Malayan Thread Co. Sdn. Bhd. v. *Oyama Shipping Line Ltd. & Anor.*[1]

Malayan Thread Co. Sdn. Bhd. v. *Oyama Shipping Line Ltd. and Anor.*[1] is yet another case where an innocent party finds himself without any redress because of the application of an exemption clause. Though the English Courts over the past few years have found themselves confronted with a flood of cases[2] dealing with exemption clauses, the Malaysian Courts have had very few opportunities to deal with such an issue. It is for this reason that this case is of particular interest to Malaysian lawyers.

The facts of the case were briefly as follows: The plaintiffs were the consignees of cotton sewing thread which was shipped on board the first defendants's ship. After the goods were unloaded some of them were stolen by persons unknown. The plaintiffs brought this action for damages for breach of contract or for conversion. The

24. (1912) 2 M.C. 25.

25. Civil Law Ordinance 1909.

26. See H.G. Calvert in *Malaya and Singapore*, ed. Sheridan, at p. 288.

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1. [1973] 1 M.L.J. 121.

2. Among the recent cases are: *Farnsworth Finance Facilities* v. *Attryde* [1970] 1 W.L.R. 1053; *Harbutt's 'Plasticine' Ltd.* v. *Wayne Tank and Pump Co. Ltd.* [1970] 2 W.L.R. 198; *Kenyon Son & Craven Ltd.* v. *Baxter* [1971] 1 W.L.R. 519.

first defendants sought to protect themselves under an exemption clause in the bill of lading which provided that "in any case the company's liability shall cease as soon as the goods leave the ship's deck and/or tackle". The High Court held that the exemption clause was wide enough to exonerate the first defendants from responsibility for short delivery of the goods.

The second defendants, the Port Swettenham Authority denied liability on the ground that they were protected by Rule 91(1) of the Port Authority By-Laws 1965 which reads:

> The Authority shall not be liable for any loss, destruction or deterioration arising from delay in delivery or detention or misdelivery of goods or from any other cause, unless such loss or destruction has been caused solely by the misconduct or negligence of the Authority or its officers or servants.

The Court held that the second defendants had exercised due care and diligence in keeping and preserving the goods and that they had discharged the onus of showing that the loss of the goods in question was not due solely to their misconduct or negligence.

The law relating to the application of exemption clauses has always been far from clear. The introduction of concepts, like the doctrine of fundamental term and fundamental breach of a contract, has, as shown by English decisions in recent years, made the position even more uncertain. While the present case note can hardly be intended to review the law, it may perhaps be useful as an attempt to analyse the attitude of the Malaysian Court in the recent case.

Breach of fundamental term and fundamental breach

The learned judge, Raja Azlan Shah J., in deciding whether the ship-owners were protected by the exemption clause said:

> In my view the correct approach in the present case is to consider whether such an act is itself a *breach of a fundamental term* of the contract because no court can allow such a breach to pass unnoticed under the cloak of an exemption clause.[3]

And later in his judgment he said: "Next I must consider the question whether the act which caused the short delivery was a *fundamental breach."*[4]

Some English Judges and writers have made several attempts to distinguish a breach of fundamental term from a fundamental breach,[5] whilst others have argued that both these concepts are synonymous.[6]

3. (1973) 1 M.L.J. 121, 122. My own emphasis.

4. My own emphasis.

5. Cf. e.g. Montrose, "Some Problems about Fundamental Terms", (1964) C.L.J. 60 and 254.

6. See Lord Denning's view in *Karsales (Harrow), Ltd.* v. *Wallis* [1956] 1 W.L.R. 936; and also Reynolds, "Warranty, Condition and Fundamental Term" (1963) 79 L.Q.R. 534.

Lord Devlin in his paper on "The Treatment of Breach of Contract"[7] argued:

> It does not matter really whether one looks at a breach from the nature of the term or from the nature of the breach.... Logically, if there is a fundamental breach, there must be a fundamental term. A breach must mean a breach of promise and there cannot be a fundamental breach of promise without a fundamental promise that is broken... whether you speak of fundamental term or fundamental breach, it is only another way of speaking of the destruction of the basis of the contract.[8]

On the other hand, for example, Professor Montrose argued:

> There may be a fundamental breach though there is no breach of a fundamental term, and it may well be that breach of fundamental term should be placed in a seperate category from a fundamental breach.[9]

In view of such uncertainty over the ambits of these two notions, it would be most interesting to observe which school of thought the Malaysian Courts would follow. As has been noted above, the learned judge in the *Malayan Thread Co.'s* case referred to both the notions in his judgment but made no attempt to distinguish them. Neither did he explain in which context he was using the respective expressions: did he take them to be synonymous or was he merely using the terms indiscriminately?

It is noteworthy that in another recent case, *Ahmad Ismail* v. *Malayan Motor Company & Anor.*,[10] the Court had to decide "whether there was a fundamental breach"[11] with regard to a hire purchase contract. In that case, too, the Judge made no attempt to explain what "fundamental breach" meant but merely came to the conclusion that he did not, in the circumstances of the case, consider "there was any fundamental breach entitling the plaintiff to terminate the hire purchase agreement".[12]

Deliberate Breaches

The learned judge in the *Malayan Thread Co.'s* case, after reviewing a number of cases, held that:

> where the servant or agent had deliberately flouted one of the bounden obligations of the contract, then that act is referable to the principal's act: *in such circumstances, the principal cannot take refuge under an exemption clause.* In the present case the loss or short delivery was caused by theft by some person or persons unknown. I would not consider the fradulent act of such person or persons to be the act of the principal, the first defendants.[13]

7. (1966) C.L.J. 192.
8. *Ibid.*, at pp. 203-204.
9. (1964) C.L.J. 60, 65.
10. (1973) 1 M.L.J. 117.
11. *Ibid.*, at p. 118.
12. *Ibid.*, at p. 119.
13. (1973) 1 M.L.J. 121 at p. 122. My own emphasis.

