Pan-United Shipyard Pte Ltd v India International Insurance Pte Ltd
[2000] SGCA 49

Case Number : CA 1/2000

Decision Date : 12 September 2000

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ

Counsel Name(s) : Navinder Singh and Ung Tze Yang (Joseph Tan Jude Benny) for the appellants; Jainil Bhandari and Kelly Yap (Rajah & Tann) for the respondents

Parties : Pan-United Shipyard Pte Ltd — India International Insurance Pte Ltd

Insurance – Insurance policy indemnifying assured as owner of vessel – Ship repairers sued by third party for damage to another vessel during repair of ship – Whether ship repairers entitled to indemnity as "owner of vessel", for legal costs incurred in defending action, when causing damage to third party while repairing ship – Whether indemnity for legal costs subject to specified deductible sum

(delivering the judgment of the court): This is an appeal against the decision of Goh Joon Seng J where he refused the appellant`s claim under an insurance policy taken out with the respondents, an insurer. The central issue is on the construction of a term in the policy relating to its scope.

The background

The facts giving rise to the claim under the policy are largely undisputed. On 22 January 1992, Pan United Shipyard Pte Ltd (`Pan United`), who are shipping builders and repairers, contracted with Ranger Shipping Pte Ltd (`Ranger Shipping`) to convert a bulk carrier The Ikopa into a clean-product tanker (`the conversion contract`). Under the conversion contract, the title and risk in The Ikopa were vested in Pan United until delivery of the vessel was effected to Ranger Shipping.

On or about 25 January 1992, Pan United, acting through their brokers, Frank B Hall insurance Brokers (S) Pte Ltd, obtained a Collective Policy of Insurance (`the policy`) with the respondents (hereinafter called `the insured`), to insure the vessel and the attendant risks. The policy covered risks during the conversion of The Ikopa and was expressly stated to be subject to, inter alia, the Institute Time Clauses (ITC) for Builders` Risks. Besides Pan United, the insureds included Petroships Pte Ltd and/or Ranger Shipping and/or Asian Lift Pte Ltd for their respective rights and interests. The policy was expressed to cover `hull and machinery, equipment, outfits and everything connected therewith in respect of a bulk carrier IKOPA to be converted to a clean product tanker`.

The conversion works to The Ikopa were done during the period from February 1992 to January 1993. As part of those works, grit blasting and spray painting were carried out on the vessel. As it so happened, at the same period, a yacht, the El Corsario (`the yacht`), was also undergoing warranty and docking works at the neighbouring shipyard of Kvaerner Fjellstrand, which premises were located next to Pan United.

Some more than two years later, in June 1995, Pan United received a claim from the owners of the yacht, Malec SA (`Malec`), alleging that the grit blasting and spray painting works carried out by Pan United on The Ikopa had caused damage to the yacht. The insurers were accordingly notified of the claim. However, by a letter dated 4 October 1995, the insurers denied liability under the policy on the grounds that firstly, the claim did not fall within the scope of cl 19.1.1 of the policy and secondly, that even if it did, the exemption in cl 19.3.10 applied to exclude the claim.

On 31 August 1996, Malec, as the owners of the El Corsario, instituted Suit 1627/96 against the appellants and Kvaerner Fjellstrand, claiming for damage caused to the yacht. Malec alleged that Pan United`s servants and/or agents had been negligent in carrying out the grit blasting and spray painting works. As the respondents had rejected liability to indemnify Pan United, the latter conducted their own defence of the claim.

On 6 February 1998, pending the hearing of Suit 1627/96, Pan United filed the present proceedings against the insurers, claiming for, inter alia, a declaration that, in the event that they were held liable for the claim made by Malec, they were entitled to be indemnified by the insurers under cl 19 of the policy.

On 25 August 1998, Suit 1627/96 was eventually settled on the terms that the claim of Malec against Pan United be dismissed but with no order as to costs. Consequently, on 1 March 1999 the appellants amended their claim in the present action and sought instead for a declaration that, pursuant to cl 19 of the policy, they were entitled to be indemnified by the respondents for the legal costs they had incurred in defending Suit 1627/96. The legal costs so incurred amounted to $146,193.96.

