International Watersport Management Ltd v Pearl Creations Company Ltd

[2002]TOCA 7

By Sunita Bois-Singh[*]

THE FACTS

This case is an appeal relating to the authority of the master of the vessel *Deep Blue* agreeing on a term of the oral charter of the vessel by the Respondent for the transport of oysters. The term the master of *Deep Blue* agreed was that the voyage would be completed overnight in a time of approximately eight to ten hours. On the evening of 20th October 1999 the vessel was chartered for the voyage to Lisa's Beach in Tonga. The departure of the vessel was delayed by two hours and the voyage took at least 22 hours. The vessel arrived at its destination at low tide and as a result had to be diverted to another place (Neiafu) which was some distance by road from the Lisa's Beach. The very long period at sea, throughout the day as well as at night proved extremely disastrous as to the state and condition of the oysters, which were intended for the cultured pearl industry in Vava'u in Tonga.

Before entering into the charter of the *Deep Blue*, Mr. Choe, the Respondent's manager had obtained advice from his company's Japanese technical expert about the requirements for the successful transport of live oysters. In particular, the time the voyage would take which was not to be more than ten hours and the temperature to which the oysters would be exposed were critical factors that required that the journey be completed within the night of no more than ten hours.

Mr. Choe enquired about the ability of the vessel to do the voyage in the stipulated time, The master of the vessel informed Mr. Choe that in good conditions the journey would take eight hours but in rough conditions it would take ten hours. The master also informed Mr Choe that the vessel's speed was 18 knots, which later at trial he claimed was a joke.

Mr. Choe had also met with the managing director of the company owning the vessel, Mr. Keller, who on appeal denied making the statement that a voyage time of eight to ten hours at his second meeting. He alleged that he had stated the voyage time to be twenty to twenty-two hours. On appeal, the judge rejected Mr. Keller's allegation that he had stated that the voyage would take twenty to twenty-two hours.

It was decided by the trial judge that during his meeting with Mr. Choe Mr. Keller had only confirmed the charter price. The rest of the terms of the contract in relation to the time and duration of the voyage were discussed and finalised by the master of the vessel.

CLAIM

On trial the Chief Justice had awarded damages to the Plaintiff (Pearl Creations Company Ltd) for the loss of a large proportion of the oysters. The Defendant appealed on the basis that the master of the vessel had no authority to stipulate the time and duration of the voyage.

OUTCOME

The defendant's appeal was dismissed with costs.

LEGAL PRINCIPLES

Ratio Decidendi

- The master is the agent of the ship-owner in every contract made in the usual course of the employment.
- The master has implied authority to contract to carry goods on board.
- The owners have already recognised the fact that the captain had authority to receive the goods on board. They cannot say at the same time that they will not be bound by the terms on which he received them.

Obiter Dicta

- The authority of the captain to bind his owners by charter – party only arises when he is in a foreign port and his owners are not there and there is difficulty in communicating with them.

HOLDINGS OF THE COURT

Terms of the contract

In this case, the appellant alleged that the duration of the voyage stipulated by the master of the vessel was not a term and that the speed of the vessel to be 18 knots was meant to be a joke. The court held that Mr. Choe was serious in the matters relating to the time and duration of the voyage at the time he made the contract and that he did not treat the speed of the vessel to be a joke.

On the balance of probabilities, the Court held that the voyage time was not mentioned at all between Mr. Choe and Mr. Keller but it was a term of the oral contract which was agreed with the master which was subsequently not contradicted by Mr. Keller. Terms in a contract do not have to be in writing. A contract may entirely consist of oral statements or it may be partly in writing and partly oral. The overall test is the objective intention of the parties as to whether the statement was promissory and meant to be binding as a term of the contract (see *Oscar Chess v Williams* [1957]1WLR 370 where it was laid down that 'the question whether a term was intended depends on the conduct of the parties, on their words and behaviour, rather than on their thoughts. If an intelligent bystander would reasonably infer that a warranty [term] was intended, that will suffice'. See also *Sun Islands Inc v Fewtrell* [1991] TLR 8 which states that an objective test should be used and what a reasonable person would construe from the statement. Following the above cases, the master's claim that the voyage could be done in eight to ten hours was treated by the Courts as a term of the contract.

Where also the person making the oral statement has special knowledge or skill in the matter then the courts are more likely to treat the statement as a term of the contract. In the present case the master of the vessel was familiar with the running and speed of the vessel.

Therefore, the Court rejected his contention that he had meant the speed of the boat to be 18 knots to be a joke. In *Dick Bentley Productions Ltd v Harold Smith Motors* [1965] 1 WLR 623 the oral statement concerning the distance travelled by the car was held to be a term of the contract because the car dealers were in a position to know the true mileage. As such the position is that where the party making a specific statement has special knowledge in that area, he will be bound by that statement and it will be treated to be a term of the contract.

