Pan United Shipping Pte Ltd v Cendrawasih Shipping Pte Ltd [2004] SGHC 32

Case Number : Adm in Per 600075/2002

Decision Date : 23 February 2004

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : Gan Seng Chee and Goh Wee Ling (Ang and Partners) for plaintiff; Brij Raj Rai and Ramesh Appoo (Just Law LLC) for defendant

Parties : Pan United Shipping Pte Ltd — Cendrawasih Shipping Pte Ltd

Admiralty and Shipping – Carriage of goods by sea – Cargo carried on board vessel lost – Cargo owners commenced action against shipowners – Whether shipowners were proper parties to be sued – Whether the vessels were demise chartered to third parties

23 February 2004

Tan Lee Meng J:

1 The defendants, Cendrawasih Shipping Pte Ltd ("Cendrawasih"), who were sued by the plaintiffs, Pan United Shipping Pte Ltd ("Pan United"), for damages for failing to deliver a cargo of steaming coal that was shipped on board their vessel, the *ASP-1,* a dumb barge that was towed by their tug, the *Samudra Perkasa II,* contended that they were not liable for a number of reasons, one of which was that the wrong party had been sued. They contended that as they had demised the *ASP-1* and the *Samudra Perkasa II* to PT Armada Arung Samudra ("PT Armada"), Pan United ought to have sued PT Armada instead. At the end of the preliminary hearing on whether or not the two ships had been demised, I ruled that they had not been demised for reasons stated below.

Background

2 Pan United claimed that they are the lawful holders and indorsees of a bill of lading for a cargo of 7,681.5mt of steaming coal that was shipped from Bengkulu, Indonesia, to Kantang, Thailand, in October 2000 on board Cendrawasih's dumb barge, the *ASP-1*, which, as has been mentioned, was towed by the shipowner's tugboat, the *Samudra Perkasa II.*

3 After the *ASP-1* and the *Samudra Perkasa II* sailed from Bengkulu for Kantang, they encountered bad weather and ran aground on a coral reef and in shallow waters in the vicinity of Aroih Raja Channel in Indonesia. As a result of the grounding, the cargo was washed overboard and lost. Pan United, which claimed to have suffered a loss amounting to US$246,729.78, instituted the present action to recover this sum, or alternatively, damages. They asserted that Cendrawasih breached Art III of the Hague Rules, which had been incorporated into the contract of carriage, by sending the vessels to sea in an unseaworthy state. They also alleged that the cargo had been stowed on deck without their consent.

4 For more than two years after the loss of the cargo in question, Cendrawasih did not inform Pan United that the *ASP-1* and the *Samudra Perkasa II* had been demise chartered to PT Armada. It was only on 18 October 2002, some three months after they filed their defence in July 2002, that Cendrawasih claimed for the first time that they were not the proper defendants because the *ASP-1* and the *Perkasa Samudra II* had been demised to PT Armada on 19 July 2000. By then, Pan United could no longer sue PT Armada for the loss of the cargo of coal because their claim, if any, against the latter had become time barred.

5 This turn of events took Pan United by surprise. Pan United alleged that the demise charterparty of 19 July 2000 was a sham and had been fabricated so that neither Cendrawasih nor PT Armada, the alleged demise charterer, would be liable to them for the loss of the cargo of coal. They added that even if there had been a demise charterparty, it is clear from *Pacol Ltd v Trade Lines Ltd (The Henrik Sif)* [1982] 1 Lloyd's Rep 456 and *The Stolt Loyalty* [1995] 1 Lloyd's Rep 598 that it was unconscionable for Cendrawasih to rely on the demise charterparty to avoid liability as they never informed Pan United of the alleged charterparty before the latter's claim against PT Armada had become time barred and had misled Pan United by granting them an extension of time for instituting legal proceedings for the loss of the cargo.

6 Pursuant to an order of court dated 19 November 2003, the following preliminary issues were to be determined before the trial:

(a) whether the tug *Samudra Perkasa II* and the barge *ASP-1* were demise chartered by the defendants to PT Armada at the material time of the incident leading to the loss and/or damage to the plaintiffs' cargo in or about October 2000 pursuant to the Bare Boat Carrier Contract dated 19 July 2000 as alleged; and

(b) if the said vessels were on demise charter by the defendants to PT Armada at the material time as alleged, whether the defendants are estopped from denying that they were parties to the bill of lading no 017/ASP-X/00 and/or relying on the said Bare Boat Carrier Contract to deny liability to the plaintiffs.

