Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd [2002] Int.Com.L.R. 07/11

JUDMENT : Mr Justice Langley: Commercial Court. 11th July 2002

INTRODUCTION

1. These proceedings arise out of the partial loss of and damage to a consignment of 34 new excavators carried on the vessel Kapitan Petko Voivoda from Korea to Turkey in September to November 2000.

2. The First Defendant was the charterer of the vessel. The cargo was carried pursuant to a charterparty between the First Claimant and the First Defendant and pursuant to 6 bills of lading issued by or on behalf of the Defendants.

3. On 21 December 2001 the court ordered the trial of certain preliminary issues designed to determine in advance of a full trial how far the Defendants are entitled to rely on various exemptions in the Hague Rules Article IV rules 2 and 5 in circumstances in which the cargo was wrongfully carried on deck when the loss and damage occurred.

THE FACTS

4. For the purposes of the trial of the preliminary issues the parties agreed a statement of assumed facts. It reads (so far as relevant) as follows:

"1. At all material times one or other of the Claimants were the owners of or otherwise entitled to sue in relation to a cargo of 34 brand new excavators ….

2. The First Claimant and First Defendant concluded a contract of carriage (of the cargo) as partly evidenced in writing by a fax dated 22nd August 2000… This contract was subject to and/or incorporated the Conline terms ….

3. The First Defendant was at all material times the Charterer of the Vessel Kapitan Petko Voivoda from the Second Defendant, the owner of the Vessel, pursuant to the terms of a Charter Party in the Gencon form dated 20th July 2000….

4. The excavators were shipped aboard the Vessel between 1st to 3rd September 2000 at Inchon in Korea in apparent good order and condition, and stowed and lashed under deck for carriage to Istanbul.

5. Six bills of lading dated 4th September 2000 were issued in respect of the shipment. None of the bills stated that the excavators were stowed on deck.

6. The contracts of carriage contained in/evidenced by the bills of lading and the contract between the First Claimant and the First Defendant provided for carriage of the excavators to Istanbul in Turkey.

7. The vessel sailed from Inchon on 3rd September. On about 5th September the Vessel arrived at Xingang in China where 26 excavators were discharged from the Vessel then restowed on deck. The Defendants do not allege that notice of/consent to the restowage was given to/obtained from cargo interests.

8. The Vessel sailed from Xingang on 10th September and on 12th September 2000 was in the Yellow Sea bound for Zhangiang when she encountered heavy weather …. On that day, at about 20:20hrs, 8 of the excavators on deck broke free of their lashings and were lost overboard. In addition other excavators stowed on deck suffered minor damage including rusting/wetting damage.

9. The loss of and damage to the excavators was caused by one or more of the following causes ….:

(1) perils of the seas (within the meaning of Art IV rule 2(c) of the Hague or Hague Visby Rules);

(2) inadequate lashing at Xingang;

(3) carriage of the excavators on deck;

(4) insufficiency of packing (this applies only in relation to the damage apart from the loss of the 8 excavators overboard).

10. There is no enactment of the Hague Rules in Korea.

11. The Hague Rules have been enacted in Turkey (the precise scope of enactment is or may be in issue between the parties but this issue is not material for the determination of the preliminary issues)."

5. The fax dated 22 August 2000 provided that the carriage would be "*underdeck only*" (number 17). The Conline terms contained a General Paramount Clause (clause 2) the effect of which on the basis of the assumed facts is that the Hague Rules (but not the Hague-Visby Rules) as enacted in Turkey applied. The bills of lading also included the Conline terms.

6. The claim in respect of the 8 excavators lost overboard is for US $761,750. The claim for the minor damage to the other excavators is for US $25,671.30.

7. In view of certain developments in the submissions after the oral hearing was completed, it should be noted that the statement of assumed facts contained nothing about the incidence of insurance of the cargo in the event of carriage on deck or at all. Thus Mr Lord is right, in his written note dated 7 June, in response to Mr Thomas' written reply submissions, to state that neither party considered the position of insurance, either generally or in relation to the particular cargo, to be a relevant fact.

