



THE “BALTIC STRAIT” – FOOD FOR THOUGHT IN RELATION TO CARGO CLAIMS

The recent Judgment in *The “BALTIC STRAIT”*¹ decided several interesting issues in relation to cargo claims, on appeal from an arbitration in which HFW (Richard Mabane and Alessio Sbraga) had represented the successful cargo insurers, SIAT Società Italiana Assicurazioni e Riassicurazioni SpA and their assured, the cargo receivers, Altfadul (“Cargo Interests”) writes Richard Mabane.

¹ *Sevylor Shipping and Trading Corp v Altfadul Company for Food, Fruits and Livestock and Siat*

“There is nothing in The Sanix Ace.... to support the conclusion that the bill of lading holder who, as receiver and end purchaser, takes delivery of cargo damaged, must give credit in a claim for full damages against the carrier under the bill of lading for a recovery made from his seller.”

The Arbitration

The arbitrators had found the respondent shipowners (“Owners”) liable as bill of lading carriers for damage to 249,250 boxes of fresh bananas shipped from Guayaquil, Ecuador to Tripoli in Libya in the amount of US\$4,567,351.13, this being the difference between the value of the cargo as discharged and its value on arrival in sound condition.

Altfadul, as holders of the bills of lading, had initially sought to reject the cargo under their sale contract with their CIF sellers, Co.Ma.Co. S.p.A. (‘CoMaCo’), who had voyage chartered the carrying vessel directly from the Owners.

CoMaCo later allowed a credit of US\$2,586,105.09 in subsequent cargo sales to Altfadul, spread over three shipments, with the intention of thereby giving Altfadul the benefit of the cargo insurance payment made by SIAT. The arbitrators held, however, that this credit had been by way of settlement of a dispute under the sale contract and, whilst noting that the amount of the credit was almost exactly the same as the cargo insurance proceeds, they fell short of finding it to be an insurance payment on the evidence before them, after the argument had been introduced

by the Owners at a very late stage, just before the final hearing.

The arbitrators nevertheless held that Altfadul could recover CoMaCo’s loss (suffered by way of CoMaCo’s credit to Altfadul) by virtue of s.2(4) of the Carriage of Goods by Sea Act 1992 (“COGSA 1992”).

The full damages awarded of US\$4,567,351.13 therefore comprised:

1. Altfadul’s own recoverable loss of US\$1,981,246.04 (since, in a claim in respect only of its own loss, on the arbitrator’s findings it had to give credit for the US\$2,586,105.09 paid to it by CoMaCo); and,
2. That additional sum of US\$2,586,105.09, as loss actually suffered by CoMaCo, but claimable by Altfadul under s.2(4) of COGSA 1992.

It was that latter part of the Award which was challenged by the Owners on appeal.

SIAT were the ultimate claimants, as assignees of the rights of CoMaCo that had included the rights of Altfadul under the bills of lading, previously assigned by Altfadul to CoMaCo under an earlier assignment.

Issues on Appeal

Leave to appeal was granted on the following two questions of law:

3. Whether s.2(4) of COGSA 1992 operates where rights of suit under the bill of lading contract have not previously been vested in the party which has suffered loss, or whether it only operates where rights of suit were previously vested in that party but it has lost them by virtue of the operation of s.2(1) of the Act; and,
4. Where the charterers of a vessel suffer loss and damage but no longer pursue a claim against the carrier under the charterparty, can the lawful holder of the bill of lading claim for the charterers’ loss under the bill of lading contract by virtue of s.2(4) of COGSA 1992, or can the lawful holder of the bill of lading only claim under that provision for losses suffered by parties which have no rights of suit under any relevant contract of carriage?

In the course of argument during the appeal hearing, the second question was narrowed down to whether the lawful holder of the bill of lading can claim by virtue of s.2(4) of COGSA 1992 losses suffered by the charterer of the vessel in respect of the bill of

“In my judgment the arbitrators were right to reject the claimant’s submission that s.2(4) of COGSA 1992 required CoMaCo to have had, but by virtue of s.2(1) to have lost, rights of suit under the bill of lading.”

lading voyage where its charterparty was directly with the bill of lading carrier, in light of *The Dunelmia* [1970] 1 QB 289, pursuant to which the bill of lading would normally be a mere receipt in such circumstances.

