SEABRIDGE SHIPPING LTD
v.
CEYLON PETROLEUM CORPORATION

COURT OF APPEAL
WEERASURIYA, J.,
DISSANAYAKE, J.
CA NO. 759/86 (F)
DC COLOMBO NO. 89356/M
JULY 3, 4 AND 18, 2000 AND
SEPTEMBER 19, 2000

Breach of contract – Adequacy of damages awarded – Objections for awarding of damages resulting from a breach – Is nature of damages compensatory? – In a claim of damages for breach of contract, can compensation for loss of reputation be considered? English Law – Roman Dutch Law.

The plaintiff-appellant instituted action seeking a judgment in a sum of Rs. 200 million arising from a breach of contract for the affreightment of crude oil. The District Court entered judgment in a sum of Rs. 2.5 million for loss of reputation.

Held:

(1) It is apparent that the plaintiff-appellant has made a claim upon erroneous computation of the measure of damages resulting from the purported breach of contract.

(2) Nature of damages being compensatory, the affected party is only entitled to such sum as will indemnify him for the loss which he has actually suffered. When he has not in fact suffered any loss by reason of the breach, he is neverthelss entitled to a verdict, but damages recoverable will be purely nominal.

(3) Damages could, in principle, be recovered in a contractual action for injury to reputation.

(4) On the material before Court it is difficult to come to a finding that, the plaintiff has actually suffered any loss by reason of the breach, therefore the damages recoverable would be purely nominal.

APPEAL from the judgment of the District Court of Colombo.

Cases referred to:

1. *Antco Shipping Ltd. v. Seabridge Shipping Ltd.* – 1979 - 3 All ER 186.
2. *Addis v. Gramophone Co., Ltd.* – 1909 AC 488.
3. *Withers v. General Theatre Co., Ltd.* – 1933 KB 536.

L. C. Seneviratne PC with *I. S. de Silva, N. Fernando* and *U. H. K. Wickramasinghe* for plaintiff-appellant.

D. S. Wijesinghe PC with *Percy Wickremasekera* and *Sanjeewa Jayawardena* for defendant-respondent.

Cur. adv. vult.

May 3, 2001.

WEERASURIYA, J.

The plaintiff-appellant by its plaint dated 22. 01. 983, instituted action against the defendant-respondent seeking, *inter alia,* a judgment in a sum of Rs. 200 million, arising from a breach of contract for the affreightment of crude oil for 1983-1984.

The defendant-respondent in its answer whilst denying the existence of a legally binding contract prayed for dismissal of the action.

This case proceeded to trial on 19 issues and at the conclusion of the case learned District Judge by his judgment dated 27. 11. 1986, entered in a sum of Rs. 2.5 million. It is from the aforesaid judgment that this appeal has been lodged.

At the hearing of this appeal, learned President's Counsel appearing for the plaintiff-appellant submitted that the learned District Judge was in grave error in restricting the claim of the plaintiff-appellant to Rs. 2.5 million.

This contention seems to be founded on three grounds, namely-

(*a*) the rejection of document marked XI in support of the claim for Rs. 200 million;

(*b*) acceptance of the document marked D65 prepared by the defendant-respondent; and

(*c*) non-acceptance of the oral evidence of Priest relating to the loss of profit.

In December, 1982, the Petroleum Corporation (the defendant-respondent) invited tender offers for the affreightment of crude oil from West Asian Gulf Ports to Colombo for the period 1983-84.

A special characteristic of this tender was that it was to be called in two parts. Part I dealt with the pre-qualification of the tenderers in terms of clause 8 of the tender conditions and Part II deals with the procedure once the tenderers have been accepted by the defendant-respondent as having pre-qualified.

The plaintiff-appellant forwarded its pre-qualification tender dated 30. 12. 1982 and the Tender Board having considered it as evident from D68 and D69, the Chairman of the Tender Board by telex dated 01. 02. 1983 (P5), informed the plaintiff-appellant that it has been pre-qualified to participate in Part II of the tender. The plaintiff-appellant submitted its tender for Part II, to the Chairman of the Tender Board of the defendant-respondent who by letter dated 18. 02. 1984 (P4), informed the plaintiff-appellant that its offer of 11. 02. 1983 had been accepted by the Tender Board in accordance with the terms and conditions of the Ceylon Petroleum Corporation tender notice dated 16. 12. 1982 and telex dated 01. 02. 1983, subject to approval of the Ministry of Industries and Scientific Affairs.

