IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1998] SGHC 399

OM 6/1998

Between

American Home Assurance Co

… Plaintiff

And

Hong Lam Marine Pte Ltd

… Defendant

GROUNDS OF DECISION

Version No 1: 20 Nov 2026 (00:35 hrs)

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American Home Assurance Co v Hong Lam Marine Pte Ltd

[1998] SGHC 399

OM 6/1998
Tan Lee Meng J
04 December 1998

Judgment :

Cur Adv Vult

The applicants, who are in the insurance and underwriting business, sought leave to appeal against the decision of the arbitrator, to whom they referred their dispute with Hong Lam Marine Pte Ltd (hereinafter referred to as the "respondents") with respect to the ambit of four bonds issued by them in favour of the respondents. When the application was first heard, both the applicants and the respondents agreed to request the arbitrator to reconsider his position. In his revised award, the arbitrator confirmed his findings in the original award. Not satisfied with the revised award, the applicants sought leave to appeal against the arbitrator's findings.

Background to the dispute

2. In December 1994, the respondents signed an agreement (hereinafter referred to as the "shipbuilding agreement") with Siong Huat Shipyard Pte Ltd (hereinafter referred to as the "shipyard") for the construction of a bunkering

vessel. The agreed price for the construction of the vessel was $10,275,000.00 and the vessel was to be completed and delivered to the respondents on or about 28 December 1995.

3. On 16 February 1995, the shipyard agreed in an addendum to the shipbuilding agreement (hereinafter referred to as the "first addendum") to procure a total of four performance bonds in favour of the respondents for a total of 65% of the agreed price of the vessel. This varied the requirement in clause 8(5) of the shipbuilding agreement for performance bonds in favour of the respondents for a total of 15% of the agreed price.

4. By another addendum dated 7 November 1995 (hereinafter referred to as the "second addendum"), the delivery date of the vessel was extended to 12 January 1996 and the respondents agreed to make an advance payment of 20% of the agreed price of the vessel.

5. Four bonds were issued by the applicants in favour of the respondents. They were as follows:

Bond Number	Date	Amount
1. 1000029962	10.2.95	S$1,541,250.00
2. 1000029981	10.2.95	S$1,541,250.00
3. 1000029982	10.2.95	S$2,055,000.00
4. 1000035688	28.9.95	S$1,541,250.00

6. The shipyard failed to complete the vessel by 12 January 1996. By then, the respondents had paid the shipyard 90% of the contract price for the vessel. Under clause 14 of the shipbuilding agreement, the respondents had two options. The first was to take possession of the uncompleted vessel and claim damages from the shipyard. The second was to seek recovery of the progress payments paid to the shipyard, together with interest. On 13 January 1996, the respondents notified the shipyard that they intended to take possession of the

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vessel. Following legal proceedings in the High Court, the respondents took possession of the uncompleted vessel. The construction of the vessel was completed in another shipyard.

7. In the meantime, the respondents made four separate demands under the bonds issued by the applicants, who declined to pay the respondents on, inter alia, the ground that the shipyard's liability to the respondents had yet to be determined in arbitration proceedings between the respondents and the shipyard.

8. The arbitrator, Mr. Joseph Grimberg, held that the respondents were entitled to recover from the applicants the amount expended in completing the vessel. The applicants were ordered to pay the respondents a total sum of $3,242,449.06, which included towing charges as well as a number of other miscellaneous charges.

9. The applicants sought leave to appeal against the award. Their counsel submitted that the issues are as follows:

> (a) Do the bonds issued by the applicants answer a claim for damages by the respondents against the shipyard?
>
> (b) Have the respondents made a claim under the bond within the expiry dates stated in the bonds?
>
> (c) Did the respondents misrepresent on 24 November 1994 that the shipyard was obliged to provide bonds for a total of 65% of the contract value?
>
> (d) Did the variation agreements between the respondents and the shipyard discharge the applicants from their obligations under the bonds?
>
> (e) Should the bonds not be enforced for the reason that the shipbuilding agreement was used by the respondents to deceive the Registrar of ships?

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> (f) Were the respondents under a duty to disclose the fact that the shipbuilding agreement had been backdated and that there had been variations to the shipbuilding agreements?

