

AFS Freight Management (2000) Pty Ltd v Freight Links Express Pte Ltd
[2001] SGHC 272

Case Number : Suit 346/2001/Y
Decision Date : 19 September 2001
Tribunal/Court : High Court
Coram : Tan Lee Meng J
Counsel Name(s) : Sushil Sukumaran Nair and Chan Wei Meng (Drew & Napier LLC) for the plaintiffs;
Francis Goh Siong Pheck (Ari, Goh & Partners) for the defendants
Parties : AFS Freight Management (2000) Pty Ltd — Freight Links Express Pte Ltd

Judgment:

1. The plaintiffs, AFS Freight Management (2000) Pty Ltd (hereinafter referred to as "AFM 2000"), contended that their former sales and handling agents for sea freight, the defendants, Freight Links Express Ltd (hereinafter referred to as "FLE"), caused them loss by wrongfully withholding their cargo and by failing and/or refusing to carry out their contractual obligations to tranship or deliver cargo forwarded to them. FLE denied having breached their contractual obligations and made a counterclaim for the sum of US\$635,165.30, which they claimed was owed to them by AFM 2000.

A. BACKGROUND

2. Until August 2000, FLE and another company, AFS Freight Management Pty Ltd (hereinafter referred to as "AFS") had an agency arrangement, under which both companies agreed to act as exclusive agents for each other in sea freight consolidation services between Australia and Singapore. AFS owed FLE more than S\$1m for services rendered under the agency arrangement.

3. In early 2000, AFS wanted to sell their assets and goodwill. Discussions were held with the New American Consolidators Association (hereinafter referred to as "NACA") and it was finally agreed that Trident Logistics (Aust) Pty Limited (hereinafter referred to as "Trident"), a company within the NACA Group, would acquire the fixed assets and goodwill of the AFS Group. The acquisition, which was concluded on 18 August 2000, did not involve the taking over of the AFS Group's debts.

4. After the completion of the purchase, Trident incorporated a new company, AFM 2000, to run the business of sea freight consolidation previously conducted by AFS. This new company, which was keen to continue AFS' business links with FLE, proposed that a new agency agreement with FLE be signed. The agreement, which was left with FLE, was never signed. However, it is pertinent to note that FLE adopted the freight rates stipulated in the unsigned agreement in their dealings with AFM 2000.

5. FLE asserted that the AFS representatives and NACA's own representatives represented to them that AFM 2000 would assume the massive debt (hereinafter referred to as "the AFS debt") owed to them by the AFS group. They contended that on the basis that AFM 2000 would be liable for the AFS debt, they did business with AFM 2000. However, AFM 2000 asserted that it was made clear to FLE that Trident had merely purchased the business assets of the AFS Group and that there was no transfer of the liabilities and/or debts of the AFS Group.

6. In the early part of 2001, FLE realised that the AFS Group was in liquidation. Relations between FLE and AFM 2000 took a turn for the worse. According to AFM 2000, their customers started to complain from late February to March 2001 that consignments that had been shipped with them, and which had been forwarded to FLE as far back as January 2000, had not arrived at their intended final destination. AFM 2000 asserted that FLE's unreasonable conduct exposed them to potential claims from their customers. After paying FLE around US\$41,000, which FLE claimed was owed to them for services rendered, and a further sum under protest with respect to storage charges for the detained goods, the goods in question were finally released.

B. THE PLAINTIFFS' CLAIM AGAINST FLE

FOR WRONGFUL DETENTION OF CARGO

7. AFM 2000's claim against FLE centres around the consequences of what they claimed was the wrongful detention of their cargo in the first quarter of 2001. They asserted that whatever grouses FLE may have had against them, there was no justification for the detention of the cargo forwarded to FLE under agreed agency arrangements. AFM 2000 thus sought the following:

- (a) a declaration that FLE acted in breach of contract when they detained the cargo in question;
- (b) damages for breach of contract; and
- (c) the refund of the sum paid by them under protest for storage charges for the detained cargo.