The plaintiff-appellant asserted in the District Court that the acceptance by P4 of the plaintiff-appellant's offer comprising of part II of the tender (P3 and P3A) constituted a legally binding contract between the plaintiff-appellant and the defendant-respondent. On the other hand, the defendant-respondent contended that P4 constituted only a conditional acceptance or a conditional award of the tender and therefore there was no legally binding contract between the parties.

The learned District Judge having considered the evidence both oral and documentary, has come to the conclusion that there was a legally binding contract between the plaintiff-appellant and defendant-respondent. This finding of the District Judge was not canvassed at the hearing of this appeal for the reason that the appeal filed by the defendant-respondent was rejected for having been filed out of time.

According to the terms of the tender 150,000 tons of crude oil had to be lifted in the first quarter of 1983. However, the defendant-respondent had failed to give lifting instructions before 15. 03. 1983, despite several requests by the plaintiff-appellant for such instructions as evident from P8, P9 and P10. Thereafter, by telex dated 07. 04. 1983 (P14), the defendant-respondent cancelled the tender.

Learned District Judge has come to a finding that despite the readiness of the plaintiff-appellant to carry out their obligations under the contract, the defendant-respondent has committed breach of contract. This finding of the learned District Judge too remains unassailed.

The only issue that arises for consideration in this appeal relates to the question of adequacy of damages awarded to the plaintiff-appellant.

The plaintiff-appellant has claimed a sum of Rs. 200 million as damages. It is relevant to note that plaintiff-appellant has not specified

in the plaint various items on which it claimed damages or on what basis the total sum of Rs. 200 million has been founded. Nevertheless, the plaintiff-appellant has sought to describe the various items under which damages were claimed mainly through its principal witness Jonathan Priest.

Learned District Judge has itemised the claim for damages broadly under three heads:

(1) Damages for making arrangements and positioning the vessel Alva Bay and the expenses incurred thereof.

(2) Damages for loss of profits, and

(3) Damages loss of reputation.

The learaned District Judge has held that plaintiff-appellant has waived its claim under item (1).

It has been recorded that learned Counsel appearing for the plaintiff-appellant as having stated to Court that he is not claiming the expenses incurred in positioning the Alva Bay which is set out in X2 (vide proceedings at pages 457 and 461). The reason for not relying on X2 appears to be that expenses relating to item I is reflected in XI.

Learned District Judge held against the plaintiff-appellant in respect of item (2) on the basis that it has failed to prove the claim for damages.

The document produced marked X1 was the sole means of proof adduced by the plaintiff-appellant in support of its claim for Rs. 200 million.

However, following glaring errors have been observed in the breakdown of the plaintiff-appellant's claim for damages.

(1) The earnings have been estimated for 9 voyages of Alva Bay (mother vessel) amounting to US Dollars 14,151,037 whereas voyage costs during the contract have been computed for 7 voyages amounting to US Dollars 9,594,943.

(2) The details of rates appearing in X1 relating to the world scale rates were inconsistent with rates contained in tender offer P3. (vide page 552 of the proceedings).

(3) There was confusion relating to contract quantity in page 1 of X1 and page 2 of X1 which read as 1.7 million long tons and 1.8 million long tons, respectively. Both these quantities contradict tender offer P3 which provides for a quantity of 1.05 million long tons plus or minus 5%. Tender offer (P3) contains no reference either to a quantity of 1.7 or 1.89 million long tons (vide pages 391, 588 and 589 of the proceedings).

(4) The computation of a quantity of 1.35 million long tons at a world scale rate of 112.5 is erroneous as the tender offer (P3) stipulates that the world scale rate 112.5 is for a quantity of 1.05 million long tons.

(5) The consumption of fuel restricted to 65 tons was founded to be incorrect, the correct amount being 143 tons of fuel per day.

(6) The number of lightering trips, daughter vessel would be required to make, for the purpose of collecting oil from the mother vessel and discharging the oil in the Port of Colombo, were shown to be wrong, in that 63 lightering trips were required as against 43 as shown in X1. (vide pages 561 and 565 of the proceedings).

