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Privy Council Office.

Judgment (2) 1964

IN THE PRIVY COUNCIL

No. 17 of 1961

O N   A P P E A L

FROM THE COURT OF APPEAL OF THE STATE OF SINGAPORE   ISLAND OF SINGAPORE

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED LEGAL STUDIES
22 JUN 1965
25 RUSSELL SQUARE
LONDON, W.C.1.

78515

B E T W E E N :-

TAY KHENG HONG ... Appellant (Plaintiff)

- and -

HEAP ENG MOH STEAMSHIP CO. LIMITED   Respondents (Defendants)

CASE FOR THE RESPONDENTS

RECORD

1. This is an appeal from an order of the Court of Appeal of the State of Singapore dated 30th September 1960, allowing the Respondents' appeal against the judgment of Ambrose J. in the High Court of the State of Singapore dated 28th May 1960, whereby it was adjudged that the Appellant should recover from the Respondents the sum of $30,711.60 and costs to be taxed. By order dated 30th January 1961 the Court of Appeal granted the Appellant leave to appeal to Her Majesty in Council, and by an Order in Council dated 25th January 1962 it was ordered that the Appellant should have leave to proceed and prosecute his appeal *in forma pauperis*.

p.128
pp.120-123
p.119
p.129
pp.129A--129B

2. The main issue in dispute is whether and in what circumstances an appellate court should reverse a finding of fact based by the judge at first instance on the demeanour of witnesses, and whether the Court of Appeal was right in the circumstances of this case in concluding, contrary to the finding of Ambrose J., that no contractual discussions took place between the Appellant and one Goh Leh, an employee of the

Respondents. If the Appellant succeeds on that issue four subsidiary questions arise, as to the terms of any contract thereby concluded and whether the Respondents were liable under it as principals.

p.2 l.27- p.4 l.13.

3. The Appellant's case was that he took part in negotiations at the Respondents' offices on or about 18th October 1958, at which Goh Leh, K.K. Khoo and Aus Suriatna were present. He alleged that Goh, acting on behalf of the Respondents, agreed to employ him as the Respondents' lighterage contractor for a period of three years in regard to steamships arriving at Singapore with rice for transshipment to Indonesia. He was to be paid $2.10 per ton for lighterage, $1.40 per ton for stevedoring, $0.12 per ton for towing, and as demurrage $0.60 per ton for every day over two days. The Appellant claimed that he carried out such services in respect of two vessels, the s.s. Incharran and the s.s. Planet, which arrived at Singapore on or about 22nd October 1958 and 27th November 1958 respectively, and thereby earned sums totalling $101,840.31 (these dates were in the wrong order, as appeared from the Appellant's evidence). The Respondents paid the Appellant only $71,128.71, the balance of $30,711.60 being equal in amount to the sums claimed by the Appellant to have been earned as demurrage.

p.11 ll.15 and 25 and p.20 l.19

p.5 l.10 - p.7 l.26.

4. By their Defence the Respondents denied that any contract was concluded between themselves and the Appellant. They admitted that the Appellant had performed the services on which his claim was based, and did not at the trial dispute the Appellant's calculations. They contended that the Appellant acted on the instructions of P.T. South Sumatra Shipping Company or General Mercantile Company, and not of the Respondents, and that they paid him only such sums as were vouched by the signature of Khoo, the general manager of General Mercantile Company. They further contended that if, which they denied, there was any contract between themselves and the Appellant, such contract was concluded by the Respondents as agents for the operators of the two vessels concerned only, and not as principals. Alternatively it was a term of any such contract that demurrage should be free.

5. In paragraph 6 of their Defence the Respondents admitted that discussions took place between the Appellant, Aus Suriatna, Khoo and themselves. This was not in accordance with the case presented on behalf of the Respondents either before (in a letter from their solicitors) or at the trial (in cross-examination of the Appellant, in their counsel's opening speech and in the evidence of Goh). In the Court of Appeal Buttrose J. said:

p.168
pp.32 ll. 21-23 and 55 ll. 16-17
p.57 l.30-p.58 l.11

> "In coming to this decision, I have not overlooked paragraph 6 of the defence and whatever may be the reason for the pleading being left in that form, it does not constitute any admission that a contract was in fact entered into or that demurrage was ever discussed between the parties."

p.126 l.32-p.127 l.3

The Respondents respectfully adopt this passage as part of their argument on this point.