8. FLE initially contended that they were not in breach when they detained AFM 2000's cargo because they had not been paid for their services under the agency arrangements with AFM 2000. However, FLE's senior vice-president, Mr Alex Ng, conceded during the trial that his company had acted without justification when they detained the said cargo. When cross-examined and when he was questioned by me, he said as follows:

Q. I put it to you that FLE had no basis to withhold cargo shipped to them by the plaintiffs in March 2001. Do you agree?

A. I agree.

Ct. You agree with the plaintiffs' counsel that what FLE did was wrong?

A. Yes.

9. When FLE's counsel, Mr Francis Goh, gave him an opportunity during re-examination to clarify his position, Mr Alex Ng reiterated that FLE had no right to detain the cargo in question when he said as follows:

Q. It was put to you that you had no basis for withholding the cargo in March 2001. You said that you agreed. Would you like to clarify the position

A. I stand by my earlier answer.

10. Whether or not Mr Ng conceded the point, there can be no doubt that FLE's detention of AFM 2000's cargo cannot be justified. FLE admitted that they gave AFM 2000 no notice whatsoever of their intention not to handle any more of the latter's goods. Mr Alex Ng said as follows during cross-examination:

Q. Prior to taking action to withhold AFM 2000's cargo, did FLE inform the latter that they would do so if no money was forthcoming?

A. No.

Q. AFM 2000 would have assumed that you would deal with their cargo as you had always done?

A. Yes.

Q. If you were going to hold their cargo, why did you not inform AFM 2000 about that?

A. I am not certain about that.

Q. You are a senior management person representing your company at this trial and yet you are unable to say why no warning was issued to AFM 2000 that you would withhold their cargo?

A. I cannot comment on that.

11. I thus hold that FLE breached their contractual obligations when they detained AFM 2000's cargo. Damages will be assessed by the Registrar. AFM 2000 are also entitled to a refund of the storage charges paid by them to FLE under protest to secure the release of their cargo and to costs.

C. FLE'S COUNTERCLAIM

12. I now turn to FLE's counterclaim, which relates to the allegation that AFM 2000 is responsible for the AFS debt of more than S\$1m. FLE's case, as pleaded, is that around August 2000, Mr Steve Reison, AFS' managing director and subsequently AFM 2000's chief operating officer, represented to them that the following terms will govern the future relationship between FLE and AFM 2000:

(a) AFM 2000 shall represent the AFS Group of Companies and FLE shall represent the Freight Links Group of Companies;

(b) AFM 2000 will be responsible for and settle the debts of the AFS companies; and

(c) AFM 2000 will make payments promptly when due for all new business.

13. FLE also asserted that in or about October 2000, two representatives of NACA and AFM 2000, namely Mr Bob Hackett, AFM 2000's managing director, and Mr Pece Gorgievski, the then vice-president of business development in the NACA Group, made the following representations to them:

(a) NACA were effectively the new owners of AFS;

(b) NACA wanted FLE to continue as AFM 2000's agents in Singapore;

(c) NACA was aware of the substantial debts owed by AFS to them and AFM 2000 will be responsible for settling the debts; and

(d) FLE will continue to work closely with Mr Steve Reison and Mr Scott Bell.

14. I have no hesitation in rejecting FLE's assertion that AFM 2000 had agreed to be responsible for the AFS debt for a number of reasons. FLE's witnesses contradicted one another and their hesitant answers did not convince me that their case rested on solid ground. To begin with, FLE's evidence as to when the alleged representations were made leaves much to be desired. Initially, they asserted that they relied on representations made to them in July 2000 and that these representations were subsequently repeated in writing. These assertions were contained in a letter from their solicitors, Ari, Goh & Partners, to AFM 2000's solicitors, Drew & Napier LLC, on 23 March 2001. The relevant parts of this letter are as follows:

2. The AFS companies, in the course of their dealings with our clients incurred total debts which presently amount to in excess of \$1,000,000.

