Sanhe Hope Full Grain Oil Foods Production Co Ltd v Toepfer International Asia Pte Ltd [2007] APP.L.R. 11/28

JUDGMENT : Mr Justice David Steel: Commercial Court. 28th November 2007

1. This is the Claimant's ("Buyer's") appeal under section 69(1) of the Arbitration Act 1996 against the FOSFA Appeal Arbitration Award dated 22 March 2007 ("the Appeal Award"). The Appeal Award overturned the Umpire's award dated 23 October 2006 ("the First Tier Award"). Cooke J granted leave to appeal on 10 August 2007.

2. The appeal concerns the construction of clause 27 of the standard FOSFA Form 22. This clause was incorporated into a contract between the parties dated 4 December 2003 for the sale and purchase of 55,000 m.t. +/- 10% at the seller's option of Brazilian Soyabeans ("the Sale Agreement").

   "In default of fulfilment of this contract by either party, the other party at his discretion shall, after giving notice, have the right either to cancel the contract, or to sell or purchase, as the case may be, against the defaulter who shall on demand make good the loss, if any, on such sale or purchase. If the party liable shall be dissatisfied with the price of such sale or purchase, or if neither of the above rights is exercised, the damages, if any, shall, failing amicable settlement, be determined by arbitration. The damages awarded against the defaulter shall be limited to the difference between the contract price and the actual or estimated market price on the day of default. Damages to be computed on the mean contract quantity. If the arbitrators consider the circumstances of the default justify it they may, at their absolute discretion, award damages on a different quantity and/or award additional damages. "

3. It is the Buyer's case, as the Umpire found, that, although the Buyer failed to perform the Sale Agreement, the Seller sustained no loss and was not entitled to recover any substantial damages. The Appeal Board in contrast concluded that the Seller was entitled to recover some $2,778,600 as the difference between the market and contract price.

4. The terms of the contract set the price by reference to Chicago Board of Trade soyabean futures for July 2004. The Buyer was required to make two advance payments. The second instalment of RMB 5.00 million was not paid as required before the commencement of futures pricing. This, it is now common ground, constituted a repudiatory breach of the Sale Agreement.

5. The essence of the dispute arising from Clause 27 is as follows. The Buyer's case is that the Seller only ever had one cargo which in the event was sold and delivered under a contract with Henan Cereal Oils and Foodstuffs Import & Export Corporation ("Henan"). Since the sale price to Henan was greater than the sale price under the Sale Agreement, it followed that the Seller had suffered no loss.

6. The Seller's case was that both the Sale Agreement and the Henan contract would have been performed but for the repudiation and thus the Seller is entitled to recover the difference between the contract price under the Sale Agreement and the market price.

7. It is not entirely easy to discern the Appeal Board's findings as to the chronology of events but the main events appear to be as follows:

   i) On 12 December 2003, the first deposit was paid by the Buyer.

   ii) In May and June 2004 there were discussions between the parties as to a proposal for a "washout" made by the Buyer.

   iii) On 16 June 2004, the Seller advised the Buyer that the shipment would be proceeded with and called for payment of the second deposit.

   iv) On 29 June 2004, the Seller nominated the vessel MANNA to perform the contract with an ETA off the loading port of about 7 July.

   v) There ensued further discussions relating to proposed amendments to the Sale Agreement suggested by the Buyer.

   vi) On 6 July 2004 the Buyer purported to claim "force majeure". This was rejected.

   vii) On 12 July 2004 the Seller "appropriated MANNA with 59,484.050 m.t. of Brazilian Soya beans as per bills of lading dated 11 July 2004 from Paranagua Brazil".

   viii) On 28 July 2004, in the absence of payment of the second deposit within 15 days of bill of lading date, the Seller declared the Buyer in default and reserved rights to proceed to arbitration.

8. It had been the Buyer's case that the same cargo had been appropriated by the Seller to Henan Cereals before 12 July pursuant to a contract 'reinstated' on 8 July. It was this same cargo, so the argument ran, that was tendered to Henan on 29 July thereby mitigating the Seller's loss. The Seller submitted that it would have been in a position to fulfil their contract with the Buyer as well if the second deposit obligation had been fulfilled.

9. The tribunal's findings were as follows:

   "6.26 WE FIND THAT Seller's appropriation of MV MANNA dated 12 July 2004 was a valid appropriation but as Buyers were in breach of contract for not paying the second deposit by 26 July 2004, the Contract was at an end. Sellers were therefore entitled to withdraw the appropriation and dispose of the goods in the best manner they thought fit. In this case WE FIND THAT Sellers did not sell the goods against the defaulter (Buyers) but reallocated them against another contract, a contract over which we have no jurisdiction, in order to mitigate losses.

