IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS 26/2012

[2014] SCSC

TRAVEL SERVICES (SEYCHELLES) LIMITED

Plaintiffversus

MARINE CHARTER ASSOCIATION (SEYCHELLES)
First Defendant

SEYCHELLES PETROLEUM COMPANY LIMITED
Second Defendant

Heard:	20 September 2013, 24 January 2014 & 17 February 2014
Counsel:	Pesi Pardiwalla for plaintiff
	Basil Hoareau for first defendant Francis Chang-Sam for second defendant
Delivered:	25 March 2014

JUDGMENT

Egonda-Ntende CJ

[1] The plaintiff is seeking damages in the sum of SR1,727,009.37 from the first defendant on account of the supply of diesel, instead of unleaded gasoline, to its boat the 'Pasadena', resulting in damage to the engines of the Pasadena, which occurred on or about the 1 October 2010 when the plaintiff's boat berthed at the first defendant's fuel deport at Port Victoria and purchased 800 litres of unleaded gasoline.

[2] The first defendant opposes this claim on the ground that the damage to the Pasadena's engines was not caused by the wrong hydrocarbon supplied to the Pasadena, which it admits it supplied, but was occasioned by poor maintenance of the engines by the

plaintiff. In the alternative it contends that if the damage was caused by the wrong hydro carbon that was supplied, this was not the fault of the first defendant but the fault of the second defendant who supplied the said wrong hydro carbon to the first defendant and who must be held liable for the damage directly or by way of indemnification of the first defendant.

[3] The second defendant was added to this action at the instance of the first defendant seeking contribution or indemnification by the second defendant of any liability that may be ordered against the first defendant in favour of the plaintiff.

[4] The second defendant contends that it was not privy to the agreement between the plaintiff and first defendant for the supply of fuel on 1 October 2010. On that day in the usual manner the second defendant supplied to the first defendant 2 different hydro carbons which the first defendant acknowledged in writing were delivered properly. The second defendant further contended that it was the incumbent on the first defendant to take proper delivery and properly store the hydro carbons supplied to it by the second defendant.

[5] The plaintiff called five witnesses during the hearing of the case. The first defendant called two witnesses while the second defendant called no witness at all. The issues in this case are the following: Firstly whether the first defendant is liable for the damage suffered by the plaintiff. Secondly if the first defendant is liable for the damage suffered by the plaintiff what is the damage and loss that the plaintiff has suffered. Thirdly as between the first defendant and second defendant whether or not the first defendant is liable to indemnification by the second defendant and if so to what extent.

Whether the first defendant is liable for the damage suffered by the plaintiff?

[6] The first defendant admits that on the on the 1st day of October 2010 the plaintiff's boat the Pasadena moored at its jetty and purchased 800 litres of unleaded gasoline. It was supplied with a hydro carbon that had been contaminated with diesel. The first defendant admits that the plaintiff was not supplied with the unleaded gasoline. However it denies that that this caused damage to the Pasadena's engines. It contends that the damage to the Pasadena's engines was either due to the poor maintenance or other defect of the engines.

In the alternative that the skipper of the Pasadena failed to take appropriate measures to reduce the risk of damage to the engines.

[7] The only evidence adduced on this issue of the damage to the engines are the plaintiff's witnesses, PW2, Mark Ferdinand Rouillon, the technician / mechanic who repaired the engines and PW3, Roy Emille Freddy Fanny, Senior Skipper, who was in charge of the Pasadena at the time it refuelled and was driven back to base. The first defendant did not call any evidence to prove its assertions that the engines were damaged due to poor maintenance or other defect other than contaminated fuel or in the alternative that the skipper did not take adequate measures to reduce the risk to the engines. No evidence was adduced to show what other measures the skipper should have taken that would have reduced the risk of damage to the engines by the contaminated fuel.

[8] Mr Fanny stated that after refuelling they headed back to base and as they were picking up speed he noticed that the temperature of the engines was unusually rising high and he reduced speed. When they got to the base, and there was some light at the berthing point, he noticed that the engines were smoking rather heavily which was unusual. He reported to his employers and a technician / mechanic was called subsequently. After the technician / mechanic inspected the engines of the Pasadena the boat was immobilised as the engines required repair.

[9] Mr Rouillon was the technician / mechanic who was brought to check the engines. He started them and tested and found that they had been contaminated with fuel. He stated that using diesel in engines for which the fuel was unleaded gasoline would lead to overheating and damaging the engine which is what happened in this particular case. He contacted the agents for the Engines who recommended replacement of the engine blocks for both engines and other accessories associated with the fuel system. The plaintiff imported the said parts and the witness, with the assistance of another Technician from South Africa, overhauled the engines and had them reinstalled on the Pasadena.

