Exxonmobil Sales and Supply Corporation v Texaco Ltd. [2003] Int.Com.L.R. 09/01

JUDGMENT : Mr Nigel Teare QC:. Commercial Court. 1st August 2003

1. This is an application for summary judgment pursuant to Part 24 of the CPR. The Claimants are Exxonmobil Sales and Supply Corporation (Exxonmobil) and the Defendants are Texaco Limited (Texaco). In this action Exxonmobil claim damages and other sums from Texaco arising out of a contract for the sale by Exxonmobil to Texaco of 15,000 mt of Ultra Low Sulphur Auto Diesel (Ulsado) cif Cardiff. On about 10 September 2001 pursuant to that contract, a cargo of Ulsado was shipped on board the mt HELENE KNUTSEN at Gravenchon. The vessel arrived at Cardiff on 15 September but her cargo was not discharged. Texaco said that the cargo was off specification and rejected it. Exxonmobil considered that such rejection was a repudiatory breach of the contract of sale and accepted the breach as bringing the contract to an end. They took steps to sell the cargo elsewhere and seek to claim damages in excess of US$785,000.

2. It is first necessary to set out the material terms of the contract. The contract was in writing and in two parts. Part 1 contained 20 clauses. Clause 4 was entitled *Quality* and provided that the product will *"meet Esso UK Ulsado winter specifications"*. It was subsequently agreed that the flashpoint of the cargo should be a minimum of 58°C. Clause 6 was entitled *Inspection* and provided:

   "(i) Seller to appoint a mutually agreeable independent inspector at load port to determine quality and quantity. Certificates of quality and quantity, as issued by independent inspector are final and binding save fraud and/or manifest error. Bill of lading quantity to be based on inspector's determination.

   (ii) Subject to clause 6(i), either party may file a claim in relation to quantity and quality within 90 days of the bill of lading date, failing which all claims in relation to quantity and quality are deemed to have been waived.

   At loadport, inspection costs for determining quality and. quantity to be shared equally between buyer and seller.

3. Clause 15 provided for English law and for the jurisdiction of the English courts. Clause 18, entitled *General Terms and Conditions*, provided:

   "The terms and conditions governing this agreement are set forth herein in this Part 1 and incorporate Exxon cif/cfr 85 agreement for the sale of oil in bulk standard form contract (the Exxon terms) with the following modifications:

   Last sentence in article 6.1, re Tovalop, is deleted; (ii) reference to Cristal in article 7.2 is deleted.

   In the event of a conflict between the terms of this Part 1 and the Exxon terms the former shall prevail."

4. Clause 20 was entitled *Damages* and provided: *"Neither party shall be liable in contract, tort or otherwise, for loss of prospective profits or for special, indirect, or consequential damages in relation to performance or non-performance under this agreement."*

5. Part II of the Contract, the Exxon terms, contained 18 clauses. Clause 2 was entitled *Quantity/Quality Determination* and provided:

   "Certificates

   2.1 The seller or terminal operator shall determine the quantity and quality of the Oil at the loading port and shall issue certificates establishing the quantity and quality of the Oil delivered. The certificates will be binding on both parties unless revised by mutual agreement pursuant to Section 2.7 (Quantity or Quality Claims) or otherwise or pursuant to Sections 2.4 (Sampling and Testing) or 17.1 (Arbitration). .....