8. The hearing itself concluded on 16 May at the termination of Mr Lord's submissions and, by agreement, Mr Thomas was to respond by way of reply submissions in writing. Those submissions, however, undoubtedly and confessedly go far beyond the legitimate scope of reply. That was done under the disarming plea that the issue was one of great importance to the maritime community and so that this court, of all courts, should only make the decision on the basis of full and proper consideration of relevant arguments. That is a plea to which the court is

and should be sympathetic and Mr Lord has rightly and readily acknowledged in his response that insofar as the new material relates to authority or textbooks intended to illustrate or establish the law then so be it.

9. But the court must also, of course, do justice between the parties and I also agree with Mr Lord that it is not permissible for the Claimant to make (as Mr Thomas has made) in a reply assertions of fact about the effect of deck carriage on insurances and freight charges, and indeed particularly so when there is an agreed statement of assumed facts, and, as was acknowledged in argument, such information as was before the court about the insurance of the instant cargo was consistent with deck carriage not being a matter which had affected the insurance position. Without intending to suggest, one way or the other, that had there been evidence before the court on the matter the conclusions I express would have been affected, I therefore approach the issues on the basis that there is no factual or expert evidence that the incidence of insurance was or would generally be affected by a conclusion either that the relevant exemptions applied or that they did not. The possible effect of such authority as there is on the issue is considered later.

THE HAGUE RULES

10. The relevant provisions of the Hague Rules are:

"Article 2 Subject to the provisions of Article VI, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, storage, carriage, custody, care and discharge of such goods shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth.

Article 3.

1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:

(a) make the ship seaworthy;

(b) ….

(c) make the holds … and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2. Subject to the provisions of Article 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

….

6. In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods ….

Article 4

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy and … to make the holds, … and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph 1 of Article 3.

Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this Article.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

…

(c) Perils, dangers, and accidents of the sea or other navigable waters.

…

(n) insufficiency of packing

…

5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding £100 per package or unit or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

This declaration if embodied in the bill of lading shall be prima facie evidence but shall not be binding or conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly mis-stated by the shipper in the bill of lading.

….

Article 5:

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities, or to increase any of his responsibilities and obligations under this convention provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of this convention shall not be applicable to charter parties, but if bills of lading are issued in the case of a ship under a charter party they shall comply with the terms of this convention. Nothing in these rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average."

11. Although not directly engaged in the present proceedings, it is to be noted that the Hague-Visby Rules contain an exception to the application of the limitation of liability in the terms of the replacement Article IV rule 5, provided for by Article 2 of the Visby Protocol. The limitation itself appears in Article 4 rule 5(a) in substantially the same terms as rule 5 of the Hague Rules.

12. The replacement Article IV rule 5(e) reads: *"Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage or recklessly and with knowledge that damage would probably result."*

13. It is this provision that led the authors of Carver on Bills of Lading First Ed. (2001) (at page 525) to express the view that the Hague-Visby Rules contained their own "fundamental breach" provision and thus that there was no justification for disapplying the Hague-Visby limitation provisions in a case of wrongful on deck stowage whatever the merits of the decision of Hirst J in ***The Chanda*** [1989] 2 LL. Rep. 494 that the limitation provisions of the Hague Rules were to be disapplied in such a case. There is also nothing in the statement of assumed facts in this case to justify consideration of the present issues on the basis that the Defendants acted with intent or recklessly in carrying the excavators on deck.

THE PLEADED ISSUES

14. Apart from pleaded issues as to whether or not deck stowage constituted a breach of contract (but see Issue 1 below) both Defendants' case is that they are relieved from liability by reason of the fact that the loss of the 8 excavators overboard was caused by the exception of a "peril of the sea" within Article IV rule 2(c) of the Hague Rules and that any claim is limited to 100,000 Turkish lira per package or unit (alternatively £100 per excavator) under the limitation in rule 5 of Article IV. The Second Defendant also alleges that the minor damage to the other excavators was caused by the exception of "insufficiency of packing" within Article IV rule 2(n) because "the outer packing of the excavators was loose and consisted of plastic sheets which were inadequate to sustain the normal rigours of the intended voyage."

15. It is the Claimants' case that the deck stowage precludes reliance by the Defendants on both the exception and limitation provisions of the Hague Rules on which they seek to rely. The value of the limitation is also in issue if it applies.

