Sitra Wood Products Pte Ltd v Royal and Sun Alliance Insurance (S) Pte Ltd [2001] SGHC 204

Case Number : Suit 233/2000

Decision Date : 30 July 2001

Tribunal/Court : High Court

Coram : S Rajendran J

Counsel Name(s) : Govin Asokan and Henry Heng (Rodyk & Davidson) for the plaintiffs; R Govintharasah (Gurbani & Co) for the defendants.

Parties : Sitra Wood Products Pte Ltd — Royal and Sun Alliance Insurance (S) Pte Ltd

Insurance – Pecuniary loss insurance – Contract for sale of goods on fob and credit terms – Total loss of goods at sea – Whether buyer's payment of invoiced value of goods a gift/windfall – Presumption as to passing of property in overseas sales – When presumption can be rebutted – Insurance as a contract of indemnity – Whether payment ought to be taken into account in diminishing seller's loss – Whether seller has insurable interest – Seller's in action prejudicial to insurers – Whether seller can claim against insurers despite receiving full payment – art III r 6 Hague-Visby Rules

Judgment:

Cur Adv Vult

1. In a series of (five) separate contracts the plaintiffs, Sitra Wood Products Pte Ltd ("Sitra Wood"), sold timber and plywood products ("cargo") on FOB terms to SAS Ravate Distribution ("Ravate"), a buyer in the Reunion Islands. The contracts of sale incorporated Sitra Wood's General Terms and Conditions of Sale, the relevant provision of which were:

> Clause 3 "The Seller shall arrange for and on behalf of the Buyer the shipment of the Goods and the Seller shall not be liable to the Buyer for all loss and damage in respect of or in connection with such arrangement or the shipment of the Goods from the date of arrangement to final destination. The Buyer accept transhipment and part shipment of the Goods."
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> Clause 5 "The shipment of the Goods is at the risks of the Buyer and for all intents and purposes the risk in the Goods passes to the Buyer upon confirmation of this Sales Contract by the Buyer. If the Goods are sold to the Buyer on FOB basis or C&F basis, the Buyer is to insured the Goods up to 110% of the price of the Goods."
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> Clause 8 "If payment is by Letter of Credits, the Seller is not obliged to ship if the Letter of Credits is not issued in favour of the Seller or the terms and conditions of such Letter of Credits are not to the satisfaction of the Seller. If payment is on D/P basis (documents against payment), the Buyer is to pay the Seller immediately on presentation of documents and the Buyer is not entitled to take delivery of the Goods if such payment is not made and the Seller is entitled to claim against the Buyer for all loss and damage suffered by the Seller by reason of the Buyer's failure or refusal to pay the Seller on presentation of the documents for payment."
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> Clause 9 "The Seller is not liable to the Buyer if the goods are not shipped/delivered late "

> Clause 10 The property in the Goods shall only pass from the Seller to the Buyer after receipt of full payment by the Seller from the Buyer.
>
> Clause 11 "If there is any dispute between the Seller and the Buyer in respect of the Goods or this Sales Contract, the Buyer is not entitled to reject the Goods or to refuse to take delivery of the Goods and/or refuse to make payment of the Goods to the Seller and the Buyer is to make payment or to take delivery as provided herein without prejudice to the right of the Buyer to refer the dispute, controversy or claim (if any) for arbitration as provided in Clause 14 herein."

It was not disputed that the risk on the cargo was to pass to Ravate upon loading and that Ravate was obliged to and did insure the cargo.

2. On 25 June 1999, Sitra Wood also sought to insure the cargo. In making this application, Sitra Wood did not disclose to their insurers, Royal & Sun Alliance Insurance (S) Pte Ltd ("Royal & Sun") the details of the contracts for sale or that the sale was on FOB terms. Copies of the five invoices were faxed to Royal & Sun but all references therein to the sale being on FOB terms were blacked out or cancelled. However, the sentence "marine insurance and war risk covered by buyer" was not blacked out in some of the invoices.

3. Mrs Lim Guek Ching ("Mrs Lim"), the employee of Royal & Sun in charge of the matter, said that although Royal & Sun had not been specifically informed by Sitra Wood that the sales were on FOB terms, she assumed that - as was common in international trade - the sellers were taking out the insurance covers on behalf of the buyers. The evidence of Mrs Lim that that was a common practice in international trade was not challenged by Sitra Wood. Nothing very material, however, hinged on the circumstances under which the policies were issued as Royal & Sun did not, in their pleadings, raise any question of non-disclosure or fraud or dispute that the sales were all on FOB terms.

4. The total insured value of the cargo in the policies provided by Royal & Sun was US$642,803.14 - a sum in excess of the total invoice value - as Sitra Wood had asked for a 10% uplift in the sale price. Mrs Lim testified that such an uplift in the insured value would usually be made in order to cover miscellaneous charges and loss of profits at destination by the consignees where the policies were to be assigned or indorsed over to the consignees.

