MSC Mediterranean Shipping Co v Cottonex Anstalt
[2016] EWCA Civ 789

Summary

Cottenex Anstalt (CA) engaged MSC Mediterranean Shipping Co ('MSC') as a carrier, to transport, in three consignments, 35 containers full of cotton from one port in Iran and one in Dubai to Chittagong, in Bangladesh. The containers were shipped between April and June 2011 and arrived in Chittagong between 13 May and 27 June 2011. Unfortunately, a dispute broke out between CA and the consignee who was supposed to pick up and pay for the cotton when it arrived in Chittagong; the price of cotton had collapsed since it was shipped and the consignee attempted to argue that it did not have to accept the cotton. So the cotton remained in its containers by the dock in Chittagong (and for all anyone knows, is still there).

This created a problem between CA and MSC because CA was supposed to return MSC's containers to MSC after the cotton had been unloaded from them. The contract between CA and MSC gave CA a bit of time after the containers arrived in Chittagong to unload them, but it also provided that if CA hung onto the containers for too long, they would have to pay demurrage (a charge for extra use of a thing) assessed at $840 per container a day. CA felt that they could not unload the cotton from the containers and return the containers because they had actually been paid for the cotton by the bank charged with paying for the cotton. CA could have bought replacement containers for $3,262 each, and did offer by letter on 27 September 2011 to buy replacement containers for MSC, but MSC insisted on the original containers being returned. MSC eventually sued CA in June 2013, arguing that CA owed them $577,184 in respect of demurrage incurred up until 30 April 2013.

At first instance, Leggatt J held that MSC was entitled to demurrage up until 27 September 2011, but not afterwards. Leggatt J held that (i) CA's letter on 27 September 2011 amounted to a repudiation of the MSC-CA contract and, applying Lord Reid's dictum in *White & Carter Councils* v *McGregor* [1962] AC 413, held that MSC did not have a legitimate interest in keeping the contract going. Leggatt J also held that (ii) a contractual provision allowing demurrage to be charged indefinitely was potentially penal in nature, but the issue did not arise in this case as his finding on (i) meant that the demurrage in this case was not payable indefinitely.

The Court of Appeal held – with Moore-Bick LJ giving the leading judgment – that CA's letter on 27 September 2011 did not amount to a repudiation, and it was not clear by that date whether it was not going to be possible for CA to perform its obligations under the MSC-CA contract ([27]). However, Moore-Bick LJ held (at [28]) that by February 2012, CA 'was in repudiation of the contract' as by that date the delay in returning the containers had become so protracted that 'the commercial purpose of the adventure had by then become frustrated'. Invoking the UKSC decision in *Geys* v *Société Générale* [2013] 1 AC 523, Moore-Bick LJ acknowledged that 'a repudiatory breach of contract does not automatically discharge the parties from performance of their remaining primary obligations' ([36]) while also acknowledging that Lord Reid's dictum in *White & Carter* 'has been accepted in a number of cases' – though Moore-Bick LJ thought (basing himself on certain remarks of Lord Wilson's in *Geys* at [86]) that the 'true explanation [of Lord Reid's dictum] may be that in an appropriate case the court in the exercise of its general equitable jurisdiction will decline to grant the innocent party the *remedy* to which he would normally be entitled' ([40]) as opposed to refusing 'to allow the innocent party to enforce his full contractual *rights*' ([40]). However, Moore-Bick LJ thought that this was not 'a case in which the *White & Carter* principle applies' ([43]) in that in this case 'the option of affirming the contracts [did

not remain] open to [MSC] once the adventure had become frustrated, because at that point further performance became impossible, just as it would if [CA]...had caused the containers to be destroyed' ([43]). This was because 'by 2 February 2012 the point had been reached...that in commercial terms the containers had been lost' ([42]). So the MSC-CA contract had been terminated by 2 February 2012, whether or not MSC wanted to keep it alive. All MSC was therefore entitled to was damages for the loss of the containers that it had suffered as a result of CA's breach in failing to return the containers, which damages came to $3,262 per container.

