LPG Shipping Ltd v Worldwide Panama Shipping Inc [1997] Int.Com.L.R. 11/18

CA on appeal from QBD (Mr Justice Mance) before Brooke LJ; Sir Brian Neill. 18th November 1997.

LORD JUSTICE BROOKE:

1. This is an application for leave to appeal by the defendant shipowners from a mandatory interlocutory injunction granted by Mr Justice Mance on 11th November 1997 in favour of the plaintiff charterers, whereby he ordered the defendants to procure that their vessel, the "*Samuda",* should proceed expeditiously to Dakar and do all things necessary to permit the discharge of the cargo of 18,000 mt of bagged rice aboard the vessel into port warehouse(s) at Dakar.

2. We will grant leave and treat this application as the appeal.

3. The facts of the matter are very fully set out in the reasons for the grant of the injunction which the judge delivered two days after granting it. This is a very fast moving piece of litigation in which two days have been set aside by the Commercial Court, on 26th and 27th November, for the trial of crucial issues in the action; and at this time of night I am not going to give a long judgment which restates the facts which are already clearly set out in the judgment of the judge.

4. Put shortly, the vessel which is the subject of this voyage charterparty has now been offshore the port of Dakar since 28th September. It is not an arrived ship, and the difficulty which has arisen between the parties stems from the release by the plaintiffs of additional bills of lading over and above the two original bills of lading which were signed by the master. There have been a number of other subsidiary issues, but this is the main one.

5. There is a dispute between the parties (which it is agreed that this court cannot resolve) as to whether additional words were added by agreement to clause 20 of the charterparty which enabled the plaintiff owners to release these additional bills of lading. There is an issue between the parties as to whether the bills of lading as released complied with the extended terms of the charterparty. There is a further issue between the parties as to whether the plaintiffs did deliver up the original bills of lading to the defendants in September. The plaintiffs say that they did and that they posted them off to the defendants in Singapore. The defendants deny that they received them. They say that when they opened the envelope all they found was a covering letter with no bills of lading inside.

6. The upshot of all this is that the defendants are expressing great concern that there are at least two sets of bills of lading in circulation and that they may suffer substantial loss if they take the vessel into Dakar. In an affidavit (which was not before the judge, but which is before us) Captain Shamsuddin Mohamed Sabed, who is the managing director of a company called Seatime, the managers of the defendants, and who is also a director of the defendants, has deposed to an unhappy experience which his company had in relation to the same vessel, when it was arrested in Singapore by the notify party stated in a second set of unauthorised bills of lading. It is that unhappy experience, we are told, which has made the defendants behave in the way they have.

7. The judge set out in his judgment the dilemma which faced him. There was strong evidence that if this cargo of rice stayed any longer on the sea outside Dakar it was likely to deteriorate. That evidence was in an affidavit sworn by Captain Sunder Hira dated 5th November 1997, which is in very clear terms; and we have been shown a letter written by the defendants' Singapore solicitors over a fortnight ago in which they too were expressing concern about the state of this cargo of rice.

8. Another factor which weighed heavily with the judge was the clear threat of the sub-purchasers in Senegal to rescind their sub-purchase contract if the vessel was not in port in the very near future; and in a recent affidavit Mr Vohra, who is a director of the plaintiff company, has deposed to the present state of the world market in rice and his anxieties about the potential damage claims which might be made if that contract is rescinded because the vessel does not discharge its cargo in Dakar in the near future.

9. The judge, setting out the issues very clearly, founded his judgment firmly on the provisions of clause 28 of the charterparty. Fortunately, this clause is in agreed terms. It provides: *"In case the original bills of lading are not available at discharge ports, master hereby agrees to allow cargo to be discharged into port warehouses for delivery to consignees upon their surrendering of the original bills of lading. Master to allow delivery of cargo from vessel or port warehouse in absence of original bills of lading provided charterers issue LOI [letter of indemnity] to owners as per owners P and I format and receivers LOI to master/owners duly endorsed by receivers bank."*

