Swiss Singapore Overseas Enterprises Pte Ltd v Navalmar UK Ltd
[2002] SGHC 267

Case Number : Suit No 1331 of 2002, SIC No 4667 of 2002

Decision Date : 13 November 2002

Tribunal/Court : High Court

Coram : Woo Bih Li JC

Counsel Name(s) : R Srivathsan (Haridass Ho & Partners) for the plaintiff; Joseph Tan (Kenneth Tan Partnership) for the defendant

Parties : —

Civil Procedure – Injunctions – Principles for granting mandatory injunction

Contract – Formation – Whether separate contract arising from correspondence

Judgment

GROUNDS OF DECISION

Introduction

1. The Plaintiff Swiss Singapore Overseas Enterprises Pte Ltd ('Swiss Singapore') applied for a mandatory injunction to compel the Defendant Navalmar U.K. Ltd ('Navalmar') whether by itself or its agents in Singapore SSC Shipping Agencies Pte Ltd ('SSC Shipping') to issue eight bills of lading, the drafts of which were attached to Schedule 1 of the application, in exchange for nine existing bills of lading issued by SSC Shipping for and on behalf of the Master of the vessel MV Zurbaran ('the Vessel'). The primary difference was that the words 'Freight To Collect' were marked on the existing bills whereas the new bills were to have the words 'Freight Prepaid'. There were also other differences which I shall elaborate on later. After hearing arguments, I granted the mandatory injunction, although not exactly on the terms sought by Swiss Singapore. Navalmar has appealed to the Court of Appeal against my decision.

Background

2. Swiss Singapore claims that by a contract dated 9 May 2002, it had purchased a cargo of 10,000 metric tonne of Indonesian Merbau Timber from UD Menara Mas of Indonesia ('UDMM') for a total value of US$1.35 million. On or about 13 August 2002, UDMM entered into a fixture note with Navalmar for the hire of the Vessel to carry the cargo from Sorong, Indonesia to Chennai, India. Swiss Singapore is not a party to the fixture note but the material terms thereof state:

> '100% freight to be remitted by telegraphic transfer by Swiss Singapore Overseas Enterprises Pte Ltd, Singapore for and behalf of Charterer into Owner's nominated bank account within 3 banking days of completion of loading and signing/releasing freight
>
> ….
>
> Owners to appoint a Singapore agent free of charge to Swiss Singapore Overseas Enterprises Pte Ltd to issue a second set freight prepaid BSL against an LOI as per Owner's format which to be signed by their authorised signatory.'

3. 1,252 pieces of the cargo was loaded at Sorong between 3 September 2002 and 4 October 2002 and the nine bills of lading with the words 'Freight To Collect' were issued by SSC Shipping for and on behalf of the Master of the Vessel.

4. On 16 October 2002, Mary Vijay of Swiss Singapore sent an e-mail to Captain Priya of Navalmar stating:

'WE ARE ARRANGING TO PAY THE FREIGHT TODAY. PLEASE ADVISE YOUR AGENTS IN SINGAPORE TO RELEASE SWITCH B/L TO US AGAINST FAX COPY OF TELEX REMITTANCE OF FREIGHT WITH A COPY TO US. ALSO PLEASE ADVISE THE POSITION OF VESSEL HER ETA CHENNAI ETC.'

5. This was followed by a handwritten fax to Captain Priya stating:

'

To: Capt. Priya

Ref. our telecon today. We have still not read your confirmation on above message. Please advise your agents details to whom we have to get the B/L Switched. Due to your not receipt of your confirmation of above matter and not confirmation of ETA of the vessel the freight payment is delayed. Your urgent confirmation is awaited to pay the freight.

Thanks.

Mary.'

6. On Friday 18 October 2002, Capt Priya sent an e-mail in response stating:

'KINDLY NOTE THAT YOU HAVE STILL NOT PAID THE OCEAN FREIGHT.

WE CANNOT SWITCH THE B/L (*sic)* UNTILL WE DO *(sic)* NOT RECEIVE THE FREIGHT INTO OUR ACCOUNT.

VESSEL SAILED FROM BINTULU THIS MORNING AND WILL CALL TUTI

FIRST TO DISCHARGE 4700 CBM LOGS AND THEN CALL AT CHENNAI.

WE EXPECT VESSEL TO ARRIVE CHENNAI ON/ABOUT THE 28/29 TH OF OCTOBER AGW WP.

KINDLY EXPEDITE FRT PAYMENT.'

