Korea Jonmyong Trading Co v Sea-shore Transportation Pte Ltd & Another [2002] SGHC 276

Case Number : Suit 230/2002

Decision Date : 22 November 2002

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : Andre Arul (instructed) (Arul Chew & Partners) and C Arul (C Arul & Partners) for the plaintiffs; Yoga Sharmini Yogarajah and Subashini Narayanasamy (Haridass Ho & Partners) for the defendants

Parties : —

Contract – Remedies – Damages – Remoteness of damage – Consequential losses from sub-contract with third parties – Right of set-off from amount payable

International Law – Proceedings – Against foreign government – Jurisdiction – Acts of independent sovereign government in relation to property and persons within its jurisdiction

quantity of high speed diesel. Judgment was thus entered in JY's favour. The only remaining issues left to be resolved were JY's claim for losses suffered under their sub-contracts with third parties in the DPRK and SST's claim in relation to a set-off. JY opted to claim only the loss under their sub-contract with Sasan Farm ("Sasan").

Held, dismissing the plaintiffs' claim for consequential losses and dismissing the first defendants' claim for set-off:

JY's claim for consequential losses in relation to their contract with Sasan did not rest on solid ground. It was not established that JY made known the special circumstances of their contract with Sasan to SST. It was not established that SST were aware of JY's sub-contract with Sasan or of the terms of that sub-contract. If all the cases on remoteness of damages were taken into account, there could be no doubt that JY's loss under their sub-contract with Sasan was too remote a consequence of SST's breach of contract (See [11] – [19]).

In any case, what actually transpired in the investigations in relation to Sasan's claim against JY was not known. The DPRK Central Public Prosecutor's Authority furnished no grounds for requiring JY to compensate Sasan. Although a representative from Sasan filed an affidavit of evidence-in-chief, and was listed as a witness, JY chose to close their case without calling him as a witness. As such, SST's counsel was denied the opportunity to question him. After having taken into account all the circumstances of the case and the evidence of the witnesses, the court had no hesitation whatsoever in dismissing JY's claim for consequential losses (See [19]).

SST was in fact alleging that JY was guilty of fraud and that the DPRK Central Prosecutors' Authority was colluding with JY to defraud them. Apart from the fact that fraud was not pleaded by SST, the officer in the Central Public Prosecutors' Authority who took charge of the investigation regarding Danny 's breach of the DPRK's laws testified that the "apology money" had been paid into JY's account because the company had the requisite foreign exchange account and had prior dealings with SST. He also confirmed that JY had transferred the sum in question to the relevant government authority. In *Aksionairnoye Obschestvo A M Luther v James Sagor & Co* [1921] All ER 138, 146, Warrington LJ said: "It is well settled that the validity of the acts of an independent sovereign government in relation to property and persons within its jurisdiction cannot be questioned in the courts of this country." It was for SST to prove their assertion that they were entitled to a set-off with respect to the "apology money." As they failed to do so, the said sum could not be deducted

from the damages payable to JY for their breach of contract (See [24]-[25]).

SST accepted that JY were entitled to damages for breach of contract if they had no right to set-off the "apology money." JY were entitled to costs as far as this claim was concerned (See [26]).

Different considerations arose with respect to the costs in relation to JY's claim for consequential losses and SST's alleged set-off. After taking all the circumstances into account, the court ordered that with respect to JY's claim for consequential losses under their sub-contracts and SST's claim regarding a set-off, the parties would bear their own costs (See [27]).

Case(s) referred to

Aksionairnoye Obschestvo A M Luther v James Sagor & Co

[1921] All ER 138 (refd)

Hadley v Baxendale

(1854) 9 Exch 341 (appd)

Koufos v C Czarnikow

[1969] 1 AC 350 (flld)

Victoria Laundry (Windsor) Ltd v Newman Industries Ltd

[1949] 2 KB 528 (flld)

Judgment

GROUNDS OF DECISION

1. The plaintiffs, Korea Jonmyong Trading Co ("JY), a Democratic People's Republic of Korea ("DPRK") company, claimed damages from the first defendants, Sea-Shore Transportation Pte Ltd ("SST"), and the second defendant, Mr Sharafdeen s/o Abdul Rasak ("Deen"), a director of SST, with respect to breach of a contract for the supply of around 3,000 metric tonnes of Indonesian high speed diesel. JY also alleged that the defendants were guilty of fraud.