[10] I am satisfied that it was really the contaminated fuel that was supplied to the Pasadena by the first second defendant that caused the damage to Pasadena's two engines. I hold the first defendant liable for the damage to the Pasadena's two engines.

What is the loss and damage that the plaintiff suffered?

[11] On the evidence adduced by the plaintiff it is clear that the plaintiff has not proved any of the value [in rupees or euros] of the damage and loss that it claimed in the plaint though for instance the damage to the engines was established. The engines were overhauled and replaced with new engine blocks and accessories. Nevertheless the cost of doing so, including the labour was never proved in evidence. Similarly for loss of earnings no proof was produced to show the exact amount that the plaintiff lost by hiring sub contractors to fulfil its pending orders instead of using the Pasadena. The plaintiff needed to demonstrate the existing orders [for the period the Pasadena was out of operation] for which it had to hire sub contractors and to what extent this reduced its earnings or margin of profits for the period in question. It was not enough to send invoices to the first defendant indicating loss of earnings being X sum and tender the same in evidence. There must be a credible explanation of how the X sum was arrived at. In the instant case there is no such evidence or explanation.

[12] Mr Pardiwalla, learned counsel for the plaintiff contended that proof of the value of loss and damage was unnecessary as the first defendant must be taken to have admitted the damage due to the plaintiff in light of its pleadings. Mr Pesi Pardiwalla, submitted that the first defendant had in effect, in light of section 75 of the Seychelles Code of Civil Procedure admitted paragraph 9 of the plaint. He referred to the case of Victoria District Council v Pillay [1968] SLR 157. He submitted that the first defendant must in effect be taken to have admitted paragraph 9 of the plaint which it did not specifically deny in its written statement of defence. He therefore submitted that it was unnecessary to provide any proof of the loss and damages suffered by the plaintiff as these had been admitted by the first defendant.

[13] In response, Mr Basil Hoareau, learned counsel for the first defendant, initially applied to orally amend the written statement of defence, without providing any ground for doing so, so as to specifically deny paragraph 9 of the plaint and to add some other matters to his defence. This was opposed by Mr Pardiwalla on the ground that the first defendant had not provided any justification for doing so. Secondly that the plaintiff had conducted its case on the basis of the pleadings as they stood and would suffer prejudice if the first

defendant was allowed to amend its defence after all parties had closed their cases. I refused the application and stated that I will provide reasons for my decision in the judgment. I will do so in due course below.

[14] Secondly Mr Basil Hoareau submitted that the first defendant had never admitted liability for the loss and damages claimed by the defendant. He referred to paragraph 6 (v) of the written statement of defence which shows that the first defendant is not admitting the claim for damages. He further stated that it was evident throughout the proceedings that the first defendant had never admitted the claim for damages.

[15] The first defendant's counsel had made no effort to provide a ground for his application. All he did was to orally apply to amend the statement of defence during final addresses. I am aware that a pleading can be amended with leave of court at any point during the course of proceedings including on an appeal. However there must be justification laid before the court by the party making the application in order for the court to exercise its discretion in the matter. It will easier for the court to allow such applications prior to the hearing of the case but may get increasingly difficult after the hearing of the case depending on the grounds put forward by the party seeking an amendment and the possible prejudice that would be inflicted on the other party or parties. In this case no ground was put forward at all as justification by the party seeking the amendment. Secondly the plaintiff objected that it would suffer prejudice having conducted its case on the basis of the pleadings as they stood then and having closed its case. I was inclined to agree. I accordingly rejected the application, especially in light of the fact that it was very late in the proceedings coming after all parties had closed their cases.

[16] Turning back to the issue of the effect of the pleadings in this case I will start by setting out the relevant provisions of the pleadings in question. Paragraph 9 of the plaint states,

> '9. The 1st Defendant is, therefore, liable to make good the resultant damages and losses to the Plaintiff as particularised below:
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> | | |
> |---|---|
> | Cost of 2 new engine blocks | Rs 426,047.02 |
> | Cost of engine accessories | Rs 68,262.35 |
> | Labor costs - | Rs 61,500.00 |
> | Loss of earnings: (EURO 20,000.00 per month x 3.66 months) | |

Rs1,171,200.00

Total **1,727,009.37**

(for purpose of computation of loss of earnings EURO 1 is rated at Rs 16)'

