

SK Shipping Europe LLC v (3) Capital VLCC 3 Corp (5) Capital Maritime and Trading Corp

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Misrepresentation, inducement, reservation of rights, affirmation of contract, rescission and damages in lieu of rescission.

This Article discusses the recent decision of the English High Court in the case of SK Shipping Europe LLC v (3) Capital VLCC 3 Corp (5) Capital Maritime and Trading Corp [2020] EWHC 3448 (COMM) and the lessons learnt from that case and its application under English law and Singapore law.

Misrepresentation Act

Under the Misrepresentation Act 1967 (**MA**), if a representation of fact is made by one contracting party (**Party A**) to another contracting party (**Party B**) and if Party B is induced by the representation to enter into the contract with Party A and if it turns out that the representation was false and provided that Party B did not affirm the contract after having knowledge of the false representations, then Party B has a cause of action against Party A for misrepresentation under the MA.

The MA envisages two types of remedies namely:

- Damages for misrepresentations under section 2(1) of the MA
- Rescission or damages in lieu of rescission under section 2(2) of the MA.

Damages – Section 2(1) MA

Under section 2(1) of the MA, Party B is entitled to damages from Party A if Party B is able to show that Party A:

- Made the representation without any reasonable ground believe that it was true
- Did not believe up to the time the contract was made that the representation was true.

Misrepresentations that meet the requirements for a claim for damages under section 2(1) of the MA are commonly called **negligent misrepresentations** under the MA.

If there is a misrepresentation but it does not meet the requirements for a claim for damages under section 2(1) of the MA, such misrepresentations are commonly called **innocent misrepresentations** under the MA. If there is an innocent misrepresentation, it follows that Party B will not be entitled to damages under section 2(1) of the MA.

Rescission- Section 2(2) MA

Under section 2(2) of the MA, Party B may seek the relief of the court for an order that either the contract is rescinded or damages are awarded in lieu of rescission.

Section 2(2) of the MA is much wider than section 2(1) of the MA in that it applies to misrepresentations that are negligent or innocent.

Whilst there is a relief for rescission under section 2(2) of the MA, care must be taken to note that there is a discretion given to the court to award damages in lieu of rescission. In other words, it is not the case that if there is a negligent misrepresentation under the MA or an innocent misrepresentation under the MA, the court will automatically rescind the contract.

Unilateral rescission

As rescission is available under section 2(2) of the MA, the question that arises is whether Party B can unilaterally rescind the contract on its own (without a court order) if there is a misrepresentation (negligent or innocent) by Party A assuming that there is no affirmation of the contract?

If Party B unilaterally rescinds the contract without an order of court, the question that arise is whether the court still has a discretion to affirm the contract and award damages in lieu of rescission or must the court rescind the contract? If the court still has a discretion to affirm the contract and award damages in lieu of rescission, what happens to the contract that was rescinded by Party B?

These were some questions that were considered by the English High Court in the case of *SK SHIPPING EUROPE LLC V (3) CAPITAL VLCC 3 CORP (5) CAPITAL MARITIME AND TRADING CORP* [2020] EWHC 3448 (COMM) (**SK Shipping Case**).

SK shipping case

Facts

In the SK Shipping Case, a letter dated 22 November 2016 (**22 November 2016 Letter**) was sent on behalf of the owner (**Owner**) of the vessel "C CHALLENGER" (**Vessel**) containing details about the speed and fuel consumption of the Vessel in its last three voyages. The letter was sent out for the purposes of finding potential charterers to charter the Vessel.

The charterer (**Charterer**) of the Vessel was one such recipient of the 22 November 2016 Letter and this led to negotiations between the Owner and the Charterer. After a series of exchanges, on or about 6 December 2016 a binding time charterparty (**Charterparty**) was concluded between the Owner and the Charterer.

One of the clauses in the Charterparty was clause 24 (**Clause 24**) stating that if there is any increase in fuel consumption of the Vessel as a result of the Vessel falling below the guaranteed performance, then these expenses were to be borne by the Owner. This was an important clause because the Charterparty was a time charterparty and under time charterparties, the Charterer is to bear the fuel expenses in the normal usage of the Vessel.