(7) (*a*) the cost of fenders,
(*b*) the cost of lightering Masters' wages and expenses,
(*c*) the cost of anti-pollution equipment,
(*d*) cost of marine lubricant and water, and
(*e*) cost of the hire of Alva Bay.

were omitted in the preparation of X1. Priest conceded that cost of the hire was US Dollars 150,000, a month.

It is to be observed even the revised XI cannot form a correct reflection of the true state of loss of profit as the basis of preparation was misconceived by working on a quantity of 1.89 million long tons. It would appear that the defendant-respondent has never accepted that the quantity that would be carried was 1.89 million long tons. The purpose of the suggestion by the defendant-respondent that US Dollars 13,742,662 seems to be the earning was to show that Priest had not adopted the rates stipulated in the tender offer (P3) in calculating the gross earnings. Furthermore, this revised XI has omitted the cost of fenders, lightering Masters' Wages and expenses, the cost of antipollution equipment, the cost of marine lubricants, the cost of fresh water and the charter costs of Alva Bay.

Learned President's Counsel sought to emphasize that documents marked D65 and D66 were produced in evidence subject to proof and that the defendant-respondent had failed to prove them but the learned District Judge had relied on D65 in arriving at his finding. It must be noted that despite a reference to certain contents of D65, learned District Judge has not sought to rely solely or mainly on D65 for his finding that plaintiff-appellant would have suffered a loss on this contract of affreightment.

Learned President's Counsel appearing for the plaintiff-appellant further contended that even if documents marked XI and X2 were disregarded, learned District Judge ought to have acted on the testimony of Priest to arrive at a favourable finding on the measure of damages resulting from loss of profit.

In this regard, it is to be borne in mind that Priest's evidence was confusing and uncertain relating to the details of computation of loss of profit. He was shown to be without sufficient experience in the assessment of damages and the document XI was hastily prepared after his arrival in Sri Lanka for the purpose of giving evidence. His admission that Counsel had made nonsense of XI and that he was compelled to revise XI in the light of cross-examination were proof of the fragile nature of his evidence.

The fundamental glaring error he had committed in preparing XI was the calculation effected on the basis of earnings from 9 voyages and computing costs for 7 voyges. This had resulted in a series of other erroneous calculations relating to the cost of fuel, chartering another vessel, port charges, bunkering, increase of lightering trips, tug costs, etc. Besides, the omissions relating to costs of fenders, lightering masters' wages and expenses, anti-pollution equipment and marine lubricant and water have aggravated the confusion resulting from the testimony of Priest.

It is in this background that one has to examine the answer by Priest in the affirmative to the question (at page 553 of the brief) that the ultimate result of the contract was a loss of US Dollars 1,782,737.

It would be apparent that the plaintiff-appellant has made a claim upon erroneous computation of the measure of damages resulting from the purported breach of contract.

It is also relevant to observe that Nigel Shaw in his testimony appeared to suggest that profit should be something like US Dollars 1.50 per long ton. This statement seem to suggest that the claim sought is merely speculative. In any event, a speculative figure of US Dollars 1.50 cannot form the basis for a proper computation in the absence of a definite quantity forming the subject-matter of contract. It is well to remind that tonnage of crude oil which the plaintiff-appellant claimed, had to be transported was uncertain inasmuch as three

different quantities, viz. 1.7 million, 1.26 million and 1.89 million tons, were claimed as seen from the evidence of Priest.

The following passage from Anson's *Law of Contract* (1979 edition by A. G. Guest at page 550) would illustrate the objectives for awarding of damages resulting from a breach:

> *"Damages for breach of contract are given by way of compensation for loss suffered and not by way of punishment for wrong inflicted. The measure of damages is, therefore, not affected by the motive or manner of breach "Vindicative or exemplary damages have no place in the law of contract".*

Therefore, it would be clear that nature of damages being compensatory the affected party is only entitled to such sum as will indemnify him for the loss which he has actually suffered. Where he has, not in fact, suffered any loss by reason of the breach, he is nevertheless entitled to a verdict but damages recoverable by him will be purely nominal. (vide Anson's *Law of Contract* 1979 edition, page 549).

