Vrinera Marine Co Ltd. v Eastern Rich Operations Inc [2004] APP.L.R. 07/21

JUDGMENT : The Hon. Mr Justice Langley: Commercial Court. 21st July 2004

The Appeal

1. "Vrinera" appeals, with the permission of Cooke J, given under Section 69(3)(c)(i) and/or (ii) of the Arbitration Act 1996, on two related questions of law arising from an arbitration Award dated 29 September 2003. The questions are whether the costs of an arbitration brought by "ERO" against sub-charterers, "Bao Steel", were caused by breach of the obligation of seaworthiness in the head charter and/or were too remote in law to be recoverable.

The Claim in the Arbitration.

2. Vrinera time chartered its vessel m/v "Vakis T" to ERO. ERO sub-chartered the vessel to "Bao Steel" on a voyage charter.

3. In July 1999 Vrinera brought arbitral proceedings against ERO claiming that bottom damage to the vessel had been caused by breach of the safe port/berth obligation in the charterparty. ERO denied liability and asserted that the claim was frivolous, vexatious and an abuse of the arbitral process. It put Vrinera to proof of the seaworthiness of the vessel.

4. On 30 January 2003 ERO commenced an arbitration against Bao Steel alleging breach of the safe port/berth obligation in the sub-charterparty. Bao Steel defended that claim including making positive allegations of unseaworthiness and ERO adopted much of Bao Steel's defence by way of a counterclaim against Vrinera in the main arbitration. ERO claimed damages and an indemnity in respect of their own costs and Bao Steel's costs of the sub-arbitration. There was, however, no claim in the sub-arbitration by either ERO or Bao Steel for damages for breach of the obligation of seaworthiness, nor did ERO expressly allege such a breach in its counterclaim in the main arbitration.

5. The two arbitrations were not the subject of consolidation but they were ordered to be the subject of concurrent hearings on liability issues.

6. At the hearing it became apparent on Vrinera's own evidence that Vrinera's case was indeed spurious. The vessel had not docked at the allegedly unsafe berth but at a berth which, on the evidence, plainly was safe. It was also, as the Tribunal held, shown that the cause of the undoubted damage to the vessel was its own unseaworthy condition at the commencement of the charterparty. On 17 September 2003 Vrinera discontinued the claim against ERO, and, in consequence, ERO discontinued the claim against Bao Steel. ERO sought an order for payment against Vrinera of their own costs and the costs payable to Bao Steel in the sub-arbitration as damages for breach of contract by reason of unseaworthiness. The Tribunal gave permission to ERO to amend the counterclaim to plead a positive case of unseaworthiness and to allege that those costs were incurred in consequence.

7. Vrinera contended that the costs were incurred as a consequence of ERO's own decision to make a claim against Bao Steel on a basis which ERO in fact believed (rightly) to be wholly without foundation.

The Award.

8. One of the issues the Tribunal had to address, because it was raised by Vrinera, was whether it had jurisdiction to decide ERO's claim for damages. It decided that it had and in the course of doing so remarked (at paragraph 25):

   "The dispute in this case has always been whether, as the Owners contended, the pattern of bottom set-up and the structural collapse seen in dry dock in Nantong in late 1999 was brought about with an appreciable external force being applied to the hull (i.e. a grounding ….) or, as the Charterers said, because of a catastrophic failure of the under frame rings in the lower part of the side ballast tanks …due to unchecked corrosion."

   In the following paragraph the Tribunal described the matters raised by ERO as "the obverse of the Owners' claim for a breach of the warranty of safety".

9. On causation and remoteness the Tribunal found in favour of ERO in the following terms:

   "39. The Owners are quite right that claims to recover costs as damages in chain arbitrations usually fail, coming to grief on the rocks of causation and remoteness. However, here we agreed with the Charterers that, whilst in most cases it will be appropriate simply to protect time by commencing arbitration proceedings and then awaiting the outcome of those arbitration proceedings before deciding whether to pursue an indemnity claim down the line, here that was not (in practice) an option open to them. They plainly took the view earlier this year that it would be necessary to bring Bao Steel into the case in order to obtain (and deploy in this arbitration) evidence that would enable them to defend the Owners' claim, a claim that they always maintained was spurious and as to which they were proved right. Accordingly, it seemed to us that their conduct in actively pursuing the arbitration against Bao Steel and applying for the sub-arbitration to be heard concurrently with this arbitration so that the evidence obtained in the former could be deployed in the latter was a reasonable course of action to adopt and did not (contrary to some cases involving chain arbitrations) break the chain of causation between the breach and the damage claimed.

   40. Important (indeed crucial) evidence was obtained from Bao Steel which assisted the Charterers case and which would not, but for the active prosecution of the sub-arbitration, have been available to them. The hazards for an intermediate charterer of fighting safe port/berth claims up and down the line in separate, non-concurrent arbitrations are well known. Had the Owners succeeded and the Charterers then sought to pass on that liability in a sub-arbitration, they might well have been met with new (and for them fatal) evidence which, had it been available earlier, would have enabled them to defeat the original claim.