It thus appears that the Judge accepted as a rule of law that where there was "a deliberate disregard to his bounden obligations",[14] the guilty party could not rely on an exemption clause. However, since the House of Lords decision in *Suisse Atlantique*,[15] one would have doubted whether there was any such rule of law, for this high authority rather seems to suggest that it is all a matter of construction in each case as to whether an exemption clause would apply in the event of a deliberate breach. The learned judge apparently appears to have overlooked this important case as he only referred to cases[16] decided before *Sussie Atlantique.*

The present position regarding deliberate breach may be neatly summed up in the words of Lord Wilberforce:

> The 'deliberate' character of a breach cannot in my opinion, of itself give to a breach of contract a 'fundamental' character, in either sense of that word. Some deliberate breaches there may be of a minor character which can appropriately be sanctioned by damages: some may be, on construction, within an exemption clause (for example, a deliberate delay for one day in loading). This is not to say that 'deliberateness' may not be a relevant factor: depending on what the party in breach 'deliberately' intended to do, it may be possible to say that the parties never contemplated that such a breach would be excused or limited and a deliberate breach may give rise to a right for the innocent party to refuse further performance because it indicates the other party's attitude towards future performance.[17]

Lord Wilberforce then added: "to create a special rule for deliberate act is unnecessary and may lead astray".[18]

Deliberate Breaches by Servant or Agent

There has been considerable doubt over the liability of a contracting party for deliberate breaches committed by the party's servants or agents. Certain cases have attempted to draw a distinction between deliberate breaches committed by a servant or an agent and those deliberate breaches committed by the contracting party. It has been argued that in the former case the contracting party can rely on an exemption clause since such breaches cannot be imputed to the party himself, whereas in the latter case, the contracting party cannot rely on the exemption clause.

Within the former category of cases is one of the earliest decisions on a question of exemption clause in Malaysia: *Chartered Bank of India* v. *British Steam Navigation Ltd.*[19] In this case goods were shipped

14. Per Lord Denning in *Sze Hai Tong Bank* v. *Rambler Cycle Co. Ltd.* [1959] A.C. 576, 588.

15. *Suisse Atlantique Societe d'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361.

16. Namely, *Bontex Knitting Works Ltd.* v. *St. John's Garage* [1943] 2 All E.R. 690; *Alexander* v. *Railway Executive* [1951] 2 All E.R. 442; and *Karsales (Harrow) Ltd.* v. *Wallis* [1956] 2 All E.R. 866.

17. [1967] 1 A.C. 361, 435.

18. *Ibid.*

19. [1909] A.C. 369 Privy Council decision on appeal from Penang.

on board the defendant's ship to be carried to Penang. After the goods were discharged at Penang and stored in a shed on the jetty, they were stolen by a servant of the landing agents. The Privy Council held that the shipping company was protected by the exemption clause which provided "in all cases and under all circumstances the liability of the company shall absolutely cease when the goods are free of the ships' tackle".

This early case was considered by the Privy Council in *Sze Hai Tong Bank* v. *Rambler Cycle Co. Ltd.*[20] In *Sze Hai Tong Bank's* case, the respondent shipped bicycle parts to Singapore under a bill of lading which stated that they were to be delivered "unto order or his or their assigns." After the goods had been discharged from the ship at Singapore, the carrier's agent released the goods to an unauthorised third party. The carrier then attempted to seek protection under an exemption clause which provided that "the responsibility of the carrier. .. shall be deemed to cease absolutely after the goods are discharged". Lord Denning, delivering the opinion of the Board, distinguished the *Chartered Bank's* case:

> the action of the fraudulent servant there [in the *Chartered Bank's* case] could in no wise be imputed to the shipping company. His act was not its act. His state of mind was not its state of mind. It is true that in the absence of an exemption clause, the shipping company might have been held liable for his fraud.... But that would have been solely a vicarious liability. Whereas in the present case the action of the shipping agent at Singapore can properly be treated as the the action of the shipping company itself....[21]

This distinction of Lord Denning has been strongly criticised on the ground that no such distinction can be drawn between a deliberate breach committed by a servant and one committed by the contracting party himself.[22] It has even been argued by some learned authors that the *Chartered Bank's* case was either wrongly decided or that it would be differently decided if it had arisen now.[23]

It is therefore rather surprising that Raja Azlan Shah J. in the recent *Malayan Thread Co.'s* case simply applied the *Chartered Bank's* case without any reservation and held that, as in the case the loss or short delivery was caused by theft by some person or persons unknown, the fraudulent act of such persons or persons should not be considered to be the act of the principal. It would thus appear that the learned judge was in effect subscribing to the distinction over which much doubt has been cast.

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20. [1959] A.C. 570.

21. *Ibid.,* at p. 588.

22. See Guest: "Fundamental Breach of Contract" 77 L.Q.R. 98.

23. See Wedderburn, (1960) C.L.J. 11, and Guest, *op. cit.*

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