Relevant terms of the policy

We shall now set out the clauses in the policy which are relevant to this case:

> *Clause 19*
>
> *19.1 The Underwriters agree to indemnify the Assured for any sum or sums paid by the Assured to any other person or persons by reason of the Assured becoming legally liable,* ***as Owner*** *of the Vessel, for any claim, demand, damages and/or expenses, where such liability is in consequence of any of the following matters or things and arises from an accident or occurrence during the period of this insurance: [Emphasis added.]*
>
> *19.1.1 loss of or damage to any fixed or movable object or property or other thing or interest whatsoever, other than the Vessel, arising from any cause whatsoever in so far as such loss or damage is not covered by Clause 17. [Clause 17 refers to liability of the Assured arising from collision involving the Vessel.]*
>
> *19.1.2 any attempted or actual raising, removal or destruction of any fixed or movable object or property or other thing, including the wreck of the Vessel, or any neglect or failure to raise, remove, or destroy the same.*
>
> *19.1.3 liability assumed by the Assured under contracts of customary towage for the purpose of entering or leaving port or maneuvering within the port.*
>
> *19.1.4 loss of life, personal injury, illness or payments made for life salvage.*
>
> *19.2 The Underwriters agree to indemnify the Assured for any of the following arising from an accident or occurrence during the period of this insurance.*
>
> *19.2.1 the additional cost of fuel, insurance, wages, stores, provisions and port*

charges reasonably incurred solely for the purpose of landing from the Vessel sick or injured persons or stowaways, refugees, or persons saved at sea.

19.2.2 additional expenses brought about by the outbreak of infectious disease on board the Vessel or ashore.

19.2.3 fines imposed on the Vessel, on the Assured, or on any Master Officer crew member or agent of the Vessel who is reimbursed by the Assured, for any act or neglect or breach of any statute or regulation relating to the operation of the Vessel, provided that the Underwriters shall not be liable to indemnify the Assured for any fines which result from any act neglect failure or default of the Assured their agents or servants other than Master Officer or crew member.

19.2.4 the expenses of the removal of the wreck of the Vessel from any place owned, leased or occupied by the Assured.

19.2.5 legal costs incurred by the Assured, or which the Assured may be compelled to pay, in avoiding, minimizing or contesting liability with the prior written consent of the Underwriters.

Clause 10

10.1 No claim arising from a peril insured against shall be payable under this insurance unless the aggregate of all such claims arising out of each separate accident or occurrence (including claims under clauses ... 19 ... exceeds - ... in which case this sum shall be deducted.

(The schedule sets out the exclusion sum to be $50,000).

Decision below

In the court below, the learned trial judge held that the indemnity which the insurers provide under cl 19.1 is a limited one. It relates only to liability arising `as owner of the vessel`. The claim of Malec arose out of alleged negligent carrying out of the works by Pan United as repairers. The alleged liability in no way arose on account of the fact that Pan United were the owners of the vessel. Accordingly, he ruled that the claim does not come within cl 19.1 and thus the insurers are not liable to indemnity Pan United. He also went on to rule that even if he were wrong on that and that the insurers were liable to so indemnify Pan United, the insurers` liability is subject to the deduction of $50,000 as provided by cl 10.

We should add that the insurers had also raised another ground to contend that they were not liable. They said that the `pollution and contamination` exemption provision in cl 19.3.10 would operate to exclude the claim. The learned trial judge did not think it necessary to go into a consideration of cl 19.3.10.

Scope of cl 19.1

Before us the same issues mentioned in the preceding two paragraphs were canvassed. We will first deal with the question of the extent of coverage provided in cl 19.1, as it could be decisive. Before doing so, there is, however, a preliminary point which we should briefly touch on. It would be noted that the claim of Malec was eventually settled. Pan United did not have to pay any compensation to Malec. But they did suffer losses to the extent of having to incur legal costs. On the authority of **Forney v Dominion Insurance Co Ltd** [1969] 1 Lloyd`s Rep 502, it is clear that if it is shown that the insurers` denial of liability under cl 19.1 was wrongful then Pan United would be entitled to claim from the insurers the legal costs incurred in resisting Malec`s claim.