Tomlinson LJ gave a short supporting judgment, holding that this case was different from *Geys* in that the innocent party in *Geys* did effectively have a choice between treating the contract as having been discharged 'or, on the other hand, affirming the contract in order to wait to see whether the guilty party performs its obligations when the time comes' ([61]). In this case, the MSC-CA could no longer be performed, with the result that there 'is no alternative to the conclusion that the contract has come to an end' ([61]).

Comments

(1) *Frustration*. The Court of Appeal's use of the term 'frustrated' was both confusing and helpful at the same time. Confusing, because the MSC-CA contract was *not* frustrated, in the proper legal sense of that term, as a result of CA's failure to return the containers to MSC. While the Court of Appeal found that the failure to return the containers eventually made proper performance of the contract impossible, the responsibility to return the containers was placed on CA and therefore CA could not rely on their failure to fulfil that responsibility to argue that the contract was frustrated. Helpful, because a frustrating event brings a contract to an end whether the parties want it to or not. And that was what happened here: when it became clear that it was not going to be possible for CA to return the containers, the contract came to an end – terminated as a result of CA's breach of contract – whether MSC wanted it to or not. So MSC never had the option of affirming the contract and keeping it alive in the face of CA's breach, and the issue of whether it had a legitimate interest under *White & Carter Councils* v *McGregor* in keeping the contract alive never arose for decision.

(2) *Rights and remedies*. In the *MSC* case, Moore-Bick LJ endorsed Lord Wilson's endorsement in *Geys* of Sachs LJ's observation in *Decro-Wall International SA* v *Practitioners in Marketing Ltd* [1971] 1 WLR 361 that under the law as laid down in *White & Carter Councils*, it 'is the range of remedies that is limited, not the right to elect' to keep alive a contract that has been repudiated by the other side. We can illustrate this view by considering a slight variation on the *White & Carter* situation. I enter into a contract with you under which I undertake, in return for a payment of £200 a month, to wear a T-shirt, with your company's name prominently displayed on the shirt, whenever I am teaching law. You then thing better of the deal and ring me to cancel it. I refuse to accept your repudiation and continue wearing the T-shirt and invoice you for £200 a month. On the Moore-Bick/Wilson/Sachs view, my right to keep our contract in place is unfettered by the decision in *White & Carter Councils*; what *White & Carter Councils* affects is my ability to sue you for the £200 a month that, on the face of it, I am owed under the contract. One criticism of this view may be that if the courts find that I had an unfettered right to keep our contract alive (with the result that my affirming the contract prevented it from being terminated for your breach), but also find that I had no legitimate interest in affirming the contract (with the result that I cannot sue you for the £200 a month that, on the face of it, I am owed under the contract), this may be unfair on me: I cannot sue you for what you promised to pay me under

the contract, but because the contract is still alive you could potentially sue me for any breaches of that contract that I commit (for example, I forget to wear the shirt in a particular teaching session). Maybe there would be ways round that result – for example, finding that because I cannot sue you for the £200 a month under the contract there is no longer any consideration for my promise to wear the T-shirt with your company's name on it and so that promise cannot be sued on. However, the more straightforward position to reject the Moore-Bick/Wilson/Sachs view and hold that *White & Carter Councils* fetters the victim of a repudiatory breach's ability to affirm the contract that has been repudiated.

(3) *Good faith*. The Court of Appeal took the chance to make some observations about some *obiter dicta* of Leggatt J's in deciding the case at first instance. Moore-Bick LJ took the view that a contractual provision for the indefinite payment of demurrage could not amount to a penalty because in practice the demurrage would never be payable indefinitely: 'general principles of law [would] impose a limit on the scope of the [defendant's] liability' ([46]). Leggatt J had argued that what he detected as a nascent idea in the common law world of requiring contracting parties to deal with each other in good faith justified limiting CA's liability in this case. Moore-Bick LJ did not think much of this: 'the better course is for the law to develop along established lines rather than to encourage judges to look for what the judge in this case called some "general organising principle" drawn from cases of disparate kinds...There is in my view a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement' ([45]).

Nick McBride

.