General principles governing leave to appeal

10. Section 28(2) of the Arbitration Act provides that subject to subsection (3), an appeal shall lie to the court on any question of law arising out of an award made on an arbitration agreement. Section 28(3) and section 28(4) of the Act provide as follows:

> (3) An appeal under this section may be brought by any of the parties to the reference -

(a) with the consent of all the other parties to the reference; or

(b) subject to section 30, with the leave of the court.

(4) The court shall not grant leave under subsection (3)(b) unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement; and the court may grant any leave subject to such conditions as it considers appropriate.

11. Section 28 of the Arbitration Act is intended to promote greater finality in arbitral awards. When referring to the provisions in the English Arbitration Act 1979 which correspond to the provisions of the Singapore Arbitration Act, Lord Diplock said in *The Nema* [1982] AC 724, 742 that "it would defeat the main purpose of the first four sections of the Act if judges, when determining whether a case was one in which the new discretion to grant leave to appeal should be exercised in favour of an applicant against objection by any other party to the

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reference, did not apply much stricter criteria than those stated in *The Lysland* [1977] 1 Lloyds' Rep 296, which used to be applied in exercising the former discretion to require an arbitrator to state a special case for the opinion of the court". This position was reiterated by his Lordship in *The Antaios* [1985] 1 AC 191.

12. As for the criteria to be applied in the exercise of judicial discretion, in *The Nema* [1982] AC 724, 742-743,

Lord Diplock said:

> Where, as in the instant case, 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.…

[R]ather less strict criteria are in my view appropriate where questions of construction of contracts in standard terms are concerned…. But leave should not be given even in such a case, unless the judge considered that a strong prima facie case had been made out that the arbitrator had been wrong in his construction; and when the events to which the standard clause fell to be applied in the particular arbitration were themselves 'one-

> off' events, stricter criteria should be applied on the same lines as those that I have suggested as appropriate to 'one-off' clauses ….

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13. In this case, the applicants contended that the clauses in the bonds were standard clauses whereas the respondents asserted that they were "one-off" clauses. Whether the applicants or the respondents are correct does not matter because on either of the tests formulated in *The Nema* in relation to a standard clause and a "one-off" clause, my conclusions would be the same.

The scope and effect of the bonds

14. The main issue in this case concerns the scope and effect of the bonds issued by the applicants in favour of the respondents. The respondents took the view that these were performance bonds payable on demand whereas the applicants asserted that they were repayment or refund guarantees.

15. The drafting of the applicants' four bonds leaves much to be desired. The first bond provided as follows:

> Whereas a Shipbuilding Agreement dated 16th March 1993 ("the Agreement") was entered into between you and Siong Huat Shipyard Pte. Ltd. ("the Builder") for the construction and purchase of a vessel (identified in the said Agreement as Builder's Hull No. 2589 and more fully described in the Drawings and Specification referred to in Appendix A to the Agreement).

And Whereas it is agreed that the Builder shall provide an Insurance Bond for the amount of Singapore Dollars One Million Five Hundred and Forty One Thousand Two Hundred and Fifty Only (S$1,541,250.00) of the relevant progress payments in your favour in exchange for payment of the relevant progress payments by you to the Builder under the Agreement, which Insurance Bond *shall be payable on your exercise of any of your rights of termination/rescission under the Agreement.*

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1. NOW WE, American Home Assurance Company, a Corporation of the State of New York with its Statutory Home Office at 70 Pine Street, New York, New York 10270, United States of America and its registered branch office at 78, Amoy Street, Singapore 0106 at the request of the Builder and in consideration of the premises and your agreeing to pay each progress payment under the Agreement at our request, *hereby guarantee repayment to you by the Builder* of a sum or sum(s) not exceeding in the aggregate of Singapore Dollars One Million Five Hundred and Forty One Thousand Two Hundred and Fifty Only (S$1,541,250.00).

(emphasis added)

16. The remaining three bonds were in identical terms with the exception that the amount of the third bond was higher than the rest. The recital provided that the bond "shall be payable on your exercise of any of your rights of termination/rescission under the Agreement". As the respondents exercised one of their rights of termination under the shipbuilding agreement by taking possession of the uncompleted vessel, they would, without more, be entitled to payment under the bonds if the recital was not contradicted by the terms of the bonds.

17. The applicants argued that effect should not be given to the words in the recital because clause 1 of the bonds provided that the applicants "*guaranteed repayment …by the Builder of a sum or sum(s) not exceeding ….*" They asserted that it was evident from clause 1 that the right of the respondents to make demands under these bonds arose only if they exercised their right to claim back from the shipyard the progress payments paid by them and not when the respondents opted to take possession of the vessel.