3. In about July 2000, it was intimated by Mr Steve Reison and Scott Bell, who are presently with your clients that there was a change of ownership in the AFS group and that Australian Freight Services Ltd was to be renamed ... [AFM 2000] ... to manage the operations of the group. Our clients were given at the point to understand that they were dealing in effect with the same parties and that the changes were in line with the reorganisation being effected within the group. These oral representations were subsequently followed up in writing.

4. It was further represented by Mr Steve Reison and Mr Scott Bell ... [that AFM 2000] would continue to be responsible for the existing debts of the AFS companies

5. Our clients continued their business on the basis of the aforesaid. It transpired in about early March 2001 that the AFS companies were being placed under receivership Our clients have come to know that the AFS companies and [AFM 2000] are controlled by the same parties.

6. Our clients are by reason of the aforesaid facts entitled to lift the corporate veil vis--vis the aforesaid companies to show that they are owned and controlled by common parties. They will be making a claim against [AFM 2000] for the entirety of the sums due to them.

15. A comparison of the contents of the above letter and FLE's pleaded case will reveal fundamental flaws in FLE's position. Contrary to what was asserted in Ari, Goh & Partners' letter of 23 March 2001, FLE conceded during the trial that no representations were made in writing and no serious attempt

was made during the trial to pierce the corporate veil.

16. Secondly, although Ari, Goh & Partners' letter of 23 March 2001 referred to representations that were made in July 2000, FLE's Defence and Counterclaim did not refer to any such representations. Instead, reliance was placed on alleged representations made by Mr Steve Reison in August 2000 and by a NACA team in October 2000.

17. A question arises as to why the alleged representations that were allegedly made by Mr Steve Reison in August 2000 and by NACA's representatives in October 2000 were not referred to in Ari, Goh & Partners' letter of 23 March 2001. That the alleged representations by NACA's representatives are important to FLE's case was conceded by Mr Alex Ng, FLE's senior vice-president, who said as follows during cross-examination:

Q. The understanding reached with NACA's representatives in October 2000 is an important part of FLE's position that AFM 2000 had taken responsibility for payment of the AFS debt to FLE?

A. Yes....

18. Mr Ng could not shed any light as to why the important October 2000 meeting with NACA representatives and the August 2000 meeting with Mr Steve Reison were not referred to in Ari, Goh & Partners' letter of 23 March 2001. When cross-examined, he merely said as follows:

Q. Given that the entire basis of FLE's claim is based on representations made in August and October 2000, can you explain why no reference was made to those representations in this letter?

A. I have no explanation.

19. Apart from being unsure about when the misrepresentation of facts was made, FLE was also unclear as to what had been allegedly misrepresented. FLE was clutching at straws when they said that AFM 2000 must be taken to have assumed liability for the AFS debt because they had been told that it was "business as usual" and that after the formation of AFM 2000, Mr Steve Reison's business card was similar to that used by him when he was in AFS. The words "business as usual", if used, must be read in their proper context. More importantly, FLE's allegation that they thought that it was "business as usual" because Mr Hackett had represented to them in October 2000 that FLE could continue to work with AFS' stalwarts, Mr Steve Reison and Mr Scott Bell, cannot be believed. It is most unlikely that Mr Hackett would have represented to FLE that Mr Bell would be working with FLE for the simple reason that the latter did not join AFM 2000 or NACA. In any case, it is rather odd that after having asserted that FLE felt reassured that they could continue to work with Mr Scott Bell, FLE's Mr Alex Ng denied any knowledge of the fact that Mr Bell was not part of the AFM 2000 team.

When cross-examined, he said as follows:

Q. You were assured that FLE could work with Mr Steve Reison and Mr Scott Bell?

A. With both of them.

Q. How could that be when Mr Scott Bell did not join AFM 2000 or NACA?

A. I am not aware of that.

Q. Did you ever deal with Mr Scott Bell after August 2000?

A. No.

Q. In that case, you must have known that Mr Scott Bell had no role to play in the new company?

A. I am not aware of his specific role in AFM 2000.

20. It is important to note that Mr Alex Ng finally conceded that as far as he was concerned, it was his own perception that AFM 2000 had assumed liability for the AFS debt. When questioned by me, he said as follows:

Ct. Did Mr Reison tell you that AFM 2000 were going to pay the AFS debt?

