Privy Council Appeal No. 37 of 1983

The Netherlands Insurance Co. Est. 1845 Limited *Appellants*

v.

Karl Ljungberg & Co. *Respondents*

FROM

THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD APRIL 1986

Present at the Hearing:

LORD BRIDGE OF HARWICH
LORD BRIGHTMAN
LORD GRIFFITHS
LORD OLIVER OF AYLMERTON
LORD GOFF OF CHIEVELEY

*[Delivered by **Lord Goff of Chieveley**]*

There is before their Lordships an appeal from a judgment of the Court of Appeal of the Republic of Singapore. The subject of the appeal is a claim by the respondents, Karl Ljungberg & Co., against the appellants, the Netherlands Insurance Co. Est. 1845 Limited, under a policy of marine insurance. Under that policy, a consignment of plywood was insured by the appellants for a voyage from Singapore to Esbjerg in Denmark. The policy incorporated the Institute Cargo Clauses (All Risks) in the edition dated 1st January 1963. On discharge of the goods at Esbjerg, some were found to be missing and others to be damaged. The respondents, as consignees of the goods and assignees of the policy, claimed against the appellants in respect of both the shortage and the damage, but the appellants denied liability.

The goods had been discharged at Esbjerg in March 1980. Any claim against the carriers would become time-barred in March 1981. The respondents' claim against the appellants under the policy was made in January 1981, and liability was denied by them shortly afterwards. If the claim against the carriers
[22] was to be preserved, it was plain that proceedings

must be commenced against them without delay. Following correspondence between the parties, in the course of which the appellants through their solicitors asserted that the respondents were bound by the terms of the bailee clause in the policy (the terms of which their Lordships will set out in a moment) to preserve the claim against the carriers, the respondents commenced proceedings against the carriers in Japan in order to preserve the time-bar.

The respondents also commenced proceedings in Singapore against the appellants, claiming their losses under the policy. They obtained summary judgment in respect of the short delivery. Thereafter their claim in respect of the cargo damage was compromised. But there remained outstanding the question of the costs incurred by the respondents in commencing proceedings against the carriers in Japan. For these, the respondents claimed that the appellants were responsible; the appellants denied liability, asserting that the bailee clause in the policy imposed upon the respondents the obligation to preserve the claim against the carriers for the benefit of the appellants but at the respondents' expense. The matter came before Wee Chong Jin C.J., who dismissed the respondents' claim for these expenses, but without giving any reasons. The respondents then appealed to the Court of Appeal (Kulasekaram, Chua and Rajah JJ.A.) who allowed the appeal, on the ground that, in the correspondence which had passed between the parties, the appellants had required the respondents to commence the proceedings against the carriers and that, on that basis, the appellants were bound to indemnify the respondents against the expense incurred by them, to the extent that the appellants had thereby benefited - i.e., in the proportion that the appellants had been held, or had agreed, to be liable to the respondents for the insured loss. From that decision the appellants now appeal, with the leave of the Court of Appeal.

It is at this stage desirable to set out the relevant provisions of the policy. The policy incorporates the hallowed wording of Lloyds' standard form, including the sue and labour clause which is in the following terms:-

> "... and in case of any Loss or Misfortune, it shall be lawful to the Assured, their Factors, Servants and Assigns, to sue, labour and travel for, in and about the Defence, Safeguard and Recovery of the said Goods and Merchandises or any Part thereof without Prejudice to this Assurance and to be reimbursed the Charges whereof by the Assurers."

The policy is expressed to be subject to certain clauses, including the Institute Cargo Clauses (All Risks). As already stated the relevant Institute Clauses are in the edition dated 1st January 1963, and these include clause 9 (the bailee clause), which is in the following terms:-

> "9. It is the duty of the Assured and their Agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss and to ensure that all rights against carriers, bailees or other third parties are properly preserved and exercised."

It is right to record that there is, on the face of the policy, under the heading "Important -Procedure in the event of loss or damage for which assurers may be liable", a series of provisions which include one in terms identical to the bailee clause in the Institute Clauses.

The appeal before their Lordships raises two separate issues. The first is whether, as the Court of Appeal held, the expense of starting the proceedings in Japan was incurred by the respondents at the request of the appellants, thereby imposing on the appellants a duty to indemnify the respondents. The second is whether, if that conclusion cannot be accepted, it is implicit in the terms of the policy that the appellants are bound to indemnify the respondents against their expenditure.