COMMENTARY: AGENTS AND THEIR AUTHORITY

Agency is the relationship arising where one person, the principal, appoints another the agent, to bring about, modify or terminate legal relations between the principal and one or more third parties. Agency therefore, can be regarded as a particular form of authority, namely to create or affect legal relations between the principal and third parties. An employee may have power to commit his employer to contracts with third parties and in that sense is the employer's agent. In the present case the master of the vessel was therefore, an agent of the ship-owning company.

The authority of an agent must be distinguished from his power. A transaction entered into by the agent within the scope of his actual authority from the principal will bind the principal but the principal will also be bound if the agent acts within his apparent authority. An agent has two distinct obligations imposed on him by the express/implied terms of the agency agreement. That is, to perform with reasonable care and skill the duties allotted to him and to observe any lawful and reasonable instructions given by the principal as long as they are within the limits of his actual/apparent authority.

In the present case the court was of the opinion that once Mr Keller made the statement that the *Deep Blue* was available for charter to deliver the oysters, the charter became part of the business of the vessel. Since Mr. Keller set the price without settling all the necessary terms, the master had authority to conclude the contract and to agree to the term settling the time for the voyage. In the case of *McLean & Hope v Fleming* [1871] 2 HL Sc App 128 Lord Chelmsford held at pp.130 that the master is the agent of the ship-owner in every contract made in the usual course of the employment of the ship. Also in the case of *Manchester Trust v Furness* [1895]2 QB 539 at 543 Lindley LJ pointed out that the general rule of law that prima facie at all events a bill of lading signed by the master is signed as the servant or agent of the ship-owner in the ordinary course of business. Lopes LJ at 547 added in the same case that holders would naturally believe and imagine that the master when he signed the bill of lading was exercising the ordinary authority which attaches to him in his capacity of master.

Obviously, in this case the judges of the appeal court were persuaded by the English authorities that suggested that a master of a vessel has authority to agree to terms of the contract in order to conclude it and as a result the principal shipping company was in breach of contract when they were not able to deliver the goods within the time specified and the deterioration of oysters as a result. Had the appeal court judges not taken this stand, the respondent would have been left with no remedy under contract law and may have had to look else where (such as under law of Equity) for the detriment faced by them under the contract.

The cases discussed above show how employers can be liable through their employees acting as agents. What is interesting is that these cases are from bigger jurisdictions where huge companies and their agents operate and who may have insurance coverage for such mishaps. In light of this, how relevant and applicable are these decisions to the smaller jurisdictions of the USP region? In the absence of any other case being decided on this issue, the decision of the court of appeal of Tonga while giving remedy to the respondent may have set a precedent in Tonga for such types of contracts. The danger in this is that the local shipping industry could be targeted by disgruntled chatterers.

Most local shipping industries operate with limited resources. Also domestic sea carriers in most of the smaller countries of the USP region operate on a small scale compared to the gigantic corporations that may operate domestically in Europe, Asia or the United states. Due to the size of such operations transactions are done, most of the time, orally or only partly in writing. Oral contracts for ordinary contracts may not be a problem however, when oral contracts are used for marine transportation there is a danger that (as in the present case) due to the nature of the contract if one party is at default it will be difficult for the other party to prove this in the absence of witnesses. In the present case this issue can be seen in relation to the length of time needed for the voyage. The respondent was adamant that he was

assured by the master that the voyage will be done between eight to ten hours when in fact it took almost twenty two hours. The appellant denied this and as there were no witnesses it was difficult for the courts to decide what exactly was said.

In order to avoid the perils of oral contracts in marine transportation the small island states of the region should consider having guidelines for sea transportation of goods particularly 'live' goods (ie goods which are easily perishable). This is imperative as the technicalities involved in marine transportation makes oral contracts impractical and inadequate for the parties' needs.

Tonga is a signatory to the Hague-Visby Rules which is a guideline for transportation of goods by sea. Unfortunately this convention does not cover sea transportation of live goods so it is not useful for the present case. A follow up convention that covers sea transportation of live animals or goods is the Hamburg Rules. Tonga is yet to ratify this convention. The Hamburg Rules have a detailed guideline of the responsibilities and liabilities of the carrier and the chatterer. Out of all the countries of the USP region the only countries that have ratified the Hague-Visby Rules are Fiji, Kiribati, Nauru, Solomon, Tonga and Tuvalu. None of the USP member countries have ratified the Hamburg Rules. Looking at the usefulness of the two conventions in relation to transportation of goods and animals by sea, the USP member countries should be encouraged to ratify the above conventions. This is required especially since the countries in the Pacific are island-States and sea transportation of goods and animals is the usual mode of transport used both within the island- State themselves and among them..

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