Background

2. On 15 February 2001, JY agreed to purchase "3,000 metric tonnes +/- 5%" of high speed diesel of Indonesian origin from SST at USD215 per metric tonne. The contract provided for the cargo to be shipped to JY in February 2001 and Nampo was nominated as the port of discharge.

3. SST entrusted the task of procuring the Indonesian high speed diesel to one Mr Danny Moorthy ("Danny"), who did not succeed in obtaining the required quantity of cargo. Only 400 metric tonnes of high speed diesel were loaded at Surabaya while slightly more than 900 metric tonnes of the said oil were loaded at Pulau Kambing. The vessel that carried the cargo to DPRK, namely *MT Princess Sarah,* had her share of problems. Time was lost as she had to be repaired before she sailed from Indonesia. She then deviated to the Philippines and she finally reached Nampo, the port of discharge, on 17th June 2001.

4. JY did not expect their cargo to arrive as late as 17th June 2001. They also did not know that *MT Princess Sarah* did not have the

agreed quantity of high speed diesel on board because SST had furnished them with bills of lading which showed that more than 3,000 metric tonnes of the cargo had been shipped. Apart from being shocked at the shortfall of cargo, they alleged that the limited quantity of high speed diesel oil that was delivered to them at Nampo was not of the same quality as that specified in their contract with SST.

5. SST asserted that the problem of a shortfall in the cargo delivered at Nampo could have been minimised had Danny, who was on board the *MT Princess Sarah,* been allowed to return to Indonesia to load more high speed diesel. However, Danny could not leave the DPRK as he was accused by the North Koreans of having committed a number of offences. Among other things, he was accused of having firearms and satellite phones in his possession without declaring them to the authorities.

6. According to JY, Danny, who faced a long term of imprisonment if he was convicted of the offences in question, offered the DPRK Central Public Prosecutors' Authority the sum of USD230,000 as "apology money" if he was allowed to leave DPRK. SST's Deen was made aware of Danny's problems with the DPRK authorities by Kosa, their agent in Nampo, and by Mr Kwon Chang Hyok ("Kwon"), JY's manager. Danny also spoke to Deen about his predicament. In due course, Deen arranged for a total of USD230,000 to be transferred to JY in late 2001 and early 2002 to secure Danny's release. JY asserted that after they received the USD230,000, they transferred the "apology money" to the relevant government authority.

7. Subsequently, JY claimed from SST damages in relation to, inter alia, their loss of profits and sums which they paid to third parties, to whom they sold the high speed diesel that SST failed to deliver. They asserted that the total loss to date amounted to USD1,515,494.50. When SST failed to pay the amount claimed, JY commenced the present action. SST denied liability to JY and added that if they are liable in damages to JY, the USD230,000 paid by them to secure Danny's release must be taken into account as it was in fact a partial refund of the money which JY paid to them for the high speed diesel oil ordered in February 2001.

Claim against second defendant withdrawn

8. During the trial, JY withdrew their claim against Deen on terms which were recorded in a consent order dated 10 October 2002. As such, this judgment will only concern JY's action against SST.

SST admits breaching the contract

9. SST admitted at the trial that they breached their contract with JY by failing to deliver the agreed quantity of high speed diesel. It was then agreed that if the claim for consequential losses under JY's sub-contracts with third parties and SST's alleged set-off of USD230,000 are not taken into account, SST would pay JY USD600,200 as damages for breach of contract. Judgment was thus entered in JY's favour for this amount. Interest at the rate of 6% per annum is payable with respect to this judgment sum as from the date of the writ.

10. As a result of the narrowing of differences between JY and SST, the only remaining issues left to be resolved were JY's claim for losses suffered under their sub-contracts with third parties in the DPRK and SST's claim in relation to a set-off. These will be considered below.

