AUSCRIPT
FAST PRECISE SECURE

Incorporating:
Margaret Wort & Co
WB Gurney & Sons

Ref. LM-2016-000148

IN THE HIGH COURT AT LONDON

Rolls Building
Fetter Lane
London

Before

THE HONOURABLE MRS JUSTICE MOULDER

IN THE MATTER OF

SCHENKER LTD v NEGOCIOS EUROPA LTD

MR A DINSMORE (instructed by Myton Law) appeared on behalf of the Claimant

The Defendant appeared in person

JUDGMENT
6th October 2017, 3.44 pm – 4.07 pm
(AS APPROVED)

MRS JUSTICE MOULDER:

1. In this case, the claimant seeks to recover monies which it says is due under an invoice pursuant to a contract entered into with the defendant, for the carriage of goods by air in the sum of some $58,000. This is the judgment on the preliminary issue of whether there is a common law rule which provides that there can be no set-off against air freight.

2. The background to this matter is that the claimant specialises in the transport of goods by road, rail, air and sea and the defendant sells, amongst other things, raw materials. The parties entered into a contract for the transportation of Chia seeds by air in October 2015. The defendant says that it was a condition of the contract that goods were delivered within seven days. In fact the goods were not delivered until early in January 2016. The defendant, therefore, denies that the freight is due or contends that the freight payable should be equal to the amount it would have paid had the goods gone by sea.

3. In the particulars of claim the claimant sought to rely on the British International Freight Association ("BIFA") standard trading conditions and asserted that these conditions applied to the contract. The defendant denied that the BIFA terms were incorporated into the contract in question. In its reply the claimant maintained that the BIFA terms were incorporated into the contract or, in the alternative, the claimant asserted that there is a common law rule that there can be no set-off against freight and to the extent that the defendant wishes to bring an action for alleged breach of contract, they must do so by way of a separate claim or counterclaim.

4. The issue of the common law rule was raised in the course of a hearing of the claimant's summary judgment application in April 2017 but the Deputy Judge took the view that it was not a point which should be decided summarily. The Deputy Judge noted that it was a point which would establish a precedent and had not been the subject of full argument, being an issue raised in the course or oral submissions. She therefore made an order that the matter should be dealt with as a preliminary issue.

5. In support of its case, the claimant has filed a witness statement of David Hardcastle, head of security and risk management at the claimant. The claimant has also obtained and filed an expert's report of David Frugtniet, a specialist insurance broker, dated 9th August 2017 and the expert gave oral evidence today.

6. Counsel for the claimant advanced the following arguments as to why the common law rule should apply to airfreight. Firstly, he submitted that it was well established in shipping law and he referred me in particular to the case of *The Brede [1974] QB 233* and *The Aries* [1977] 1 Lloyds Rep 334. In *The Aries*, the Court of Appeal declined to alter the rule which had been approved in *The Brede* and I was referred to the judgment of Lord Wilberforce at 337. Lord Wilberforce said:

> "…a claim in respect of cargo cannot be asserted by way of deduction from the freight is a long established rule in English law. As a rule, it has never been judicially doubted or questioned or criticised. It has received the approval of authoritative text books. It is said to be an arbitrary rule and so it may be in the sense that no very clear justification for it has ever been

> stated but this does not affect its status in the law. It is said to be inconsistent with the rule laid down in relation to the sale of goods and contracts for work and there are two answers to this. First, the two rules have been running in parallel for over a Century without difficulty.
>
> "As the argument for inconsistency with the rule prevailing in relation to the sale of goods, it is no part of the functions of this House or the judges to alter a well established rule or, to put it more correctly, to say that a different rule is part of our law for the sake of harmonisation with a rule operating in a different field.
>
> "But beyond all this, there is a decisive reason here why this House should not alter the rule approved in *The Brede* by reversing it; that is that the parties in this case have, I think, beyond doubt contracted upon the basis and against the background that the established rule is against deduction."

7. Lord Salmon in his judgment in the same case at 341 referred to the rule as being a "rule of law which … has been generally accepted for over 100 years … and upon the faith of which many thousands of contracts of carriage have been made."