The insurers` case is that in order for cl 19.1 to apply, it must be established that the assured`s liability to a third party was incurred by the assured `as owner of the vessel` and not in any other capacity. They contended that for a claim to fall within cl 19.1 the character of the assured being the `owner` of the vessel must be an essential ingredient giving rise to the liability; it was not meant to be merely descriptive of the assured`s identity or status. In support, they cited **Sturge v Hackett** [1962] 1 Lloyd`s Rep 117 and **Rigby & Anor v Sun Alliance & London Insurance Ltd** [1980] 1 Lloyd`s Rep 359, the two cases which were relied upon by the trial judge.

In ***Sturge v Hackett*** , the insured sought indemnity under a Householder`s Comprehensive Policy which covered his liability `as occupier` of a flat which he had rented. The insured caused damage to the flat as a result of his negligent act and was sued by the owner of the flat for the damage. In determining whether the policy covered the damage caused, the court had to consider whether the insured was liable `as occupier` of the flat. McNair J held at p 124 that:

> ***the phrase `All sums for which the Assured (as occupier ...) may be held legally liable` in the section of the policy headed `Liability to the Public` clearly relates, and relates only, to a well-defined group of liabilities imposed upon occupiers of premises. The words `as occupier` connote that occupation is an essential ingredient of the liability and are not merely descriptive of the identity or status of the person to whom liability attaches*** *... As it seems to me, the material words of the policy are words of `legal art` within the principle stated by Lord Sumner in* ***London and Lancashire Fire Insurance Co Ltd v Bolands Ltd*** *[1924] AC 836, at p 846, and cover those liabilities which the law imposes upon the occupier because he is the occupier and admit of no ambiguity. [Emphasis added.]*

On appeal, the Court of Appeal upheld this construction of the words `as occupier` (see **Sturge v Hackett** [1962] 1 Lloyd`s Rep 626) although the appeal was allowed on a different point. Diplock LJ stated at p 631:

> *In our view, the learned judge was right in law in holding that the question whether Colonel Hackett`s liability falls within the occupier`s liability clause depends upon whether the fire that caused the damage started upon premises of which he was the occupier.*

The approach taken in ***Sturge v Hackett*** was endorsed and followed in the later case, ***Rigby & Anor v Sun Alliance & London Insurance Ltd*** , where the court dealt with a policy on buildings which contained a clause that read:

> *Additional Protection ... the Company will pay to the Insured ... (13) the amount*

> *of claimant`s damages (including costs and expenses)* ***arising out of the Insured`s liability at law attaching solely as owner (not occupier) of the house*** *in respect of ... [Emphasis added.]*

The insured in that case had claims made against him by his neighbours because of damage caused to their property by the encroachment of the roots of oak trees on the insured`s land. The issue was whether the insured was entitled to be indemnified under the policy for those claims. Mustill J was of the view that the claims did not fall within the scope of the policy as they were not of a type in which proof of ownership of the house by the insured was necessary to establish the claim. This was how the learned judge construed the relevant clause in the policy (at p 36):

> ***The liability must attach to the insured `as owner`. These words are apt to describe not the capacity of the insured or the history of the liability, but the character of the liability itself. To my mind, they denote that the status of the insured as owner is an integral part of the cause of action against him****, and not merely that in practice he would never have found himself in the position of receiving a claim and being held liable if he had not been the owner of the premises. This view corresponds with the opinions expressed on a very similar point by Mr Justice McNair and Lord Justice Diplock delivering the judgment of the Court of Appeal in* ***Sturge v Hackett*** *[1962] 1 Lloyd`s Rep 117 at p 124, and [1962] 1 WLR 1257. [Emphasis added.]*

Applying the principles enunciated in these two cases in the construction of cl 19 of the subject policy, the learned trial judge ruled that the policy could not be invoked by Pan United as liability for the claim brought by Malec against Pan United did not depend on the fact that Pan United were the owners of The Ikopa. The claim arose because of their liability as ship repairers/builders.

Pan United challenged the dichotomy drawn by the trial judge between acts of the appellants as `owners of the vessel` and the appellants as `repairers of the vessel`, a distinction they said is wholly unreal. They argued that at all material times they were both the owners as well as the repairers of the vessel. Thus, any purported distinction of their acts in those two capacities would be quite errorneous. It could not have been the intention of the parties to make such a distinction.