5. Ravate chartered a vessel, the "Arktis Queen", to ferry the cargo to the Reunion Islands. The loading of the vessel was completed on 28 June 1999 and she set sail for the Reunion Islands immediately thereafter. The invoices issued in respect of the cargo and the method of payment were as follows:

Invoice No. Date Amount Payment

*(1) SWP/4652/99 28.06.99 US$248,189.53 LC

(2) SWP/4653/99 28.06.99 US$ 21,418.57 D/A 90 days

(3) SWP/4654/99 28.06.99 US$102,658.47 D/A 90 days

*(4) SWP/4655/99 28.06.99 US$153,731.92 LC

(5) SWP/4656/99 28.06.99 US$ 58,370.01 D/A 90 days US$584,368.50

The 1st and the 4th invoices were to be paid by irrevocable letters of credit ("LCs"). The remaining three were to be paid by bills of exchange drawn by Sitra Wood on Ravate.

6. The voyage to the Reunion Islands was expected to take approximately 12 to 13 days. The vessel did not, however, reach the Reunion Islands. It sank in the Indian Ocean, off the Reunion Islands, on 9 July 1999, with total loss of cargo.

7. Sitra Wood, on 15 July 1999, submitted a claim to Royal & Sun under the policies for the insured total sum of US$642,803.14 in respect of the loss of cargo. Royal & Sun appointed WK Webster (International) Pte Ltd ("Webster") to investigate the claim and asked Sitra Wood to co-operate with Webster in the investigation.

8. On 13 October 1999 Webster, on behalf of Royal & Sun, rejected the claim by Sitra Wood. In their letter to Sitra Wood, Webster pointed out that the buyers had not rejected the bills of lading and other documents and suggested that Sitra Wood should direct its claim to its buyers. It would be relevant to set this letter out in full:

> "The goods were sold by you to your buyers on FOB terms. The payment term of the sale contracts is documents against acceptance (D/A) 90 days from the date of the bills of lading. The bills of lading (together with other documents, including invoices and bills of exchange) were endorsed and sent by you to your buyers and had not been rejected by your buyers.
>
> Investigations have also revealed that your buyers and/or their cargo insurers have made claims against and demanded security from the owners and/or P&I Club of the carrying vessel in respect of their losses and damages on account of the loss of the goods.
>
> It is clear that you have no insurable interest in the goods at the time of the casualty. Our principals, Royal & Sun Alliance Insurance (S) Ltd, are therefore under no liability whatsoever to you.
>
> Payment for two of the sale contracts, namely (i) invoice No. SWP/4655/99 for USD153,731.92, and (ii) No. SWP/4652/99 for USD248,189.53, are drawn under irrevocable letters of credit. Your claims should be directed to your buyers and/or the L/C issuing bankers, and they would no doubt claim from their cargo insurers.
>
> In the meantime, for your own interest, you should ensure that all your rights against third parties, including the buyers, L/C issuing bankers, carriers and bailees are properly preserved and exercised.
>
> For the avoidance of doubts, please note that our principals reserve all their rights and defences, and all measures and steps taken by them, their servants or agents in investigating into this matter or otherwise shall not under any circumstances be considered as a waiver of any of their rights and defences or otherwise prejudice any of their rights and defences."

Sitra Wood had, on 4 October 1999, in fact received the payments from Ravate in respect of invoices 2, 3 and 5. The payments under the LCs, in respect of invoices 1 and 4, were, however, still outstanding. This was because Ravate had requested, and Sitra Wood had granted, extensions of

time for these payments. The payments under the LCs were thereafter effected on 27 October 1999 and 29 November 1999. The factual position therefore was that Sitra Wood had received full payment under all five invoices and did not suffer any loss as a result of the sinking of the Arktis Queen.

9. The shipment of the cargo was, as provided in cl 5 of the General Terms and Conditions, at the risk of Ravate. Ravate was also required, under that clause, to insure the cargo up to 110% of its value. As noted earlier, Ravate had insured the cargo as required. Upon receiving news that the Arktis Queen had sunk, Ravate made a claim for the loss with its insurers. Ravate's insurers accepted liability under their policy and paid the claim in two tranches: the first on 31 August 1999 and the second on 11 October 1999. In turn, Ravate executed a document subrogating to its insurers all rights of recourse against anyone in respect of the loss of the cargo. Ravate also surrendered to its insurers the original bills of lading which had been endorsed by Sitra Wood.

