The "Feng Hang and Others"
[2001] SGHC 378

Case Number : Adm in Rem 496/1998

Decision Date : 28 December 2001

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Jainil Bhandari and David Tan (Rajah & Tann) for the plaintiffs; Leong Kah Wah and Derek Tan (Joseph Tan Jude Benny Anne Choo) for the defendant

Parties : —

Admiralty and Shipping – Bills of lading – Defendant-carrier issuing bill of lading to plaintiffs-shippers – Defendant in breach of contract of carriage and negligent as carrier by issuing second bill of lading to buyer – Chinese claimant obtaining detention order preventing release of cargo from Chinese port – Lifting of order – Port authority insisting on acceptance of its quantification of cargo – Condition unacceptable to plaintiffs – Plaintiffs abandoning cargo – Defendant disputing causation of loss – 'But for' test – Whether second bill of lading used to obtain detention order – Whether issuance of second bill of lading effective or dominant cause of port authority's demand or plaintiffs' decision to abandon cargo

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The parties

The first plaintiff is Tata Iron & Steel Co Ltd of India. The second plaintiff is another Indian company, MMTC Ltd, and the third plaintiff is MMTC Transnational Pte Ltd, a Singapore company. The defendant is COSCO Container Lines of the Republic of China.

The original transactions

The transactions related to 10,000mt of chrome ore. The third plaintiff entered into an agreement to buy it from the second plaintiff which purchased it from the first plaintiff. The third plaintiff was not the end-purchaser of the chrome ore. It sold it on to TNW Pte Ltd, a Singapore company (`TNW`), which I am informed is now dormant.

The ore was shipped from Paradip, India to Huangpu in China on the defendant`s vessel Feng Hang. A bill of lading dated 24 July 1997 was issued by the defendant`s agents in India, The Oceanic Shipping Agency Pvt Ltd to the second plaintiff for the account of the first plaintiff. The consignee was `To order` and the notify party was TNW. The goods were stated as 9,999.8mt chrome ore.

TNW arranged for the United Overseas Bank Ltd to issue a letter of credit in favour of the third plaintiff in payment for the ore. When the third plaintiff sought payment under the letter of credit, discrepancies were found in the documents tendered. TNW assured the third plaintiff that it accepted the discrepancies, but it did not instruct the bank to do that. The letter of credit expired without payment on 14 August 1997.

The ore was discharged from the Feng Hang at Huangpu into the custody of the port authority there upon its arrival in August. The port authority released 4,500mt of the ore without presentation of the bill of lading upon discharge from the Feng Hang to a third party, the Loudi Ferroalloy Factory of Loudi City, Hunan.

The plaintiffs commenced these proceedings against the defendant, and obtained judgment in this action in respect of the loss of the 4,500mt on 31 March 2000. The trial before me was concerned with the ore remaining in the custody of the port authority.

The second set of bills of lading

On 28 July the defendant`s agents in Singapore, Costar Shipping Pte Ltd issued a second set of bills of lading for the same cargo. This set of bills of lading, also dated 24 July, identified the shipper as `TNW Pte Ltd for and on behalf of MMTC Limited a/c The Tata Iron & Steel Co Ltd`. The consignee was `To order` and the party to be notified was the Hunan Leadar International Metals and Minerals Corp. This set of bills of lading was issued and released to TNW against a letter of indemnity from TNW. The first set of bills of lading was not returned for cancellation and the consent of the plaintiffs was not obtained for this exercise.

In the event, the second set of bills of lading was not used to obtain the delivery of the remaining ore to any party.

The remaining ore at Huangpu

The remaining ore was subject of legal proceedings in China. The Hunan Provincial Native Produce Animal By Products Import & Export Corp (hereinafter referred to as `the Hunan corporation`) obtained a detention order from the Furong District People`s Court of Changshan City on 24 September 1997 in connection with a claim by the Hunan corporation arising out of an earlier transaction in manganese ore between it and TNW. The order prevented the port authority from releasing the remaining ore while it was in force.

The order was in force till 24 April 1998 when it was lifted. This was apparently brought about by further dealings between TNW and the Hunan corporation whereby TNW sold the remaining ore to the Hunan corporation.

When the Hunan corporation claimed the remaining ore, the defendant disputed its claim, and the matter was brought before the Guangzhou Maritime Court. The Hunan corporation`s claim was dismissed at the first instance, but on appeal, the Guangdong High Court held in its favour on 16 July 1999.

While this was going on, the plaintiffs took steps to dispose of the ore when they did not receive payment from TNW. They were hampered in their efforts because of the uncertainty over their ability to take delivery of the ore.