Whether the ships were demised

7 Cendrawasih claimed that the *ASP-1* and the *Samudra Perkasa II* were demised to PT Armada for obvious reasons. A demise charterer is *pro hac vice,* and for the duration for the charter, the "owner" of the vessel. One important consequence of such a charterparty is that a bill of lading signed by the master is, without more, binding on the demise charterer and not the shipowner.

8 Whether a ship has been demised depends on whether or not the shipowner has "parted with the whole possession and control of the ship, and to this extent, that he has given to the charterer a power and right independent of him and without reference to him to do what he pleases with regard to the captain, the crew, and the management and employment of the ship" (*per* Lord Esher MR in *Baumwoll Manufactur von Scheibler v Gilchrest & Co* [1892] 1 QB 253 at 259). In a Straits Settlements case, *D'Almeida v Gray* (1856) 1 Kyshe 109 at 114, McCausland R pointed out:

> Mere words of letting and hiring will not of themselves invest a party with the possession of the ship, if the other provisions of the instrument and the nature of the contract qualify and restrain the words, and shew that the hiring and letting were not used in their positive sense and signification, but as mere terms of contract for the whole capacity and use of the vessel, and not as words of demise of the entire hull of the ship.

9 In the present case, Cendrawasih failed to establish that the *ASP 1* and the *Samudra Perkasa II* had been demised to PT Armada. No satisfactory explanation was given as to why the existence of the alleged demise charterparty of 19 July 2000 was not revealed until October 2002, more than two years after the grounding of the vessels in question, and why the plaintiffs' counsel were finally shown the alleged demise charterparty only on 2 December 2002, after repeated requests to inspect it.

10 Cendrawasih's director and main witness, Mr David Sng, who claimed to have signed the

alleged demise charterparty on 19 July 2000, testified unsurprisingly that he signed only one charterparty for the demise of *ASP-1* and the *Samudra Perkasa II* on that day. However, Pan United's counsel, Mr Gan, pointed out to Mr Sng that the original charterparty dated 19 July 2000 that was tendered to the court was totally different from a copy of a charterparty, also dated 19 July 2000, found in the defendants' bundle of documents. This took Mr Sng aback and when asked why he claimed to have signed only one charterparty when he had signed two charterparties for the demise of the two vessels on the same day, he took a long time to think before saying that he had made a mistake and that PT Armada's director, who also signed both charterparties, had made a similar mistake. This led Mr Gan to suggest that Mr Sng signed charterparties as and when he was asked by his counsel to submit documents for the purpose of the trial and that the documents that purportedly evidenced the existence of a demise charterparty were not genuine.

11 Whether or not one of the two demise charterparties allegedly signed on 19 July 2000 was a mistake, it should be noted that many of the important obligations assumed by the demise charterer under both versions of the alleged demise charterparty of 19 July 2000 were performed by Cendrawasih and not by PT Armada. The assumption by a shipowner of obligations which ought to have been assumed by the charterer under a demise charterparty has been taken as an indication that the charterparty, if entered into, is not one by demise (see, for instance, *Boustead v Clarke* (1835) Straits Law Reports 391 and *D'Almeida v Gray* ([8] *supra*) although it ought to be borne in mind that the fact that some restrictions have been put on the use of the vessel will not, without more, prevent a charterparty from being one by demise (see *Baumwoll Manufactur von Carl Scheibler v Christopher Furness* [1893] AC 8). In the present case, although both versions of the alleged charterparty dated 19 July 2000 required an "on hire survey report" to be conducted and paid for by PT Armada before possession of the vessels was handed over, no such survey was carried out. Neither was the guarantee required under the charterparty for due performance of the demise charterer's obligations furnished by PT Armada. Furthermore, PT Armada admitted that they did not, as was required under both versions of the demise charterparty, insure the vessels.

12 It should also not be overlooked that although the alleged charterparty of 19 July 2000 provided that the demise charterers were responsible for damage to and loss of the *ASP-1* and the *Perkasa Samudra II,* Cendrawasih made no claim against PT Armada for the loss of the *ASP-1* or for damage sustained by the *Perkasa Samudra II.* It is also worth noting that Cendrawasih, and not PT Armada, made claims for general average contribution. These facts strengthened Pan United's argument that the *ASP-I* and the *Perkasa Samudra II* were not demised to PT Armada on 19 July 2000.