   6.27 Buyers attempted to prove that Sellers had resold the goods to Henan Cereals thereby establishing the Default price. However WE FIND THAT there is no conclusive evidence to prove that the MV MANNA goods were the subject of a new sale to Henan Cereals and there was no declaration or notification from Sellers that they were selling the goods against the defaulter. As found above the injured party may dispose of the goods in any manner they think fit

providing they bear in mind that they must always mitigate any losses. WE FIND THAT the Toepfer/Henan Contract has no impact on the quantification of Seller's loss under the contract in dispute and that the Umpire at First Tier misinterpreted the Default Clause of the Contract.

6.28 Under the terms of the Default Clause the injured party (Sellers) after giving notice may, at his discretion, cancel the contract or sell the goods against the defaulter. Sellers did not exercise their rights or declare either of the foregoing alternatives; therefore WE FIND AND HOLD THAT damages must be assessed strictly in accordance with the Default Clause of the Contract; that is on the difference between the Contract price and the estimated or actual price of the goods on the Date of Default."

10. The catalyst for the legal challenge pursued by the Buyer was the proposition that the "Umpire at First Tier misinterpreted the Default Clause of the Contract". This in turn necessitates quoting the relevant passage from the First Tier Award:

"6.53 …. It is clear to me that my task in assessing loss, quantifying compensation and awarding damages is to "make good the loss", to use the precise words of the Default Clause, suffered in this case by the seller. If no such loss has been suffered, then there is no call for compensation, there is no loss to quantify - and no damages to award, much less limit. This is why line 256 of FOSFA Contract No. 22 states that the defaulter must make good the loss "if any". This is also why Line 256 of FOSFA Contract No 22 talks of the damages being "limited to" the difference between the contract price and the market price. Toepfer's construction of the Default Clause would have me read Lines 258 and 259 of FOSFA Contract No 22 as if this part of the Clause were a liquidated damages clause providing the formula to be used for the quantification of damages. This would, in my view, be erroneous: these lines constitute a limitation clause, limiting damages which fall to be awarded under Line 256 of the printed Contract.

11. It is the Buyer's submission that this analysis of the clause was entirely correct i.e. that the Buyer must make good the loss, if any, subject to a limit of the difference between the market price and the sale price. It was not, as the Umpire understood the Seller to contend, a liquidated damages clause.

12. Accordingly, the Buyer challenged the suggestion that there had been any misinterpretation by the Umpire. Indeed it was contended that the Appeal Tribunal in concluding that "damages must be assessed strictly in accordance with the Default clause: that is on the difference between the Contract price and the estimated or actual price of the goods on the Date of Default" had in contrast wrongly concluded that it was a liquidated damages clause.

13. At the hearing before me, it was common ground that the Umpire's analysis of the clause quoted above was unimpeachable and that in particular it was not a provision for liquidated damages. It simply required an assessment of the loss sustained (if any) with an upper limit.

14. It was the Seller's submission that the conclusion that it was entitled to recover the difference between the contract price and the market price was not based on any misinterpretation of the contract to the effect that the clause was a liquidated damages clause but simply because the Buyer had failed to make out its case that the same cargo had been appropriated to a contract with Henan before the Buyer's default.

15. The Seller submitted that that this was a clear inference from three findings:-

i) "the Seller's appropriation of MV MANNA was a valid appropriation" but since the contract was at an end because of the failure to pay the second deposit, the Seller was entitled "to withdraw the appropriation and dispose of the goods in the best manner they thought fit."

ii) the Seller "did not sell the goods against the [Buyer] but reallocated them against another contract".

iii) "there is no conclusive evidence to prove that the MV MANNA goods were the subject of a new sale to Henan."

16. Accordingly, it was submitted by the Seller, the award of the difference between the contract price and market price was "strictly" in accord with the Default clause. Further, it followed, so the argument ran, that whether or not the strictures expressed by the Appeal Tribunal as to the interpretation of the contract by the Umpire were justified, any remission of the award would simply result in the award being confirmed.

17. I have sympathy with this proposition bearing in mind that it is not suggested that there was at any material time a shortage of Brazilian Soyabean cargoes. But the fact remains that the Appeal Tribunal does appear to have wrongly concluded that the umpire had misinterpreted the clause (as opposed to misapplied it). In the absence of any express finding that there was only one cargo available for appropriation either to the Toepfer / Sanhe contract or to the Toepfer / Henan contract, it is desirable that the award be remitted to the Tribunal for reconsideration in the light of this judgment.

18. The issue for the Appeal Board to determine is whether the Buyer has shown that the Seller would not have earned the profit from the Henan contract but for the Buyer's repudiatory breach of the Sale Agreement.

Duncan Matthews QC (instructed by Holmes Hardingham) for the Claimant
David Lewis (instructed by Middleton Potts) for the Defendant