THE ISSUES TO BE TRIED

16. The issues which the court ordered to be tried are expressed to be:

1. Whether deck stowage was a breach (a) of the terms of the charterparty and (b) the bills of lading;
2. If so, on each off the following assumptions, namely
   (a) deck carriage was the effective cause of the loss and/or damage;
   (b) the loss and/or damage was caused by deck carriage and one or more of (i) inadequate lashing, (ii) perils of the sea, or (iii) insufficiency of packing.

   Are the Defendants precluded by reason of the unauthorised deck carriage from relying on:
   (a) the limitation provisions
   (b) the other defences provided by the Hague Rules.

ISSUE 1

17. The Defendants (jointly represented for the purpose of the trial of the issues) did not (rightly in my judgment) seek to dispute that carriage of the excavators on deck was in fact a breach of the terms of the charterparty and also of the bills of lading. The answer to the question posed by issue 1 is, therefore, yes.

ISSUE 2

18. Issue 2 raises questions which have been (and are) the subject of considerable debate in the textbooks and, perhaps to a rather lesser extent, in decided cases. The debate has been coloured by varied judicial attempts to find a principle on which to base the conclusion that in the case of such a *"serious"* breach of contract as carriage on and not under deck it would be commercially unacceptable to allow the carrier to exclude or limit his liability for the consequences to the goods in question. The "*principle*" has in some instances been found (particularly in the USA) in an extension of the "*doctrine of deviation*" whereby an exclusion or limitation clause will not protect a carrier if he deviates from the route contracted for and in others (particularly in the United Kingdom but only until the decision of the House of Lords in ***Photo Production Ltd. v Securicor Transport Ltd.*** [1980] AC 827) in the so-called and now discredited doctrine of "fundamental breach of contract" whereby exclusion clauses were held as a matter of law not to be available to a party in fundamental breach of the particular contract. In ***Photo Production*** the House of Lords made clear (or repeated) that the question whether and to what extent an exclusion clause was to be applied to a fundamental breach or a breach of a fundamental term of a contract was a matter of construction of the contract in question: Lord Wilberforce at pages 842-3. In ***The Antares*** [1987] 1 LL Rep 424 Lloyd LJ, at page 430, expressed himself in favour of consigning the deviation cases to the same fate as a fundamental breach. The Court of Appeal there decided that the time-bar provisions of the Hague-Visby Rules were applicable and effective as written in a case of unauthorised deck stowage.

THE AUTHORITIES

19. The starting point for consideration of the issue must, I think, be the decision in ***The Chanda*** as it both addresses and decides the issue in the manner for which the Claimants contend. Indeed, although many authorities have been cited to me, the principles which are now to be applied, and which Hirst J in ***The Chanda*** acknowledged, are I think

reasonably clear without the need to cite much authority. What does, however, need to be kept in mind and is I think apparent from the citations is that the doctrine of fundamental breach was perhaps a long time dying and even after burial the underlying justice which it was thought to reflect encouraged resurrection in different disguises from time to time. Some disguises are to be found in the language of "*presumption*" others in "*rules*" of construction which are expressed in sufficiently absolute terms or used to such effect that they resemble more the outlawed rules of law.

20. In ***The Chanda*** the relevant cargo wrongfully stowed on deck was a control cabin for an asphalt plant. It contained "very sophisticated electronic and computerised equipment constituting some 90% of its value". On discharge it was a total loss. The cause was held to be the carriage on deck during very rough weather with gales of up to force 10. A contributory cause was inadequate lashing for which the defendant owners were also held to be responsible.

21. Hirst J held that the defendants could not rely on the limitations in the Hague Rules. I think the second headnote to the report accurately selects the key passages in his judgment (at page 505) and reasoning:

"clauses which were intended to protect the shipowner provided he honoured his obligation to stow goods under deck did not apply if he was in breach of that obligation; the package limitation fell within this category since it could hardly have been intended to protect the shipowner who as a result of the breach exposed the cargo in question to such risk of damage; the package limitation clause being repugnant to and inconsistent with the obligation to stow below deck was inapplicable."