   Sampling and Testing

   2.4 Samples of the Oil, sufficient for testing, shall be taken from the delivery lines by the use of automatic flow proportional line-sampling devices. When these devices are not available, representative samples shall be taken from the shore tanks from which delivery is made or from a Vessel composite where the cargo is line-blended on board the Vessel. Sampling and testing shall be in accordance with the latest approved methods as published in the API Manual. Qualities for which the API Manual does not specify a test method shall be determined using the latest standard test methods available in the official publications of the American Society for Testing and Materials or the Institute of Petroleum. From samples taken a representative portion shall be retained at the loading terminal for a period of 90 days after completion of loading, or for longer by written request of Buyer; and a corresponding portion shall be placed aboard the Vessel. In the event of any claimed defects in quality of the Oil, either party may cause the portion of the sample retained at the terminal to be retested by an inspector agreed upon by Buyer and Seller. Each party shall bear one-half of the inspector's expenses incurred on such occasion. Subject to either party's right to invoke arbitration under Section 17.1 if the result of the test of the retained sample differs from the Seller's or terminal operator's original test result by an amount less than the reproducibility per the applicable standards, the original test result shall stand; or if the result of the test of the retained sample differs from the Seller's or terminal operator's original test result by more than the reproducibility per the applicable standards, the result from the test of the retained sample shall stand."

6. The final clause, clause 18, of Part II was entitled *Entire Agreement* and provided as follows:

   "This instrument contains the entire agreement of the parties with respect to the subject matter hereof and there is no other promise, representation, warranty, usage or course of dealing affecting it."

7. The material facts can be shortly described. Exxonmobil and Texaco appointed SGS Gravenchon as the independent inspector under Part 1 clause 6. On 7 and 8 September 2001 SOS sampled the contents of shore tanks TK713 and TK714 at Gravenchon. They reported that the cargo in each shore tank had a minimum flashpoint of 58°C. Before the cargo was loaded on board the carrying vessel, SGS took and retained samples from each of the two shore tanks on 12 September. At Cardiff, where the vessel arrived on 15 September, tests were carried out on the cargo in the ship's tanks and according to ITS Caleb Brett, the receivers' inspectors, its

flashpoint was below the contractual minimum of 58°C. Exxonmobil delivered their invoice for US$4,023,529.53 but, as I have already indicated, Texaco refused to pay.

8. Exxonmobil say that Texaco are unable to justify their refusal to pay on the grounds that the cargo failed to comply with the specification because, according to the determination of SGS at the loadport, it did so comply and such determination was final and binding upon the parties, save for fraud or manifest error. Texaco have raised several defences justifying their stance.

Express term

9. The first is that on the true construction of clause 2.4 of Part II of the sale contract it was an express term of the contract of sale that a representative portion of the samples of the oil tested by SGS for the purpose of making their determination would be retained at the loading terminal for a period of 90 days and a corresponding portion would be placed on board the vessel. It is said that no such portions were retained and therefore the determination by SGS was not a contractually binding determination.

10. This defence is said to be bad for several reasons. Firstly it is said that the material part of clause 2.4 relied upon was not incorporated into Part 1 of the contract because it was in conflict with clause 6 of Part 1.

11. Mr. Michael Nolan, Counsel for Exxonmobil, argued that Part II clause 2 provided for a different regime of quality determination from that provided by Part 1 clause 6. Clause 2.4 was therefore in conflict with Part 1 and the latter had to prevail in accordance with Part I clause 18 of the contract of sale.

12. Mr. David Goldstone, Counsel for Texaco, argued that Part 1 clause 6 was silent as to sampling procedure. There was therefore nothing in Part 1 with which Part II clause 2.4 could be in conflict and so clause 2.4 was incorporated.

13. I agree with the submission made by Mr. Nolan on behalf of Exxonmobil.

14. Part II clause 2.1 provides a procedure whereby quantity and quality are to be determined by "*the seller or terminal operator*". That determination is to be binding unless revised by mutual agreement or pursuant to clause 2.4 or by arbitration. It is immediately apparent that this is a different regime for determining quality and quantity from that provided in clause 6 of Part 1. Clause 2.4 enables either party to cause to be retested, by an inspector agreed upon by both parties, the portion of the sample retained at the loading terminal. If the result of the retest differs from the determination of the seller or terminal operator by a certain amount the result of the retest shall stand. Thus the provision in clause 2.4 which provides that "*from samples taken, a representative portion shall be retained at the loading terminal"* is an integral part of the procedure whereby a challenge may be made to the determination of the seller or terminal operator. That procedure is clearly in conflict with the procedure in Part 1 Clause 6 for the determination of quality and quantity by *"a mutually agreeable independent inspector"* whose determination is final and binding. A procedure is made up of its constituent parts. They cannot, in my judgment, be divorced from the procedure of which they form a part. It follows that the part of that procedure whereby a portion of the samples taken was to be retained cannot be incorporated into the sale agreement. I do not accept that there is no conflict between that aspect of the procedure in clause 2.4 and the procedure provided by clause 6 of Part 1 merely because clause 6 of Part 1 is silent as to whether or not portions of samples taken should be retained. That argument ignores the circumstance that the provision concerning the retention of a portion of the samples taken does not stand alone in Part II but is an integral part of a determination Procedure which is in conflict with the determination procedure in Part 1.