Jonathan Priest and Nigel Shaw who testified on behalf of the plaintiff-appellant conceded that the proper method of computation of damages was the method laid down in the case of *Antco Shipping Ltd. v. Seabridge Shipping Ltd*[1].

Lord Denning set out the method of assessing or computing loss of profit in the following terms:

> *"Eventually, the question fell to be decided; what damages were the owners entitled to as a result of the original repudiation by the characters? The measure would be this. First, calculate the amount of freight which the owners would have received if the*

charter party had been fulfilled by carrying the oil from a Mediterranean port (other than Libya) to the Caribbean. Second, calculate the credit which the owners should have given in one of two ways: either by (i) the actual amount which the owners made by putting the vessel to profitable use with the Bunge organization or (ii) by taking the market rate of freight which the owners could have made by letting the vessel out on the market."

Priest in his evidence conceded that the market rates for freight was available monthly from an association called AFRA (Average Freight Rates Assessment) while Shaw admitted that the market rate for freight can be easily determined and that it was possible to precisely state the market rate for the period of February or March, 1983, to April, 1984. Thus, for the purpose of computing damages the market rate was available to the plaintiff-appellant but failed to place that in evidence. Furthermore, Priest conceded that Alva Bay had actually earned freight between May, 1983 and December, 1983, but these figures of actual earnings were not offered as evidence.

Therefore, learned District Judge seems to be justified in stating that the Court is without this essential evidence and therefore he is unable to assess any damages in favour of the plaintiff-appellant.

The learned District Judge had refused to accept XI as a document which reflects a true assessment of measure of damages from the purported breach of contract. He has refused to act on the oral testimony of Nigel Shaw and Jonathan Priest on the assessment of damages resulting from loss of profit.

However, the learned District Judge has awarded the plaintiff-appellant damages resulting from the loss of reputation.

It now remains to consider this question.

Learned President's Counsel appearing for the defendant-respondent contended that both the Roman Dutch Law as well as the English Law, clearly lay down the principle that in a claim for damages for breach of contract, no compensation for loss of reputation can be considered.

The following passages from Anson's *Law of Contract* (1979 edition, pages 551 and 553) stipulate the rules applicable on the question of loss of reputation:

> *"Damages cannot, in principle, be recovered in a contractual action for injury to reputation . . .*
>
> *An exception, however, exists in the case of a banker who refuses to pay a customer's cheque when he has in his hands funds of the customer to meet it. If the customer is a tradesman, he can recover in respect of any loss to his trade reputation by the breach."*

The rationale behind this rule seems to be that damages for injured feelings are only recoverable in the special cause of actions for breach of promise of marriage which though technically based on contract are in many respects more closely analogous to action in tort. (vide *Addis v. Gramophone Co., Ltd.*[2]).

In this regard it is vital to note that a distinction must be made between a breach of contract which causes injury to a reputation which a person already possesses and one which deprives him of an opportunity, to which the contract entitles him, of enhancing his reputation. So, an actor whose contract entitles him to be advertised as playing a leading part at a well-known music hall, may recover damages for the loss of publicity though not for any injury that his failure to appear may cause to his existing reputation (*Withers v. General Theatre Co., Ltd.*[3]). (vide Anson's *Law of Contract,* page 552).

In the light of the above rules of law, it seems to me that the learned District Judge has erred in awarding damages in a sum of Rs. 2.5 million for loss of reputation.

On the material placed before the District Judge by Nigel Shaw and Jonathan Priest, it was difficult to come to a finding that plaintiff-appellant had actually suffered any loss by reason of the breach.

Therefore, the damages recoverable by the plaintiff-appellant would be purely nominal. 280

On a consideration of the totality of the circumstances, award of a sum of Rs. 2.5 million for loss of profit seems justifiable. Therefore, I direct that plaintiff-appellant is entitled to recover a sum of Rs. 2.5 million as damages, on account of loss of profit resulting from breach of the contract.

Subject to the above variation relating to the item under which damages were awarded, this appeal is dismissed with costs.

DISSANAYAKE, J. – I agree.

Appeal dismissed subject to variation relating to the item under which damages were awarded.