I. Supreme Court of Singapore - High Court

II. The "Duden" - [2008] SGHC 149 (9 September 2008)

The "Duden"
[2008] 4 SLR 984; [2008] SGHC 149

<="">

Suit No:	Adm in Rem 112/2005, RA 247/2008
Decision Date:	09 Sep 2008
Court:	High Court
Coram:	Andrew Ang J
Counsel:	Wendy Leong (AsiaLegal LLC) for the appellants/defendants, Wendy Tan and Charmaine Fu (KhattarWong) for the respondents/plaintiffs

Subject Area / Catchwords

Admiralty and Shipping
Arbitration

Judgment

9 September 2008

Andrew Ang J:

Introduction

1 This was an appeal against the decision of the assistant registrar (“AR”) in Admiralty in Rem No 112 of 2005 granting a stay of proceedings in favour of arbitration in England. Specifically, the appeal was brought against one of the conditions imposed by the AR for the stay of court proceedings, *viz*, the condition that the appellants/defendants waive the defence of time bar in the arbitration proceedings. At the end of the hearing of the appeal, I dismissed the appeal with costs fixed at $2,500 and disbursements.

Facts of the case

2 The respondents/plaintiffs are the lawful holders and/or endorsees of the Bill of Lading No 001 dated 27 September 2004 ("the Bill of Lading") under which 25,400mt of Indian solar salt ("the Cargo") was shipped. The Cargo was shipped on board the *Duden* ("the Vessel") on a voyage from Kandla Port, India, to Qingdao, China.

3 During that period of time, the Vessel was serving under a chain of time charterparties. The head charterparty, dated 20 May 2003, was between the appellant and Anchor Navigation Ltd ("Anchor Navigation"). On 9 March 2004, Anchor Navigation chartered the Vessel to Parkroad Corporation ("Parkroad") for a period of about 13 months. Parkroad, in turn, subchartered the Vessel to other parties for various periods. One party to whom Parkroad had subchartered the Vessel to was Grand Loyal Ltd ("Grand Loyal"). On 9 September 2004, the Vessel was further subchartered by Grand Loyal to Goodearth Maritime Ltd ("Goodearth"). Goodearth subsequently fixed the Vessel on the following day, 10 September 2004, Jakhau Salt Company Pvt Ltd (*ie*, the named shipper in the Bill of Lading) for the voyage from Kandla, India, to Qingdao, China, with the Cargo.

4 On 3 November 2004, part of the Cargo was found damaged and/or contaminated during discharging operations at the discharge port of Qingdao. According to the respondents' surveyors, the damage to and/or contamination of the Cargo was caused by the rust of the Vessel's bulkheads and the rust of the bottom of the Vessel's holds. As such, the respondents held the appellants, being the contractual carrier of the Cargo, responsible for the loss and damage they suffered.

Proceedings in Singapore

5 On 7 July 2005, the respondents filed a writ of summons ("the Writ") in the High Court of Singapore against the Vessel wherein they claimed damages, interest thereon and costs from the appellants in respect of the appellants' breach of contract and/or duty as bailees and/or negligence in or about the loading, stowage, handling, custody, care and discharge of the Cargo. The Writ was valid for 12 months. Upon obtaining issuance of the Writ, the respondents engaged a professional shipwatch service provider, Navspec Marine Consultants Pte Ltd ("Navspec"), to maintain local watch on the Vessel and to alert them of the arrival, if any, of the Vessel in Singapore with a view to effecting service of the Writ and arresting the Vessel for security.

6 On 5 July 2006, the Writ was renewed for a further 12 months, *ie*, from 7 July 2006 to 7 July 2007. On 15 February 2007, the Vessel called in Singapore. Navspec was maintaining watch on the Vessel but was not alerted of the Vessel's call. As such, the respondents were not made aware of the Vessel's call and failed to effect service of the Writ. On 3 July 2007, the respondents renewed the Writ for a further 12 months, *ie*, from 7 July 2007 to 7 July 2008. Full disclosure was made of the fact that the Vessel had called in Singapore on 15 February 2007.

7 On 12 November 2007, the Vessel called in Singapore again. Service of the Writ was finally effected and the Vessel was arrested. On 15 November 2007, the Vessel

was released upon the appellants' provision of security for the respondents' claim in the sum of US$222,857.35 by way of payment into court.

