The "Patraikos 2"
[2000] SGHC 86

Case Number : Adm in Rem 81/1996

Decision Date : 12 May 2000

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Navinder Singh (Joseph Tan Jude Benny) for the plaintiffs; Augustine Liew and Wendy Ng (Haridass Ho & Partners) for the defendants

Parties : —

Civil Procedure – Discovery of documents – When discovery of particular documents will be ordered – Whether documents relate to matters in question – Privilege – Correspondence between defendants' solicitors in separate action and third party – Whether correspondence privileged – Whether volume of documents so massive as to make discovery oppressive – s 128(1) Evidence Act (Cap 97, 1997 Ed) – O 24 r 7(3) Rules of Court

JUDGMENT:

GROUNDS OF DECISION

The background

1. The defendants in this case entered into a contract of carriage sometime at the end of 1995, whereby they agreed to ship various consignments of cargo ("the cargo") on board their vessel, the "*Patraikos 2*" ("the vessel"). On or about 7 January 1996, the vessel was navigating through the Singapore Straits when it ran aground on the rocks of South Ledge, approximately 2.2 miles off the Horsburgh Lighthouse. The plaintiffs, who claimed to be the owners of the cargo, alleged that the grounding led to ingress of seawater into the vessel's cargo holds. This in turn led to the cargo becoming submerged, requiring rescue by professional salvors.

2. The plaintiffs now bring the present action against the defendants, claiming for damage sustained by their cargo. In so doing, the plaintiffs based their claim on Art III rr 1 and 2 of the Hague Rules as amended by the Brussels Protocol 1968 ("the Rules"). Rules 1 and 2 read:

> 1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to —
>
> > (a) Make the ship seaworthy.
> >
> > (b) Properly man, equip and supply the ship.
> >
> > (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.
>
> 2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

3. It was the plaintiffs' case that the defendants breached the duties imposed by the above provisions. Amongst other things, the plaintiffs alleged that the vessel's Filipino second officer, Ben Gallardo Orlanda ("Orlanda"), was not competent to serve on the vessel as second officer. They

contended that sometime in June 1989, Orlanda was second officer on another ship called the *Saronikos II*, which had also run aground. The plaintiffs further alleged that the vessel had no proper bridge management team.

4. The plaintiffs also contended that the grounding of the vessel alone could not have resulted in damage to the cargo, but that entry of seawater was facilitated by there being large corrosion holes in the vessel's bulkhead.

5. The defendants denied all the plaintiffs' allegations. Firstly, they contended that the vessel was in fact seaworthy. Apparently, the vessel had been surveyed and classed in Belgium just before the voyage. The vessel had then undergone extensive maintenance repairs at Rotterdam, and passed a drydocking inspection. This included a thorough inspection of all her compartments, which disclosed no defects therein. Secondly, the defendants maintained that the ship was properly manned, to a level exceeding flag requirements, by competent and certified officers and men. The defendants further maintained that the ship was fully and properly equipped and supplied. Finally, the defendants denied that any part of the ship was ever unfit or unsafe for the reception, carriage or preservation of goods carried on board.

6. In addition to the above contentions, the defendants also alleged that the grounding of the vessel was caused by Orlanda's negligence. In this regard, the defendants relied on Art IV r 2 of the Rules, which reads:

> 2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from —
>
> > (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.
> >
> > …
> >
> > (c) Perils, dangers and accidents of the sea or other navigable waters.

7. Apart from the present action, other proceedings had also been instituted against the defendants in England ("the English action") by various other cargo owners whose cargo was also on board the vessel when the grounding took place.

The documents discovered by the defendants

8. On 8 October 1999, the defendants filed their list of documents for discovery. The plaintiffs were dissatisfied with the list, and filed Summons-in-Chambers 7688 of 1999, applying for a Further and Better List of Documents and Affidavit Verifying the same. Some of the documents requested were those which were referred to by documents disclosed in the defendants' original list. Some of the other documents were said to exist based on the surrounding circumstances. The Assistant Registrar granted an order in terms, and the defendants appealed by Registrar's Appeal No. 600005 of 2000 (the defendants' appeal). I dismissed the defendants' appeal with costs when it came up for hearing on 12 January 2000. The defendants have appealed against my decision (in Civil Appeal No. 17 of 2000) in so far as they relate to the following sets of documents ordered to be disclosed:-

(i) Survey reports for the vessel's Annual Class Survey, Annual Loadline Survey, Annual Construction Survey, Annual Safety Equipment Survey and Annual Cargo Gear Survey.

(ii) Two faxes from Sinclair, Roche & Temperly (SRT) to Dioryx Maritime Corporation (Dioryx), dated 19 August 1996 and 3 September 1996 respectively. (SRT are the defendants' solicitors in the English action. Dioryx was the agent employed by the defendants to manage the vessel.)