22. In reaching this conclusion Hirst J quoted from ***Royal Exchange Shipping Co Ltd v Dixon*** (1886) 12 App Cas 11 and ***J Evans & Sons (Portsmouth) Ltd v Andrea Merzario*** [1976] 2 LL Rep 165 (in particular per Roskill LJ at page 169) and ***Photo Production***_and expressed himself satisfied that "*neither the* ***Dixon*** *nor the* ***Evans*** *case rested on the discredited fundamental breach rule, but rather on a principle of construction"* as expressed in the passage I have quoted from the headnote.

23. It is of course a well known and established approach to construction that if two or more provisions of a contract are inconsistent or "*repugnant"* the court will nonetheless seek to make sense of them in the light of the commercial context and the deduced intentions of the parties. The same concept is sometimes expressed as "the four corners" rule. But there is nothing in the reasoning of Hirst J which directly addresses the wording of Article IV rule 5 and in particular the words "in any event" which appear in it. Nor do I think the answer to a question of construction can readily vary according to the gravity of the consequences of a given breach of a term of contract. Carriage on and not under deck may itself be *"serious",* and have serious consequences, or not as the case may be. This case illustrates as much. Loss overboard was *"serious";* damage to the other excavators was not. Equally there are breaches of a contract subject to the Hague or Hague-Visby Rules which may be serious but to which the limitation undoubtedly does apply, such as unseaworthiness due to a want of due diligence, as has now been expressly decided by the Court of Appeal in ***"The Happy Ranger"*** (CA 17 May 2002 Case No: A3/2001/1695).

24. The "repugnancy" principle is not, to my mind, as a matter of construction, an appropriate basis for rejection of a limitation clause applicable "in any event" unless there is something in those words themselves which would justify giving them a restricted meaning. Despite Mr Thomas' submissions to that effect I cannot see that there is. There is no basis for a construction that would read "in any event expressly provided for in these Rules" so as to seek to disapply the limitation to any matter the subject of an express agreement. Many quite trivial matters may be expressly dealt with. The Hague Rules were also designed to be an international code.

25. As Mr Lord submitted unauthorised carriage on deck is or is also a breach of Article III rule 2 which is expressly made subject to the provisions of Article IV but, and in any case, I can see no logic or reason why the limitation should be so construed as to apply to other breaches (serious or not) but not to carriage on deck whether or not that has serious consequences. In ***"The Happy Ranger"*** it was submitted on behalf of cargo interests that the limitation in Article IV rule 5(a) of the Hague-Visby Rules did not apply to a breach of the "overriding obligation" of seaworthiness in Article III rule 1. But Tuckey LJ (with whom Aldous LJ and, on this point, Rix LJ agreed) said:

"However, I think the words in any event mean what they say. They are unlimited in scope and I can see no reason for giving them anything other than their natural meaning. A limitation of liability is different in character from an exception. The words in any event do not appear in any of the other Article IV exemptions including rule 6 and as a matter of construction I do not think they were intended to refer only to those events which gave rise to Article IV exemptions. I do not attach any significance to the fact that the only other place where they appear is in Article III where it is accepted that the time-bar provisions apply both to Article III rule 1 and 2 claims. If rule 5(a) had the meaning contended for by (counsel for cargo interests) rule 5(e) would be unnecessary."

26. I respectfully agree. Moreover, although the reference by Tuckey LJ to and reliance upon rule 5(e) is not applicable to the Hague Rules, I do not think it affects the substance of the point or the issue.

27. In contrast, the repugnancy or inconsistency principle is, in my judgment, plainly in play in relation to the application of the exemptions in Article IV rule 2 of the Hague Rules. An owner who contracts to carry goods under deck but in fact wrongfully carries them on deck cannot, I think, rely on the exemptions of "perils at sea" or "*insufficiency of packing*" to exclude liability if the cause of damage to the cargo is the deck carriage and it would not have occurred if the cargo had been carried under deck. In this case if the excavators would not have been lost or damaged as they were had they been stored underdeck I think the exemptions cannot be relied upon by owners. They are properly to be construed to apply only to carriage underdeck. Packing sufficient for

underdeck carriage only is required. A peril of the sea sufficient only to cause loss to cargo so carried is the risk undertaken and accepted by cargo owners.