10. The judge formed the view, on the proper interpretation of that clause, that the present contractual position was that the defendants were obliged by clause 1 to complete the voyage - no argument was even addressed to the contrary - and, at the lowest, obliged under clause 28 to deliver into warehouse. The judge held that the straightforward and obvious meaning of these two sentences in clause 28 was that they both dealt with the same sort of situation as regards bills of lading, but different situations regarding the provision of LOIs. He said: *"The first sentence caters for and requires delivery into warehouse. However, if appropriate LOIs are provided, delivery falls under the second sentence to be made direct from the vessel to receivers. If delivery has already been made into warehouse before appropriate LOIs are provided, delivery then falls under the second sentence to be made from the warehouse as soon as the LOIs are provided."*

11. Mr Dye submitted to us (and I did not hear Mr Hirst give any form of convincing answer) that the defendants, having elected not to treat the plaintiffs' conduct in putting further bills of lading into circulation as repudiatory, are bound by the provisions of the contract which, as clause 28 makes clear when coupled with clause 1, binds them to discharge the cargo into the plaintiffs' chosen port in Dakar.

12. Mr Hirst, fortified by affidavits which were not before the judge, submits that Dakar is not a safe port. The judge had referred to a submission which the defendants, without evidence, had made to him that he should, for unspecified reasons, regard Dakar as an unfriendly place to be arrested. Evidence has now been put before us to the effect that one member of the commercial community in Dakar feels that the system of justice in maritime cases which is available in Dakar is unlikely, in anything other than a cut-and-dried case, to be favourable to overseas shipowners. On the other hand, there is evidence adduced by the plaintiffs before us that there is a respectable system of law in Senegal which is administered by trained judges and that there is no reason to attack the local system of law in the way that the defendants have seen fit to do.

13. Mr Dye adds that, since the defendants seem to be concerned that they might be arrested when they arrive at the harbour in Dakar, they might face exactly the same danger of arrest anywhere on that coast where they might land. He says that the same considerations might impel interested parties to seek a remedy in rem at other ports and it would, therefore, not be particularly helpful to the defendants to be relieved of their contractual obligation to discharge the cargo at Dakar in order that they might have the opportunity to discharge this potentially deteriorating cargo elsewhere on the same coast.

14. There is a dispute between the parties as to whether there would be a warehouse available to accommodate this quantity of rice if the judge's mandatory order stands. The defendants, on the one hand, have adduced evidence from those concerned with the shipping world in Senegal that it would not be possible to store 18,000 mt in a warehouse in Dakar and it would be likely to be a further month before there is warehouse capacity for such a quantity of rice. On the other hand, very late evidence has been adduced to the court by the plaintiffs showing that a qualified surveyor has visited a warehouse which is said to be available close to the port at Dakar. The report of this surveyor is before the court and it confirms that suitable port warehousing facilities are available for such a cargo if it was to be discharged within the next week or so.

15. In my judgment there is nothing in the order of Mr Justice Mance (which requires the defendant by itself, its servants or agents to procure that the vessel does all things necessary to permit discharge of the cargo of 18,000 mt of bagged rice aboard the vessel into port warehouse at Dakar) which should be construed as meaning that the defendants would be in contempt of court if as a matter of fact there were no warehouse facilities available when they arrived at Dakar, so long as they did all things necessary to permit the discharge of that cargo.

16. Mr Hirst's strongest submissions were to the effect that an interlocutory mandatory injunction is a very rare animal. He referred us to the well known passage in the speech of Lord Upjohn in ***Redland Bricks Ltd. v Morris*** [1970] AC 652 at 665, where the principles were set out and Lord Upjohn said that a mandatory injunction could:

"... only be granted where the plaintiff shows a very strong probability upon the facts that grave damage will accrue to him in the future."

17. Judges at first instance have later given guidelines about the way in which a court should exercise its discretion in this fairly rare corner of its discretionary powers. We were referred to ***Shepherd Homes Ltd. v Sandham*** [1971] Ch 340, where Megarry J said, at p.348:

"As it seems to me, there are important differences between prohibitory and mandatory injunctions. By granting a prohibitory injunction, the court does no more than prevent for the future the continuance or repetition of the conduct of which the plaintiff complains. ... On the other hand, a mandatory injunction tends at least in part to look to the past, in that it is often a means of undoing what has already been done, so far as that is possible. Furthermore, whereas a prohibitory injunction merely requires abstention from acting, a mandatory injunction requires the taking of positive steps ... This will result in a consequent waste of time, money and materials if it is ultimately established that the defendant was entitled to retain the erection."