[17] Paragraph 6 of the written statement of defence states,

> '6. By way of further answer to Paragraphs 4,6, 7 and 8 of the Plaint the defendant avers as follows:
> (i) The Seychelles Petroleum Company Ltd (hereinafter referred "Seypec"), is the Defendant's supplier of the unleaded Gasoline and other hydro-carbon fuel and through its employees I responsible to fill the said tanks at the fuel depot of the defendants with the appropriate hydro-carbon fuel;
> (ii) the Plaintiff was supplied with a different hydro carbon fuel (other than Gasoline) due to the fault and negligence of Seypec in filling the unleaded Gasoline Tank with a different hydro-carbon fuel (other than Gasoline) and consequently Seypec is responsible for any damages caused to the Plaintiff, if any is proven;
> (iii) the Defendant exercised its contractual obligation towards the Plaintiff in good faith and properly;
> (iv) further and / or in the alternative to the above sub-paragraph, the engines of the Pasadena were not affected by the fuel but rather due to the poor maintenance of the engines and or other defect of the engines;
> (v) further and / or in the alternative the above sub-paragraph, the skipper of the Pasadena failed to take appropriate measures to reduce the risk of damage to the engines; and / or
> (vi) the damages being claimed by the Plaintiff, is grossly exaggerated;'

[18] It is clear from the foregoing portion of the statement of defence for the first defendant and the rest of the written statement of defence that there is no reference in the first place to paragraph 9 of the plaint or amended plaint. Paragraph 9 is not specifically or even generally denied. Paragraph 8 as well as the earlier paragraphs of the plaint are denied and answered in paragraph 6 of the written statement of defence for the first defendant.

[19] The first defendant admits supplying the wrong fuel to the plaintiff but claims that this was in good faith and that the fault lay with second defendant the supplier of such fuels to the first defendant. Secondly the first defendant then claims that if the plaintiff suffered any damage it is the fault of the second defendant if any such damage is proven or in the alternative such damage was caused by the plaintiff's failure to maintain its engines or was contributed to by the

plaintiff's skipper who failed to take any measures to reduce risk of damage. Lastly that the damage claimed by the plaintiff is grossly exaggerated.

[20] It is clear that there is no specific answer to or traverse of the contents of paragraph 9 of the plaint save for the paragraph 6(v) of the written statement of defence which contends that the damage is grossly exaggerated.

[21] Section 75 of the Seychelles Code of Civil Procedure states,

> 'The statement of defence must contain a clear and distinct statement of the material facts on which the defendant relies to meet the claim. A mere general denial of the plaintiff's claim is not sufficient. Material facts alleged in the plaint must be distinctly denied or they will be taken to be admitted.'

[22] This provision has been considered in the case that Mr Pardiwalla referred to by the Court of Appeal of Mauritius [sitting as a Court of Appeal for Seychelles] hearing an appeal from the Supreme Court of Seychelles in Victoria District Council v Pillay (supra). The facts of that case were that the defendant had denied liability to which was attributed the loss that the plaintiff had suffered. The plaintiff had claimed a loss arising from the death of 68 turtles at the defendant's hands. However on a preliminary point the court had ruled that a portion of the claim was statute barred and only 33 turtles had died during the relevant period. The defendant had not specifically in its pleadings denied that the turtles had died. The trial judge found that in accordance with section 80 [now 75] of the SCCP the defendant had admitted the death of the said 33 turtles since their death had not been specifically denied in the defendant's written statement of defence. This was upheld on appeal. This case is apposite to the case at hand.

[23] Paragraph 9 of the plaint alleges certain material facts with regard to the claim for damages including particulars of the loss or damage suffered by the plaintiff. There is no specific and or distinct denial of those averments by the first defendant. There is no denial that the plaintiff had to purchase 2 engine blocks at the sum stated in the plaint. There is no denial with regard to all other particulars of loss and damage including in relation to cost of engine accessories, labour charges and loss of earnings. The only statement in the defence that comes near to denying the said sums of money is paragraph 6(v) that states that the claims are exaggerated. However it must be firstly noted that this paragraph is not specifically an answer to paragraph 9 of the plaint as it is restricted to paragraphs 4, 5, 6, 7 and 8 of the plaint. More importantly it is not specific,

individually and separately, as to what exactly is exaggerated in the various particulars provided by the plaintiff in paragraph 9 of the plaint. It does not conform to the requirement that it must be 'a clear and distinct statement of material facts on which the defendant relies to meet the claim.'