28. If therefore, as on any view of the law it must be, the question is approached as one of construction free from any authority I would conclude that whilst the exceptions relied upon could not (subject to the facts) assist the owners, the limitation in Article IV rule 5 was applicable despite carriage on deck. I would also reach the same conclusion, with diffidence, notwithstanding and with respect to the decision in ***The Chanda*** where the point which drives me to that conclusion was apparently not addressed and the limitation was held to be inapplicable, as I read the judgment, for a repugnancy of presumed intention which I do not think can be justified as a matter of construction.

29. I should therefore consider the authorities on which Hirst J relied in ***The Chanda.***

30. ***Dixon's case*** is, I think, consistent with the conclusion I prefer. It involved the jettison of a cargo of cotton which it was held was wrongfully carried on and not under deck. The ship's owners sought to rely on exceptions of jettison and perils of the sea in the bills of lading. It was decided that they could not do so on the basis that the cause of the loss was the carriage on deck and the exceptions relied upon had "*exclusive reference to goods safely stowed under hatches".*

31. ***Evans' case*** involved the loss of a container overboard. The headnote of the report states that "the new express term" (as the court found) that the container would be shipped under deck had the consequence that "the defendants were not entitled to rely on the exemptions contained in the trading conditions since the effect of the new express term was to override those exemptions." The "exemptions" included a limitation of liability clause which stated that "in no case" should the liability of the carriers exceed £50 per ton. Lord Denning M.R., at page 168, *"rejected"* the printed conditions as repugnant to "the express oral promise or representation". Roskill LJ (at page 170) said:

"This is not a case of fundamental breach. It is a question of construction. Interpreting the contract as I find it to have been I feel driven to the conclusion that none of these exception clauses can be applied, because one has to treat the promise that no container would be shipped on deck as overriding any question of exempting condition.

Otherwise, as I have already said, the promise would be illusory."

Geoffrey Lane LJ at page 171 referred to "*any other conclusion*" destroying *"the business efficacy of the new agreement."*

32. These are compelling statements. But, again, I do not think they compel a different conclusion to the one which I prefer as a matter of construction of the present agreements. It is consistent with principle that "a new oral agreement" could change or abrogate terms which would otherwise form part of a contract. But that is not the present case.

33. Section 30 of the Marine Insurance Act 1906 provides, by reference to the form in the First Schedule to the Act, for a form of marine insurance policy and rules for construction of the policy. Rule 17 provides (in part) that:

"in the absence of any usage to the contrary, deck cargo and living animals must be insured specifically, and not under the general denomination of goods."

34. In his written reply submissions, Mr Thomas referred to a number of authorities of some antiquity which are to the same effect as this Rule. Mr Thomas relied upon these authorities and the Rule for the submission that the obligation to carry below deck was one of "central importance to the contract of carriage and its balance of risk and has been treated as such by the maritime community for well over a century …. It is therefore rightly characterised as a *fundamental* term."

35. But that is not substantially in issue. Mr Lord accepts, as is obvious, that on deck carriage increases the risk of loss or damage to an extent which may be very serious. The question is, I think, whether and, if so why and on what principle a breach of contract by on deck carriage should give rise to a different result than any other breach of the contract as regards the application of Article IV rule 5. Moreover I think, as Mr Lord submitted, that it remains a matter at least open to serious argument whether Rule 17 and the authorities to which Mr Thomas referred are addressing intended carriage on deck but not such carriage arising from a breach of contract by the carrier. If the principle depends on non-disclosure the fact of on deck carriage would have to be known to the cargo owners to vitiate the policy.

CONCLUSION

36. In my judgment therefore it is open to me to follow what I think to be the proper construction of the charterparty and bills of lading and the answers to Issue 2 are:

i) On each of the assumptions (a) and (b) as to the cause of the loss and damage to the cargo the Defendants are not precluded by reason of the unauthorised deck carriage from relying on the limitation provisions of the Hague Rules.

ii) The operation of the other defences provided by the Hague Rules will depend on the facts but the Defendants are unlikely to be able to rely on them.

Mr R. Thomas (instructed by Clyde & Co) for the Claimants
Mr R. Lord QC and Mr L. Akka (instructed by Hill Taylor Dickinson and Jackson Parton) for the Defendants