15. For this reason Texaco have no real prospect of establishing the alleged express term. Exxonmobil argued that there were further reasons why Texaco's argument based upon clause 2.4 could not succeed. I shall refer to them later after dealing with Texaco's argument that, if there was no express term that a representative portion of the samples of the oil tested by SGS for the purpose of making their determination would be retained at the loading terminal, there was an implied term and/or usage or custom to that effect.

Implied term

16. It was submitted on behalf of Texaco that the suggested term should be implied in order to give business efficacy to the provision in clause 6 that in cases of manifest error the determination of the inspector would not be final and binding. It was said that only by having the facility to retest a portion of the oil tested by SGS could a manifest error he established.

17. I was referred to ***Veba Oil v Petrotrade*** [2002] 1 LR 295 at p.302 where the meaning of manifest error was discussed by Simon Brown LJ. He defined it as referring to *"oversights and blunders so obvious and obviously capable of affecting the determination as to admit of no difference of opinion.*"

18. A manifest error may be shown on the face of the determination by an error of arithmetic or by a misplaced decimal point or other typographical error. In such cases it will be unnecessary to retest a portion of the retained sample to establish the error. Thus it cannot be said that the suggested implied term is necessary to make the contract work.

19. Assuming, in Texaco's favour, that it is permissible, when seeking to establish a manifest error, to have regard to evidence of a re-test in addition to that which is stated on the face of the determination (arguably contrary to the decision of Potter J. in ***Heald Foods Ltd v Hyde Dairies Ltd. and others,*** 6 December 1996) the suggested implied term may make it easier in some circumstances to establish a manifest error. It was therefore said that the suggested implied term was very important. However, terms are not implied on the grounds of importance, ease

of proof, convenience or reasonableness but on the grounds that they are necessary to make the contract work. I do not consider that the suggested implied term is necessary to make the "*manifest error*" provision work.

20. For this reason Texaco have no real prospect of establishing the alleged implied term based upon business efficacy.

Usage of custom

21. Texaco adduced evidence including expert evidence, that there was a usage or custom to the effect that a representative portion of the samples of oil tested by an inspector for the purpose of making his determination would be retained by the inspector for a reasonable time. It was said that a term to that effect is therefore to be implied into the contract. Forceful criticisms were made of the cogency of this evidence but I do not consider that the dispute as to whether there was a usage or custom with the required qualities of notoriety, certainty and reasonableness (see Chitty on Contracts 28th ed para 13-018) can be resolved on this application for summary judgment. For the purposes of this application Texaco have adduced sufficient evidence to show that there is a real prospect of establishing the suggested usage or custom at trial.

22. However, it is submitted on behalf of Exxonmobil that a term cannot be implied in the contract of sale on the grounds of usage or custom because of clause 18, the entire agreement clause, which provided:

"*This instrument contains the entire agreement of the parties with respect to the subject matter hereof and there is no other promise, representation, warranty, usage or course of dealing affecting it.*"

23. It was submitted on behalf of Exxonmobil that this term prevented the implication of a term based upon usage or custom. This was not accepted by Texaco who said that the language of clause 18 fell far short of excluding implied terms. It was said to be directed at "*oral representations, conduct and the like*". Had it been intended to exclude implied terms that could have been done expressly as was done in ***Deepak v ICI*** [1998] 2 ER 139. Implied terms relating to quality were expressly excluded by clause 2.5 of Part II. The express exclusion would be mere surplusage if clause 18 extended to implied terms.