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18. Counsel for the applicants submitted that as it is clear from the operative part of the bonds that they are repayment guarantees, the recital could not be used to alter the scope of the operative part of the bonds. The simple answer to this assertion is that the arbitrator did not regard the wording of clause 1 of the bonds as clear enough to determine the nature of the bonds. Hence, he thought it necessary to take into account the words in the recital. The arbitrator, who took the view that he was also entitled to look at the factual matrix, referred to *Moschi v Lep Air Services Ltd* [1973] AC 331, 354, where Lord Simon said:

> It is not permissible to construe a contract by reference to negotiations leading thereto …. However, in order to ascertain what a promisee had a right to expect from the words used it is permissible to look not merely to the words but to all the circumstances. As Lord Wilberforce said in *Prenn v Simmonds* (at pp 1383H, 1384A): "The time [has] long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations".

19. The arbitrator noted that it was clear from the correspondence which passed between Minet, the insurance brokers who procured the bonds on behalf of the shipyard, and AIU, the applicants' managing agent in Singapore, that the parties contemplated the issue of performance bonds. In a letter dated 10 November 1994, Minet's Esther Kwan sent AIU's Tan Thian Seng a draft version of the proposed bond. In her letter, she wrote as follows:

> As mentioned, the Builders Agreement between Siong Huat Shipyard and Hong Lam Marine requires the issuance of a Performance Bond.

20. On 28 November 1994, Tan wrote to Kwan. Under the heading "Performance Bond", he pointed out as follows:

> FYI, strong rejection from N.Y. on wording you furnished. The Bond was first rejected until I proposed to change wording.

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Tan enclosed a fresh draft of the proposed bond. Instead of stating that the surety was to "irrevocably and unconditionally undertake… to pay on demand … if and whenever the Builder shall be in default of its obligations …", the fresh draft stated that the applicants were to "guarantee repayment … by the contractor" upon the exercise by the respondents of rights of termination/rescission under the shipbuilding agreement.

21. The arbitrator made it clear that he did not think that much turned on the label attached to the bonds. At paragraph 28 of his revised award, he observed:

> The bonds were variously described as performance bonds or repayment guarantees in the documents. The parties themselves appear to have used the two terms interchangeably. The question is really one of construction. In *Moschi v Lep Air Services Ltd*, Lord Diplock said at p. 349:

Even the use of the word "guarantee" is not in itself conclusive. It is often used loosely in commercial dealings to mean an ordinary warranty. It is sometimes used to mis-describe what is in law a contract of indemnity and not of guarantee…. Every case must depend upon the true construction of the actual words in which the promise is expressed.

22. The arbitrator took the view that it was evident that at all material times, the parties contemplated the issuance of bonds in the nature of performance bonds. It could never have been their intention that the applicants' obligation should only arise if the respondents chose to recover the repayment of progress payments from the shipbuilders and there was no reason why the respondents would have wanted to limit their right to seek payment under the bonds to such an event. The respondents wanted an immediate source of funds in the event that the shipyard was unable to perform its contractual obligations. As such, they required a third party to issue performance bonds, which would enable them to obtain payment irrespective of the position between them and the

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shipyard. In his view, the applicants were aware of this and the bonds were issued in response to this purpose even though they were couched as repayment guarantees. The applicants may have rejected the wording of the bonds proposed by the respondents but they did not object to the fundamental nature of the bonds required to be issued, namely, bonds designed to provide the respondents with a ready source of funds on the termination or rescission of the shipbuilding agreement, irrespective of the position between the respondents and the shipyard. He said that the recitals to the bonds attested to this as they made it clear that the bonds shall be payable on the respondents' exercise of any of the rights of termination or rescission under the shipbuilding agreement. In his view, it was inconsistent with the avowed object of the bonds for the applicants to contend that they were only repayment guarantees.