A. No.

Ct. Is it your own understanding that AFM 2000 will pay the AFS debt?

A. Yes.

21. Apart from the uncertainties regarding the time and nature of the alleged representations made by AFM 2000, FLE did not act as if they really believed that AFM 2000 were responsible for the AFS debt. From the time FLE commenced business with AFM 2000 in August 2000, no notice was served on AFM 2000 regarding the amount owed by AFS until after AFS had gone into liquidation. Admittedly, Mr Lee Hock Seng, FLE's assistant vice-president, claimed that before Ari, Goh & Partners' letter of 23 March 2001 was sent to AFM 2000's solicitors, FLE had informed AFM 2000 of the amount owed by AFS. When cross-examined, he asserted as follows:

Q. Do you have any documentary evidence that prior to the letter of 2001, the plaintiffs were informed of the debt of the AFS Group?

A. There were letters from our financial controller.

Q. Are any of these letters in evidence?

A. They are with our financial controller.

Q. *Is it your personal evidence that letters were sent to the plaintiffs, demanding payment of the debts of the AFS Group?*

A. Yes.

(emphasis added)

22. Mr Alex Ng also asserted that FLE had sent AFM 2000 monthly statements with respect to the AFS debt. When cross-examined, he said as follows:

Q. Is there any documentary evidence to show that before your lawyers wrote a letter of demand, FLE informed AFM 2000 of the amount owed by AFS?

A. No, not that I know of.

Q. I put it to you that no statement of accounts was sent to AFM 2000 with respect to the AFS debt because they did not assume AFS' liability.

A. We have monthly statements sent to overseas trading partners.

Q. You just said that FLE did not send AFM 2000 any documentary statement on the amount owed by AFS.

A. I was talking about a letter of demand. We sent monthly statements of accounts of the amount owed by AFS to AFM 2000.

23. FLE's financial controller, Mr Thomas Woo, contradicted Mr Lee and Mr Ng. When cross-examined, he stated that he took no steps to inform AFM 2000 about the AFS debt because "internal senior people assumed the responsibility of collecting the debt". That no statement of accounts relating to the AFS debt was ever sent to AFM 2000 is patently clear from the following position taken by Mr Woo during cross-examination:

Q. From August 2000 until the matter became a legal problem, no demand was made to AFM 2000 for payment of this large debt of \$1m.

A. No demand was made.

Q. From August 2000 to March 2001, you never sent a notice of demand to AFM 2000 to show that they owed the debt of \$1m?

A. No.

24. Apart from not demanding from AFM 2000 the amount owed by AFS until after the latter had gone into liquidation, FLE's senior vice-president, Mr Alex Ng, agreed with AFM 2000's managing director, Mr Bob Hackett, in March 2001 that the total amount owed by AFM 2000 to FLE was only around US\$41,000. On 12 March 2001, Mr Hackett wrote to Mr Ng as follows:

I understand your position has been that AFS Freight Management 2000 had owed FLE around USD41,000 and therefore had exceeded your credit limit, so that bookings were blocked by your system. Further, I understand that all you desire is that we pay each other what we owe, and move on. This is all we want as well.

25. On 13 March 2001, Mr Ng replied to Mr Hackett as follows:

As you correctly said, our position has been that [AFM 2000] is owing [FLE] about US\$41,000 plus, details of which have been given to you. If you are agreeable to this amount, please arrange to settle this urgently.

26. Mr Ng made no reference whatsoever to the AFS debt when he stated that FLE's position has been that AFM 2000 owed FLE around US\$41,000. AFM 2000 paid the sum claimed by FLE even though they thought that the amount should have been a little less. FLE is in no position now to say that the AFS debt was not included in Mr Ng's confirmation of the amount owed by AFM 2000.