18. A little later he said: "*The subject is not one in which it is possible to draw firm lines or impose any rigid classification. Nevertheless, it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will, of course, grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation."*

19. So one has language like "*strong and clear*" and "*a very strong probability of a risk of grave damage*".

20. In ***Films Rover International Ltd. v. Cannon Film Sales Ltd.*** [1987] 1 WLR 760, Hoffmann J discussed the nature of a mandatory interlocutory injunction in a passage of his judgment which starts at p.679. He said, at p.680D:

"But I think it is important in this area to distinguish between fundamental principles and what are sometimes described as ´guidelines', i.e. useful generalisations about the way to deal with the normal run of cases falling within a particular category. The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the ´wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been ´wrong' in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle."

21. A little later he said that: "*Semantic arguments over whether the injunction as formulated can properly be classified as mandatory or prohibitory are barren. The question of substance is whether the granting of the injunction would carry that higher risk of injustice which is normally associated with the grant of a mandatory injunction.*"

22. Mr Hirst submitted to us that, if his clients are right and if it turns out that their arguments are upheld by the judge when he tries the facts of the issues relating to the making of the contract and the release of the bills of lading and the arrival or not of the original bills of lading in Singapore, this was a case in which the judge, quite wrongly, overlooked the fact that he had ordered a speedy trial in two weeks' time and that the passage in his judgment in which the speedy trial was mentioned did not, as he had thought, justify the grant of the injunction. Rather, Mr Hirst submitted, it was a very good reason why the injunction should not be granted.

23. I turn first to the later evidence which was not before the judge. It appears to me that it adds nothing to the material which was before him. The reason I say that is because I am not at all impressed by the submission that the port of Dakar could be regarded as an unsafe port in the context of the case law which identifies what may be a safe port and what may be an unsafe port. Mr Hirst frankly conceded that he had no authority on which he could rely to suggest that a port at which there might be reason to doubt the quality of the system of law, of the type mentioned in his own clients' evidence, could properly be described as an unsafe port, although he showed us the relevant passage in the current edition of Scrutton on Charterparties.

24. For my part I am of the view that, if that material had been before the judge (in addition to the unsupported suggestion that was made to him by counsel) when he granted the injunction, it would not have taken matters any further at all. For similar reasons, although there is a dispute between the parties as to whether warehousing would be available for the cargo if it were to be landed at Dakar, I do not consider that the possibility that warehousing might not be available would be any reason why the order should not be made. There is evidence, supported by a professional man, that such warehousing is available and, as I have said, if by any chance it was not, it would not, as Mr Hirst's clients fear, constitute a contempt of the court if they were unable to see the cargo taken into a warehouse when the ship docks at Dakar because a warehouse was unavailable.

25. I turn back, therefore, to the approach of the commercial judge, reminding myself in this context of the principles set out by the House of Lords in the speech of Lord Diplock in ***Hadmor Productions Ltd v. Hamilton*** [1983] AC 191, in which he stressed how very slow this court or any appeal court should be to interfere with a discretionary decision of a judge as to whether to grant or to refuse an injunction.

26. The relevant passages of the judge's judgment, in which he discussed the main reasons why he exercised his discretion in the way that he did, are at pages 6, 7, 8 and 9. The judge discussed the question of security on page 7 of his judgment. This formed a strong part of Mr Hirst's case: that his clients were anxious, if they were ordered to go into Dakar, that they might suffer loss against which they were not secured. As Mr Dye submitted, if they went into Dakar, they would be doing no more and no less than they had already agreed to do.

27. I have read the passage in the judge's judgment in which he deals with the matter of security, where he considered that some fortification of the cross-undertaking should be appropriate and acceded to the plaintiffs' suggestion that, in addition to the sum already put up by Evax Limited, they should put up $50,000 now and $50,000 in two weeks' time.

