****. [Emphasis mine.]*

39 Lord Upjohn, in ***Suisse Atlantique Societe d`Armement Maritime SA v NV Rotterdamsche Kolen Centrale*** [1967] 1 AC 361, also gave the words `fundamental breach of contract`, much the same definition when he said:

> *I believe that all your Lordships are agreed and, indeed, it has not seriously been disputed before us that there is no magic in the words `fundamental breach`; this expression is no more than a convenient shorthand expression for saying that a particular breach or breaches of contract by one party is or are such as to* ***go to the root of the contract*** *which entitles the other party to treat such breach or breaches as a repudiation of the whole contract.*

40 Did the substitution of the crane barge in place of the 300-ton hydraulic crane make the operations in this case, to use the words of Devlin J, `something totally different from that which the contract contemplated` or to use the words of Lord Upjohn, something that went `to the root of the contract`?

41 It was clearly a term of the contract that Titan was free to use whatever equipment it deemed fit so long as the use of the equipment was first cleared with the plaintiffs. The need to obtain clearance arose, as noted earlier, from the fact that the main contract between the plaintiffs and Esso required lifting procedures to be reviewed and approved by Esso. It is clear from the evidence that the change in this case was effected with the consent of the plaintiffs (and Esso). That being so, the plaintiffs would be hard-put to argue that, by using the crane barge, Titan was even in breach of the contract.

42 The fact that the plaintiffs acquiesced to the change of equipment to be used is a clear indication that the type of equipment that Titan chose to use was not a fundamental term of the contract. This change was a far cry from the deliberate disregard, in the Sze Hai Tong case, of the primary obligation of a shipper not to part with goods except on production of the bill of lading. What was important in this contract was the lifting of TK-2216 and not the equipment to be used in the lifting. If indeed Titan, by using the crane barge, was in breach of the contract, that breach would not, in my view, be a matter that went to the `root of the contract` or render the performance of the contract `something

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totally different from that which the contract contemplated` and would therefore not be a breach of a fundamental term.

43 The requirement that the plaintiffs take out an insurance policy as required under the contract was, on the other hand, in a different category. Titan had agreed to carry out its obligations in consideration of the plaintiffs (a) paying it the sum of $53,000 and (b) the plaintiffs bearing the costs of insurance covering themselves and Titan against all risks. Failure by the plaintiffs to carry out the latter term left Titan exposed, in the event of an accident, to claims for damages. This breach by the plaintiffs was, in my view, a breach of a fundamental term of the contract.

44 **Insurance not enuring to benefit of Titan**

45 The plaintiffs submitted, alternatively, that even if the insurance clause was part of the contract, that clause, on its true construction, was not intended to enure to the benefit of Titan and accordingly the plaintiffs by not effecting the insurance would not be precluded from claiming against Titan. The plaintiffs cited numerous cases in support of this proposition. These included the decision of the Court of Appeal in ***Wisma Development Pte Ltd v Sing - The Disc Shop Pte Ltd*** [1994] 3 SLR 295 and ***Walter Wright Mammoet (Singapore) Pte Ltd v Resources Development Corp Ltd*** [1995] 1 SLR 528.

46 Counsel for the plaintiffs, relying in particular on a passage from the judgment of the High Court (per Punch Coomaraswamy J) in ***Wisma Development Pte Ltd v Sing - The Disc Shop Pte Ltd*** [1993] 3 SLR 781 submitted that the presence of a `waiver of subrogation` clause could not by itself indicate an intention that the insurance was intended to enure to the other

party`s benefit. I do not think that Punch Coomaraswamy J in that case went so far as to say that. That case was an appeal from a district judge. The district judge in that case had referred to a subsequent tenancy agreement between the same parties where the insurance clause included a provision for waiver of subrogation against the landlords and had reasoned that the absence of such a provision in the contract he was considering showed a clear intention to preserve the subrogation rights of the tenants` insurers to proceed against the landlord. In my view, Punch Coomaraswamy J, in the passage cited by counsel, was merely expressing his disapproval of a contract being construed by reference to terms contained in a subsequent contract. What the learned judge said was not, in my view, an authority for the proposition being canvassed by the plaintiffs.

47 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 Titan 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 enure to the benefit of Titan.

48 **Insurance clause vague**

49 The plaintiffs also submitted that the insurance clause in this case was vague and ambiguous and therefore could not bind the parties. The evidence did not support this submission. The plaintiffs` witnesses agreed that they knew what the clause required of them. Eng had even consulted an insurer. In any

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event, the only element that could be said to be uncertain was the amount of cover to be taken out. This, according to Singh, was left to the plaintiffs to decide as the plaintiffs knew, or could find out, the value of TK-2216. It would clearly be an implied term of the contract that the plaintiffs were to take out insurance for a reasonable amount, bearing in mind the value of TK-2216 and the likely costs of repair to TK-2216 in the event it should be damaged during the lifting and/or the transportation.

50 **Conclusion**

51 At the end of the hearing I was satisfied that the plaintiffs, in not taking out the insurance policy as agreed, had breached a fundamental term of their contract with Titan. Had the plaintiffs not committed this breach, the plaintiffs could have recovered the losses arising from the accident from the insurers and, as Titan was a joint insured and in view of the waiver of subrogation, Titan would not be held liable for those losses. In these circumstances, I accepted the submission of counsel for Titan that the plaintiffs should not be allowed to benefit from their breach of a fundamental term of the contract and I dismissed the plaintiffs` claim with costs. I also ordered that the costs of the third party be borne equally by the plaintiffs and Titan.

52 ***Plaintiffs` claim dismissed*** .

S Rajendran J

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Penguin Engineering & Construction Pte Ltd v Titan Logistics (S) Pte Ltd (Pioneer Offshore Enterprises Pte Ltd, Third Party) [1996] SGHC 244

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Nigel Bogaars and Savliwala Din (Harry Elias & Pnrs) for the defendants
Leonard Chia (JC Ho & Kang) for the third party