8 On 10 January 2008, the appellants filed Summons No 113 of 2008 to set aside the second renewal of the Writ on the ground that the Vessel had called in Singapore on 15 February 2007 during the currency of the first renewal of the Writ and that service of the Writ should have been effected at that time. In the alternative, the appellants asked for a stay of court proceedings in favour of arbitration in London. The appellants succeeded with respect to the setting aside of the second renewal of the Writ before the AR but this was reversed on appeal by Choo Han Teck J on 23 May 2008 (Registrar's Appeal No 145 of 2008). The appellants subsequently applied for leave to appeal to the Court of Appeal against the decision under s 34(2)(*d*) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed). Leave was refused, however, and the appellants then proceeded to make an application to the Court of Appeal for leave to be granted (Originating Summons No 821 of 2008). The application was dismissed on 19 August 2008.

9 In respect of the application to stay court proceedings in favour of arbitration in London, the AR ordered a stay of court proceedings on condition that the security obtained by the respondents from the arrest of the Vessel be retained as security for the arbitration proceedings in London and the appellants waive the defence of time bar in the arbitration proceedings in London. The AR imposed the second condition, *viz*, the waiver of the defence of time bar as she felt it was appropriate and necessary in the circumstances of the case. It was not denied that the claim would have been subject to the defence of time bar pursuant to Art III r 6 of the Hague-Visby Rules which states as follows:

Subject to paragraph 6*bis* the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen.

10 The appellants subsequently appeared before me on 28 July 2008 to appeal against the AR's decision to impose the condition that the appellants waive the defence of time bar in the English arbitration proceedings.

The law

11 The relevant statutory provision which empowers the court to impose conditions when granting a stay of proceedings in favour of arbitration is s 6(2) of the International Arbitration Act (Cap 143A, 2002 Rev Ed). This provision states that when an application is made by a party in accordance with s 6(1) the court must order a stay of court proceedings unless the arbitration agreement is "null and void, inoperative or incapable of being performed" but may impose "such terms or conditions as it may think fit". Such empowerment of the court stands in contrast to s 9 of the Arbitration Act 1996 (c 23)(UK) (the English equivalent of s 6 of the International Arbitration Act) where, if the criteria for a stay of court proceedings in favour of arbitration are made out, the court is obliged to stay proceedings for arbitration *without condition* (David Joseph, *Jurisdiction and Arbitration Agreements*

and their Enforcement (Sweet & Maxwell, 2005) at para 11.02). It is similar to Australian legislation, where s 7(2)(b) of the Arbitration (Foreign Awards and Agreements) Act 1974 provides that the court may impose "such conditions (if any) as it thinks fit" when ordering a stay of proceedings in favour of arbitration.

12 The discretion of the court to impose terms and conditions upon a stay of court proceedings in favour of arbitration is an *unfettered discretion*. This was the view of Lai Siu Chiu J in *Splosna Plovba International Shipping and Chartering d.o.o. v Adria Orient Line Pte Ltd* [1998] SGHC 289. She held (at [23]):

My orders as well as the original orders of the deputy registrar were made in accordance with s 6(2) of the [International Arbitration Act], that a stay could be ordered on such terms and conditions as the court may think fit*. I find no provisions in the Act and certainly I was informed of none by counsel for the defendants, that fettered the discretion of a court in imposing terms for granting a stay.* Counsel did not cite any authorities for the defendants' argument that s 6(3) overrides s 6(2) of the Act. A plain reading of s 6(3) does not support his interpretation. [emphasis added]

13 With respect, Lai J's opinion appears to me to be in accord with the intention of the Legislature. The power to impose terms and conditions on a stay of court proceedings was present in the original version of the International Arbitration Act (*ie*, Act 23 of 1994). This power was retained in the subsequent significant overhaul of arbitration legislation (the result of which is the present version of the International Arbitration Act). The overhaul was initiated in 1997, when the Review of Arbitration Act Committee ("the Committee") was formed by the Attorney-General to review arbitration legislation in Singapore. By 2001, the Committee completed their final report, together with a draft Arbitration Bill (for domestic arbitration) and a draft International Arbitration (Amendment) Bill. In the final report, the Committee noted that the Arbitration Bill would give the court "the additional power to order stay on terms as it thinks fit" and stated that this was adopted from the International Arbitration Act (*ie*, Act 23 of 1994). No mention of any fettering of the court's discretion in this respect, *vis-à-vis* both the proposed Arbitration Bill and International Arbitration (Amendment) Bill, was mentioned by the Committee (or in the subsequent parliamentary debates).