6. At the trial nine witnesses gave evidence on behalf of the Appellant and five on behalf of the Respondents. Only the Appellant spoke of the discussions alleged to have taken place between himself, Goh, Khoo and Aus, and to have resulted in a contract. Goh denied that any such discussions took place. Neither Khoo nor Aus gave evidence. There was, however, a considerable body of evidence, both oral and documentary, to the effect that the operators of the vessels concerned, through Aus, entrusted the handling and transshipment of the cargoes to Khoo, and left to the Respondents only the tasks of husbanding the vessels and of paying, out of funds received, such other bills as should be vouched by Khoo. This if true was consistent with Goh's evidence, and quite inconsistent with the evidence of the Appellant.

p.10 ll.2-22.
p.57 l.30-p.58 l.11.

7. Dealing with the main issue in his judgment, Ambrose J. said:

p.115 ll. 11-18.

> "I see no reason to disbelieve the Plaintiff. He was subjected to a severe and prolonged cross-examination with a view to shaking his credit. He was not shaken at all and impressed me as a simple, honest and straightforward witness. I am fully satisfied that the Plaintiff discussed the terms of the

contract with Goh Leh. I am fully satisfied that Goh Leh told the Court a deliberate lie when he said that he had no discussions with the Plaintiff."

p.115 ll. 31-33. p.111 ll. 9-11 p.3 l.7.

The learned Judge added, however, that there was no evidence that the Contract was for a period of three years. In fact there was no evidence on either side of any fixed duration for the alleged contract. Counsel for the Appellant sought to say that "three years" in the Statement of Claim should have read "three months". This period was equally without support in the evidence. 10

p.125 ll.2-11.

8. In the Court of Appeal Buttrose J. said:

"There was here a considerable volume of independent and extrinsic evidence both oral and documentary which, in my view, supported and was consistent only with the defendants' case which was that there was no contractual relationship between the parties at all with regard to lighterage and that before the defendant company ever came into the picture, arrangements regarding the lighterage of the rice had already been made by one Khoo of South Sumatra Trading Co. with the Plaintiff and the Defendants had nothing whatever to do with it..........So far as one can gather from the judgment of the trial judge, he failed to consider any of these matters. If he had done so, I do not see how he could possibly have arrived at the conclusion which he did, because it runs counter, not only to the oral evidence to which I have referred, but to well-nigh all the documentary evidence in the case... ....In all the circumstances, therefore, I have come to the clear conclusion that the trial judge was plainly wrong. In his anxiety to give the plaintiff redress from the obvious swindle of which he was the unhappy victim, the learned trial judge failed, in my view, to give sufficient or any consideration to the questions of the onus of proof, the probabilities of the case and the inferences to be drawn from the documents." 20 30 40

p.126 ll.26-31. p.127 ll.12-18.

Tan J. and Wee J. agreed with the judgment of Buttrose J.

9. The Respondents concede that an appellate court should be slow to overrule findings of the trial judge based on the credibility of witnesses. But they respectfully submit that there are without doubt cases where such a course should be adopted. An example was the well-known decision of the English Court of Appeal in Yuill v. Yuill (1945) P.15. In Watt (or Thomas) v. Watt (1947) A.C. 484, at p.488, Lord Thankerton laid down three propositions, of which the last was:

> "The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

The Respondents submit that the reasons given by Ambrose J. for his judgment are not satisfactory, and that it appears unmistakably from the evidence that he did not take proper advantage of his having heard and seen the witnesses. The Respondents also rely, as Buttrose J. did in the Court of Appeal, on the distinction drawn in Benmax v. Austin Motor Co. Ltd. (1955) A.C. 370, between the finding of a specific fact and a finding of fact which is really an inference drawn from facts specifically found. Whether or not the learned Judge actually drew inferences from specific facts, the Respondents submit that he certainly ought to have done so, and in that respect an appellate court is plainly entitled to interfere with his findings.

pp.112-118.

p.124 ll.17-26.

10. Other witnesses called on behalf of the Appellant contradicted his evidence in material particulars. Thus -

(a) Tan Yat Chin said that he heard from the Appellant that he had secured two contracts to carry rice about the 11th or 12th October 1958. This was consistent with the Respondents' case, but not with the Appellant's evidence that he first secured the contracts four days before the arrival of s.s. Planet.

pp.51, ll.1-2 and 53 ll.25-29.

p.15 ll.19-24

(b) Loo Choy Lan stated that the Appellant gave her a first draft of bills to be made

p.40 ll.9-20.

p.23, 1.29 and p.25 11.33-34. p.8 11.19-26.

out, written in English. The Appellant stated that he did not understand English, and gave instructions to her to make out the bills in English. Both versions were inconsistent with paragraph 4 of the Appellant's Reply.

11. Much of the Appellant's evidence was in itself unreliable. Thus -

p.10 1.25. p.14 11.23-26.