13 As for payment of the charter hire, the terms of payment provided for under the alleged charterparty were not complied with by PT Armada. Cendrawasih admitted that they did not invoice PT Armada for the charter hire and that they did not issue receipts to PT Armada for charter hire allegedly paid by the latter. In fact, no credible evidence was submitted to prove that charter hire for the *ASP-1* and the *Perkasa Samudra II* had indeed been paid by PT Armada to Cendrawasih. Reference was made to the transfer of funds by PT Armada to Cendrawasih on a few occasions but I was not convinced that these small sums were necessarily for the charter hire for the demise of the *ASP-1* and the *Perkasa Samudra II*.

14 Admittedly, the master of the *Perkasa Samudra II*, Mr Marwant Thalib, testified that he was employed by PT Armada but he could not state unequivocally that PT Armada were demise charterers rather than managers of the vessel. It was also noted that Cendrawasih failed to adduce any evidence to substantiate their assertion that Pan United knew that they were dealing with PT Armada from the very start and that discussions between Pan United and PT Armada made it very clear that the shipowner had no hand in the shipment of the lost cargo of coal.

15 To prop up their case, Cendrawasih contended that there was nothing unusual about the demise charterparty of 19 July 2000 with respect to their barge, the *ASP-1*, and their tugboat, the *Samudra Perkasa II*, because they had a course of dealing with PT Armada, as far as demise charters are concerned. As proof of this, Cendarawasih produced a copy of a demise charterparty dated 19 September 1999 (the "first September 1999 charterparty") for the demise of two vessels to PT Armada. These vessels were a tugboat, the *Gasindo 9*, and a barge, the *Gasindo 18*, which was subsequently renamed the *ASP-1.* However, this other earlier charterparty for the *Gasindo 9* and the *Gasindo 18* only served to advance Pan United's argument that Cendrawasih was in the habit of producing far too many charterparties to the court whenever it suited their purpose.

16 The first September 1999 charterparty is flawed for many reasons. For a start, in September 1999, Cendrawasih had not become the owners of either the *Gasindo 9* or the *Gasindo 18.* Mr Sng, Cendrawasih's main witness, testified that Cendrawasih purchased the *Gasindo 9* in 2000. He also confirmed in para 3 of his affidavit of evidence-in-chief that Cendrawsih purchased the *Gasindo 18* in June/July 2000. It was thus not possible for Cendrawasih to have demised the *Gasindo 9* or the *Gasindo 18* to PT Armada in September 1999.

17 Secondly, while the *Gasindo 9* was chartered together with the *Gasindo 18* to PT Armada for $30,000 per month for three years under the first September 1999 charterparty, she was also chartered together with another vessel, the *Gasindo 15,* for $30,000 per month for three years under another demise charterparty (the "second September 1999 charterparty") that was executed on the same day as the first September 1999 charterparty. Mr Sng could not explain how the *Gasindo 9* could be chartered together with different vessels under two separate charterparties for the same period of time. All he could say after much hesitation was that the first September 1999 charterparty was a mistake as the second vessel in that charterparty ought to have been the *Gasindo 15* and not *Gasindo 18*. In other words, in both charterparties, the *Gasindo 9* should be demised together with the *Gasindo 15.* This attempt by Mr Sng to gloss over matters does not really help Cendrawasih's case for if in both the first September 1999 charterparty and the second September 1999 charterparty, the vessels demised by Cendrawasih to PT Armada were the *Gasindo 9* and the *Gasindo 15,* a new prickly question arises as to why Mr Sng and PT Armada's representative had to sign two charterparties on the same day for the same period of charter for the two ships.

18 Thirdly, although the *Gasindo 9* was renamed the *Samudra Perkasa I* in 2001, the *Gasindo 9* was also referred to in the second September 1999 charterparty as the *Samudra Perkasa I*. Counsel for Pan United submitted that this was yet another reason why the alleged charterparty in question could not have been signed in September 1999.

19 After taking all circumstances into account, I had no doubt whatsoever that the *ASP-1* and the *Samudra Perkasa II* had not been demise chartered to PT Armada on 19 July 2000 and I made a ruling to this effect. In view of my finding on the first preliminary issue, it was not necessary for me to consider the second preliminary issue posed to the court.

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