Privy Council Appeal No. 42 of 1987

Universal Dockyard Limited *Appellant*

v.

Trinity General Insurance Company Limited *Respondent*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH MARCH 1989

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD GRIFFITHS
LORD ACKNER
LORD OLIVER OF AYLMERTON
LORD GOFF OF CHIEVELEY

*[Delivered by **Lord Goff of Chieveley**]*

The appellant company, Universal Dockyard Limited ("UDL"), is a shipbuilding company carrying on business in Hong Kong. The respondent company, Trinity General Insurance Company Limited ("Trinity") is, as its name shows, an insurance company, also carrying on business in Hong Kong. In 1983 and 1984 UDL built a dredger for a port authority in the Republic of China (the Qin Huang Dao Port Management Authority ("the port authority")). When the dredger was completed, she had to be sailed to Qin Huang Dao. For that purpose, the port authority sent ten seamen from China to Hong Kong to man the dredger on her voyage. She sailed from Hong Kong on 2nd November 1984. There were in all fifteen men on board: the ten seamen from China, four employees of UDL who had been involved in building the dredger, and one shipbuilding engineer who had been assisting in the supervision of her construction. Two days after she sailed, the dredger capsized during a storm in the South China Sea. Tragically, twelve of those on board were drowned, including eight of the ten seamen from China.

[12] Before the vessel sailed, UDL had already obtained insurance cover for her. Originally, while she was under construction, UDL (acting through a Mr. Leung, whose wife was an executive director of UDL) had

obtained cover from Trinity in the form of a contractor's all risks policy and a hull policy. Mr. Leung, who acted as agent for UDL, had negotiated this cover with a Mr. Chang, who was Trinity's office manager; these two policies were among several negotiated by him with Mr. Chang, which yielded a substantial premium income for Trinity. However, when Mr. Leung came to negotiate a sea transit policy for the vessel on her voyage from Hong Kong to China, he found Trinity's quotation too high and placed the business elsewhere.

In addition to the sea transit policy, UDL was under an obligation to the port authority to obtain personal cover for the Chinese seamen working the dredger on her voyage to China. After approaching other insurers, Mr. Leung obtained for UDL cover from Trinity at a lower rate than that quoted by the other insurers. It is this insurance cover, and the circumstances in which it came into existence, which lie at the heart of the present proceedings.

The policy issued by Trinity was a personal accident travel ("PAT") policy in a standard form. It was dated 29th October 1984, and provided cover for a period of fourteen days commencing on 31st October 1984. The policy purported to provide cover in respect of eleven persons, whose names were set out in a document attached to and forming part of the policy; these were in fact the ten seamen who had come from China, and the shipbuilding engineer who had been supervising the construction of the dredger. Under the policy, the maximum sum recoverable in the event of death was HK$200,000 per person insured. The premium was not stated in the policy; it was in fact HK$610. Trinity reinsured the risk with others to the extent of 95 per cent. The cover provided by the policy was expressed to be subject to certain exclusions, including the following:-

> "The policy does not insure against death or disablement caused by or resulting from -
> ...
>
> (d) Accident occurring whilst the Insured is engaged in ... manual work in connection with the Insured's occupation or profession ..."

After the casualty, UDL claimed the sum of HK$1,600,000 from Trinity under the policy- HK$200,000 in respect of each of the eight seamen who had died. Trinity rejected UDL's claim on the ground that liability was excluded in each case by the exclusion clause quoted above, since all the seamen were at the time engaged in manual work in connection with their occupation. It has been common ground throughout these proceedings that, by reason of that exclusion clause, the seamen were not covered by the policy. UDL however paid the sum of HK$1,600,000 to

the port authority, and in the present proceedings sought to recover that sum from Trinity.

The PAT insurance cover provided by Trinity was the outcome of negotiations between Mr. Leung and Mr. Chang at the end of October 1984. Apart possibly from an initial approach on 26th October (asserted by Mr. Leung but denied by Mr. Chang), the relevant negotiations took place almost entirely on 29th October, during two telephone conversations between Mr. Leung and Mr. Chang.