10. Sitra Wood initially took the position that it could not claim reimbursement from Royal & Sun in respect of the payments that Ravate had made. This is evident from the fact that after receiving the sum of US$578,680.15 (being the full invoice value less bank charges) from Ravate, Sitra Wood, by letter dated 13 December 1999 issued a credit note to Royal & Sun in respect of the US$578,680.15 received from Ravate. In the credit note, Sitra Wood described the US$578,680.15 from Ravate as "payment received from our customer". In that letter, Sitra Wood only sought from Royal & Sun the difference between the sum received and the insured sum of US$642,803.14, namely, US$64,122.99. Royal & Sun rejected that reduced claim and Sitra Wood placed the matter in the hands of their solicitors, M/s Rodyk & Davidson.

11. Sitra Wood's case in the present proceedings is that as the cargo had perished at sea before delivery to Ravate, Ravate was not obliged to pay for the cargo and that the payments made by Ravate to Sitra Wood were in the nature of a gift/windfall and therefore not to be taken into account in assessing the loss suffered by Sitra Wood. In that context, it is relevant to note that there was not the slightest hint of that case in Sitra Wood's letter of 13 December 1999.

12. It is also relevant to note that even with the benefit of legal advice, ie even after Rodyk & Davidson came into the picture, Sitra Wood's claim against Royal & Sun remained the same. Rodyk & Davidson, in their letter dated 17 December 1999 to Webster, took the following position:

> "In relation to the point raised in your letter to our clients dated 13 October 1999 that they have no insurable interest in the goods, we would draw your attention to the fact that the contracts were subject to our clients' General Terms and Conditions, a copy of which is enclosed herewith. Clause 10 of the General Terms and Conditions provided that:
>
> > 'The property in the Goods shall only pass from the Seller to the Buyer after receipt of full payment by the Seller from the Buyer.'
> >
> > We are instructed by our clients that when the abovenamed Vessel sank on 9 July 1999, they have not received the full payment from the buyers. In the circumstances, property in the goods remained with our clients and it follows therefore that they do have an insurable interest in the goods.
> >
> > We are further instructed by our clients that it was only on or about 30 November 1999 that our clients received the

> final settlement from the Buyers to the sum of US$584,366.50 [the credit note gave the figure as US$578,680.15]. However, as you would be aware, the full insured value of the goods is US$642,803.14. We have therefore been instructed by our clients to claim the balance sum of US$58,436.64.
>
> Further, we have been instructed by our clients to claim additional bank interest and charges incurred by our clients as a result of the delay in the matter herein to the sum of US$5,686.35."
>
> (Emphasis added.)

As can be seen, there was again not the slightest suggestion that the payments were in the nature of a gift/windfall to Sitra Wood. To the contrary, Rodyk & Davidson describe the money received from Ravate as "the final settlement from the Buyers".

13. Webster, by letter dated 24 December 1999, pointed that fact out to Rodyk & Davidson and asked Rodyk & Davidson to clarify what exactly was the insured peril that had operated that gave Sitra Wood a valid claim under the policies. One month later, on 24 January 2000, Rodyk & Davidson responded as follows:

> "Our clients wish to remind you that the insurance coverage on the goods, as agreed between both parties, was based on the invoice value of the goods plus 10%. As stated in our previous letter dated 17 December 1999, our clients have since received payment of the sum of US$584,366.50 from the Buyers, being the invoice value of the goods. However, as you would no doubt be aware, the goods were insured above the invoice value and it is in this respect which our clients are claiming for. That is, the sum of US$58,436.69 being the 10% above the invoice value of the goods."
>
> (Emphasis added.)

The position, therefore - more than one month after engaging solicitors - was that Sitra Wood was still only claiming the 10% uplift from Royal & Sun. There was not the slightest suggestion, even at this late stage, that the payments by Ravate were anything other than normal payments for sums due under the invoices. The idea that the payments from Ravate was a gratuitous payment by way of gift had - as counsel for Royal & Sun, Mr Govintharasah, put it - not as yet, been born.

14. Webster responded to Rodyk & Davidson on 31 January 2000. In that response they stated:

> "We are afraid that your letter referred to does, in our view, appear to contradict itself. Your clients have confirmed that they have been paid, in full, for the goods in question. As we understand it, the receivers of the cargo had also arranged for insurance coverage of these goods and, we believe, have been compensated by their insurers. Thus, your clients were paid in terms of the sale contract. Therefore, we cannot understand how it is that you can maintain that your clients had an insurable interest in the cargo at the time of the loss. They have suffered no loss and thus there is no loss upon which to attach the 10% which you are now claiming.

Whilst we understand your contention that the 10% is in effect a loss of profits insurance, this can only attach if there is a loss incurred. In this particular instance, your clients have received payment in terms of the contract of sale as was required. For them to have received this payment, it is obvious that risk and title in the goods had already passed to the buyer. The buyer was thus obliged to pay for the goods. In such a circumstance, your clients cannot also have an insurable interest.

In the circumstances, therefore, we continue to maintain that your clients are not entitled to any further compensation."

Nothing material transpired between the parties for some weeks thereafter.