On their part, Pan United relied upon the case of **Christmas v Taylor Woodrow Civil Engineering Ltd & Anor** [1997] 1 Lloyd`s Rep 407. It concerned a floating platform which was owned by the first defendants and was on demise charter to the second defendants at the material time. The platform was insured with the plaintiffs and both the defendants were named as the assureds in the policy. The policy incorporated the Institute Time Clauses Hull Port Risks which provided, inter alia,

> *10.1 The Underwriters agree to indemnify the Assured for any sum paid by the Assured to any other person or persons by reason of the Assured becoming legally liable, as owner of the Vessel, for any claim, demand, damages and/or expenses, where such liability is in consequence of any of the following matters ... [para 4]. Including cover in respect of liability arising out of goods ... being lifted and/or transported mechanically or otherwise by the insured equipment and/or craft for the purpose of any contract for works or otherwise.*

At the relevant time, the second defendants were using the platform for a crane to perform some

works for a water authority. Under the contract, the second defendants were required, on completion of the works, to clear away all the material and rubbish from the work site. On the day of the incident, while the platform was jacked up, it was struck by an exceptionally large wave which lifted it off the legs, causing the crane to fall off the platform and sink. Substantial expenses were incurred by the second defendants in removing the crane from the seabed. They sought to recover the expenses from the plaintiffs under the policy. The learned Deputy Judge (Kershaw QC) while noting that the clause provided that the assured should become `legally liable as owner` and the second defendants were only charterers, and not owners, nevertheless ruled that the second defendants were entitled to be indemnified under the policy. The learned judge held that the policy must be read as a whole and that the word `owner` should be construed in the light of the fact that the second defendants, the charterers, were also an assured under the policy.

By analogy, Pan United contend that here the policy should be construed in the light of the fact that Pan United, who were also named as one of the assureds under the policy, were then both the owners and repairers. It was absurd to say that the act giving rise to liability was that of a repairer rather than an owner.

It seems to us that Kershaw QC was able to reach the decision he did for two reasons. First, he held that if there was any conflict between the standard provisions of the Institute Time Clauses and the typed wording in the condition, the standard clauses would have to give way to the typed conditions. There, the charterers were named as an assured. Thus, the clause should be suitably modified to take account of that. It should be construed to mean that the charterers, as an insured, were to be indemnified against any liabilities which they might be under, against which an owner would be indemnified, if sued as owner. Second, the charterers became liable to remove the crane from the seabed `not in any way as charterer or because it was a charterer by demise and an owner would have been liable, but purely and simply and solely because of its contractual obligation to the water authority.`.

In ***The Institute Clauses*** by N Geoffrey Hudson and JC Allen (3rd Ed, 1999) the learned authors made the following comments in relation to the phrase `by reason of the Assured becoming legally liable, as owners of the vessel` in cl 19.1 of the ITC for Builders` Risk (at pp 241-242):

> *The nature of the liability which must attach to the assured in order to found a claim under this part of the clause differs from that which must attach to an assured under the Running Down Clause (RDC) in the Hull policy in two respects.*
>
> *(a) it is wider than the RDC-type liability in that it is not limited to tortious liability, ie that which arises `by way of damages`; but*
>
> *(b) it is narrower, in that it must be liability which attaches to the assured `as owner of the vessel`.*

In making these commentaries, the learned authors relied upon ***Rigby v Sun Alliance*** and ***Christmas v Taylor Woodrow*** .

We think that ***Christmas v Taylor Woodrow*** can simply be explained on the basis that the second defendants there were effectively the owners, having demise chartered the platform. The charterers` liability would have been that of the owner but for the demise charter, and as the charterers were named as an assured, they must be viewed to have stepped into the shoes of the owner. The nature

of the liability there was not in question, unlike our present case.

With respect to counsel for Pan United, he failed to appreciate that the point is not so much whether the act is an act of an owner or a builder/repairer but the basis upon which the liability or loss arose. Did it arise because they were the owners? That is the question. It is the capacity in which liability is incurred that is crucial.