After the Vessel was delivered to the Charterer, it was noticed that there was excessive fuel consumption. This led to numerous exchanges between the Owner and the Charterer over many months. Among the numerous exchanges included the following messages:

- A message from the Charterer to the Owner on 24 March 2017 (**24 March 2017 Message**) which was sent on a without prejudice basis.
- A message from the Charterer to the Owner on 20 July 2017 (**20 July 2017 Message**).

In these two messages, the Charterer alleged that the Owner misrepresented on the actual fuel consumption of the Vessel because there was excessive fuel consumption.

There were also other exchanges from the Charterer alleging that the Owner had breached the terms of the Charterparty for various reasons including the excessive fuel consumption of the Vessel.

The Owner denied the allegations.

The Charterer continued to maintain their allegations of misrepresentations and breach of contract but at the same time the Charterer also continued to give orders to the Vessel to proceed with long voyages.

In a message from the Charterer to the Owner dated 19 October 2017 (**19 October 2017 Message**) the Charterer put the Owner on notice that the Charterparty was:

- Rescinded on the basis of the Owner's misrepresentations
- Terminated on the basis of the Owner's repudiatory breaches of the Charterparty.

On 20 October 2017, the Owner terminated the Charterparty on the basis that the 19 October 2017 Message was a repudiation by the Charterer of the Charterparty.

The Charterer stopped paying hire and the Owner commenced a court action against the Charterer seeking recovery of the unpaid hire. The Charterer filed a counterclaim alleging that:

- There were false representations made by the Owner in the 22 November 2016 Letter which induced the Charterer to enter into the Charterparty
- The Owner was in breach of various clauses of the Charterparty (including Clause 24) and that these were repudiatory breaches.

Decision of the high court

Negligent misrepresentation under MA

The High Court held that the 22 November 2016 Letter did contain representations and that these representations were untrue. The High Court also held that the representations were not made fraudulently but they were made without any reasonable ground for believing that they were true. In other words, the representations were negligent misrepresentations under the MA.

No inducement

The High Court however also held that the Charterer was **not induced** by the 22 November 2016 Letter when it entered into the Charterparty. The test for inducement was whether the Charterer would have entered into the Charterparty if the representations were not made at all. Here, the court held that Charterer would have entered into the Charterparty even if the representations were not made.

Affirmation

The High Court further held that the Charterer by its conduct had **affirmed** the Charterparty after having knowledge of the speed and fuel consumption issues. This is because as early as March 2017 (when the 24 March 2017 Message was sent) the Charterer knew that there were issues on the speed and fuel consumption and these were repeated in the 20 July 2017 Message. Despite this knowledge the Charterer proceeded to give orders to the Vessel to go on a voyage and further gave discharge instructions for that voyage. Such conduct, according to the court amounted to a decision on the part of the Charterer to affirm the Charterparty.

Repudiatory breach

The court dismissed the Charterer's claim for damages for repudiatory breach of the Charterparty because whilst the Owner was in breach of some of the clauses in the Charterparty, these breaches were not repudiatory breaches. As such these breaches did not give rise to a right to the Charterer to terminate the Charterparty.

As the Charterer terminated the Charterparty on the basis of the misrepresentations and repudiatory breaches, the court held that the Charterer (and not the Owner) was in repudiatory breach of the Charterparty.

Reservation of rights

One issue before the court was whether the 24 March 2017 Message which was sent on a without prejudice basis precluded the court from making a finding that the Charterer had affirmed the Charterparty. The court answered this in the negative.

The court held that the use of the words "without prejudice" would mean "without prejudice" to the Charterer's rights and therefore there was a reservation of rights. The Court however went on to say that while a reservation of rights will often have the effect of preventing subsequent conduct constituting an election, this is "not an invariable rule" and the final analysis will depend on all the facts of the case.