15. On 14 March 2000 Rodyk & Davidson, for the first time, made a claim against Royal & Sun on behalf of their clients for the full insured sum of US$642,803.14 and threatened legal action if the claim was not met. The basis of this claim, as given in their letter, was:

> " pursuant to the terms of the insurance policies above, you are liable, as insurers, to indemnity our clients for the loss suffered. Decided cases have established that in a marine insurance policy, where the value of the goods insured is agreed between the parties, the value as stated in the policy will be conclusive between the insured and the marine insurer. Further, following Section 68 of the Marine Insurance Act, in the event of total loss of the insured goods, there shall be a full recovery of the insured value. Decided cases in this area of marine insurance law have also applied the full-recovery principle as stated above in a valued marine insurance policy.

Further, our clients had insurable interest in the Goods because, under their contracts of sale with the buyers of the Goods, our clients had reserved the title to the Goods until fully paid for the same.

At the time of the total loss, the buyer of the Goods had not paid our clients for the Goods. As such, our clients retained their interest in the Goods at the time of loss. It therefore follows that our clients had an insurable interest in the Goods and all the material time.

> We have also been instructed by our clients that they have received a sum of US$584,366.50 from the Buyers of the Goods. However, such sums received does not reduce the loss suffered by our clients as a result of the sinking of the Vessel. The payment from the Buyers of the Goods were completely voluntary and out of goodwill. Following the local Court of Appeal case of Malayan Motor And General Underwriters (Pte) Ltd v Abdul Karim & Anor, the payment from the Buyers is not a payment which ought to be taken into account in diminishing the loss against which the contract of insurance, which is a contract of indemnity, was given. It was never intended by the Buyers of the Goods, when making the payment, that you are to benefit form (sic) the payment. As such, following the decision in that case, you are accordingly liable for the full insured value of the Goods as agreed in the above insurance policies."
>
> (Emphasis added.)

By this letter Rodyk & Davidson threatened legal action against Royal & Sun if the claim was not met in full.

16. Webster, on 21 March 2000, responded to say that:

> "We are indeed very surprised to note that you now wish to claim the full sum insured. This would appear to us to be a case of double indemnity. You have in fact confirmed that the contractual price has been paid to your clients. They have thus not suffered a loss in respect of this amount. We fail, therefore, to see and understand what loss can possibly be caned in this instance. The policy which your clients took out was in effect a seller's interest policy. The buyers have paid your clients because, as we understand it, they have also been indemnified by their insurers."

and rejected the claim contained in Rodyk & Davidson's letter.

17. On 6 May 2000, Sitra Wood commenced the present proceedings against Royal & Sun for the sum of US$642,803.14. The issues that arise for consideration by the court as summarised by Mr Govin Asokan (counsel for Sitra Wood) in his closing submissions are:

> (A) Did Sitra Wood have an insurable interest in the cargo?
>
> (B) Were the payments by Ravate in settlement of the invoices or were they a gift and/or windfall or otherwise such that they ought not to be taken into account in diminishing and/or extinguishing Sitra Wood's loss?
>
> (C) Can Royal & Sun, as a matter of law, rely on cl 16 - the "sue and labour" clause - of the Institute Timber Trade Federation Clauses ("ITTF Clauses")?

Mr Govintharasah's summary of the issues was in almost identical terms.

18. Although there was consensus between the parties as to the issues that arose for determination in these proceedings, Mr Govintharasah complained that Mr Asokan, in his submissions, was repeatedly referring to and raising points which were ancillary and/or extraneous and/or irrelevant to the issues to be decided. There is substance in this complaint. Mr Asokan has, in his lengthy submission, delved at length into several issues not germane to the issues at hand. In this judgment, I will confine myself to the three issues that the parties have agreed are the relevant ones.

19. I will first deal with issue (B), namely, that as the cargo had perished at sea Ravate was under no obligation to effect payment and that the payments (totally about US$580,000) made by Ravate were merely as goodwill and therefore in the nature of a gift/windfall and not to be taken into account in diminishing or extinguishing Sitra Wood's losses.

Gift/windfall.

20. Immediately after the vessel had been loaded, the relevant documents were forwarded through banking channels for acceptance by Ravate. Mrs Abeda Patel ("Mrs Patel"), a director of Ravate and a witness called by Sitra Wood, could not recall if Ravate accepted the documents before or after the vessel sank but the banking documentation produced showed that by 21 July 1999 the documents under the two LCs maturing on 27 September 1999 had been accepted by Ravate and by 29 July 1999 the three bills of exchange maturing on the same date had been accepted. It was not in dispute that thereafter Ravate asked for and Sitra Wood agreed to extend the maturity dates and, as noted earlier, full payments under the invoices were made by 29 November 1999.