In UDL's Statement of Claim as originally drawn, its claim against Trinity was founded upon an alleged negligent misrepresentation by Mr. Chang to Mr. Leung, made over the telephone on 29th October, that a PAT policy would "sufficiently serve the purpose and cover the risk of personal injury of the 11 Chinese crew men on their journey from Hong Kong to China". However, at the trial leave was obtained to amend the Statement of Claim to add two new paragraphs (14A and 16A) in the following terms:-

> "14A. Further and in the alternative, by the telephone conversation pleaded in paragraph 7 above [i.e. a telephone conversation between Mr. Leung and Mr. Chang on 29th October], the parties entered into a contract in which the consideration from the Defendant was a promise to write insurance which would effectively cover the risk of personal injury to the said 11 Chinese crewmen and the consideration from the Plaintiff was a promise to insure themselves under such a policy.
>
> 16A. Further by reason of the matters hereinbefore pleaded, the Defendant is in breach of the collateral contract described in paragraph 14A above, and the Plaintiff has thereby suffered the loss set out in paragraph 17 herein."

This was, therefore, an allegation of an oral contract collateral to the main written contract contained in the policy of insurance. Once this plea had been advanced, it seems that the allegation based upon a negligent misrepresentation was no longer pursued by UDL.

The trial judge, Jones J., found in favour of UDL. He expressed his conclusion in the following words:-

> "There was an implied contract by the defendant with the plaintiff to provide an effective insurance policy for the personal safety of the insured on the voyage from Hong Kong to China which was accepted by the plaintiff. There has been a clear breach by the defendant to provide such insurance for the insured by their failure to issue the appropriate policy. Accordingly the plaintiff is entitled to judgment against the defendant for the sum of HK$1,600,000."

In considering the question whether any collateral contract came into existence, the learned judge heard evidence from a number of witnesses - the principal witnesses being, of course, Mr. Leung and Mr. Chang. It is unnecessary for their Lordships to rehearse this evidence in any detail. Their Lordships consider it sufficient for present purposes to record that the judge was faced with what appeared to be a direct conflict of evidence. Mr. Leung's evidence was to the effect that he made it plain to Mr. Chang that he was seeking insurance for eleven crewmen, whereas Mr. Chang's evidence was to the effect that he was asked to write insurance for a group of mainland Chinese ship builders to cover them for their voyage back to China. The fact that the occupations of the insured were stated in the document attached to the policy to be "ship building engineers" was, of course, consistent with Mr. Chang's evidence; but it was explained by Mr. Leung as deriving from the second telephone conversation which took place between them on 29th October, in the course of which Mr. Chang assured him that the description of their occupations was a formality and a matter of no importance. Faced with this conflict of evidence, the judge found it difficult to determine where the truth lay. He said:-

> "The allegation that Mr. Leung had deliberately misrepresented the occupations of the insured appeared as a matter of commonsense to be without foundation, for although the insured persons could no doubt be travelling as passengers, it was in the circumstances inherently unlikely. On the other hand, it was difficult to understand why Mr. Chang who had negotiated several policies with Mr. Leung that resulted in some substantial premiums being paid, would insist in describing the insured as ship building engineers when he knew perfectly well that they were crewmen."

Regarding himself as faced with these two improbable alternatives, he concluded that Mr. Chang must have decided to describe the men's occupation as that of ship building engineers, although he knew that ten of them were crewmen, his purpose being to resume the successful business relationship which he had previously enjoyed with Mr. Leung, and he being prepared to take a risk because it was unlikely that anything would happen on the voyage.

The judge fortified his conclusion by reference to two matters in particular - first, that delay by Trinity before it repudiated liability under the policy was attributable to "stalling tactics" employed in order to put off the evil day when a positive decision had to be made; and second, that evidence given by Trinity's insurance manager Mr. Liu (whose task was to prepare the policy and to arrange the appropriate reinsurance cover) which corroborated that of Mr. Chang, was given "to support that of Mr. Chang" and was flawed in

certain material respects. The judge held that Mr. Leung, who "gave great thought to his evidence" and "took a long time to give" answers to many questions, was a truthful witness, and that Mrs. Leung, who also gave evidence, was impressive; whereas Mr. Chang did not tell the truth about the policy of insurance.

The judge's decision, that Trinity was liable in damages for breach of an "implied" contract by it to provide an effective insurance policy to cover the eleven men on the voyage, was reversed by the Court of Appeal. They first pointed out that there was no basis for "implying" such a contract; if any collateral contract was made, it must have been agreed as a result of direct negotiations between the parties. This is no doubt right. Their Lordships however suspect that, in using the word "implied", the judge meant no more than that the collateral contract was to be derived from what passed between Mr. Leung and Mr. Chang on 29th October. Next, the Court of Appeal stressed the burden of proof resting upon UDL to establish the existence of a collateral oral contract. In doing so, their Lordships have little doubt that the Court of Appeal had in mind a much-quoted passage from the speech of Lord Moulton in *Heilbut, Symons & Co. v. Buckleton* [1913] A.C. 30, when he said (at p.47):-

> "Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are therefore viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an animus contrahendi on the part of all the parties to them must be clearly shown. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them and more especially would have the effect of lessening the authority of written contracts by making it possible to vary them by suggesting the existence of verbal collateral agreements relating to the same subject-matter."