23. As for the applicants' argument that meaning must be accorded to the word "repayment" in the bonds, the arbitrator said at paragraph 54 of his revised award:

> As I have explained, the plain purpose of the bonds was to provide the [respondents] with a ready source of funds on the termination/rescission of the Agreement. The quantum of the funds was determined by reference to the progress payments made by the [respondents]. To that extent, the bonds constituted a "repayment" of sums expended by the [respondents]. I am of the view that it is not possible to give the word "repayment" the interpretation proposed by the [applicants]. The factual matrix resulting in the issuance of the bonds, the commercial purpose of the bonds and the intentions of the parties at the time the bonds were issued are against the [applicants'] interpretation.

24. For good measure, the arbitrator took the view that even if the bonds may be regarded as repayment guarantees, the applicants would still be liable to the respondents because they guaranteed the performance by the shipyard of its obligations to make payment of any sum payable to the respondents on the

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termination or rescission of the shipbuilding agreement, up to the maximum amounts stated in the bonds.

25. The arbitrator has provided adequate reasons for his view of the scope of the applicants' bonds. On either of the tests enunciated by Lord Diplock in *The Nema* for "one-off" clauses and standard clauses

,

I see no reason why leave should be granted for an appeal against the arbitrator's decision on the scope of the bonds.

Validity of the demands

26. The question of the validity of the respondents' demands will next be dealt with. By virtue of clause 2 of the bonds, the bonds were to be valid until 13 February 1996 or the date when the vessel was satisfactorily delivered by the shipyard to the respondents, whichever was the later. On 12 February 1996, the respondents made a demand for payment under the bonds. Each of the letters of demand included the following paragraphs:

> We refer to the subject Bond issued by you in our favour.
>
> Siong Huat Shipyard Pte Ltd (the "builder") failed to effect delivery of the vessel to us on 12th January 1996. We have, accordingly, exercised our rights of termination of the Shipbuilding Agreement.
>
> We hereby demand immediate payment of the sum of ….

27. The applicants attacked the validity of the demands on two grounds. First, they contended that the respondents' demands were in respect of amounts paid by them to the shipyard, sums which would have been repayable under the bonds only if the respondents had exercised the second option available to them

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under clause 14 of the shipbuilding agreement. Secondly, if the respondents' demands were in respect of damages and the bonds answered a claim for damages, no claim for damages was made before the deadline for making a claim.

28. The arbitrator, who noted that the bonds did not expressly provide for demands, let alone make provisions for the terms of the demands, said that the demands were for the amounts of the bonds and not for damages. He added at paragraph 79 of his revised award:

> The primary claim in the present arbitration is for repayment of the bonds. The claim for damages is in the alternative. In my judgment, the [respondents'] demands were in appropriate terms. They constituted valid and timeous claims for repayment under the bonds, and were so treated by [the applicants] when they were received, [their] attitude then having been, in effect, that their liability depended upon the Shipyard being held liable to the [respondents]….

29. The arbitrator thus concluded that the respondents' demands were validly made within the period stipulated by clause 2 of the bonds. There is no reason for me to grant leave to appeal against this finding of the arbitrator.

Uberrima fides

30. The applicants also contended that the bonds could not be enforced because the respondents failed to disclose that the shipbuilding agreement had been backdated to avoid compliance with Regulation 13F of the Prevention of the Pollution of the Sea (Oil) Regulations Act 1991 and that the shipbuilding agreement had been varied before the issuance of the bonds.

31. The arbitrator, who made it clear that he did not consider the bonds to be insurance contracts, took the view that the principle of *uberrima fides*, which is

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applicable to contracts of insurance, does not apply to performance bonds or guarantees. He added that even if there was a duty of disclosure in this case, the question of a breach of this duty did not arise because it was not established that the applicants had been induced by the alleged non-disclosure to enter into the contracts. I can see no ground for granting leave to appeal against this finding of the arbitrator as it is clear from the decision of the House of Lords in *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501 that before an insurer can avoid a contract of insurance on the ground of non-disclosure, it must be established that the non-disclosure was material and that the non-disclosure, if material, must have induced the actual insurer who issued the policy to enter into the contract of insurance.

Effect of variations to the shipbuilding contract

32. As has been mentioned, some of the terms of the shipbuilding agreement were varied by the first addendum and the second addendum. It was accepted that the applicants did not consent to, and were in fact unaware of the existence of, the variations until after the respondents had made demands for payment under the bonds.