7. On Monday 21 October 2002, Mary Vijay sent an e-mail to Capt Priya stating:

'THANKS FOR YOUR BELOW MESSAGE. KINDLY SEND A MESSAGE CONFIRMING THAT SINGAPORE SHIPPING WILL BE SWITCHING THE B/L TO US AGAINST TELEX COPY CONFIRMING OF FREIGHT PAYMENT MADE TO YOU. WE NEED THIS VERY URGENTLY AS WE DO NOT WANT ANY CONFUSION OR DELAY IN GETTING THE B/L SWITCHED. WE WILL ONLY TAKE THE SWITCH B/L FROM YOUR AGENT AFTER PAYMENT OF FREIGHT. HENCE YOUR CONFIRMATION TO US REQUIRED VERY URGENTLY.'

[Emphasis added.]

8. An e-mail of the same date was sent in reply to Mary Vijay stating:

'we confirm that bills of lading will switched by Singapore shipping upon receipt of frt remittance advise. kindly note that delay is on your account due to non payment of freight, otherwise this could have been done 10 days ago.'

[Emphasis added.]

9. On the very same day, Swiss Singapore arranged for payment of the freight of about US$258,000 and Mary Vijay sent an e-mail to Capt Priya to forward the telex confirmation of payment and eight drafts of bills of lading with an urgent request that Navalmar instruct SSC Shipping to sign and release the new bills.

10. Eight days later, on 29 October 2002, Swiss Singapore's solicitors, Haridass Ho & Partners ('Haridass') sent an urgent chaser by fax to Navalmar to point out that Navalmar had confirmed in its e-mail dated 21 October 2002 that the bills of lading would be switched upon receipt of remittance for the freight and notwithstanding such remittance, Navalmar had refused to instruct SSC Shipping to issue the new bills. They also pointed out that without the new bills, Swiss Singapore would not be able to negotiate the letter of credit issued in their favour by their Indian buyers and their Indian buyers could not arrange customs and other clearance. The penultimate paragraph of the fax put Navalmar on notice that if it failed to instruct SSC Shipping to issue the new bills by close of office the next day, they would proceed to the courts in Singapore to compel Navalmar by injunction to instruct its Singapore agents (i.e SSC Shipping) to issue the new bills.

11. In response, English solicitors Michael Lloyd & Co ('Michael Lloyd'), acting for Navalmar, sent a fax reply dated 29 October 2002 asserting that Navalmar was dismayed at the apparent indifference to an enormous demurrage debt incurred at the load port and asking what assurance Swiss Singapore could give concerning payment thereof. The demurrage and related costs was US$187,930. They also sought particulars of the contract between Navalmar and Swiss Singapore and the contract term regarding the issue of the new bills.

12. Haridass responded in a fax dated 30 October 2002 pointing out the material terms of the fixture note and Navalmar's e-mail dated 21 October 2002 wherein it had confirmed that the bills of lading would be switched 'upon receipt of frt remittance advice' and stressing that Swiss Singapore had paid freight. Haridass warned that if the new bills were not issued, Swiss Singapore would be left with no alternative but to seek the remedy stated in their earlier fax and asked Michael Lloyd to revert by the opening of Haridass' office the next day.

13. Michael Lloyd then sent a reply fax dated 30 October 2002, stating that Swiss Singapore was not a party to the fixture note and could not seek reliance on it. They also said that 'It would appear inequitable in any event for them to take advantage of part of the document whilst ignoring other obligations of the shipper set out in it'. Mr Lloyd also asked to speak to Mr Haridass but no evidence was given as to whether Mr Lloyd managed to speak to Mr Haridass and what was said in the conversation.

The application for a mandatory injunction

14. On Friday 1 November 2002, Swiss Singapore commenced an action in Singapore and filed an ex parte application for the mandatory injunction which I have mentioned. As the application was for a mandatory injunction, I directed its Counsel, Mr R Srivathsan, to forward a copy of the Writ of Summons, the application and the supporting affidavit to Michael Lloyd and to SSC Shipping with a cover fax or letter stating that the application had been adjourned to 10.30 am of 5 November 2002 (as Monday 4 November 2002 was a public holiday in Singapore). The Vessel was expected to reach Chennai on 5 November 2002.

Arguments

15. On Tuesday 5 November 2002, Mr Joseph Tan appeared for Navalmar before me. He sought an adjournment to the following Monday i.e 11 November 2002 to file an affidavit in response although he had received instructions the previous Saturday afternoon and he had spoken to London solicitors on Sunday and Monday. He was instructed that Navalmar's e-mail had been sent under pressure otherwise Swiss Singapore would not pay the freight. He was also instructed that the export of logs from Indonesia was illegal under Indonesian law.

16. Mr Srivathsan objected to any adjournment and took me through the e-mail dated 18 October 2002, and the two e-mail dated 21 October 2002 which I have cited in paras 6 to 8 above.