They then turned to the evidence of Mr. Leung, and to certain answers given by him relating to his second conversation with Mr. Chang, and in particular to the circumstances in which the occupations of the eleven men came to be described as "ship building engineers" in the document attached to the policy. The relevant passages in Mr. Leung's evidence are of such importance that they deserve to be quoted in full. In his evidence in chief, he said with regard to the occupations of the men:-

> "I.M. Chang asked me their occupations. I did not know so I asked my wife. She was still beside me. She replied 'they are China crew members'. My wife's mood was not very happy as I'd be on telephone for some time. I told I.M. Chang that

they were crewmen. I.M. Chang asked me if there were any engineers amongst these 11. I was unable to answer so I asked my wife. I was still holding receiver and she said 'I think so'. I then heard 1.M. Chang said on telephone before I said anything 'shall I put down ship building engineers'. 1 asked my wife if this should be done. I.M. Chang when he said ship building engineer, he spoke in English. Only these 3 words. At time he said 'engineer', when he asked me in Chinese whether any of them were engineers. When he suggested putting down engineers, I.M. Chang said 3 words in English. I said to my wife. I asked her in Chinese if any were engineers. After I.M. Chang suggested putting down ship building engineers, I asked my wife whether this should be done and she was very impatient and she said 'alright'.

I did not think the matter of the mens jobs was important at that time. I.M. Chang said to me that their occupation is not important nothing will happen, it will not be that coincidental. When wife agreed I informed I.M. Chang about this."

Not unnaturally, counsel for Trinity pursued this point in cross-examination, picking up Mr. Leung's evidence in the penultimate sentence of the passage quoted above. The following exchange then took place:-

"Q. Whether any reasons why did not think important to state jobs of the 11 members.

A. That was not said by me, but said by I.M. Chang.

Q. Do you remember being asked in examination in chief?

A. Yes.

Q. Answer because at that time I.M. Chang said not important nothing will happen.

A. Yes.

Q. What was the coincidence that you talked about?

A. During building of vessel nothing happened and I.M. Chang quite happy about it so when he said that this would not be coincidental, I think he meant that there would not be an accident.

Q. Does not matter if policy wrong as would be no claim on policy?

A. I did not say so.

Q. You understand.

A. I did not quite understand what he said either.

Q. He said he (sic) would not matter if occupation wrongly stated in the policy.

A. He did not say it did not matter even if occupation wrongly stated but said this is only a formality, it would not be that coincidental.

Q. Did you understand coincidence which would not happen this occupation would be wrong and the ship sinking?

A. I think that was what he was thinking at time.

Q. You give that answer to your counsel as to why you thought details of jobs not important.

A. Yes."

With this evidence in mind, the Court of Appeal concluded that UDL had failed to establish the existence of the collateral oral contract alleged by them. Sir Alan Huggins V.-P. said:-

> "The first question is whether the Plaintiff's evidence, if believed, established that the parties had contracted for insurance of crewmen. There was no basis for implying such a contract: if it was made it was as a result of direct negotiation. Even if Mr. Tony Leung, husband of an executive director of the Plaintiff, initially asked for the insurance of crewmen, he and his wife subsequently agreed that the policy should be issued in respect of 'ship building engineers'. They so agreed because it was, they say, indicated to them that the wording of the policy was unimportant. However, the reason they thought the wording was unimportant was not that the policy would cover crewmen in spite of the wrong description but that, however the insured were described, 'nothing will happen', i.e. the ship would not sink and the men would not be injured. Mr. Chang, the Defendant's Office Manager, is not alleged to have said that the wrong description would be unimportant even if the vessel did sink, and Mr. Leung did not say that he had so understood what Mr. Chang did tell him. Indeed, Mr. Leung specifically said that it was not the misdescription per se which was unimportant, it was the unlikely coincidence of misdescription and casualty which made the misdescription unimportant. The Plaintiff was thus agreeing to accept a policy which it knew would not cover crewmen. It received what it had agreed to accept."