21. Under cl 9 of the contract (quoted in paragraph 1 above), Ravate was contractually obliged to pay for the cargo whether or not the cargo arrived at the Reunion Islands. The fact that Ravate paid

for the cargo inspite of the vessel having sunk was consistent with this contractual obligation. Under cl 5 of the contract, the risk of shipment was on Ravate. Also, this was an FOB transaction and under cl 5 Ravate was required to insure the cargo to safeguard itself against cargo risk. This Ravate did and, upon learning of the loss of the cargo, Ravate claimed for and obtained reimbursement from the insurers for the loss suffered. The conduct of Ravate in insuring the cargo and settling the amounts due under the invoices was in accordance with the terms agreed between the parties.

22. In the above scenario, for Sitra Wood to now claim that Ravate made the payments merely out of goodwill is, in my view, a highly implausible claim. To highlight just one aspect, if Ravate was making the payments purely out of goodwill, there would be no need to obtain Sitra Wood's consent for the extensions in respect of the maturity dates. It may be that, if the documents had not been accepted before the loss of the cargo, Ravate could have tried, using the loss as the reason, to delay or avoid its contractual obligations. To that extent, the fact that Ravate did not resort to such conduct could be said to be an expression of goodwill but that sort of "goodwill" cannot detract from the fact that, the documents being in order, Ravate, under its contract with Sitra Wood, was obliged to accept the same. Notwithstanding Mrs Patel's evidence that Ravate would have to inspect the cargo before accepting it, these transactions were - as cll 9 and 11 amply indicate - transactions where the parties dealt only in documents.

23. In any event, if indeed Ravate made the payments merely out of goodwill, the payments could not be categorised as "losses" to Ravate vis--vis its insurers. Ravate cannot have it both ways. If it was a gift, Ravate would have no claim against its insurers. If these were gratuitous payments, Ravate could not and should not have handed the endorsed bills of lading to its insurers or subrogated its rights against the carrier to the insurance company. If, because of the loss of cargo, Ravate wished to cancel the contract, it should have so informed Sitra Wood and declined to accept the bills of lading and other documents. Sitra Wood could then have claimed indemnity from Royal & Sun and subrogated its rights against Ravate and/or the carrier to Royal & Sun. Under the contracts, the risk of shipment was on Ravate. It seems to me that, the cargo having perished during shipment, Ravate decided to honour its contract with Sitra Wood by paying for the cargo on the credit terms agreed and then obtain reimbursement from its insurers.

24. One of the arguments advanced by Mr Asokan in support of his submission that the payments by Ravate were gratuitous was the fact that cl 10 of the contract provided that the property in the goods would pass to the beneficiary only after receipt of full payment. In support of this submission, Mr Asokan, cited the headnotes in the case of Mitsui & Co Ltd & Anor v Flota Mercante Grancolombiana SA, The Ciudad de Pasto, The Ciudad de Neiva [1989] 1 All ER 951. The headnotes read:

> "Arising out of the presumption in s 19 of the 1979 Act that where by the bills of lading shipped goods were deliverable to the order of the seller the seller reserved the right of disposal and the property in the goods did not pass to the buyer until the conditions imposed by the seller had been fulfilled, it was to be presumed that where only part of the purchase price had been paid the condition imposed by the seller for the passing of the property in the goods was payment of the balance of the purchase price, since in the ordinary way a seller would not wish to part with the property in his goods if they were shipped overseas until he had been paid in full. On the facts, that presumption had not been displaced since the sellers took the bills of lading to their own order and consequently retained the property in the goods until the balance of the purchase price had been paid. Since the second plaintiffs had been unable to show that their claim failed. The appeal would therefore be allowed."

Mr Asokan pointed out that just as in Ciudad de Pasto, in the present case too the bills of lading were "to order" and at the time of the loss of cargo payment had not been made.

25. The facts in Ciudad de Pasto briefly were that the sellers had sold a consignment of prawns to the buyer and had received 80% of the purchase price before shipment. There was no evidence before the court as to the actual terms of sale and no evidence as to when the balance 20% was to be paid or whether it was paid. The court had to determine whether the property in the cargo had passed to the buyer upon shipment, thereby entitling the buyer to sue the carrier in tort. The court found that property had not passed to the buyer. In arriving at that conclusion, Staughton LJ said at page 957:

> "It seems to me that in the ordinary way a seller will not wish to part with the property in his goods if they are shipped overseas until he has been paid in full."

But, as Mr Govintharasah pointed out in his submissions, Staughton LJ having said that went on to quote, with approval, the following paragraph in Benjamin's on Sale of Goods:

> "There is support for that view again in Benjamin para 1484:
>
> 'In overseas sales, there is, therefore, a fairly strong presumption that the seller does not intend to part with property until he has either been paid or been given an adequate assurance of payment. Of course the presumption may be rebutted: for example, by the fact that buyer and seller are associated companies (so that the seller does not need security for payment) or by the fact that the contract expressly provides for credit'."
>
> (Emphasis added.)