(iii) All documents, including surveys relating to class recommendations after survey of the vessel in Belgium.

(iv) All invoices evidencing repairs made to the vessel in the past 5 years prior to grounding.

(v) All classification survey reports/records, including but not limited to the Lloyd's Classification Reports/Repairs, of the vessel for a period of five years prior to its grounding

(vi) All documents pertaining to the grounding of the *Saronikos II* in June 1989, including statements, if any, given by Orlanda in relation to the grounding.

I will now deal with each of these sets of documents in turn.

(i) Survey reports for the vessel's Annual Class Survey, Annual Loadline Survey, Annual Construction Survey, Annual Safety Equipment and Annual Cargo Gear Survey.

9. Before an application for discovery of particular documents will be granted, the documents in question must be shown to "relate to matters in question in the cause or matter" (see O 24 r 7(3) of the Rules of Court). In this regard, the test laid in *Compagnie Financiere v Peruvian Guano* [1882] 11 QBD 55 (at 63), should be borne in mind. A document relates to the matters in question if:

(i) they would be evidence upon any issue

(ii) they contain information which may (as opposed to *must*) enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, or

(iii) they may fairly lead him to a train of inquiry, which may have either of the two consequences in (ii) above.

As some cases have put it more simply, documents relate to matters in question if they 'throw light on the case' (see *Merchants' & Manufacturers' Insurance Co Ltd v Davies* [1938] I KB 196 at 210, *Manilal & Sons (Pte) Ltd v Bhupendra KJ Shan* [1990] 2 MLJ 282).

10. One of the 'matters in issue' in the present case would be, as can be seen from the plaintiffs' reliance on Art III r 1(a) of the Rules, whether the vessel was seaworthy. Before a ship is deemed 'seaworthy', it must, amongst other things, "be fit in design, structure, condition, and equipment to encounter the ordinary perils of the voyage" (*Carver's Carriage By Sea*, 13th ed. at para 147). That

being the case, the reports for the vessel's Annual Class Survey, Annual Loadline Survey, Annual Construction Survey, Annual Safety Equipment Survey and Annual Cargo Gear Survey would clearly constitute evidence as to the seaworthiness of the vessel. I thus had no difficulty in finding that these survey reports should be disclosed.

11. I would also add that in filing their list of documents, the defendants in the present case actually included the entire list of documents discovered by the plaintiffs in the English action. Included in this list discovered in the English action was a Greek letter, which had in turn made reference to the above survey reports. Having chosen to disclose the entire list of documents discovered in the English action, the defendants thereby implied that these documents (including the Greek letter) are relevant. It would now lie ill in their mouths to contend otherwise.

(ii) The faxes from SRT to Dioryx

12. As mentioned above, the grounding of the vessel led to the English action being commenced against the defendants. In the course of the proceedings in the English action, correspondence was exchanged between SRT (i.e. the solicitors for the defendants in the English action) and the solicitors for the English plaintiffs. In one of the letters, dated 1 May 1997, SRT had broached the issue of the qualifications of the vessel's Chief Officer at the time of grounding, one Aris Sporidis. Apparently, Aris Sporidis only had a Second Mate's Certificate. However, SRT stated in the letter that the defendants' agents who managed the vessel, Dioryx, employed officers based on their experience and not only on the basis of their paper qualifications alone. SRT further stated in the letter that the Greek authorities had been prepared to give Aris Sporidis dispensations to act as Chief Mate, despite his having only a Second Mate's Certificate. The plaintiffs thus sought discovery of certain faxes sent by SRT to Dioryx, and I allowed their application. The defendants have appealed against my order with respect to two of the faxes dated 19 August 1996 and 3 September 1996. I felt that the plaintiffs' application for discovery of the faxes was justifiable, as these faxes would throw light on the issue regarding Aris Sporadis' qualifications. If he only had a Second Mate's Certificate, and was not genuinely qualified to act as Chief Officer aboard the vessel, then this might support the claim that the defendants failed to properly man the vessel, as required by Art III r 1(b) of the Hague Rules (see also *The "Makedonia"* [1962] 316, at 337-338, where it was held that the shipowners' failure to employ sufficiently experienced engineers amounted to a breach of the obligation to properly man the ship).

13. One of the objections raised before me by the defendants was that the faxes were privileged. I rejected this argument. Apart from the statutory protection afforded by s 128(1) of the Evidence Act Cap 97 to communications between lawyers and their clients, it appears that there is also protection afforded by the common law, which extends to certain communications made in contemplation of litigation. The latter protection has been termed 'litigation privilege', and consists of the following two limbs (see *Singapore Court Forms and Precedents* at para XIX p 203):

> (i) communications between the client's professional legal advisers and third parties, if made for the *purpose* of pending or contemplated litigation, and
>
> (ii) communications between the client or his agent and third parties, if made for the *purpose* of obtaining information to be submitted to the client's professional legal advisers for the purpose of obtaining advice upon pending or contemplated litigation.