28. What clearly weighed with the judge in the exercise of his discretion are the matters set out on page 8. He said: "*... other considerations appear to me to point strongly to making the order for completion of the voyage and discharge into a warehouse. It will break the impasse and prevent further and potentially much larger loss on each side.*"

29. He was clearly influenced by the evidence that the rice cargo, although not the most vulnerable perishable cargo, was nonetheless at physical risk of deterioration, that nobody could presently know what its precise condition or exposure is, and that the commercial position was one that must at some point become intolerable.

30. Although Mr Hirst told me that his clients had placed before the judge an assurance that they had been informed by the ship's master, who was a qualified surveyor, that at the time the master communicated with them the vessel was sound and the cargo in satisfactory condition, the judge, in my judgment, particularly in the light of the views expressed by the defendants' own solicitors, was entitled to take into account the risk to the cargo every day it remained at sea outside Dakar. Mr Hirst submitted that another fortnight would not make very much difference. Mr Dye riposted that, even when the judge tried the crucial issues, that would not necessarily resolve the dilemma in which Mr Hirst's clients felt themselves to be, with their anxiety about the risk of arrest. Nothing that the judge might rule would necessarily change the risk of other parties seeking relief in rem if they chose to do so.

31. The next matter which clearly weighed with the judge was that the end receivers would determine their purchase contract should the vessel not arrive by 10.00 GMT on Friday, 21st November. The judge said that that confirmed the obvious need to bring the impasse to an end before yet further contractual disputes involving other parties arose.

32. He then considered the possibility which Mr Hirst has discussed with us of their going or disposing of the cargo elsewhere. The judge held that to go elsewhere would not only represent a further breach of the obligation to proceed to the discharge port, but would further exacerbate the dispute, with the risk of loss on all sides, not to mention the risk of arrest, albeit elsewhere than in Dakar, which the defendants, without evidence, had suggested that he should, for unspecified reasons, regard as an unfriendly place to be arrested.

33. Mr Hirst accepted that, when his clients had previously threatened to dispose of the cargo, they had no contractual basis for saying that they had any title to dispose of it, having been paid freight, when their only lien over the cargo was in respect of unpaid freight under the terms of the charterparty. Mr Hirst referred to the concept of agency of necessity, perhaps, for justifying the defendants taking drastic action at some stage, but he did not dwell very convincingly on that suggestion.

34. The judge, having considered all these matters, said: *"In all the circumstances and for the reasons given, this is one of those rare cases where an immediate mandatory interlocutory injunction was and is in my judgment called for, requiring in this case completion of the voyage and discharge into warehouse, where the goods will remain under the defendants' control, so that the court will, if delivery is not duly taken, be able to make further orders, including if appropriate orders for disposal of the goods.*"

35. It was inherent in the judge's order that what he was doing was putting into effect the terms which the parties had agreed in clause 28 of the charterparty, so that the goods would remain, in accordance with the terms of the contract, under the defendants' control in the warehouse.

36. Mr Hirst's clients have put before us further evidence, in the form of the affidavit from Captain Shamsuddin Mohamed Sabed, which goes to support his clients' version of the facts and his clients' case that, for instance, it is extremely unlikely that the ship's master behaved in the way that the agents at the loading port contend he did. But he did not suggest that there were any knock-out points there, and clearly there are issues to be tried.

37. In my judgment, bearing in mind the fact that the judge clearly was well aware of the rarity of the relief that he was granting, and bearing in mind the principles on which such relief should be granted and the principles on which this court should and should not interfere with the decision of a judge in the exercise of a discretion whether or not to grant an injunction, I am of the clear view that this is a case in which the court should not interfere.

38. I would, therefore, dismiss the appeal.

SIR BRIAN NEILL:

I agree that, for the reasons explained by my Lord, this is one of the rare cases where the judge was justified in granting this mandatory injunction at an interlocutory stage.

Order: leave to appeal granted; appeal dismissed with costs.

MR J HIRST QC and MR T HILL (instructed by Messrs Sinclair Roche & Temperley, London EC2) appeared on behalf of the Applicant/Appellant Defendant.
MR B DYE (instructed by Messrs Majumdar & Mogilnicki, London EC1) appeared on behalf of the Respondent Plaintiff.