The plaintiffs and the defendant entered into negotiations to overcome the problem. They came to an

agreement the terms of which were set out by the plaintiffs` solicitors on 8 May and confirmed by the defendant on 14 May 1998. The agreement provided that:

> *(1) [The plaintiffs] will present the original Bill of Lading No. 1 dated 24 July 1997 ("the Bill of Lading") at your office in Singapore, and such presentation of the Bill of Lading at Singapore will be deemed as presentation to [the defendant] (or their agents) at the discharge port (Huangpu).*
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> *(2) [The defendant] agrees that the presentation of the Bill of Lading at Cosco KSH`s office in Singapore as aforesaid amounts to presentation at the discharge port and will not require a further presentation of the Bill of Lading to be made at the discharge port.*
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> *(3) Upon presentation of the Bill of Lading as aforesaid, [the defendant] shall issue two delivery orders covering the entire shipment of 9,999.800MT of chrome ore to the party nominated by [the plaintiffs].*
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> *(4) The aforesaid delivery order(s) shall be provided at [the plaintiffs`] option to [the plaintiffs] in Singapore or to such of their nominated agents at Huangpu, as the case may be.*
>
> *(5) [The defendant] confirms that the cargo remaining at Huangpu will be delivered against presentation of their delivery order(s) provided that the lien/detention order imposed by the Hunan Local and Animal By Products Imports and Exports Corporation is not in force.*
>
> *(6) In the event that the said lien/detention order remains in force at the time of presentation of the said delivery order(s), and [the plaintiffs] require the Bill of Lading for the purposes of any legal proceedings to lift the said lien/detention order, or to otherwise assert their rights to obtain delivery of the cargo, [the defendant] irrevocably and unconditionally undertakes to return the Bill of Lading to [the plaintiffs] upon request being made for the same.*
>
> *(7) The proposal is made strictly without prejudice to all rights and remedies of [the plaintiffs] against [the defendant] in respect of their claims against [the defendant], whether in rem or in personam, for breach of contract and/or conversion of the cargo of 9,999.800MT of chrome ore shipped under Bill of Lading No. 1 dated 24 July 1997 from Paradip India to Huangpu China which rights and remedies are expressly reserved and acknowledged by [the defendant] to be so reserved. Similarly, [the plaintiffs] acknowledge that any rights and defences that [the defendant] may have against them in respect of [the plaintiffs`] claims (with (**sic**) rights and defences are hereby not admitted) are also expressly reserved.*

> *For the avoidance of doubt once the aforesaid terms are accepted, this Amended Proposal constitutes a binding agreement between the parties in relation to the presentation of the Bill of Lading and the delivery of the remaining cargo at Huangpu.*

Pursuant to the agreement, the plaintiffs presented the original bill of lading on 15 May and received two delivery orders, one for 4,500mt of the chrome ore and the other for the balance 5,500mt on 27 May.

While the plaintiffs were making the arrangements with the defendant, they were also looking for buyers for the ore, and were successful with the arrangements for the delivery of the ore in place.

The first plaintiff`s related company in Hong Kong, Tata South-East Asia Ltd (`TSEA`) found a buyer, Glory Profit Development Ltd (`Glory Profit`), for the remaining ore. For the sale to proceed, the remaining ore was surveyed to determine its quantity. The survey showed that there was 4,848.82mt of ore at Huangpu port.

To the plaintiffs` disappointment the remaining ore was not released because of difficulties with the port authority. The first problem was over the levying of an interest penalty of 15% per month for port charges in arrears, amounting to US$230,032. This was resolved in September 1998 when the port authority reduced the amount substantially.

The second problem was the request by the port authority that TSEA issue a letter of indemnity to protect it from any liability it may incur in releasing the remaining ore. This demand was withdrawn in November 1998 after negotiations.

The final obstacle was the port authority`s insistence in December 1998 that the quantity of remaining ore was to be taken as 5,499.80mt. It was not acceptable to the plaintiffs because the figure was contrary to the survey, and was arrived at simply by deducting the 4,500mt released from the quantity stated in the original bill of lading.

With that disagreement, there was no release. As time passed, conditions for a resolution worsened when storage costs grew and chrome ore prices fell, and Glory Profit withdrew from the purchase.

When no resolution was at hand on 29 January 1999, the plaintiffs abandoned the cargo to the port authority as the accumulated storage charges exceeded the prevailing market value of the ore.

The issues

The defendant accepted in the course of the trial that it breached its contract of carriage and was negligent as carrier when it issued the second set of bills of lading, but it disputed that its actions caused the plaintiffs` loss. Consequently the plaintiffs identified the issues for trial as, firstly whether the defendant`s breaches in contract and tort caused the plaintiffs to suffer loss, damage and expense and secondly, the measure of damages the plaintiffs are entitled to.

It is useful to review the defendant`s actions in connection with the ore. There was the wrongful issue of the second set of bills of lading for which the defendant accepted responsibility. However, there was no clear link between the second bill of lading and the detention order which prevented the port authority from releasing the ore.

Counsel for the plaintiffs submitted that the Hunan corporation must have relied on the second bill of lading to establish TNW`s ownership of the chrome ore to obtain the detention order. No evidence was presented to support this submission. No copies of the documents filed in the application for the detention order were produced, or evidence from anyone who has read the documents or has knowledge of the circumstances leading to the issuance of the detention order. There may be different ways for the Hunan corporation to assert that the chrome ore belonged to TNW. For example, TNW could have offered the ore for sale as its property without reference to that bill of lading and that may be relied on in the application. The plaintiffs accepted that the bill of lading may not have been issued when counsel submitted that:

> *Whether Hunan Provincial presented a copy of the second set of bill of lading ...* ***or some other document****, the important point to note is that the evidence before the Furong District Court must have shown that the chrome ore belonged to TNW. [Emphasis is added.]*

There was no basis to infer that the second bill of lading was used to obtain the detention order without referring to the application itself.