14. Of greater relevance to the present case is the above first limb, since the faxes constitute

communications between the defendants' legal advisers (SRT) and a third party (i.e. Dioryx). In *Wheeler v Le Marchant* (1881) 17 Ch.D. 675, Cotton LJ held (at 684-685):

> "Hitherto such communications" -- between a solicitor and a third person -- "have only been protected when they have been in contemplation of some litigation, or for the purpose of giving advice or obtaining evidence with reference to it. And that is reasonable, because then the solicitor is preparing for the defence or for bringing the action, and all communications he makes for that purpose, and the communications made to him for the purpose of giving him the information, are, in fact, the brief in the action, and ought to be protected."

However, in *Secretary Of State For Trade And Industry v Baker* [1998] WLR 667, Sir Richard Scott VC considered *Wheeler v Le Marchant*, and held (at 675):

> These citations make clear, in my opinion, that documents brought into being by solicitors for the purposes of litigation were afforded privilege because of the light they might cast on the client's instructions to the solicitor or the solicitor's advice to the client regarding the conduct of the case or on the client's prospects. *There was no general privilege that attached to documents brought into existence for the purposes of litigation independent of the need to keep inviolate communications between client and legal adviser. If documents for which privilege was sought did not relate in some fashion to communications between client and legal adviser, there was no element of public interest that could override the ordinary rights of discovery and no privilege*. [emphasis added].

15. Thus, in order to have the benefit of the privilege, the defendants had to show that the faxes sent by SRT to Dioryx either reflected the defendants' instructions to SRT in some way, or somehow gave an indication of the legal advice that SRT would be giving the defendants; this they failed to do. Accordingly, I held that the faxes should be disclosed.

(iii) All documents, including surveys relating to class recommendations after survey of the vessel in Belgium

16. These documents related to the seaworthiness of the vessel, and thus clearly "relate to matters in question" in this case. The plaintiffs had adduced evidence before me to the effect that the survey in Belgium took place just a matter of months before the grounding occurred, so these documents would be all the more relevant in establishing the seaworthiness (or the lack thereof) of the vessel.

(iv) All invoices evidencing repairs made to the vessel in the past 5 years prior to grounding

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17. Again these documents are relevant in determining the seaworthiness of the vessel, so they should be disclosed. In fact, they are particularly relevant, bearing in mind that there was evidence adduced by the plaintiffs that several tons of rust were removed from the hull of the vessel when it was being repaired in Rotterdam, just before the grounding.

18. In the course of submissions, counsel for the plaintiffs argued that it would be oppressive for the defendants to be made to produce these documents, which stretched back for a period of 5 years. I did not find this to be the case. Of course there may be times when the sheer volume of the documents requested might render the application for discovery oppressive. In *Science Research Council v. Nass* [1980] A.C. 1028, Lord Edmund-Davies remarked (at

1076):

> Again, a request for inspection of a great mass of documents, without any attempt at selection, could well be regarded as oppressive.

That does not appear to be the case here. There is no evidence that the volume of documents involved will be so massive that the defendants will find discovery oppressive.

(v) All classification survey reports/records, including but not limited to the Lloyd's Classification reports/repairs, of the vessel for a period of five years prior to its grounding

19. These documents are relevant in that they again pertain to the seaworthiness of the vessel. In their defence, the defendants claimed that the vessel was "in class and in possession of current and valid Safety Construction and Loadline Certificates" (at para 7(i)(a) of Defence). The documents that had been requested by the plaintiffs under this head will go to show whether the defendants' claim is true.

vi) All documents pertaining to the grounding of the Saronikos II in June 1989, including statements, if any, given by Orlanda in relation to the grounding

20. It appeared that even before the grounding of the vessel, Orlanda had been connected with another marine accident involving the ship "*Saronikos II*", of which he had also been second officer. After the grounding of the vessel, a statement had been taken from Orlanda where he claimed that the "*Saronikos II*" had only been involved in a minor collision, and that the "*Saronikos II*" suffered no damage. The plaintiffs however adduced evidence that the "*Saronikos II*", far from being involved in merely a minor collision, had actually been grounded (as was the case with the vessel) The plaintiffs further contended that Orlanda had been on the bridge when the grounding of the "*Saronikos II*" occurred. I was of the view that all the documents pertaining to the grounding of the "*Saronikos II*", including statements, if any, given by Orlanda in relation to the grounding, were relevant to matters in question in this case. If these documents indicated that the grounding of the "*Saronikos II*" resulted from Orlanda's incompetence or negligence, then the plaintiffs were entitled to use the evidence to argue that the defendants, in engaging Orlanda, failed to properly man the ship, knowing his past employment history..

Conclusion

21. For all the aforesaid reasons, I dismissed the defendants' appeal.

LAI SIU CHIU

JUDGE

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