27. If one looks at the whole picture squarely, much as AFM 2000 wanted to have a business relationship with FLE, there was no reason for them to cripple themselves by assuming liability for the AFS debt, which amounted to more than S\$1m. In paras 11-13 of his affidavit of evidence-in-chief, Mr Steve Reison, AFM 2000's chief operating officer and the man accused of having represented to FLE that the AFS debt would be paid by the new company, stated as follows:

11. Immediately following the conclusion of the purchase of the AFS Group by Trident, AFS sent a written announcement out to all customers, vendors and agents, advising them of the changes arising from the purchase and how the accounting was to be treated....

12. The announcement made clear that notwithstanding the sale, all transactions prior to 31 July 2000 would remain the responsibility of AFS.

13. As the Defendants were agents of AFS, the fax announcement would have been sent to the Defendants. In addition, I personally followed up with several telephone calls thereafter to one Wang Tek Lee from the Defendants. During those phone calls, I advised the Defendants again that neither Trident nor the Plaintiffs were responsible for the debts owed by AFS prior to 31 July 2000.

28. The announcement, which was sent to FLE, was in the following terms:

We are pleased to announce that effective from 1st August 2000 AFS has undergone a change of ownership and has joined the N.A.C.A. (New American Consolidators Association) organization.

This change of ownership will also change our trading name to:

AFS Freight Management (2000) Pty Ltd

The previous structure of AFS Freight Forwarding operations, offices and personnel will remain unchanged and it is business as usual....

All invoices and credit notes up to 31st July 2000 in the name of [AFS] will continue to be processed and reconciled from Brisbane and we would ask that you refer any matters on this to:

AFS Freight Management Pty Ltd

[Queensland]

All invoices and credit notes for business arriving 1st August 2000 and thereafter will be finalised in the name of the new company and we would ask that you issue invoices/credit notes to the relevant office of [AFM 2000] as shown below. All shipment documentation, bills of lading, and airway bills are also to be issued to AFS Freight Management (2000) Pty Ltd.

29. I have no doubt that this announcement did not put the position clearly. Mr Bob Hackett was honest enough to concede that the above-mentioned announcement regarding the setting up of AFM 2000 and the treatment of accounts with effect from 1 August 2000 could have been more clearly worded. However, he asserted that whatever ambiguities may have remained after the announcement, they were cleared up soon enough. When cross-examined, he said as follows:

I can understand that if the announcement was the only communication that took place with the agents, there could be a misunderstanding. The reality of the situation was that all the announcements were followed by personal dialogue, telephone calls and other communications that I believed clarified with potential partners that this was a goodwill purchase and that the AFS debts were not acquired by the new company.

30. Mr Hackett testified that he personally explained the position to FLE when he came to Singapore in October 2000 and that the FLE team fully understood the implications of their relationship with AFM 2000. When cross-examined, he said as follows:

I went into more details in the October meeting. I told the defendants that Trident had purchased the business and not the company and that it had set up a new company to handle its business. I asked them if they understood and they said 'yes'. I further explained that acquisition did not include debtors or creditors. Mr Wang said that he understood and accepted that. He said that there were some outstanding debts but I told them that they had to discuss these debts with the directors of the old company, Mr Reison and Mr Bell. That was the end of the discussion. It was not a long discussion.

31. Mr Hackett's account of what transpired at the October 2000 meeting was supported by Mr Pece Gorgievski, who categorically denied that representations had been made to FLE that AFM 2000 would assume liability for the AFS debt.

32. Taking all circumstances into account, there can be no doubt that the evidence of AFM 2000's witnesses is more credible than that of FLE's witnesses. As FLE has not discharged the burden of proving that representations were made to them that AFM 2000 would take over the AFS debt, their counterclaim against AFM 2000 is dismissed with costs.

Sgd:

TAN LEE MENG

Judge

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