14 That having been said, discretionary power must, of course, be exercised judiciously. The corollary to a wide discretionary power is the great caution with which it should be exercised. Unfortunately, there is little case law (both local and from Australia) on the court's exercise of its discretion with regard to the imposing of conditions on a stay of court proceedings in favour of arbitration.

15 The main guiding principle in my view is that courts generally should be slow to interfere in the arbitration process. In recent years, courts have moved from strong uncertainty as to the arbitration process resulting in extensive judicial interference or the non-enforcement of arbitration agreements to a position in favour of arbitration, *ie* deferring to party autonomy and avoiding intervention where possible (Julian D M Lew, Loukas A Mistelis & Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at p 356).

16 Nevertheless, in a case such as this, the court should not be reluctant to intervene by exercising its statutory power to impose conditions where the justice of the case calls for it. As Lai Kew Chai J, in *The Xanadu* [1998] 1 SLR 767, observed (at [6]), the court is "entitled to impose terms and conditions as appear reasonable or required by the ties of justice". But even then, a condition imposed as to the waiver of a defence of time bar can only be justified in "very special circumstances as it takes away a substantive right of one of the parties" (see the commentary on *The Xanadu* in *Halsbury's Laws of Singapore* vol 2 (LexisNexis, 2003 Reissue) at para 20.044).

17 In *The Xanadu*, the defendants applied for a stay of the plaintiffs' action on the basis that the contracts of carriage upon which the plaintiffs' claim was brought provided for the claim to be dealt with by way of arbitration in London. The stay was granted by the AR on the condition that, *inter alia*, the defendants waive the defence of time-bar in the arbitration proceedings. The defendants appealed against this condition. Lai J dismissed the appeal and, in doing so, held (at [6]):

I was not persuaded that the learned assistant registrar had exercised her discretion erroneously in any way. Although she had to order a stay, she was entitled to impose terms and conditions as appear reasonable or required by the ties of justice. For the following reasons, I would go further and state that I would have imposed the same condition in the circumstances of this case. First, there was, at the least, sufficient ambiguity which was reasonably entertained by the plaintiffs on the question whether the relevant bill of lading had identified the arbitration clause which was invoked. It was therefore reasonable for the plaintiffs to have commenced these admiralty proceedings. Secondly, the defendants waited until after early September 1996, after the expiry of the time-bar, before they filed their application on 20 September 1996 to stay these proceedings. It was noteworthy that the statement of claim was filed on 13 August 1996. Thirdly, if the condition was not imposed, the plaintiffs would suffer undue and disproportionate hardship, seeing that their claim is in excess of US$222,518.

Decision of the court

18 In my opinion, the respondents in the present case could not be faulted for failing to institute arbitration proceedings. The Bill of Lading did not contain any arbitration agreement and the only reference to an arbitration agreement was in the reverse side which provided, *inter alia*, for the incorporation of "[a]ll terms and conditions, liberties and exceptions of the [Charter Party], dated as overleaf, including the Law and Arbitration Clause". However, there was *no identification of the relevant charterparty* on the front page of the Bill of Lading. The respondents were only informed of the identity of the relevant charterparty after the expiry of time for instituting proceedings.

19 The claim for compensation was first made by the respondents on 14 June 2005, when their Hong Kong solicitors sent a letter of demand to the appellants. Sixteen days later, on 30 June 2005, the appellants referred the claim to their Protection & Indemnity Club, the American Club ("the American Club"), to deal with the matter. About a month later, on or about 21 July 2005, the American Club responded to the claim by advising the respondents that they were reviewing the claim documents and

seeking further clarification from their experts and correspondents. The claim was investigated by the American Club from 21 July 2005 to sometime before 20 November 2006. During this period of time, neither the appellants nor the American Club made reference to the incorporation of charterparty terms regarding arbitration.