There was also a third question as to whether, on the facts found in the Award, Altfadul (and therefore SIAT as ultimate assignees) were entitled to damages equal to the full value of the cargo damage in any event as a matter of English common law, irrespective of any recovery or entitlement to recover from their seller, CoMaCo. That had not been dealt with in the Award but, if it was answered in SIAT’s favour on the findings made in the Award, the appeal could be resisted on that basis, as was indeed accepted by the Owners.

Right to Full Damages Irrespective of Prior Recovery

It was this latter question that was dealt with first in the Judgment of Mr Justice Andrew Baker, because it had the potential to defeat the appeal in itself.

Cargo Interests argued that, under English common law, a bill of lading holder suing on the bill of lading may recover full damages

despite an earlier recovery from an intermediate seller (“earlier” meaning prior to the date on which damages were awarded), and that, therefore, Altfadul was entitled to recover full damages without reference to the US\$2,586,105.09 paid to it by CoMaCo (as Altfadul’s Seller) by way of settlement of a sale contract dispute between them (on the findings of the Tribunal, though that was not accepted by the Cargo Interests).

Cargo Interests cited the case of *R&W Paul Ltd v National Steamship Co Ltd* (1937) 59 Ll L Rep 28 as direct authority for this proposition, together with various other cases and passages from textbooks².

The Owners’ main argument in response was that R&W Paul was a questionable authority, because it was based upon a contractual title to sue under the old Bills of Lading Act 1855 (rather than COGSA 1992) and, as explained by *The Sanix Ace* [1987] 1 Lloyd’s Rep 465, as the leading modern authority and analysis in this area, the doctrine of full recovery in respect of damaged cargo is limited to cases where the claimant owned or was entitled to immediate possession of the cargo at the time it was damaged (an issue which had not been dealt with in the Award).

The Judge accepted the position of Cargo Interests that, pursuant to *R&W Paul*, Altfadul was entitled to claim the full loss represented by the damage to the banana cargo, irrespective of any earlier recovery from CoMaCo as intermediate seller, a position which he found was unaffected by the much later case of *The Sanix Ace* (which indeed he thought was if anything consistent with it).

This meant that the issues under COGSA 1992 no longer mattered at the end of the day, as that decision alone meant that the Award in Cargo Interests’ favour would be upheld. The Judge nevertheless went on to decide those two remaining issues.

COGSA 1992

The Provisions of Section 2

It is helpful to set out in full the provisions of Section 2, as follows:

“2. *Rights under shipping documents.*

1. *Subject to the following provisions of this section, a person who becomes-*

(a) *the lawful holder of a bill of lading;*

2. *The Aramis* [1989] 1 Lloyd’s Rep 213, *The Athenian Harmony* [1998] 2 Lloyd’s Rep 410, *The Sanix Ace* [1987] 1 Lloyd’s Rep 465, *Scrutton on Charterparties* 23rd Ed., Article 212, *Voyage Charters* 4th Ed., para. 18.91, and the Law Commission Report, “*Rights of Suit in Respect of Carriage of Goods by Sea*” (Law Com No. 196 of March 1991) that led to COGSA 1992.

(b) the person who (without being an original party to the contract of carriage) is the person to whom delivery of the goods to which a sea waybill relates is to be made by the carrier in accordance with that contract; or

(c) the person to whom delivery of the goods to which a ship's delivery order relates is to be made in accordance with the undertaking contained in the order,

shall (by virtue of becoming the holder of the bill or, as the case may be, the person to whom delivery is to be made) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract.

2. *Where, when a person becomes the lawful holder of a bill of lading, possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates, that person shall not have any rights transferred to him by virtue of subsection (1) above unless he becomes the holder of the bill-*

(a) by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill; or

(b) as a result of the rejection to that person by another person of goods or documents delivered to the other person in pursuance of any such arrangements.

3. *The rights vested in any person by virtue of the operation of subsection (1) above in relation to a ship's delivery order-*

(a) shall be so vested subject to the terms of the order; and

(b) where the goods to which the order relates form a part only of the goods to which the contract of carriage relates, shall be

confined to rights in respect of the goods to which the order relates.

4. *Where, in the case of any documents to which this Act applies-*

(a) a person with any interest or write in or in relation to goods to which the document relates sustains loss or damage in consequence of a breach of the contract of carriage; but

(b) subsection (1) above operates in relation to that document so that rights of suit in respect of that breach are vested in another person,

the other person shall be entitled to exercise those rights for the benefit of the person who sustained the loss or damage to the same extent as they could have been exercised if they had been vested in the person for whose benefit they are exercised.