It is clear from the above quotation that the presumption that a seller does not intend to part with property can be rebutted if credit terms are extended to the buyer. In the absence of evidence before the court in that case as to the actual terms of the sale, the court was not prepared to infer that the prawns had been sold on credit and found that property had not passed. That, however, is not the position in our present case. The sale to Ravate by Sitra Wood was a credit sale.

26. It is the intention of the parties as manifested in their contract terms and in their dealings that determine when property in goods passes. As Sitra Wood had extended credit to Ravate, property in the goods would pass when Ravate agreed to the terms of that credit. In this case, Ravate was in physical possession of the property from the date of shipment and property in the goods passed when Ravate in exchange for the shipping documents (in particular the endorsed bills of lading) accepted the credit terms.

27. In support of its claim that Ravate made the payment out of goodwill, Chew Hua Mong ("Chew"), the Managing Director of Sitra Wood, procured from Ravate the following letter dated 24 February 2000:

> "We refer to the above invoices and the 5 consignments of plywood and timber you agreed to supply to us under various sales contracts which were lost at sea in July 1999 after shipment.
>
> This is to confirm that as a gesture of goodwill and for our continuing business relationship, we have made payments to you in respect of the above captioned

invoices according to the invoices price for the said consignments."

I use the word "procured" because it seems to me, on the evidence I have heard, that the idea that the payments were not contractual but purely out of goodwill was an idea born in hindsight. Sitra Wood had, upon receiving the payments from Ravate, abandoned its claim in respect of those payments. Even after Rodyk & Davidson came into the picture, that continued to be the position of Sitra Wood. In abandoning its original claim, Sitra Wood was necessarily taking the position that the payments received from Ravate were in satisfaction of the invoices. Indeed, that is what Sitra Wood (and Rodyk & Davidson) told Webster at that time. US$584,366.50 is not a small sum of money. If indeed Ravate made that payment as a gift, one would expect that the first thing that Sitra Wood would do is to tell its solicitors about their good fortune in having a buyer, who, out of sheer generosity and goodwill had paid in full for the lost cargo. If Rodyk & Davidson had been informed of this, the correspondence between Rodyk & Davidson and Royal & Sun would have reflected this fact.

28. It seems to me that the truth of the matter was that the payments made by Ravate were not payments made out of sheer goodwill. Ravate paid because Ravate, having accepted the credit and having undertaken the cargo risk, felt obliged to pay. Chew, however, came to know from his discussions with Rodyk & Davidson that if the payments had been by way of a gift or goodwill, then Sitra Wood would, in addition to the payments received from Ravate, be able to claim the full insured value. Sensing an opportunity of making some money, Chew then spoke to Ravate and managed to obtain from Ravate the letter quoted above. Thereafter Chew gave instructions to Rodyk & Davidson based on Ravate's letter of 24 February 2000. I accept the submission of Mr Govintharasah that Sitra Wood's defence that the payments by Ravate were out of sheer goodwill was a defence concocted by Sitra Wood to bolster its claim.

29. In arriving at this conclusion, I am aware that Mrs Patel claimed authorship of the letter of 24 February 2000. That may well be so but that does not detract from the fact that she did so because Chew asked for such a letter. It is pertinent that the letter does not, in so many words, say that Ravate made the payments inspite of knowing that it was under no legal obligation to do so. It is also pertinent to note that Mrs Patel, in cross-examination, admitted that Ravate was contractually bound to pay for the cargo under the irrevocable LCs.

30. An insurance contract is a contract of indemnity. The underlying principle of such contracts, as clearly established in Castellain v Preston & Ors (1883) 11 QBD 380 is that the insurer is liable to the insured to the extent of the insured's loss and that the insured should not profit from his own loss.

31. In Castellain, a vendor contracted with a purchaser for the sale at a specified price of a house which had been insured by the vendor against fire. Before the date of completion, the house was damaged by fire and the vendor received the insurance money from the insurer. The purchase was afterwards completed, and the contracted price was paid to the vendor without any deduction on account of the damage caused by the fire. The (English) Court of Appeal held that the insurer was entitled to recover from the vendor the insurance monies received. To quote from the judgment of Brett LJ at 386:

> "The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say, which

> either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong."
>
> (Emphasis added.)

In Castellain, the purchaser need not have paid the contracted price. He could have sought an abatement in the price by reason of the fire and paid only the abated price. It seems to me that the payment, in that case, of the contracted price (to the extent of the difference between that price and the abated price) was much more in the nature of a gift than the payment in this case.

32. The principal authority relied on by Sitra Wood, in court, as well as in the very first letter written by Rodyk & Davidson claiming the full insured sum, was the decision of the Court of Appeal in Malayan Motor and General Underwriters (Pte) Ltd v Abdul Karim & Anor [1982] 1 MLJ 51. Mr Asokan emphasised, on several occasions in the course of his submissions, that the decision in the Malayan Motor case, being a decision of the Court of Appeal, was binding on this court.