In any event the detention order was lifted on 24 April 1998, and the parties came to the agreement on 14 May whereby the plaintiffs were to present the original bill of lading to the defendant in Singapore in exchange for two delivery orders for the collection of the ore from the port authority.

Each party had done its part under the agreement. The bill of lading was presented and the delivery orders were issued. By the concluding paragraph of the agreement of 14 May that

> *For the avoidance of doubt once the aforesaid terms are accepted, this Amended Proposal constitutes a binding agreement between the parties in relation to the presentation of the Bill of Lading and the delivery of the remaining cargo at Huangpu*

the parties confirmed that the acceptance of the terms constituted a binding agreement on the presentation of the bill of lading and the delivery of the remaining ore. The plaintiffs do not assert that the defendant had not discharged its obligations under the agreement.

There was no delivery because the port authority insisted the acceptance of its quantification of the remaining ore. The plaintiffs considered the condition to be unreasonable. I will not pass judgment on that as the port authority is not a party in these proceedings and that issue may yet come up in other proceedings here or in China.

It suffices to say that when the port authority imposed that condition the second bill of lading and the detention order no longer presented any difficulties. Even if it is assumed that the port authority was wrong to insist on the agreement and to refuse to release the ore without it, the demand and refusal had nothing to do with the second bill of lading or the detention order.

The causation issue

Counsel for the plaintiffs set out the position succinctly that

> *A claimant can recover damages for a breach of contract or in tort where that breach (or wrong) was the "effective" or "dominant" cause of the loss ... The courts adopt a "common sense" approach in interpreting the facts of each case in determining whether a breach was the cause of the loss or merely the occasion for the loss.*

This reflects the settled law stated in ***Chitty on Contracts*** (28th Ed) at para 27-024:

> ***Requirement of a causal connection***. *The import issue in remoteness of damage in the law of contract is whether a particular loss was within the reasonable contemplation of the parties, but causation must first be proved: there must be a causal connection between the defendant`s breach of contract and the claimant`s loss. The claimant may recover damages for a loss only where the breach of contract was the "effective" or "dominant" cause of that loss. The courts have avoided laying down any formal tests for causation: they have relied on common sense to guide decisions as to whether a breach of contract is a sufficiently substantial cause of the claimant`s loss. The answer to whether the breach was the cause of the loss or merely the occasion for the loss must "in the end" depend on "the court`s common sense" in interpreting the facts.*

and in ***Clerk & Lindsell on Torts*** (18th Ed) at para 2-06:

> ***The "but for" test***. *The first step in establishing causation is to eliminate irrelevant causes, and this is the purpose of the "but for" test. The courts are concerned, not to identify all of the possible causes of a particular incident, but with the effective cause of the resulting damage in order to assign responsibility for that damage. The "but for" test asks: would the damage of which the claimant complains have occurred "but for" the negligence (or other wrongdoing) of the defendant? Or to put it more accurately, can the claimant adduce evidence to show that it is more likely than not, more than 50 per cent probable, that "but for" the defendant`s wrongdoing the relevant damage would not have occurred ... It is worth bearing in mind that the "but for" test functions as an exclusionary test, i.e. its purpose is to exclude from consideration irrelevant causes. The fact that the defendant`s conduct is found to be a cause, applying the "but for" test, is not conclusive as to whether he should be held responsible in law since the function of the causal enquiry in law is to determine which causes have significance for the purpose of attributing legal responsibility. It is sometimes said that the law seeks the* ***causa causans*** *(effective factor) rather than the* ***causa sine qua non*** *(factor(s) without which damage could not have occurred). [Emphasis is supplied.]*

I found that the plaintiffs` case did not meet the `but for` test. There was no evidence that the second bill of lading was used by the Hunan corporation to obtain the detention order. No link was established between that and the second bill of lading or the detention order.

Even if the `but for` element was established, the actual effect of the second bill of lading on the remaining ore has to be considered. The ultimate and effective obstacle to the collection of the ore was the port authority`s insistence on the acceptance of its figure on the quantity of ore remaining and this was an independent decision of the port authority. If the port authority requires the collecting party to accept its quantification of any cargo or remaining cargo to be collected, it would make the demand whether a second bill of lading was issued or not. In any event, the order was lifted well before the plaintiffs abandoned the remaining ore. The issuance of the second bill of lading cannot be said to be an effective or dominant cause of the demand or the decision to abandon the remaining ore in any sense.

Conclusion

As the plaintiffs failed to prove that their loss was caused by the defendant it was unnecessary to deal with the damages issue and their action was dismissed with costs.

I was informed that the defendant made an offer to settle on 22 June 2001 which was not accepted. In view of that, and the fact that the defendant only admitted its breach of contract and negligence as carrier in the course of the trial, I ordered that the defendant is to have two-thirds of its costs on a standard basis up to 22 June and on an indemnity basis thereafter.

Outcome:

Claim dismissed.