(a) in examination-in-chief he stated that he had no lighters. This he contradicted in cross-examination. 10

p.10 1.2. p.15 11.25-26.

(b) In examination-in-chief he said that Khoo took him to the Respondents' office on the day after he first heard of the contracts. This he contradicted in cross-examination.

p.31 1.26. p.32 11.10-12.

(c) He stated that all payments were received by himself personally, and later that Soo Huat twice went to the Respondents to receive payments on his instructions. 20

p.10 1.6. p.34 11.4-6.

(d) In examination-in-chief he stated that, when he went to the Respondents' offices, Goh Leh addressed him in Hokkien. In re-examination he stated that the conversation was in English, which he did not understand.

p.22 1.7 - p.25 1.4.

(e) He was unable to give any satisfactory explanation of why one cheque received from the Respondents was paid into the account of Tay Kheng Hong & Co. 30

12. The facts found by Ambrose J. involve the following conclusions:

(a) a number of documents were fabricated for the purpose of the case, including:

pp.177, 178, 189. Three letters from Aus Suriatna to the Respondents dated 21st October, 22nd October and 24th November 1958.

pp.179-180. A letter from the Respondents to Aus Suriatna dated 29th October 1958.

pp.215, 216. Letters from General Mercantile Company to the Acting Controller of supplies dated 28th February and 9th March 1959. 40

pp.227-228. An undated memorandum from one Haalebos to Goh Leh.

A pro forma disbursements statement of Barretto Shipping & Trading Co. Ltd. — pp.231-232.

(b) The Respondents procured the signature of Khoo on various bills after they had been presented and paid, solely for the purpose of manufacturing evidence against the Appellant. In addition to those of the Appellant's bills that were paid, the bills of Eagle Engineering Co., Sin Bee Huat and Tan Yat Chin were so signed. — pp.130-138, 144-152. p.182, Ex D.16 pp.209C-209F.

10

(c) The Respondents risked trouble and difficulty through not employing their regular lighterage contractor. — p.65,11.8-14 and p.37 11.10-17.

(d) The evidence of Eric Lambert and of Koh Swee Gim, independent witnesses called by the Respondents, was untrue. — p.93 11.3-16. pp.97-98.

(e) The amount requested by the Respondents was insufficient to cover the disbursements they would have to meet. — p.63 11.9-29; p.83 1.11 - p.85 1.26; p.88 1.21 - p.89, 1.6.

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(f) On-carriage was booked by Khoo, although lighterage and transshipment were being handled by the Respondents. — p.86 11.20-33.

(g) Khoo collaborated with the Respondents to defraud the Appellant, whom he was in the process of setting up in business. The Respondents received no benefit thereby, and Khoo would have had no difficulty in defrauding the Appellant without their help. — p.14, 11.28-29. p.22 1.20 - p.23 1.7.

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13. Ambrose J. did not deal in his judgment with any of the matters set out in paragraphs 10, 11 and 12 above. The Respondents respectfully submit that these factors are conclusive in showing that the learned judge ought not to have relied solely on his impression of the Appellant in the witness box, and ought to have found in favour of the Respondents on the main issue. Neither side called Khoo or Aus Suriatna as a witness, and if any inference is to be drawn it should be in favour of the Respondents, and against the Appellant on whom the burden of proof lay. — pp.112-118.

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14. If it be found, contrary to the Respondents' submission, that a contract was in fact concluded

orally between the Appellant and Goh Leh, four further issues arise, viz:

(i) whether it was a term of that contract that demurrage should be free;

(ii) whether the contract was such as to bind the Respondents personally, or whether they acted only as agents for the operators of the vessels concerned;

(iii) whether a local agent is by local usage personally liable when he contracts on behalf of a foreign principal; and 10

(iv) whether there is a presumption that in such a case an agent contracts personally.

pp.116-118. p.127, ll.21-26. Ambrose J. found in favour of the Appellant on all these issues. The Court of Appeal did not find it necessary to consider them, having found that no oral contract was concluded.

pp. 138, 152. p. 42 l.16. 15. The bills submitted by the Appellant for lighterage and towing charges contained, at the time that they were submitted, the words "free demurrage", and were signed or initialled by the Appellant. The Respondents respectfully submit that the Appellant failed to give any satisfactory explanation of how those words came to be on the bills. It should be inferred that, if any contractual discussions took place between the Appellant and the Respondents, it was a term of such discussions that demurrage would be free. 20

p.25 l.19-p.26 l.24.