Their Lordships have found themselves unable to agree with the reasoning of the Court of Appeal; but, since they accept the argument of the respondents on the second issue, they trust that it will not be thought discourteous to the Court of Appeal if they deal with the first issue comparatively briefly.

The matter was referred to by the respondents' solicitors in a letter to the appellants' solicitors dated 15th January 1981, in which they asserted that the duty on the respondents under the policy to preserve claims by the commencement of proceedings against the carriers only arose when, on payment of the claim, the appellants became subrogated to the respondents' rights against the carriers. In reply on 16th January, the appellants' solicitors stated that the respondents' duty under the policy to preserve their rights was in no way affected by the appellants' decision to admit or deny liability under the policy. Further correspondence followed in which the parties' solicitors reiterated their clients' positions, culminating in a letter from the appellants' solicitors dated 28th January 1981 which contained the following passage (on which the respondents particularly rely):-

> "Our clients put your clients to notice that should your clients not preserve our clients' rights and interests in any event, on an entirely 'without prejudice' basis, this would be an additional ground for our clients to deny liability under the policy."

This correspondence of course took place with reference to the bailee clause. The Court of Appeal expressed the opinion that "the clause does not place any obligation on the insured to take proceedings against third parties unless the insurer has called upon the insured to perform its obligation thereunder". They then concluded that "upon a reading of the correspondence which had passed between [the parties] the proper inference to be drawn was that the [appellants] had required the [respondents] to commence the actions against the third parties".

The respondents did not seek to support that reasoning before their Lordships; and with all respect to the Court of Appeal, their Lordships consider that the respondents were right to adopt that course. The clause did not in terms restrict the obligation of the assured to preserve rights to cases where the insurers had requested the assured to do so; and there is no basis upon which any such term can be implied. The respondents, however, founding their argument in particular upon the passage in the appellants' solicitors' letter dated 28th January 1981 quoted above, submitted that the appellants' insistence that the respondents preserve the appellants' rights and interests "in any event", coupled with the threat to deny liability if such rights were not preserved and, in particular, their insistence that the respondents were under a duty to preserve rights against the carriers, was a clear and unequivocal direction to the respondents to commence proceedings in Japan before the right of action was lost by expiry of time, which would give rise to a duty on the appellants to indemnify the respondents against the costs incurred by them in consequence of such direction. This submission their Lordships are unable to accept. The position was that the appellants were simply asserting that the respondents were under an obligation, under the bailee clause, to preserve their rights as against the carriers. They were justified in so doing; and a request by them to the respondents to perform their duty under the relevant contract could not give rise to any duty to indemnify the respondents, unless the contract expressly or impliedly imposed such a duty upon them.

Their Lordships therefore turn to the second issue on the appeal which, in their opinion, is the crucial issue in the case. Before their Lordships, the appellants submitted first that, under the bailee clause, the respondents were under a duty to commence

the Japanese proceedings in order to ensure that all rights against the carriers were properly preserved; and further that, under the clause, there was no express obligation upon the appellants to indemnify the respondents against any expenditure thereby incurred. With those submissions, their Lordships agree. The crucial question is whether any term should be implied in the policy. As to that, the appellants submitted that such a term could only be implied if business efficacy required it; and that their Lordships should not yield to the temptation to imply such a term merely because they thought it reasonable to do so. Again, their Lordships accept the submission. They turn therefore to the question whether a term should be implied to give efficacy to the contract.

In considering that question, their Lordships do not think it right to consider the words "to ensure that all rights against Carriers, Bailees or other third parties are properly preserved and exercised" in isolation. It is first of all desirable to have regard to their setting in the contract of insurance. In this connection, it is to be remembered that, in the event of the insurers paying a claim of an assured for cargo damage under the policy, they would become subrogated to the rights of the assured against the carriers in respect of the relevant damage. If the insurers then wished to enforce such rights against the carriers in legal proceedings, they would be entitled to do so and, although in England they must proceed in the name of the assured, they can do so as *dominus litis* though only on the basis that they indemnify the assured against costs. From this it follows that, on the appellants' submission before the Board, the assured would be responsible for the costs of litigation commenced under the bailee clause up till the time of payment of the claim by the insurers, but thereafter the cost of litigation would fall on the insurers. This is in itself a somewhat surprising result; and it is not to be forgotten that, under the bailee clause, the obligation on the assured is not merely to commence proceedings but to ensure that all the specified rights are "properly preserved and exercised". Costs may therefore be incurred by the assured, in performing their obligations under the clause, not merely in commencing litigation to preserve a time-bar but in pursuing litigation so commenced in order to prevent it from lapsing or being otherwise prejudiced by delay; and it is notorious that such costs can, in certain jurisdictions, be by no means insignificant. On the appellants' approach, therefore, it follows that the insurers might have a positive incentive to delay a settlement, thus throwing a greater burden of costs upon the assured; and this would be by virtue of an obligation imposed under the policy which requires the assured to take a

course of action which is plainly intended to be for the benefit of the insurers.