Counsel also relied upon **Reardon Smith Line Ltd v Yngvar Hansen-Tangen** [1976] 3 All ER 570 to contend that in construing a commercial contract, regard should be had to the factual background and the commercial purpose. We do not dispute that. Indeed, insurance policies are to be construed according to the principles of construction applicable to commercial contracts generally. There are no peculiar rules of construction applicable to the terms and conditions in a policy which are not equally applicable to the terms of other commercial contracts. We also accept the principle that the literal meaning of words should not be permitted to prevail where it would produce an unrealistic and generally unanticipated result, as, for example, where it would unwarrantably reduce the cover which it was the purpose of the policy to afford: **Morely v United Friendly Inc plc** [1993] 1 Lloyd`s Rep 490.

But we must point out that in the present case the `interest` which the policy was intended to insure was `hull and machinery equipment outfits and everything connected therewith in respect of a bulk carrier IKOPA to be converted into a clean product tanker` for the period 14 February to 13 December 1992. When the policy was extended for a period of one month from 14 December 1992 to 13 January 1993, the interest covered was stated to be `builders` risks in respect of vessel constructed under hull number 98 pursuant to a building contract dated 22 January 1992 as amended by ...`. It would thus be seen that the policy was meant to protect the vessel under conversion. Contrary to the assertion of Pan United, the policy is not a general policy to cover liabilities to third parties arising from the acts of Pan United or the other named insureds of the policy although the policy also covered (under cl 17.1) damage caused to another vessel following collision with the insured vessel. The coverage under cl 17.1 is expressly stated to be an additional coverage: `The indemnity provided by this clause shall be in addition to the indemnity provided by the other terms and conditions of the insurance.` Bearing the foregoing in mind, it is clear why the protection and indemnity afforded under cl 19.1 is limited to liability incurred as owner of the insured vessel. Pan United are therefore not correct to contend that cl 19 seeks to provide cover for third party damage in addition to what is provided for in cl 17. There is, in truth, no general regime to extensively cover third party losses.

A perusal of the statement of claim filed by Malec against Pan United shows that it was purely a claim in negligence against Pan United, the shipyard. It was never asserted by Malec that Pan United`s status as the owner had anything to do with the claim. Their status, as owners of the vessel, was completely irrelevant to the claim.

Does this construction, as contended by Pan United, lead to the result that cl 19.1 would be a wholly redundant clause? They argued that, on this construction, there would never be any instance where there would be liability under cl 19. This sweeping assertion is again not correct. An example of such a loss or liability arising where an owner like Pan United would have to bear would be where natural forces damaged the vessel under conversion or, due to such forces, the vessel damaged the property of a third party.

Accordingly, we agree with the trial judge that the claim by Malec against Pan United does not fall within cl 19.1 and the insurers are not liable to indemnify Pan United. This being sufficient to dispose of the appeal, it is unnecessary for us to go into the other two arguments canvassed, namely, the

scope of the exemption in cl 19.3.10, and whether the deduction specified in cl 10 is applicable to Pan United`s claim.

Question of deductibility

But we will say this much as regards the question of deductibility under cl 10, which would only arise if the claim of Pan United came within cl 19.1. Clause 10.1 provides that no claim is payable `unless the aggregate of all such claims arising out of each separate accident or occurrence` exceeds $50,000. Pan United argued that this clause applies only to the principal claim and not to a claim for legal costs. Such a claim for legal costs is not a claim arising from an accident or occurrence. We find the purported distinction between the principal claim and the costs incurred to be without merit. Clause 10.1 does not make such a distinction. The criteria provided in cl 10.1 is `each separate accident or occurrence.` It does not matter that several claims arise out of that accident. If a claim is made against an insurer and the insurer defends the claim on the insured`s behalf and the insured is required to pay the claim and costs, there can be no doubt that the insured is entitled to claim against the insurer for both the principal claim and the legal costs incurred and the insurer would be entitled to deduct the $50,000 and have to indemnify the insured only as to the remainder. Why should it make a difference if the claimant fails in his claim (or the claim is settled as in the present case) but the insured has to bear his own costs. Accordingly, we agree with the learned trial judge that had Pan United succeeded in showing that cl 19.1 applied, their claim for indemnity would be subject to the specified deduction of $50,000.

Judgment

In the premises, the appeal is dismissed with costs. The security for costs (with any accrued interest) shall be paid out to the respondents or their solicitors to account of the respondents` costs.

Outcome:

Appeal dismissed.

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