[24] Paragraph 6(5) of the written statement of defence is evasive on the issue of damages as it fails to respond specifically to the different heads of loss and provide material facts from the perspective of the first defendant that show that any of the plaintiff's different claims or all of the plaintiff's claims were exaggerated and thus answer the plaintiff's claim on its merits.

[25] I agree with Mr Pardiwalla that as the items of loss and damage set in forth in the paragraph 9 of the plaint have not been distinctly denied the same must be taken to have been admitted in accordance with section 75 of the SCCP. I enter judgment for the plaintiff against the first defendant in respect of all heads of damage so claimed totalling to SR 1,727,009.37 and costs of this suit. The said sum shall be bear interest at the legal rate from today until payment in full.

Is the first defendant entitled to indemnification by the second defendant and if so to what extent?

[26] The only testimony in relation to this issue was adduced by the witnesses of the first defendant. The second defendant chose not to call any witnesses in this case. The second defendant supplied to the first defendant fuel for re sale to its clients. On the 1 October 2010 the second defendant supplied both unleaded gasoline and diesel to the first defendant. It was delivered by a truck belonging to the second defendant that was being driven and managed by the second defendant's staff. He was a new member of staff and this was his second occasion to supply fuel to the first defendant. As usual on arrival a member of staff of the first defendant, DW2, Charles Phillip Grandcourt, went up the truck and checked that the seals were fine and that what was being delivered was what had been ordered. There were 2 loads of diesel and unleaded gasoline. DW2 came down the truck, and left the driver to unload the fuel, by pumping it into the respective tanks for each fuel. The driver offloaded one into the first defendant's tanks. As he was offloading the second one, most probably diesel, he stopped and switched off the engine. DW2, heard the engine stop while he was in the office. He came back to the off loading point and the driver told him he had made a mistake. The driver then offloaded the last batch of fuel and left. The witness did not ask him which or what mistake he had made.

[27] Subsequently the Pasadena came to purchase fuel as did other customers on the same day. DW1, Pat Labrosse, the manager of the first defendant's depot, was called by several customers that they had apparently been supplied the wrong or contaminated fuel as they were having trouble with the engines of their boats. The first defendant notified the second defendant who came, tested the fuel in the unleaded gasoline tank and emptied the said unleaded gasoline tank and re supplied the first defendant afresh with 7500 litres of unleaded gasoline at no cost.

[28] It is clear that there was contamination of fuel in the first defendant's unleaded gasoline tank. This took place on the 1 October 2010 when the second defendant came to deliver the fuel to the first defendant's depot. It appears that the second defendant's driver who was new and this was his second occasion to deliver fuel to the first defendant. He delivered some quantity of diesel into the first defendant's unleaded gasoline tank and then realised his mistake. He stopped the pump and re connected the fuel to the correct tank and completed the supply.

[29] The second defendant's driver told the first defendant's staff, DW1, that he had made a mistake but did not divulge the details of the mistake. Though this should have put the first defendant's staff on guard and prompt him to ask 'What mistake?' he did not. Had he done so, and been told of the mix up, may be he would have immediately notified the second defendant's headquarters and immediate action would have been taken to avert supply of contaminated fuel to third parties. As in fact it was done once a report was made. Or the first defendant would have refused to sell fuel, which is what they did on receiving the complaints about the unleaded gasoline supplied on 1 October 2010, until the problem had been sorted out. In this regard I tend to think that he acted negligently leaving third parties to be served with adulterated or contaminated fuel, not fit for purpose.

[30] At the same time it appears to me that the first defendant had a duty to supervise the unloading of the fuel, and if for no other reason to avoid the kind of mistake that occurred in this instance. The first defendant did not supervise the unloading process. A member of staff, DW2, after checking the seals walked away leaving a new staff of the second defendant to proceed on his own. This was negligent in the circumstances of this case. The first defendant failed to supervise the offloading and storage of the hydro carbons delivered to it which it ought to have done.

[31] In light of the foregoing I am inclined to find that the contamination of the first defendant's fuel tank was due to the fault of the second defendant but that this was contributed to by the first

defendant's failure to supervise the off loading of the fuel and ensure that it was delivered to the proper tanks. I would order the second defendant to indemnify the first defendant to the extent of one half of the damage awarded to the plaintiff and the first defendant to bear one half of the said damage. The defendants shall bear in the same proportion the plaintiff's costs of these proceedings.

Signed, dated and delivered at Ile du Port on the 21st day of March 2014

F M S Egonda-Ntende
Chief Justice