Fuad J.A. said:-

> "On their own case, both Mr. and Mrs. Leung agreed to the misdescription of the occupations of the men to be insured. Mrs. Leung clearly dealt with Mr. Chang through her husband who was U.D.L.'s agent. Mr. Leung must be taken to have shared Mr. Chang's view that it was unlikely that there would be an accident. It seems to me quite absurd to suggest (if indeed this was the suggestion) that this was an assurance of any kind and that it was a matter which only concerned Mr. Chang. Here, according to Mr. Leung, he was being told that the event insured against was not likely to happen, not that the men would be covered despite the misdescription of their occupations; this resulted in the wrong policy being issued, if his intention had been to insure working seamen. Even if his experience in this particular insurance field was limited, he could not have failed to appreciate the significance of what, on his own evidence, was being said to him."

He concluded that the judgment in favour of UDL could not be allowed to stand, "based as it was on an oral agreement whose terms were not proved with sufficient certainty to found a claim in the face of the policy later issued". Clough J.A. agreed with both Sir Alan Huggins V.-P. and Fuad J.A.

Their Lordships are unable to fault the reasoning and conclusion of the Court of Appeal on this point. They accept that, in the relevant passages in Mr. Leung's evidence, there are some answers which are by no means clear, and in particular the use of the word "coincidental" appears to be unusual. They are also very conscious of the fact that there was before the Court of Appeal not a verbatim transcript, but the judge's note of Mr. Leung's evidence; and furthermore that (as they were told) Mr. Leung gave his evidence through an interpreter. Even so, for the reasons so plainly stated by Sir Alan Huggins V.-P. and Fuad J.A., they consider, like them, that the judge's conclusion on the issue of collateral contract cannot stand; they do not think that their conclusion could be better expressed than it was by Fuad J.A., viz. that a collateral oral contract was not "proved with sufficient certainty to found a claim in the face of the policy later issued".

As was pointed out by the Court of Appeal, that decision disposed of the case; and, since it was based on the conclusion that Mr. Leung's evidence failed to disclose the existence of a collateral oral contract, it became strictly unnecessary to consider the judge's findings of fact with regard to the relative merits of the conflicting evidence of Mr. Leung and Mr. Chang. Before their Lordships, Mr. Scrivener submitted that it was not enough to consider, with reference to Mr.

Leung's evidence alone, whether his evidence of what passed between himself and Mr. Chang disclosed any such collateral oral contract as alleged; to consider that submission it was, he submitted, necessary to go further and ascertain, with reference to all the evidence, where the truth lay. Their Lordships are, however, unable to accept that submission; in their opinion, in agreement with the Court of Appeal, if Mr. Leung's evidence does not disclose any collateral contract, none can be proved to have existed. In fact, however, Fuad J.A. went further and subjected the judge's findings of fact to a critical analysis. He criticised the judge's conclusion that Mr. Chang decided to misdescribe the occupation of the ten seamen in the policy, in order to resume his company's successful business relationship with Mr. Leung, as conjectural. He pointed out that the delay before Trinity repudiated liability, attributed by the judge to stalling tactics, did not cast doubt on Mr. Chang's testimony, bearing in mind that Mr. Chang was only the office manager, and that the managing director had explained why the delay had occurred; and he observed that the judge's conclusion that Mr. Liu had given his evidence to support Mr. Chang - i.e. falsely to support him - was not justified on a careful reading of the evidence. In these circumstances it appears that, even if he had been prepared to hold that Mr. Leung's evidence *prima facie* disclosed the existence of a collateral oral contract, Fuad J.A. would nevertheless have rejected the judge's conclusion on the facts.

Mr. Scrivener suggested that an appellate court had no right to interfere with the judge's findings of primary fact; in their Lordships' opinion, however, Fuad J.A. was entitled so to do in the present case, where (as he held) the judge had misdirected himself as to the effect of certain evidence which he understood to support his conclusion. Indeed, had the matter arisen for decision before them, their Lordships would have been disposed to adopt the same approach to the facts as that adopted by Fuad J.A.. Having regard to the evidence of Mr. Leung there must, their Lordships consider, be a strong probability that the apparently stark conflict of evidence between Mr. Leung and Mr. Chang revealed no more than an initial misunderstanding between them, followed by an anxiety on the part of one or both of the witnesses (perhaps subconsciously) to improve his case when he came to give evidence. Such an understanding of the evidence would be entirely consistent with a conclusion that no collateral oral contract of the kind alleged by UDL ever came into existence.

For these reasons, their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondent's costs.