Upon reviewing all the facts of the case, the court was of the view that the Charterer had all along taken the position that there were misrepresentations made by the Owners. The court held that there was evidence to show that by 24 March 2017 which was when the 24 March 2017 Message was sent, the Charterer had already drawn the conclusion that there was a misrepresentation on the fuel consumption and that this continued up to and including the time the 19 October 2017 Message was sent. The court went on to say that the Charterer did not just have a mere suspicion but a "firm belief" in the fact that the consumption had been misdescribed. The court added that these rights if any were inconsistent with the conduct of the Charterer in affirming the Charterparty.

Rescission and damages in lieu of rescission

As the claim in negligent misrepresentation under the MA failed, the court held that it was not necessary to decide whether to rescind the Charterparty or award damages in lieu of rescission under section 2(2) of the MA.

The court however went on to say that assuming the Charterer was induced by the representations and assuming that there was no affirmation of the Charterparty by the Charterer, this would not have been a case where the court would order rescission. Instead, this would have been a case where the court would have ordered damages in lieu of rescission.

As the Charterparty was terminated, the court also considered whether damages in lieu of rescission was still available under section 2(2) of the MA. The court answered this in the affirmative and said the following:

- Usually if a misrepresentation was said to "strike the root of the bargain", it is more likely that the court will exercise its discretion to rescind the contract. Otherwise, it will award damages in lieu of rescission

- On the facts of the case (in the SK Shipping Case) the misrepresentation did not “strike the root of the bargain” and accordingly the court would not have rescinded the Charterparty. Among other things, the court observed the following:
 - There was a substantial fall in the tanker charterparty market and as such a rescission would be very onerous to the Owner. On the other hand, the Charterer could have claimed their losses under Clause 24 of the Charterparty
 - If the Charterers knew the true position of the performance of the Vessel at the time of the Charterparty, it would have resulted in a small reduction of the hire rate payable under the Charterparty
 - If the Charterer had not contracted with the Owner, it would probably have contacted with other ship owners at a hire rate that is the same as in the Charterparty
- The fact that the Charterer had already terminated the Charterparty was not a relevant consideration when deciding whether to rescind or award damages in lieu of rescission under section 2(2) of the MA. This is because the effect of not rescinding a contract and awarding damages instead is to be considered in the context of the actual losses suffered by the representee (ie Charterer) as a result of the misrepresentation. The losses here are the loss caused by the misrepresentation and not losses that follow from the refusal of rescission.

The court said that if a party rescinds the contract on its own, they do so at their peril because the order to be made under section 2(2) of the MA is a discretionary order and therefore the party must be aware that the court may exercise its discretion to award damages in lieu of rescission thereby keeping the contract alive.

Implied representations

The Charterer also alleged the warranties contained in the Charterparty (given by the Owner) on the speed and fuel consumption of the Vessel are **implied representations** on the actual speed and fuel consumption of the Vessel.

The High Court disagreed and held that these were not representations as they were mere offers to contract which are promises rather than representations.

Lessons learnt

The lesson to be learnt from the SK Shipping Case is that care must be taken when considering what is to be done as a result of a misrepresentation.

The first thing for a misrepresentee to take note of is that it should not act in a way that is inconsistent with its stand. If it acts inconsistently with its stand it will be deemed that it had affirmed the contract and this will defeat any claim under misrepresentation.

The second thing for a misrepresentee to take note of is that if it rescinds the contract, it runs the risk of the court finding that there was no misrepresentation or (assuming there was a misrepresentation) the court not exercising its discretion to rescind the contract under section 2(2) of the MA. If this happens then the act of rescission by the misrepresentee may amount to a repudiatory breach of contract by the misrepresentee. In short, the termination becomes unlawful.

The third thing for a misrepresentee to take note of is that there is no guaranteed reservation of rights simply because this is stated in correspondence emanating from the misrepresentee. Whilst there may be a prima facie case of a reservation of rights in such circumstance, this is not an invariable rule and the court will still look at all the facts of the case.

Application to Singapore law

Although the SK Shipping Case is a decision of the English courts, its decision on inducement, affirmation and damages in lieu of rescission are persuasive authorities under Singapore law.

Under Singapore law, there is a Misrepresentation Act (Cap 390) which has a section 2 that is identical to the section 2 of the MA. Accordingly, the fact that the SK Shipping Case considered English legislation would not, by itself make the case less persuasive when being considered by a court in Singapore.