The appellants' argument has also to be considered in relation to the fact that the policy contains a sue and labour clause under which it shall be lawful to the Assured "to sue labour and travel for, in and about the Defence, Safeguard and Recovery of the said Goods ... and to be reimbursed the Charges whereof by the Assurers". It can of course be said, as indeed it was said on behalf of the appellants, that the fact that the sue and labour clause makes express provision for reimbursement of the assured by the insurers, whereas the bailee clause does not do so, militates against the implication of a term in the bailee clause to the same effect. But it is not to be forgotten that a marine insurance policy consists of a number of provisions, some of which (often the most important) are provisions contained in one or more documents which are incorporated by reference; and their Lordships doubt if the terms of the sue and labour clause in the standard form have much impact upon the construction of the bailee clause included in the Institute of Cargo Clauses. They consider it to be of more significance that the bailee clause itself commences by imposing an obligation on the assured "to take such means as may be reasonable for the purpose of averting or minimising a loss" without expressly stating whether costs so incurred by the assured shall be reimbursed by the insurers; and yet it was accepted in the course of argument that the assurers must be under a duty to make such reimbursement. The conjunction of the two obligations in the bailee clause, one of which admittedly carries a duty of reimbursement by the insurers, reinforces the respondents' argument that an implied duty of reimbursement applies to both obligations under the clause.

The respondents placed in the forefront of their submissions the proposition that the obligation on the assured under the bailee clause properly to preserve and exercise all rights against carriers was an obligation imposed upon them for the benefit of the insurers. Their Lordships do not feel able to accept that, as a general proposition, the mere fact that an obligation is imposed upon one party to a contract for the benefit of the other carries with it an implied term that the latter shall reimburse the former for his costs incurred in performance of the obligation. But the fact that, in the present case, the relevant obligation is indeed for the benefit of the insurers is, their Lordships consider, a material factor which may be taken into account; and when that factor is considered together with all the other factors which their Lordships have set out, they consider that a term must be implied in the contract, in order to give business efficacy to it, that

expenses incurred by an assured in performing his obligations under the second limb of the bailee clause (in the form now under consideration) shall be recoverable by him from the insurers in so far as they relate to the preservation or exercise of rights in respect of loss or damage for which the insurers are liable under the policy.

In conclusion, their Lordships wish to refer to certain matters which were drawn to their attention in the course of argument.

First, they were referred by counsel for the appellants to paragraph 1320 of the current (16th) Edition of Arnould on Marine Insurance, in a footnote to which (note 82) the learned editors expressed the opinion that the bailee clause, in the form now under consideration, cannot be construed as entitling the assured to recover from the insurers the costs of proceedings against third parties. As against that, however, the learned editors of the 7th Edition of MacGillivray & Parkington on Insurance Law suggest (at paragraph 1185) that it is arguable that such costs are recoverable. For the reasons they have given their Lordships prefer the more tentative opinion expressed in the latter work.

Second, attention was drawn to the fact that, in earlier and later editions of the Institute Cargo Clauses, express provision was made for the recovery of such costs; and it was submitted for the appellants that this pointed to the conclusion that the omission of such an express right of recovery from the bailee clause in the edition of 1st January 1963 must be read as intended deliberately to deprive the assured of his right to costs. However, even on the assumption that their Lordships are entitled to look at an earlier edition of the Clauses for the purpose of construction of a later edition, the form which the clause took in the earlier edition is too different to provide any helpful guidance to the construction of the clause in its later form.

Finally, their Lordships were properly referred to a number of authorities, in particular to *Duus Brown & Co. v. Binning* (1906) 11 Com. Cas. 190, and the decision of the Court of Appeal of New Zealand in *Arthur Barnett Ltd. v. National Insurance Company of New Zealand Ltd.* [1965] N.Z.L.R. 874; but, on examination, neither of these authorities proved to be sufficiently in point to be of assistance in the construction of the bailee clause which it fell to their Lordships to consider in the present case.

For the reasons they have given, their Lordships dismiss the appeal with costs.