JY's claim for losses under their sub-contracts with third parties

11. Although JY initially asserted that they suffered losses under a number of sub-contracts with third parties in the DPRK, they opted to claim only the loss under their sub-contract with Sasan Farm ("Sasan"), a large rice farm in the Pyongyang area. JY's case is that they breached a contract to deliver 1,000 metric tonnes of high speed diesel to Sasan because of SST's failure to deliver the agreed amount of high speed diesel to them. Sasan complained to the DPRK Central Public Prosecutors' Authority, claiming that JY owed them USD1,290,800 for the cost of additional manpower and USD1,507,840 for a shortfall in rice production. The Central Public Prosecutors' Authority ordered JY to pay USD620,000 to Sasan. JY sought to recover this sum as well as legal expenses incurred in relation to Sasan's claim from SST.

12. SST asserted that this claim by JY is invalid because of the rule on remoteness of damage, which was summed up by Alderson B in *Hadley v Baxendale* (1854) 9 Exch 341, 354-55 in the following oft-cited words:

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such

breach of contract should be such as may fairly and reasonably be considered as either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

13. JY's claim for consequential losses in relation to their contract with Sasan does not rest on solid ground. For a start, it was not established that JY made known the special circumstances of their contract with Sasan to SST. Admittedly, JY's manager, Kwon, initially claimed that SST's Deen knew about JY's sub-contract with Sasan Farm. In paragraph 28 of his affidavit of evidence-in-chief, he stated as follows:

> During the extensive discussions between the Plaintiff and the 1st Defendant prior to the execution of the Contract, namely between 15 January 2001 to 16 February 2001, Jon and I had long and detailed discussions with Deen on various issues and topics relating to the role of the Plaintiff in DPRK and its customers including :-
>
> …..
>
> (c) details of the Plaintiff's contractual obligations (except price) to third parties in DPRK, including … [Sasan]

14. However, Kwon's position shifted when he was cross-examined. He said as follows:

> Q. Did you tell the defendant you had a sub-contract?
>
> A. I said I have lots of contracts, one of which was Sasan. I *told him in general* and *sometimes I put in the name of Sasan* as one of my sub-purchasers.
>
> Q. You did not tell him every detail?
>
> A. *I did not tell him every detail*.
>
> Q. What did you tell him about the Sasan contract?
>
> A. I said I have a contract with Sasan. I did not mention Sasan every time.

15. In contrast, Deen steadfastly maintained that he was unaware of JY's sub-contract with Sasan and the ramifications of this sub-contract. When cross-examined, he said as follows:

> Q. Did the plaintiffs discuss who their customers were?
>
> A. Never.
>
> Q. Did you try to find out more about the sub-sale of oil in North Korea?
>
> A. The only thing they said was they can get Russian oil but they want to try and get oil from this area.
>
> Q. Did you discuss the domestic market and who controls the prices?
>
> A. No. …..

16. Mr Ameer Sadique Mohamed Zaheer, a former sales executive of SST, who said that he was present during most of Deen's meetings with the North Koreans, also knew nothing about JY's sub-contract with Sasan. He impressed me as a truthful witness. When cross-

examined, he said as follows:

> Q. Did you recall conversations about JY's sub-sale to a farm?
>
> A. No.
>
> Q. During the extensive discussions, did you hear any talk about a sale of oil to a farm?
>
> A. No.
>
> Q. Was there any discussion on market conditions and the plaintiffs' duties?
>
> A. In the meetings I attended, none of these was discussed.

17. I hold that it was not established that SST were aware of JY's sub-contract with Sasan or of the terms of that sub-contract. The effect of a party not knowing the special circumstances surrounding the other contracting party's sub-contract with third parties must be viewed in the light of *Hadley v Baxendale,* where Alderson B said as follows:

> Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. On the other hand, if these special circumstances were wholly unknown to the party breaking the contract he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.