5. *Where rights are transferred by virtue of the operation of subsection (1) above in relation to any document, the transfer for which that subsection provides shall extinguish any entitlement to those rights which derives-*

(a) where that document is a bill of lading, from a person's having been an original party to the contract of carriage; or

(b) in the case of any documents to which this Act applies, from the previous operation of that subsection in relation to that document;

but the operation of that subsection shall be without prejudice to any rights which derive from a person's having been an original party to the contract contained in, or evidenced by, a sea waybill and, in relation to a ship's delivery order, shall be without prejudice to any rights deriving otherwise than from the previous operation of that subsection in relation to that order."

The Intention and Effect of Sections 2(1) and 2(4)

The Judge noted that the effect of COGSA 1992, where it operates, is that the holder or other person falling within s.2(1)(a)-(c) "*shall ... have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract*".

He also noted that, as was common ground between the parties, the Law Commission Report that had led to COGSA 1992 (Law Com No. 196 of March 1991, "*Rights of Suit in Respect of Carriage of Goods by Sea*" - the "Report") was admissible in considering the proper construction of the statute, Parliament having adopted the recommendations of the Report and enacted the law proposed by the Law Commission, such that the Report may be treated as good evidence of the legislative purpose of the Act and the problems intended to be remedied by it.

The Judge noted, in that regard, that the origin of s. 2(4) had been the concern, expressed by the Law Commission at paragraph 2.25 of the Report, that it was, "*unsatisfactory that a sea carrier should be able to question the entitlement to sue of the consignee or indorsee by raising a technical point that the loss may ultimately fall on someone else*".

The legislative policy recommended by the Law Commission, and adopted by Parliament, was, "*simply to allow the lawful holder of a bill of lading to sue the carrier in contract for loss [of] or damage to the goods covered by the bill, irrespective of whether the property in the goods passes upon or by reason of the consignment or indorsement*" (paragraph 2.21), so "*there [will] no longer be a link between the transfer of contractual rights and the passing of property*" (paragraph 2.22).

At the same time, the Judge noted that, in the hands of a voyage charterer whose charterparty is with the bill of lading carrier, a bill of lading is a mere receipt only and the contract with the carrier is still the

“The arbitrators asked themselves whether “If we were to hypothesise that the Charterers had vested in themselves the rights of suit under the bill of lading, would they have been entitled to recover the loss suffered?”...In my judgment, with the benefit of the argument developed on appeal, the correct answer was “No, unless they were charterers to whom the mere receipt rule did not apply: see *The Dunelmia*”.”

charterparty (the ‘mere receipt rule’), unless the charter provides otherwise or particular facts lead to a different conclusion (for example, if the charterer transacts upon the basis of the bill of lading independently of the charter, as per *The Dunelmia* [1970] 1 QB 289).

The Judge went on to hold that this mere receipt rule had been unaffected by the Bills of Lading Act 1855 (as per the decision of the Court of Appeal in *The Dunelmia*) and that, in his view, the same was also true for s.2(1) of COGSA 1992, noting the identical statutory language and applying the presumption of consistency between statutes. Indeed, the Law Commission’s Report (admissible as good evidence of the legislative purpose of the Act in identifying the problems intended to be remedied by it) had expressly stated that nothing in COGSA 1992 was intended to require *The Dunelmia* to be decided differently (paragraph 2.53 of the Report).

The position of the charterer whose charter is with the bill of lading carrier was in fact given particular attention by the Law Commission at paragraphs 2.51-2.55 of the Report, recognising that particular issues arise where a bill of lading passes through the hands of such a charterer (the point decided in *The Dunelmia*) and making clear that the new Act was

not intended to change how those issues would be determined.

The Judge then turned to the two remaining questions.

The Scope of Section 2(4)

The Owners contended that the scope of s.2(4) was limited to cases where the party which had suffered the loss (L) had previously had rights of suit but had lost them by virtue of s.2(1). That, they submitted, conveyed that s.2(4) was concerned only with the case where s.2(1) was the problem in the sense that it had divested L of what would otherwise have been its own ability to sue for its loss.

However, the Judge found that there was nothing in the statutory language to suggest that, commenting that, if s.2(4) was indeed so narrow, it would have solved only half the problems it was meant to address. In particular, it would not have addressed cases where the loss had been suffered by a party below the bill of lading holder in the chain of dealings. The Judge further noted that, had that been the intention, it would have been extraordinary for s.2(4) not to have been expressly drafted in such terms, or by reference to s.2(5), which deals expressly with the loss of rights resulting from the operation of s.2(1).