33. The applicants took the view that these unauthorised variations discharged them from liability under the bonds. However, the arbitrator did not share their view. As for the first addendum, which varied the requirement in clause 8(5) of the shipbuilding agreement for performance bonds in favour of the respondents for 15% of the agreed price for the construction of the vessel to 65% of the agreed price, the arbitrator said that the first addendum was executed to correct an obvious error in the shipbuilding agreement. In his view, the parties were aware that bonds were to be furnished for 65% of the agreed price and not 15%.

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As such, this variation did not discharge the applicants from liability under the bonds.

34. As for the second addendum, it affected the shipbuilding agreement in two ways. First, it extended the delivery date of the vessel. Secondly, it provided for a 20% advance payment. The arbitrator pointed out that whether or not an extension of time or prepayment constitutes a material variation depends on the particular obligations undertaken by the applicants. In this case, the variation of the terms on payment and delivery in the shipbuilding contract was immaterial to the applicants' obligations under the bonds because the applicants did not take these terms into account when deciding whether or not to undertake the risk. In fact, they executed the bonds without looking at the shipbuilding agreement. In view of this, the arbitrator said that the applicants were not discharged from their liability under the bonds. I see no reason why leave should be granted for an appeal against the decision of the arbitrator with respect to the effect of the first addendum and second addendum.

Illegality

35. The shipbuilding agreement, which was concluded in December 1994, was backdated to 16 March 1993. The reason for this was obvious. By the time the shipbuilding agreement was concluded, a new regulation, which was not in force in March 1993, required oil tankers to have a double hull. The vessel did not comply with this regulation. The shipbuilding agreement was thus backdated to enable the vessel to be registered as a Singapore vessel.

36. The applicants contended that this deception tainted the shipbuilding agreement with illegality and so rendered the agreement and the bonds issued by them unenforceable. However, the arbitrator took the view that the applicants

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had not established that the nexus between the illegal act and the claim under the bonds was such that the respondents were barred from making a claim under the bonds. He accepted that in the three cases cited by the applicants in support of their case, namely, *Suntoso Jacob v Kong Miao Ming* [1986] 2 MLJ 170, *Alexander v Rayson* [1936] 1 KB 169 and *Palaniappa Chettiar v Arunasalam Chettiar* [1962] MLJ 143, the purpose of the transactions was to deceive some authority whereas the purpose of the shipbuilding agreement between the respondents and the shipbuilders in this case was not to deceive the Registry of Ships. Furthermore, the respondents' right of action against the applicants was not dependent on their being the owner of a Singapore registered ship.

37. The arbitrator noted that the respondents' right to payment under the bonds crystallised when they exercised their right to terminate the shipbuilding agreement. The shipbuilding agreement was terminated on 12 February 1996 whereas the deception on the Registrar was only practised when the vessel was registered on 25 May 1996. As such, if the claim had been brought against the applicants on the date of termination, the shipbuilding agreement would clearly have been enforceable.

38.

The effect of an illegal act on a claim often gives rise to perplexing problems. Whether or not I agree with the conclusions reached by the arbitrator with respect to the matter presently being discussed is not in issue. What is relevant is that on the basis of the principles laid down in

The Nema

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, there are insufficient grounds for the granting of leave to appeal against the arbitrator's finding that the backdating of the shipbuilding agreement did not affect the respondents' rights under the bonds issued by the applicants.

Conclusion

39. In *The Antaios* [1985] 1 AC 191, 199, Lord Diplock noted that the provisions of the English Arbitration Act 1979 which correspond to the Singapore Arbitration Act are intended "to promote speedy finality in arbitral awards rather than that insistence upon meticulous semantic and syntactical analysis of the words which businessmen happen to have chosen to express the bargain made between them, the meaning of which is technically, though hardly commensensically classified in English jurisprudence as a pure question of law." In *The Nema* [1982] AC 724, 744, his Lordship pointed out that in deciding how to exercise his discretion to give leave to appeal, what the judge should normally ask himself in this type of arbitration, particularly where the events relied upon are "one-off" events, is not whether he agrees with the decision reached by the arbitrator but whether it appears upon perusal of the award that the arbitrator has misdirected himself in law or that his decision was such that no reasonable arbitrator could reach. Taking all circumstances into account, the parties in this case should be left to accept the decision of the arbitrator. As such, leave to appeal against the award of the arbitrator is refused with costs.

TAN LEE MENG

JUDGE

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Tan Lee Meng J

Prem Gurbani (Gurbani & Co) for the applicants
Scott Thilligaratnam (Ramdas & Wong) for the respondents

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