24. In my judgment clause 18 is effective to exclude implied terms based upon usage or custom. I have reached that conclusion for these reasons:

(i) Although entire agreement clauses come in different forms (see ***Inntrepreneur v East Crown*** [2000] 2 LR 611 at p.614) they generally constitute a binding agreement that the terms of a contract are to be found in the document or documents evidencing the contract.

(ii) "*Usage or course of dealing*" are two methods by which a term might be implied in a contract; see Chitty on Contracts 28th ed.para.13-018 - 13-021. It was not suggested that usage and custom in this context were other than synonymous.

(iii) Thus the agreement that "*there is no usage*" is a clear indication that the parties intended that terms based upon usage or custom were not to be implied into the sale agreement.

25. Counsel for Texaco argued that the clause only excluded terms based upon express promises, representations or warranties made ii negotiations or otherwise than in the documents forming the contract and that the reference to usage and course of dealing was intended to refer to usages or a course of dealing of one party alone such as is referred to in Chitty at para.13-020. The clause certainly extends to express promises, representations or warranties made elsewhere than in the documents forming part of the contract but I am unable to read the effect of the clause as being restricted to such cases. The reference to usage and course of dealing is a clear reference to two particular methods which can give rise to an implied term and clearly indicates that the clause is not restricted to excluding from the contract things said orally or in writing during negotiations. I was not persuaded by the reference to Chitty para. 13-020 that the references to usage and course of dealing in the entire agreement clause should not be understood as referring to implied terms based upon usage or course of dealing.

26. For this reason Texaco have no real prospect of establishing the alleged implied term based upon usage or custom.

27. The entire agreement clause was also relied upon by Exxonmobil in seeking to defeat the argument that a term should be implied based upon business efficacy. I have not, on that account, rejected Texaco's argument that a term should be implied on the grounds of business efficacy. It seems to me arguable that where it is necessary to imply a term in order to make the express terms work such an implied term may not be excluded by the entire agreement clause because it could be said that such a term is to he found in the document or documents forming part of the contract. The same cannot be said of an implied term based upon usage or custom.

28. For these reasons Texaco is liable to Exxonmobil for breach of the sale agreement.

Other matters

29. I shall deal briefly with the other matters raised by Exxonmobil as reasons why Texaco's defence based upon an express term, implied term or usage or custom would not avail them.

30. Firstly, it was said that SGS in fact retained *"from samples taken a representative portion*" because, before the cargo was loaded on board the carrying vessel, SGS took and retained samples from each of the two shore tanks on 12 September. However, although these came from the same shore tanks from which SGS took their samples on 7 and 8 September, they were not a *"portion"* of those samples. Had I reached the conclusion that there was an express term of the contract of sale that a representative portion of the samples of the oil tested by SGS for the purpose of making their determination would be retained at the loading terminal for a period of 90 days I would have held

that Texaco had a real prospect of establishing that that term had been breached. Similarly, if I had reached the conclusion that there was an implied term to that effect based upon business efficacy or usage or custom I would have held that Texaco had a real prospect of establishing that that implied term had been breached.

31. Secondly, it was said that such a breach would not prevent the determination of SGS from being final and binding. Texaco submitted that it would because SGS would not have followed the contractual procedure for determining quality and the departure from that procedure could not be described as trivial or de minimis; see ***Veba Oil v Petrotrade*** [2002] 1 LR 295 at p.301. Exxonmobil distinguished that case on the grounds that in that case the departure was from the procedure leading up to the determination of quality by the expert whereas here the departure, if there was one, occurred after the determination had been made. The determination was therefore wholly unaffected by the failure of SGS to retain a portion of the tested oil.