41. We also agreed with the Charterers that what happened was a foreseeable result of the Owners' breach and the damage to the vessel consequent thereon."

The Issue.

10. It is now accepted by Mr Turner, on behalf of ERO, that this decision was bad in law because the Tribunal did not apply the right legal test for either causation or remoteness. The issue in the submissions before this court is whether or not the matter should be remitted to the Tribunal to address those questions on the correct legal basis, or, as Miss Andrews QC for Vrinera submits, the answer is so obvious and so obviously in favour of Vrinera that the court should proceed to give it and so save the parties from incurring yet further costs in a futile reference back.

11. The reasons why the Award cannot stand can be stated shortly. The Tribunal appear to have addressed the issue of causation only by reference to whether or not pursuit of the claim against Bao Steel *did "break the chain of causation"*. They did not address the question whether or not as a matter of commonsense the breach of contract by Vrinera complained of (unseaworthiness) was the *"effective or dominant"* cause of the loss by way of the costs incurred and payable in the sub-arbitration.

12. The Tribunal addressed the issue of remoteness solely by reference to foreseeability. It is agreed that is inadequate but not agreed what the correct test would have been. Miss Andrews puts forward the question *"whether, at the time when the relevant charter was entered into (October 1998), if the parties had foreseen the breach of the condition of seaworthiness, would the type of loss claimed (i.e. the costs of a sub-arbitration against sub-charterers passing on a claim by the owners for a different breach) have been within their contemplation as a 'not unlikely' result of that breach".*

13. Mr Turner's formulation reads: *"Liability in costs on the part of [ERO] to a sub-charterer would have been within the reasonable contemplation of the parties at the time of concluding the charterparty as a not unlikely result of the owners breaching the charter by delivering the vessel in an unseaworthy state."*

14. The (possibly) significant difference between the two formulations is that Miss Andrews seeks to include the basis on which the claim would be made against the charterer in the remoteness test. In my judgment Mr Turner is right about this. As he submitted, Miss Andrews' test conflates causation and remoteness. The law does not require that the mechanism by which the damage arose should be contemplated by the parties, only that the damage itself should have been: Chitty on Contracts, 29th Edition, para 26-050.

The Principles to be Applied.

15. Section 69(7) provides: *"On an appeal under this section the court may by order-*

(a) confirm the award,

(b) vary the award,

(c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or

(d) set aside the award in whole or in part.

The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration."

16. I think Mr Turner is right that the drafting of sub-section (7) discloses a bias in favour of remission of an award no doubt on the well established principle enshrined in Section 1 of the Act that it is for the parties' chosen tribunal to determine its disputes and Section 69 gives the court the limited jurisdiction to address questions of law not fact. On the other hand, the matter remains one for my discretion provided I am satisfied that to remit the award would be "*inappropriate*". Section 1 of the Act also, of course, entitles the court to take account of delay and expense. But Miss Andrews, I am sure rightly, based her submission on the argument that if the correct tests were applied the outcome was inevitable. If she is right about that, then I agree with her that remission would be futile.

Application of the Principles.

17. The difficulty faced by ERO can readily be stated. The claim against ERO alleged only breach of the safe port/berth obligation. It is now established that claim was spurious and indeed that the damage to the vessel was caused by its unseaworthiness. But the claim arose from the spurious allegation and it was that same allegation which led to and was repeated in the sub-claim by ERO against Bao Steel. In "c*ommonsense*" the cause of ERO's costs exposure in the sub-arbitration was Vrinera's decision to make the unsafe port/berth allegation and ERO's decision to make the same allegation against BAO Steel. Nor do I think this conclusion is affected by the Tribunal's view that safe port/berth and unseaworthiness were the obverse of each other. To establish causation ERO must show that the dominant cause of the expense it has incurred on the costs was the breach by Vrinera of the seaworthiness obligation. But I agree with Miss Andrews, that the *"real"* cause of the expense was that ERO brought a failed claim against BAO Steel for breach of a different obligation.

18. I hope Mr Turner will forgive me if I say that when asked to illustrate how ERO might seek to put its case on *"dominant cause"* he was unable to articulate it with any precision. He acknowledged that the way he had put it before the Tribunal was more consistent with "but for" than dominant purpose. He submitted that this was an exceptional case in which at the hearing "the tables had been turned" and so the Tribunal might follow an exceptional course if the matter were to be remitted to it on an issue which was one of fact and so peculiarly within its remit.

19. Attractively as the submission was put, for the reasons I have sought to express I agree with Miss Andrews that try as one might the necessary link between the breach by Vrinera and the costs incurred in the sub-arbitration cannot be found.

20. I shall look to the parties to draft (and hopefully agree) an Order to reflect the terms of this judgment and will consider any disagreements and other ancillary matters which cannot be agreed when this judgment is formally handed down.

Miss G. Andrews QC and Mr N. Hart (instructed by Rodgers & Co) for the Claimant/Owners
Mr J. Turner (instructed by DLA LLP) for the Defendant/Charterers