18. The principles laid down in *Hadley v Baxendale* have been restated in subsequent cases, including *Victoria Laundry (Windsor) Ltd. v Newman Industries Ltd* [1949] 2 KB 528 and *Koufos v C Czarnikow* [1969] 1 AC 350, where the House of Lords did not agree on a single reformulation of the rule on remoteness of damage. The combined effect of all the cases on remoteness of damage was summed up in *Chitty on Contracts,* 28th ed, p 1291, in the following terms:

> A type or kind of loss is not too remote a consequence of a breach of contract if, at the time of contracting (and on the assumption that the parties actually foresaw the breach in question), it was within their reasonable contemplation as a not unlikely result of that breach.

19. If all the cases on remoteness of damage are taken into account, there can be no doubt that JY's loss under their sub-contract with Sasan is too remote a consequence of SST's breach of the contract to supply JY with 3,000 metric tonnes of Indonesian high speed diesel. In any case, what actually transpired in the investigations in relation to Sasan's claim against JY is not known. The DPRK Central Public Prosecutors' Authority furnished no grounds for requiring JY to compensate Sasan USD620,000. Although a representative from Sasan, Mr Nam Jong Ok, filed an affidavit of evidence-in-chief, and was listed as a witness in the present action against SST, JY chose to close their case without calling him as a witness. As such, SST's counsel was denied the opportunity to question Mr Nam, whose answers could have shed more light on the ramifications of Sasan's petition to the Central Public Prosecutors' Authority. After having taken into account all the circumstances of the case and the evidence of the witnesses, I have no hesitation whatsoever in dismissing JY's claim for consequential losses under their sub-contract with Sasan.

SST's claim regarding a set-off

20. I now turn to SST's assertion that they are entitled to set-off USD230,000 from the amount payable by them to JY for breach of contract. As has been mentioned earlier on, Deen arranged for the transfer of USD230,000 to JY in late 2001 and early 2002 to secure the release of Danny, who was then being investigated by the DPRK Central Public Prosecutors' Authority. SST contended that this sum was actually a partial refund by them of the money paid by JY for the high speed diesel and that it should be taken into account for the purpose of computing the damages payable. JY disagreed and asserted that the question of a set-off of the USD230,000 does not arise because this sum was Danny's "apology money" with respect to the criminal charges faced by him. JY referred to Order No 572 of the DPRK Central Public Prosecutors' Authority dated 12 November 2001, which is the following terms:

> The Central Public Prosecutors' Authority of DPRK have investigated into the matters concerning [Danny], the Captain of MT "Princess Sarah" which called at Nampo Port on 17th June 2001, … and discovered and confirms the following criminal and illegal behaviour committed by [Danny] and his crew.
>
> - Captain has organised illegal international voyage by being involved in chartering a vessel without Nationality Certificate …
>
> - Captain did not declare weapons, ammunition and satellite phones and concealed 3 pistols, ammunition, knives and 2 sets of satellite phones.
>
> - Captain used satellite phones from time to time and without permission even shot 1 bullet in the Nampo Port area, thus violating the safety of the country and being afraid of his crime, he threw away 1 pistol into the sea
>
> - Captain and his crew violated public order in the Nampo area sea bathing resorts, insulting ladies and gentlemen there and destroying some of the resort facilities, thus several protests were made from several diplomats and the local people.
>
> All the above criminal and illegal behaviour have been clearly proved by … scientific and objective evidence. Therefore, the Central Public Prosecutors' Authority informed [Danny] that he would be charged for minimum 10 years' imprisonment under … Article 116 of the Criminal Law of the Republic.
>
> [Danny] confessed and recognised his crimes and the correctness of the law of the Republic but suggested that as he eagerly wished to return to his family in Singapore, he wished a compound in which he would pay USD230,000.00 for his apology and not … be prosecuted.
>
> … [T]he Central Public Prosecutors' Authority decided to accept his apology amount … and … orders as follows:
>
> 1. [Danny] to arrange remittance of transfer of apology amount of USD230,000.00 to the Credit Bank of Korea, Pyongyang in favour of [JY] not later than end of December 2001.
>
> 2. [JY] to arrange transfer of this amount immediately upon credit to the national treasury account with the Foreign Trade Bank of DPRK.