17. Mr Tan did not dispute that freight had been received by Navalmar or that the Vessel was likely to reach Chennai on 5 November 2002. He said he had nothing to add in respect of the application for an adjournment.

18. I then decided to grant an order in terms of the first prayer of the application whereupon Mr Tan produced a draft affidavit of his which he said he would affirm in the afternoon (which was subsequently extended to 12 pm of the next day). On that basis, I allowed Mr Tan

to address me on the merits of the application. Mr Tan raised a number of arguments and I will deal only with the more substantive ones.

19. Mr Tan's first argument was that Swiss Singapore was not a party to the fixture note. The fixture note was governed by English law although it provided for arbitration in Singapore. In so far as Swiss Singapore appeared to rely on the English Contract (Rights of Third Parties) Act 1999 ('the Act'), which gives rights to third parties, he pointed out that Swiss Singapore had not adduced evidence of English law, such law being a question of fact. On the other hand, Navalmar had obtained a written opinion from an English Counsel Mr Michael Nolan dated 4 November 2002 to the effect that the Act did not give Swiss Singapore the right to enforce the term in the fixture note under which Navalmar agreed to issue a second set of bills of lading against a letter of indemnity. I would add that the letter of indemnity was never raised as an issue previously or by Mr Tan and I need say no more on it.

20. Secondly, the intended new bills contained different information which Navalmar objected to. The objections were stated in a fax dated 1 November 2002 from Michael Lloyd to Haridass i.e (i) there were eight instead of nine bills, (ii) more importantly, the new bills would acknowledge shipment of a total of 6,301 cbm logs whereas the original bills referred to 6,171 cbm, (iii) the new bills would be dated 29 September 2002 whereas the originals had various dates between 3 September 2002 and 4 October 2002.

21. Thirdly, if the contract of sale was illegal then Swiss Singapore should not be granted equitable relief against Navalmar as Swiss Singapore had come to court with unclean hands. Mr Tan said that the cargo could be discharged in Chennai and kept in a godown while the issue of demurrage is sorted out.

22. Fourthly, Mr Tan submitted that the entire transaction was suspicious. In the past, Navalmar had dealt only with Swiss Singapore. For the present cargo, Swiss Singapore had asked Navalmar to charter the Vessel but prior to the conclusion of the charter, Swiss Singapore said that they would prefer it if Navalmar dealt with UDMM for this particular transaction. Navalmar had never dealt with UDMM before and had entered into the charterparty with UDMM solely at Swiss Singapore's request. Accordingly, Swiss Singapore might be liable for demurrage as undisclosed principal.

23. Mr Srivathsan did not dispute that Swiss Singapore was not a party to the fixture note. Swiss Singapore was relying on the Act to give it rights against Navalmar. He took me through section 1 of the Act. He also submitted that Swiss Singapore would also rely on the e-mail as constituting a separate contract as between Navalmar and Swiss Singapore and/or estoppel.

24. As for the different information to be contained in the new bills, they were the requirements of Swiss Singapore's purchasers.

25. As for illegality, he submitted that Swiss Singapore was the buyer FOB. It was not its concern whether the seller has the requisite licence to sell or export the cargo.

26. As for the allegation that Swiss Singapore was the undisclosed principal, he denied this on the basis that it had bought the cargo from UDMM.

The reasons for my decision

27. Section 1 of the Act provides:

> 'Right of third party to enforce contractual term
>
> 1.(1) Subject to the provisions of this Act, a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if -
>
> (a) the contract expressly provides that he may, or
>
> (b) subject to subsection (2), the term purports to confer a benefit on him.
>
> (2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.

(3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.

(4) This section does not confer a right on a third party to enforce a term of a contract otherwise than subject to and in accordance with any other relevant terms of the contract.

(5) For the purpose of exercising his right to enforce a term of the contract, there shall be available to the third party any remedy that would have been available to him in an action for breach of contract if he had been a party to the contract (and the rules relating to damages, injunctions, specific performance and other relief shall apply accordingly).

(6) ….

(7) ….'

28. Section 6 states:

'6.(1) ….

(2) ….

(3) Section 1 confers no right on a third party to enforce -

(a) any term of a contract of employment against any employee,

(b) any term of a worker's contract against a worker (including a home worker), or

(c) any term of a relevant contract against an agency worker.

(4) ….

(5) Section 1 confers no rights on a third party in the case of -

(a) a contract for the carriage of goods by sea, or

(b) ….

Except that a third party may in reliance on that section avail himself of an exclusion or limitation of liability in such a contract.

