



2 May 2012

PRESS SUMMARY

Petroleo Brasileiro S.A. (Respondent) v E.N.E. Kos 1 Limited (Appellant) [2012] UKSC 17
On appeal from [2010] EWCA Civ 772

JUSTICES: Lord Phillips (President), Lord Walker, Lord Mance, Lord Clarke, Lord Sumption

BACKGROUND TO THE APPEAL

The appeal concerns the rights of the owner of a time-chartered ship to payment for use of the ship and fuel by the charterer to discharge cargo after the ship has been lawfully withdrawn for non-payment of hire.

The appellant is the owner of the ship *MT Kos*. The ship was time-chartered to the respondent on 2 June 2006 for 36 months. The charterparty contained a standard form of withdrawal clause entitling the owner to withdraw the vessel if the hire was not paid when due *'without prejudice to any claim owners may otherwise have on charterers under this contract'*. On 31 May 2008 the respondent failed to make the required payment and the appellant withdrew the ship on 2 June 2008.

At the time of the withdrawal the *MT Kos* was at Angra dos Reis in Brazil and was in the process of being loaded with cargo. Over the course of 2 and 3 June, the respondent unsuccessfully sought to persuade the appellant to cancel the withdrawal. The respondent then made arrangements to unload the cargo which was already on the ship, which took until 5 June. The ship was therefore detained at Angra dos Reis for 2.64 days. Had the cargo been unloaded immediately upon withdrawal, it would have been detained for one day.

The appellant claimed from the respondent the cost of the service of the ship for the 2.64 days, including bunkers (fuel) consumed in the same period, on a number of different bases: (i) the express terms of an indemnity given in clause 13 of the charterparty (ii) under the terms of a new contract made after the withdrawal (iii) on the ground of unjust enrichment, and (iv) under the law of bailment. The High Court granted the claim on the last basis alone. The Court of Appeal allowed the respondent's appeal, rejecting all bases for the claim except for the recovery of the value of bunkers consumed in actually discharging the cargo.

JUDGMENT

The Supreme Court unanimously allows the appeal and restores the order of Andrew Smith J in the High Court. Lord Sumption (with whom Lord Phillips, Lord Walker and Lord Clarke agree) gives the main judgment, concluding that the express indemnity in the charterparty applied on the facts of this case. Lord Mance would not have allowed the appeal on this basis but all five justices agreed with Andrew Smith J that the claim could in any event succeed under the law of bailment.

REASONS FOR THE JUDGMENT

The charterparty

The respondent had argued that any delay or loss arising from the need to discharge the cargo was the result of the choice exercised by the appellant to withdraw. This was however morally and legally neutral [7].

Clause 13 of the contract, an employment and indemnity clause that is found in most modern forms of time charter, provided that the charterers indemnified the owners against all consequences or liabilities that arose from the master complying with the charterers' or their agents' orders [8]. The clause was very wide, but not unlimited [10]. It had to be read in the context of the owners' obligations under the charterparty as a whole [11], and was sensitive to the legal context in which it arose. The real question was whether the respondent's order to load the cargo was an effective cause (not necessarily the only one) of the appellant having to bear a risk or cost which he had not contractually agreed to bear [12] [62]. Here, the detention of the vessel in the appellants' own time and at their own expense after the charter had come to an end was not an ordinary incident of the chartered service nor was it a risk that the appellant had assumed under the contract. It therefore fell within the indemnity [16]. The appellant was entitled to the market rate of hire for 2.64 days and the value of the bunkers consumed [17].

Lord Mance would not have allowed the appeal on this ground. He considered that the search was one for the 'proximate' or 'determining' cause [37] and that the loss suffered by the appellant was not caused by compliance with the respondent's instructions but instead by the fact that the charter was at an end [51]. The fact that no cargo would have been on board but for the instructions was not the test of the proximate or effective cause. Subsequent events had superseded those instructions and rendered them a matter of history [51]. To apply the indemnity was unnecessary, the general contractual context supported a conclusion that the indemnity clause was inapt to apply [52] and its application would, in his view, open the door to uncertainty [55].

Bailment

The appellant was also entitled to succeed at common law as the non-contractual bailee of the cargo after the withdrawal of the vessel. The principles set out in the *The Winson (China Pacific SA v Food Corp'n of India)* [1982] AC 939 applied: the cargo was bailed to the appellant under a contract which terminated whilst the cargo was still in its possession and the appellant could not escape the continuing duty to take reasonable care of the cargo until arrangements were made to discharge it [28]. As bailee, the appellant would be entitled to the bunkers and the opportunity cost of the ship remaining in Angra dos Reis [28].

Other bases for the claim

The argument that a new contract had been made after the withdrawal turned entirely on the facts of the case and the courts below had correctly held that no such contract had been made [5]. The argument based on unjust enrichment raised larger issues which the Supreme Court decided not to address in the context of this dispute [31].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

www.supremecourt.gov.uk/decided-cases/index.html