21. Danny, who denied that he had committed many of the offences referred to in the Order of the DPRK Central Prosecutors' Authority, admitted that he had breached the DPRK's laws in relation to possession of firearms and satellite phones. Deen accepted that he had been informed about Danny's predicament by SST's Korean agent, Kosa, and that he had been urged to help secure Danny's release.

Contemporaneous documents with respect to the transfer of the USD230,000 from Deen's account indicate that the money was paid to secure Danny's release. On 24 December 2001, Danny's wife, Jenny, wrote to JY as follows:

> Please be informed that I am trying my best to look for financial help for my husband (Capt. Danny Moorthy) and will be able to remit the balance money to you by end December 2001.
>
> Please bear with me during this 1 week period and arrange to send my husband back to Singapore once you receive my remittance.

22. On 21 January 2002, Deen wrote to JY's Kwon as follows:

> The Captain's wife came to our office this morning crying and desperately seeking our help in releasing her husband from your custody. She says that so far she had borrowed the money from your relatives and friends to arrange for the US$200,000/- and now she needs to settle this amount by Chinese New Year. (14/02/2002). She says it would be better for her husband to be released earlier (before Chinese New Year) so that he can help her in settling the debts.
>
> Though the original amount asked by you was US$200,000/- and now you are asking for further US$30,000/- she says she will try somehow to get the loan by the end of this week.
>
> Please try to arrange to get her husband released by this week as she is anxious for his safe return.

23. SST contended that the above-mentioned letters from Danny's wife, Jenny, and Deen were written because they were told that Danny would only be released if the USD230,000 was forwarded to JY on the basis that it was in respect of Danny's release from custody. What is strange is that when cross-examined, Danny admitted that his wife had tried to borrow money to secure his release. JY's counsel, Mr Andre Arul, rightly pointed out that if the USD230,000 in question was intended to be a partial refund of the purchase price paid by JY to SST, there was no reason for Danny's wife to try and raise money to secure his release.

24. What SST is in fact alleging is that JY is guilty of fraud and that the DPRK Central Public Prosecutors' Authority is colluding with JY to defraud them. SST submitted that it should not be overlooked that the "apology money" was transferred to JY's account. Apart from the fact that fraud was not pleaded by SST, it is pertinent to note that Mr Yun Jun Hi, the officer in the Central Public Prosecutors' Authority who took charge of the investigation regarding Danny's breach of the DPRK's laws, testified that the "apology money" had, for convenience, been paid into JY's account because that company had the requisite foreign exchange account and had prior dealings with SST. He also confirmed that JY had transferred the USD230,000 in question to the relevant government authority. It ought to be borne in mind that in *Aksionairnoye Obschestvo A M Luther v James Sagor & Co* [1921] All ER 138, 146, Warrington LJ said:

> It is well settled that the validity of the acts of an independent sovereign government in relation to property and persons within its jurisdiction cannot be questioned in the courts of this country:
>
> > "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory"
>
> *per*

Clarke J, delivering the judgment of the Supreme Court of the United States of America in *Oetjen v Central Leather Co* … (1917) 246 US Rep at p 303.

25. It is for SST to prove their assertion that they were entitled to a set-off with respect to the USD230,000 "apology money". As they failed to do so, the said sum cannot be deducted from the damages payable to JY for their breach of contract.

Costs

26. As has been mentioned, SST accepted that JY are entitled to the sum of USD600,200 for breach of contract if they had no right to set-off the USD230,000 paid by them to JY in late 2001 and early 2002. JY are entitled to costs as far as their claim for USD 600,200 is concerned.

27. Different considerations arise with respect to the costs in relation to JY's claim for consequential losses and SST's alleged set-off. JY's counsel pointed out that the alleged set-off occupied more time than their claim for loss suffered under their sub-contract with Sasan. However, it must be borne in mind that JY started off with three claims for consequential losses and a number of representatives of those who entered into sub-contracts with JY filed affidavits of evidence-in-chief. None of these representatives appeared in court to give evidence. After taking all circumstances into account, I order that with respect to JY's claim for consequential loss under their sub-contracts and SST's claim regarding a set-off, the parties shall bear their own costs.

Sgd:

TAN LEE MENG

JUDGE