(6) In subsection (5) "contract for the carriage of goods by sea" means a contract of carriage -

(a) contained in or evidenced by a bill of lading, sea waybill or a corresponding electronic transaction, or

(b) under or for the purposes of which there is given an undertaking which is contained in a ship's delivery order of a corresponding electronic transaction.'

29. It is true that Swiss Singapore did not tender any opinion from any English solicitor or counsel on the Act but there was evidence

from Mr Nolan as to what section 1 and 6 states, in addition to his opinion thereon. However, Mr Nolan's opinion was significantly silent about the exchange of e-mail.

30. It seemed to me that Swiss Singapore had a strong case that Navalmar was estopped from denying that Swiss Singapore had an enforceable right against it under the fixture note in respect of the issuance of new bills or that there was a separate contract between Swiss Singapore and Navalmar arising from the exchange of the e-mail regarding the issuance of the new bills when freight was paid by Swiss Singapore.

31. On the latter point, Mr Tan submitted (in his request for further arguments which I declined to accede to) that the consideration from Swiss Singapore was done for and on behalf of UDMM and as agent for UDMM. Thus, there was no consideration from Swiss Singapore. However, there was no evidence that Swiss Singapore had paid the freight on behalf of UDMM or as its agent. He also submitted that the payment of freight was past consideration but, as Swiss Singapore was not a party to the fixture note, it was, prima facie, not obliged to pay the freight in the first place.

32. As regards the second argument on the three discrepancies between the drafts of the new bills and the originals, I was of the view that this could be overcome by an appropriate order addressing the objections.

33. As regards the third argument about illegality, there was no evidence from an Indonesian lawyer about the illegality let alone Swiss Singapore's complicity in it. Mr Tan had relied solely on what Capt Priya had told him, and Capt Priya had in turn relied on what Navalmar's Indonesia agents had said. Even then, Mr Tan could only say that the whole transaction 'may be' illegal. In any event, the cargo was already no longer in the territory of Indonesia and the present dispute was not between buyer and seller. It seemed to me that Navalmar was not at all concerned about the alleged illegality. It had not offered to return the freight paid or to carry the cargo back to Indonesia. On the contrary, it was quite prepared to deliver the cargo to Swiss Singapore or its buyers if demurrage was paid. It was clear to me that the allegation about illegality was just an excuse raised in an attempt to deny Swiss Singapore the relief it had sought.

34. As regards the fourth argument about Swiss Singapore being the undisclosed principal behind the fixture note, Navalmar could still pursue this position even if the mandatory injunction was granted.

35. I was mindful that a court should be slow in granting a mandatory injunction especially if it is the substantive relief sought in the action. However, I was of the view that the justice of the case was clearly in favour of Swiss Singapore, at least in respect of its present application.

36. It is not in dispute that Navalmar was aware that demurrage was outstanding when its two e-mail dated 18 and 21 October 2002 were sent. It could have remained silent when Swiss Singapore had sought its confirmation that the new bills would be issued upon payment of the freight or it could have informed Swiss Singapore quite openly that the new bills would not be issued unless both the freight and demurrage were paid. It did not elect either of these options. Instead, it gave not one but two confirmations that it would switch the bills when the freight was paid. The first confirmation was implied in its e-mail dated 18 October 2002 and the second was specific in its e-mail dated 21 October 2002. Indeed in its second confirmation, it went so far as to say that the delay in the switch was due to non payment of freight and that this could have been done '10 days ago'.

37. Navalmar knew that Swiss Singapore did not want any dispute about the new bills (see again Swiss Singapore's e-mail dated 21 October 2002 cited in para 7 above). Yet either it deliberately deceived Swiss Singapore into believing that the bills would be switched upon payment of the freight or it resiled from its position after receiving such payment. Even after Navalmar had received evidence of the payment of freight, it did not promptly raise the issue of outstanding demurrage with Swiss Singapore as a condition before releasing the new bills for eight or more days until Haridass sent its chaser dated 29 October 2002, as I have mentioned.

38. It is all very well for Navalmar to take the position that the cargo can be discharged at Chennai and kept at a godown while the issue of demurrage is sorted out. It must be aware that this situation would give it the upper hand with a view to causing Swiss Singapore to capitulate to its demurrage claim. Having received about US$258,000 as freight, Navalmar has, unfortunately, resiled on its word just to obtain payment of approximately US$188,000.

39. In the circumstances, I had a 'high degree of assurance', to use the words of Megarry J in *Shepherd Homes Ltd v Sandham* [1971] Ch 340, that I should grant a mandatory injunction. Accordingly, I maintained the thrust of the injunction order I had granted but varied it to take into account the three discrepancies raised by Navalmar.

Sgd:

WOO BIH LI

JUDICIAL COMMISSIONER

SINGAPORE

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