Thus, the Judge held, the arbitrators had been right to reject the Owners’

submission that s.2(4) of COGSA 1992 required CoMaCo to have had, but by virtue of s.2(1) to have lost, rights of suit under the bill of lading.

The Dunelmia

The Judge then turned to the question of whether s.2(4) did not entitle Altfadul (or SIAT as assignee) to recover CoMaCo’s losses because CoMaCo was the voyage charterer whose charterparty had been with the claimant, the bill of lading carrier.

In that regard, the Judge held that the question posed by s.2(4) is to what extent the rights of suit vested by s.2(1) in the bill of lading holder could have been exercised by the party which had suffered the loss, if those rights had been vested by s.2(1) in them. On the findings of fact in the Award, the Judge held that s.2(4) of COGSA 1992 did not entitle SIAT (as assignee of Altfadul) to recover on behalf of CoMaCo the loss which had been suffered by CoMaCo by way of its credit to Altfadul.

In making this finding, the Judge rejected Cargo Interests’ contention that this contradicted or undermined the stated purpose of s.2(4) of COGSA 1992, as set out in paragraph 2.25 of the Report, namely to prevent carriers being able to question the entitlement of the holder to recover *“by raising a technical point that*

the loss may ultimately fall on someone else". In that regard, in fact, the Judge commented that allowing the recovery of the loss in these circumstances would be to override freedom of contract in respect of charterparties in a way that he did not think was warranted by the language of s.2(4), given that it is not overridden by the language of s.2(1) (referring again to *The Dunelmia*).

Comment

Damage to cargo on board ships is often suffered in the context of a complex web of contractual relationships, including bills of lading, charterparties and sale contracts, in the latter cases often with chains of each, and with the passage of property and risk under sale contracts not necessarily coinciding with the transfer of rights of suit under the bills of lading.

It is perhaps inevitable, in such circumstances, that situations will not infrequently arise where the party with a right to claim under the bill(s) of lading has not suffered the loss, and it is precisely that mischief which COGSA 1992 was intended to address.

Against that background, and the contents of the Law Commission's report, the Judge was surely right to find that s.2(4) of COGSA was never meant to be so narrow as to be limited to cases where the party which had suffered the loss had previously had rights of suit but had lost them by virtue of s.2(1): as the Judge pointed out, that would rule out claims where the loss had been suffered by a party below the bill of lading holder in the chain of dealings, such as a sub-buyer, and thereby would not achieve the clear intention behind COGSA 1992.

The position where the bills of lading are, in the hands of the charterer who suffers loss, a mere receipt (as per *the Dunelmia*) is more complex, and the Judge was perhaps influenced by the idea that a claim by charterers which might not be possible under the terms of the charterparty at all (because the terms were different or because it was time barred, for example) might be 'rescued' and still pursued by a claim under the bill of lading pursuant to S.2(4), where the bill of lading holder claimed as trustee. However, it is in the nature of the contractual structure that a shipowner will be party to two quite separate contracts governing the carriage of the cargo (the charterparty and the bill(s) of lading) which may be quite different, so it would not be so strange an outcome if a claim could find its way up to the carrier through either route; nor would it be particularly unusual for there to be a settlement under a sale contract in relation to the cargo damage as between the charterer and the bill of lading holder in a classic CIF sale situation.

In any event, the general common law principle, in *R&W Paul*, that the full loss represented by the damage to the cargo can be claimed, irrespective of any earlier recovery from an intermediate seller, reaches the right result and very much in the spirit of COGSA 1992, in not affording the shipowner a technical defence to avoid liability where they ought to be responsible for the loss. Equally, in the context of cargoes - such as the bananas in this case - which may suffer gradual deterioration over the course of a whole voyage, to limit the position by reference to *The Sanix Ace*, and require proof that the claimant owned, or was entitled to

immediate possession of, the cargo at the time it was damaged, would be wholly impractical, and again contrary to the spirit of COGSA 1992, by setting up potential technical defences based on the timing of the passage of title, or the right to possession. Instead, it should surely suffice that the bill of lading holder took delivery of a cargo which was damaged, quite regardless of when the damage occurred (providing it was post-shipment) and it is perfectly practical (and in keeping with the approach of COGSA 1992) for the bill of lading holder in such circumstances to sue as trustee for the party which actually suffered the loss.

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