33. The plaintiffs in the Malayan Motor case had purchased a consignment of timber from the vendors on c.i.f. terms for shipment to Hodeidah. At Hodeidah, a part of the cargo (to the value of US$17,757.40) was found missing. The vendors had at that time already assigned the all risks policy of marine insurance that they had taken out on the cargo to the plaintiffs. The vendors and the plaintiffs arrived at an understanding that the plaintiffs' bankers would deduct the value of the missing cargo from the sum payable to the vendors and that when the plaintiffs received payment from the insurance company for the loss, the plaintiffs would credit that sum to the vendors. When the claim was made the insurance company disputed liability on the ground that the plaintiffs, having been reimbursed by the vendors, had suffered no loss. In that factual context, Wee Chong Jin CJ, at first instance, in his unreported judgment in Suit No. 2718/77 held:

> "There was on the undisputed facts no money or other benefit received by the assured which ought to be taken into account in diminishing the loss against which the contract of indemnity is given. The fact that the plaintiffs have been compensated by their vendors, the assured is, in so far as concerns the defendant underwriters, res inter alios acta. The defendants as underwriters will be subrogated to the assured's right to recover the value of the missing timber from the carriers."
>
> (Emphasis added.)

and gave judgment for the plaintiffs against Malayan Motor and General Underwriters for the sum claimed of US$17,757.40. The Court of Appeal described the arrangement reached between the vendors and the plaintiffs as "a fair way of resolving their business relations" and upheld his decision.

34. Mr Asokan relied on Malayan Motor as authority for the proposition that only payments by the party who caused the loss could be taken into account as diminishing the injured party's loss. He based this submission on the following passage in the judgment of the Court of Appeal at 526 where, in distinguishing the case of Stearns v Village Main Reef Gold Mining Co Ltd (1905) 21 TLR 236, the Court of Appeal stated:

> "There the insurers had indemnified the assured: in our case nothing has been paid by the insurers. Another material distinction is in that case the assured was later compensated by the party that had caused the loss. In our case the

> assured has not (nor the assignees) received any payment from the carriers for the loss. The insurers therefore cannot assert, or even argue, that they are entitled not to make any payment."
>
> (Emphasis added.)

Mr Asokan submitted that the above dicta applied to the present case. He submitted that, as in the Malayan Motor case, Sitra Wood, in the present case, had not received any payments from the carrier. The fact that the payments were made by Ravate as a gift, he submitted, made those payments res inter alios acta and, following the decision in Malayan Motor, was not recoverable by the insurers.

35. I cannot accept that submission. The Court of Appeal, in my view, did not decide the Malayan Motor case on the broad basis that where compensation was paid by someone other than the carrier, the insurers are precluded from arguing that they need not make payment. All that the Court of Appeal was doing, in the above passage relied on by Sitra Wood, was highlighting the differences between the case they were considering and the case of Stearns. The basis of the Court of Appeal's decision is to be found in the sentence immediately following the passage relied on by Mr Asokan where Sinnathuray J, adopting the language used by Wee Chong Jin CJ, said:

> "The point to be emphasised is neither the assured (plaintiffs) nor the assignees (vendors) have received any money from anyone which as the learned Chief Justice has observed 'ought to be taken into account in diminishing the loss against which the contract of indemnity is given.' "

The question to ask therefore is: were the payments made by Ravate payments which ought to be taken into account in diminishing the loss against which the contract of indemnity was given?

36. On the facts as I have found them to be, Ravate made the payments to Sitra Wood under a contractual obligation to do so. It was therefore Ravate which suffered a loss when the Arktis Queen sank. Despite what Mrs Patel claimed, I find that it was because Ravate, at the relevant time, had accepted that position that Ravate agreed to make payments to Sitra Wood and thereafter, quite properly, had handed the bills of lading over to its insurers, subrogated to those insurers its rights against the carrier for the loss of the cargo and obtained payment in compensation of that loss from its insurers. In those circumstances, the payments by Ravate to Sitra Wood were, in my view, payments that clearly ought to be taken into account in diminishing the loss of Sitra Wood. As Sitra Wood has been paid in full for the cargo, Sitra Wood has suffered no loss. Their claim against Royal & Sun therefore fails.

Insurable interest.

37. Whether Sitra Wood had an insurable interest in the cargo has been dealt with above. This was a credit sale. That being so, Sitra Wood, even if it had an insurable interest at the time of loading, no longer had any such interest when Ravate accepted the terms of the credit and the endorsed bills of lading were handed over to Ravate. Besides, Sitra Wood - having been fully paid by Ravate for the cargo - suffered no loss. The question of whether it had an insurable interest is therefore academic.

Clause 16 - ITTF Clauses.