pp.130-138, 141, 144-152, 165-166. 16. All bills submitted by the Appellant to the Respondents contained, after the name of the Respondents, the words "Agent P.T. Indonesia Sugar Line Ltd." or "Agent P.T. Indonesia Samudera Lines Ltd." The Respondents respectfully submit that the Appellant failed to give any explanation of how those words came to be on the bills. It should be inferred that, if any contractual discussions took place between the Appellant and the Respondents, it was a term of such discussions that the Respondents were acting as agents only and not as principals. When a contract is made orally it is a question of fact whether an agent contracted personally or not, as was decided in <u>Williamson v. Barton</u> (1862) 7 Hurlstone & Norman 899. The Respondents submit that, on the evidence, Ambrose J. should have found that they did not contract personally. 30 40

17. In the alternative Ambrose J. found that, when an agent contracts on behalf of a foreign principal, personal liability is imposed on the agent by usage in Singapore. There is no mention of any such usage in the Appellant's pleadings, and such a finding was not open to the learned Judge. The evidence on which it was based, that of Pears and Ireson, did not support it. What those witnesses said, in effect, was that if an agent contracts personally he is by the usage of Singapore personally liable, a proposition which the Respondents do not dispute. Their evidence did not touch on the question the learned Judge was considering, namely whether an agent is rendered personally liable by usage notwithstanding that he is known to be contracting as agent for a foreign principal, and contracts in terms which do not involve an express or implied acceptance of personal liability.

p.118, 11.3-10.

p.2, 1-26-p.4 1.13, p.7 1.7-p.8.
p.36, 11.27-33.
p.47, 1.1 - p.48, 1.12

18. As a further alternative Ambrose J. held that, in law, an agent who contracts on behalf of a foreign principal is presumed to incur personal liability, unless a contrary intention appears. This was not strictly an alternative, but a presumption which the learned Judge applied in deciding whether the Respondents contracted personally or not. If, as the Respondents submit, it is clear that they did not contract personally, the presumption has no application. But the Respondents further respectfully submit that the presumption no longer exists in commercial transactions. So long ago as 1917 Bray J., sitting in the Court of Appeal in Miller Gibb & Co. v. Smith & Tyrer Ltd. (1917) 2 K.B. 141 at page 163, doubted the authority of the older cases. In the same year Scrutton L.J. in H.O. Brandt & Co. v. H.N. Morris & Co. Ltd. (1917) 2 K.B. 784 at page 797 expressed a similar view. In the Respondents' submission the present law was correctly stated by Pritchard J. in J.S. Holt & Moseley (London) Ltd. v. Sir Charles Cunningham & Partners (1949) 83 Lloyds List Reports 141 at page 145:

p.118 11.11-20.

> "The intention of the parties can only be ascertained from the facts as proved in evidence, and the nationality and whereabouts of the principal is no more and no less than one of the facts to which such

> weight will be given as in any particular case the Court thinks proper."

In so far as Ambrose J. regarded the fact that the Respondents' principals were foreign as raising a presumption in favour of their personal liability, he was wrong; the dictum of Scrutton L.J. on which he relied, referred to above, was no authority for the proposition. The judgment of Pearce J. in Rusholme Ltd. v. S.G. Read Ltd. (1955) 1 W.L.R. 146, on which Ambrose J. also relied, accepted that the law had been correctly stated by Scrutton L.J., and was therefore also wrong in according the status of a presumption to what was merely a factor to be considered.

19. The Respondents therefore respectfully submit that this appeal should be dismissed with costs for the following amongst other -

R E A S O N S

(1) BECAUSE the evidence established that no discussions, whereby an oral contract was concluded, took place between the Appellant and any representative of the Respondents, and no such contract was concluded.

(2) BECAUSE in the alternative there were terms of any such contract that demurrage should be free, and that the Respondents were acting on behalf of their principals and assumed no personal liability.

(3) BECAUSE the evidence did not establish a usage in Singapore that ships' agents are personally liable to lighterage contractors notwithstanding that they have contracted in such terms as not to render themselves personally liable.

(4) BECAUSE there is in law no presumption that an agent contracting on behalf of a foreign principal assumes personal liability.

(5) BECAUSE the judgment of Ambrose J. in the High Court of the State of Singapore was wrong.

(6) BECAUSE the order of the Court of Appeal of the State of Singapore was right and should be upheld.

JOHN F. DONALDSON

C.S. STAUGHTON

No. 17 of 1961

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BETWEEN :-

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- and -

HEAP ENG MOH STEAMSHIP CO. LIMITED — Respondents (Defendants)

CASE FOR THE RESPONDENTS

E.F. TURNER & SONS,
66, Queen Street,
London, E.C.4.