32. I have not found this an easy question. However, where the retention of a portion of the tested oil can fairly be described as part of the agreed procedure to be followed by the independent expert, albeit the final step and one to be taken after the oil has been tested and its quality determined, and the inspector does not take that final step, the party seeking to rely upon the inspector's determination cannot say that the agreed procedure has been followed. In those circumstances, assuming that the departure cannot be said to be trivial or de minimis, it seems to me seriously arguable that the other party has not agreed to be bound by the inspector's determination, notwithstanding that the result of the determination would not have been affected. Since the evidence which has been adduced by Texaco shows that they have a real prospect of establishing that the departure was not trivial or de minimis I would not therefore have rejected Texaco's defence on this ground.

33. However, since I have concluded that Texaco have no real prospect of establishing the express or implied term on which they rely, I do not grant permission to defend.

Quantum

34. Exxonmobil are not seeking a monetary summary judgment. However, there is a further question of construction which I have to decide, namely, whether their claim for the difference between the price paid by Mabanaft (the substitute sale) and the price payable by Texaco, as well as the heads of damage set out in paragraph 21(2) to (4) of the Particulars of Claim, are excluded by clause 20 of Part as being *"loss of prospective profits"*.

35. Exxonmobil seek to recover damages based upon the prima facie measure of damages set out in section 50 of the Sale of Goods Act 1979. That enables the seller to be compensated for the buyer's failure to accept the goods and is measured by the difference between the contract price and the market price at the time when the goods ought to have been accepted. If the seller had himself bought the goods at a price less than the contract price such measure of damage will in fact compensate for the loss of profit he expected to make on the sale. But if he bought the goods at a price in excess of the contract price and so would have made a loss on the sale he would still be entitled to the same measure of damage. I therefore do not consider that the exclusion of *"loss of prospective profits"* prevents Exxonmobil from recovering the loss they claim. They are entitled to that measure of damage whether or not they would have made a profit on the sale to Texaco.

36. Had there been a failure to deliver at a time of a rising market and Texaco were seeking damages they could recover damages assessed by reference to the contract price and the market price at the time when the goods ought to have been delivered pursuant to section 51 of the sale of Goods Act. If they had on-sold the goods at a price in excess of the contract and market price clause 20 would prevent them from recovering the prospective profit on the sub-sale. Although clause 20 applies to both parties I am unable to read it as excluding a claim by Exxonmobil for damages assessed by the measure of damages set out in clause 50 of the Sale of Goods Act. That is not in my judgment a claim for loss of prospective profit because it can be claimed whether or not Exxonmobil would have made a profit. Texaco accept that if the claim for the difference between the price paid by Mabanaft and the price payable by Texaco is not caught by clause 20 of Part 1, then the other heads of damage claimed are not caught by that clause either.

37. For these reasons I will grant the declaration sought in relation to the effect of clause 20.

38. I was also asked to resolve a dispute arising from an argument by Texaco that the claim for the difference between the price paid by Mabanaft (the substitute sale) and the price payable by Texaco is too remote and hence irrecoverable because it was on-sold on different terms, namely a lower flash point, from the tern-is on which the cargo was to be sold to Texaco. I was asked to declare that the loss claimed was not too remote. It seems to me that this argument raises or may raise issues of reasonableness (relating to the manner in which Exxonmobil on-sold the cargo), causation, remoteness and mitigation. All these issues will or may overlap and will or may involve disputed issues of fact. For this reason I do not consider it appropriate to make the declaration sought. The damages must be assessed in the ordinary way.

39. Finally, judgment is claimed for a sum of demurrage said to be due as a matter of contract. I understand that Texaco accept that if they are not given permission to defend there should be judgment for the sum claimed under this head. Since I have not given permission to defend there will be judgment for the sum claimed of US$60,100 together with interest.

40. I would be grateful if the parties could agree the terms of an order to give effect to this judgment.

Michael Nolan (instructed by Rayfield Mills) for Claimants
David Goldstone (instructed by Hill Taylor Dickinson) for the Defendants