38. In its Defence, Royal & Sun had pleaded, in the alternative, that Sitra Wood was in breach of cl 16 of the ITTF Clauses in that Sitra Wood had failed to take reasonable measures to ensure that all

rights against carriers, bailees and other third parties were properly preserved. Sitra Wood, in its Reply, denied that it was in breach of cl 16. Sitra Wood further pleaded that Royal & Sun are estopped from relying on cl 16 of the ITTF Clauses and/or had waived the requirements of the said clause. As I have decided this case on the grounds that Sitra Wood's claim fails because Sitra Wood has not suffered any loss, it is not necessary for me to consider this issue. I only do so for the sake of completeness.

39. It was not in dispute that the ITTF Clauses were applicable in this case. Clause 16 provided as follows:

> "MINIMISING LOSSES.
>
> 16 It is the duty of the Assured and their servants and agents in respect of loss recoverable hereunder
>
> 16.1 to take such measures as may be reasonable for the purpose of averting or minimising such loss and
>
> 16.2 to ensure that all rights against carriers, bailees or other third parties are properly preserved and exercised and the Underwriters will, in addition to any loss recoverable hereunder, reimburse the Assured for any charges properly and reasonably incurred in pursuance of these duties."
>
> (Emphasis added.)

Sitra Wood was reminded of this obligation by Webster (see penultimate paragraph of Webster's letter to Sitra Wood dated 13 October 1999 quoted in paragraph 8 above).

40. By Article 111, rule 6, of the Haque Rules, there is a one-year time limitation within which suits against the carrier for damage to or loss of cargo is to be instituted. That rule specifies that such suits have to be brought instituted "within one year of their delivery or of the date when they should have been delivered". Sitra Wood did not commence proceedings against the carrier until 16 August 2000. The unchallenged evidence before me was that the voyage between Singapore and the Reunion Islands would take approximately 12 to 13 days. The Arktis Queen, in the normal course of events, would therefore have reached the Reunion Islands by about 11 July 1999. The suit commenced by Sitra Wood against the carrier on 16 August 2000 was therefore time-barred.

41. Mr Asokan submitted that Sitra Wood was not in breach of cl 16 of the ITTF Clauses as Royal & Sun had not specifically required Sitra Wood to commence proceedings against the carrier. In particular, Mr Asokan referred to Webster's letter of 13 October 1999 to Sitra Wood (paragraph 8 above) and pointed out that nowhere in that letter had Webster required Sitra Wood to file a writ for the benefit of Royal & Sun. To quote from Mr Asokan's submission:

> "The defendants (Royal & Sun) were not interested in the plaintiffs (Sitra Wood) filing a writ to protect the defendants' rights. They cannot now complain. They misled the plaintiffs and/or made them act on a mistaken basis. It is most unfair and/or inconscionable."

I could see nothing "unfair" or "unconscionable" in the conduct of Royal & Sun or Webster. The obligation to properly preserve the rights that Sitra Wood had, or might have had, against the carrier, bailees or other third parties, was on Sitra Wood. Royal & Sun by Webster's letter of 13 October 2000

had reminded Sitra Wood of this obligation. Sitra Wood, on its part, perhaps because it had received full payment from Ravate, did nothing, until 16 August 2000, in pursuance of this obligation. By its inaction, Sitra Wood has prejudiced Royal & Sun's right of subrogation.

42. The obligation of an assured to prosecute claims is summarised in Arnould's Law of Marine Insurance and Average (16th Ed at paragraph 1320) as follows:

> "Although it is clear that the assured must not actively prejudice the right of subrogation, it appears that there is no obligation on the assured, apart from express provisions in the policy, to take any active steps to prosecute claims, or to preserve time-limits, before his claim under the policy has been paid. There is, however, an express obligation on the assured under the Bailee Clause in the Institute Cargo Clauses to 'ensure that all rights against carriers, bailees or other third parties are properly preserved and exercised.' It is submitted that the effect of this important clause is to give the underwriter a cross-claim for damages, which in appropriate circumstances may amount to a full defence to a claim under the policy, in any case where the assured has failed to preserve a time-limit against the third party, or has committed some other breach of the obligations imposed by the clause."

There was in the present case, an obligation under cl 16 of the ITTF Clauses on the assured (Sitra Wood) to ensure that all rights against carriers, bailees or other third parties were properly preserved. Sitra Wood had breached this obligation. I accept the view expressed by Arnould that such a breach would give the underwriter a cross-claim for damages. As the breach in this case would result in Royal & Sun's right by way of subrogation becoming nugatory, such breach would be a full defence to Sitra Wood's claim under the policy for the invoiced value of the cargo.

43. For the above reasons, I dismiss with costs Sitra Wood's claim against Royal & Sun.

S. RAJENDRAN
Judge

30 JULY 2001
SINGAPORE