20 It was only on 13 December 2006 that the appellants informed the respondents that the Bill of Lading incorporated the terms of the charterparty dated 9 March 2004 between Anchor Navigation and Parkroad (see [3] above), which contained a London arbitration clause and that, as no notice of arbitration had been received from the respondents within one year from completion of discharge of the Cargo, the respondents' claim was time-barred. The appellants' English solicitors subsequently deposed in an affidavit dated 9 January 2008 that the Bill of Lading incorporated the charterparty dated 9 September 2004 between Goodearth and Grand Loyal (see [3] above), which also contained a London arbitration clause, rather than the charterparty dated 9 March 2004. The respondents' Hong Kong solicitors deposed in an affidavit that the respondents were never privy to the terms of the charterparty dated 9 March 2004 or the charterparty dated 9 September 2004 or, indeed, any other charterparty. The respondents were only provided with a copy of a charterparty, *viz*, the charterparty dated 9 March 2004, on 18 December 2006. This was the first time that the respondents had seen an arbitration clause in the course of the pursuit of the claim. As for the charterparty dated 9 September 2004, the respondents had never seen it prior to the service of the appellants' English solicitor's affidavit dated 9 January 2008.

21 The incorporation of the charterparty dated 9 September 2004 takes a rather confused and indirect route. The appellants, in their submissions to the AR, contended that the Bill of Lading was clearly intended to be used with a charterparty and this was the fixture note between Goodearth and the respondents (see [3] above; hereinafter referred to as "the Fixture Note"). The Fixture Note itself referred to a charterparty dated 9 September 2004 between Goodearth and Anchor Navigation. The appellants admitted to the AR that there was no such charterparty between Goodearth and Anchor Navigation but produced a letter from the solicitors of Goodearth stating that the charterparty referred to in the Fixture Note was the charterparty between Goodearth and Grand Loyal (see [3] above) and not Anchor Navigation. The AR accepted the appellants' explanation that there was a mistake made in the Fixture Note and that it had intended to refer to the charterparty between Goodearth and Grand Loyal. She concluded that there was no charterparty between Goodearth and Anchor Navigation dated 9 September 2004, and therefore the parties must have been referring to the charterparty between Goodearth and Grand Loyal.

22 In my view, it would be wrong for the respondents to be subject to the defence of time bar in light of the uncertainty and confusion surrounding the identity of the charterparty referred to in the Bill of Lading. It would be unreasonable to expect the respondents to comply with an arbitration agreement found in a charterparty, the identity of which the appellants themselves were not certain of. In *The Xanadu*, the presence of ambiguity *vis-à-vis* the arbitration agreement was one of the reasons expressed by Lai J as to why he would have imposed the condition of a waiver of the defence of time bar on the defendants (see [17] above). I would go further and say

that it is a compelling reason when the ambiguity is egregious, as it was in the present case.

23 Based on the foregoing, I felt that the justice of this case demanded the imposition of the condition that the appellants waive the defence of time bar in the English arbitration proceedings. Counsel for the appellants submitted that there was room for the respondents to seek an extension of time for the commencement of arbitration via the arbitral process and s 12 of the Arbitration Act 1996 (c 23)(UK). However, in my view, justice had to be done (or ensured) in substance with the imposition of the condition that the appellants waive the defence of time bar. In this respect, I stand guided by Lord Mansfield CJ in *Alderson v Temple* [1768] EngR 55; (1768) 4 Burr 2235; 98 ER 165, where his lordship stated (at 167):

[T]he most desirable object in all judicial determinations, especially in mercantile ones, (which ought to be determined upon natural justice, and not upon the niceties of law,) is, to do substantial justice.

24 I would add a further observation. In a speech entitled “The differing approach to commercial litigation in the European Court of Justice and the courts of England and Wales” (Institute of Advanced Legal Studies, 23 February 2006), Sir Anthony Clarke MR once remarked:

Arguments of every kind have been deployed over the years to persuade courts that the interests of justice lie in the issues being determined elsewhere, although in very many cases the true position is that the defendant’s real interest is to ensure (if at all possible) that the issues will in practice never be determined at all.

The present case appears to be of that ilk; the appellants in the present case do not appear to have any *bona fide* intention to have the respondents’ claim arbitrated. They appear all too clearly to be trying all ways and means to avoid an adjudication of the matter, as demonstrated by the fact that they mounted an unmeritorious application to the Court of Appeal for leave to appeal against the decision of Choo J upholding the renewal of the Writ. The appeal was bound to fail as there was clearly no *prima facie* case of error, question of general principle decided for the first time, or question of public importance – those being the situations where leave to appeal would be granted (see *Lee Kuan Yew v Tang Liang Hong* [1997] 3 SLR 489 at [16]). In the event, it did fail.

Conclusion

25 In the result, I dismissed the appeal with costs fixed at $2,500 plus disbursements.

Reported by Nathaniel Khng.