8. As well as being a rule which is well established in shipping, the rule has been applied to road haulage and I was referred to the decision of Neill J in *R H & D International Ltd v IAS Animal Air Services Ltd* [1984] 1 WLR 573. In that case, Neill J referred to the earlier authorities as well as the dicta of Lord Wilberforce in *The Aries* case. At p576 of the judgment he said, referring to the earlier cases:

> "In each of these six cases the plaintiffs obtained summary judgment for unpaid freight due for carriage of goods under the CMR, despite the fact that the defendant made counterclaims for damage to or loss of the goods. In each case, the court applied the principles in *Aries Tanker Corporation* on the basis that it was of general application to all claims for freight ..."

9. He went on:

> "… It would be wrong for me as a judge of first instance to introduce uncertainty into this branch of the law by reaching a decision in conflict with the earlier decisions to which I have been referred and which now extend over a period of six and a half years. I have also in mind the fact that in *Aries Tanker Corporation v Total Transport Ltd,* Lord Wilberforce (in a passage upon which Donaldson J relied in *Silver Wind v Wood Shipping*) said in relation to the rule of deduction or abatement "… there is no case of its having been extended to contracts of any kind of carriage. The rule against deduction in case of carriage by sea is, in fact, as well settled as any common law rule can be."

10. It is clear, therefore, that the rule applied to international road haulage and in *United Carriers Ltd v Heritage Food Group* [1996] 1 WLR 371, May J had to consider whether to extend it to the domestic carriage of goods. In his judgment May J referred to the earlier case of *R H & D International* to which I have referred and he said at p375 H:

> "Neill J then referred to the single sentence in Lord Wilberforce's opinion in the *Aries Tanker* case which I have already discussed. There are thus seven cases at first instance where the rule in the *Aries Tanker* case has been applied to international contracts of carriage by road …"

He went on:

> "I have been provided with notes of the judgments in four of those cases. It appears that Mustill J in *Seawheel Ltd v Henry G Collins & Co Ltd* and Donaldson J in *Silver Wind v Wood Shipping* took the rule to apply to contracts of carriage generally. The note which I have of Parker J's judgment in *Concorde Express Transport Ltd v Lecalite Contracts Ltd* appears only to follow previous decisions in applying the law to carriage of goods under the CMR. Forbes J in *M & S Shipping Ltd v Simon International Haulage Ltd* agreed with Donaldson J in applying the exception to all types of carriage."

He then went on to discuss the position in relation to domestic carriage at page 378 and he said:

> "Left to myself, I would decide that the *Aries Tanker* rule did not apply to such contracts, that is domestic road contracts. I would draw a line between carriage by sea and international carriage by land (and also I think carriage by air) to which the rule did apply and domestic carriage by land to which it did not. That would not be a line drawn by logic but it would be a pragmatic division between cases to which the rule was to be applied from antiquity and cases where I conceived that it would be quite anomalous and without the only modern justification which supports the rule for carriage by sea. I do not, however, feel able to reach that conclusion."

He goes on to hold that the rule did apply also to domestic carriage of goods.

11. The point that counsel for the claimant made before me, as well as noting that the rule was then clearly extended to road haulage, is that, in the passage cited above, May J had assumed that carriage by air was included in the category of contracts to which the rule would definitely apply.

12. Counsel also referred me to the case of *Britannia Distribution v Factor Pace* [1998] 2 Lloyds Rep 420, a decision of His Honour Judge Hegarty. In my view, this was of limited assistance as it was conceded by counsel in the case that the general rule that there could be no set off was of general application and, although I accept it was not challenged by His Honour Judge Hegarty, it does seem to me not to advance the matter much further.

13. Although there is no English authority on the position in relation to the rule extending to air freight, there are two Hong Kong authorities to which I was referred which have specifically considered the question. The two cases are *Emery Airfreight Corporation v Equus Tricots Limited* and *RAF Forwarding (HK) Ltd v Wong Angela*. *Emery Airfreight Corporation* was a case in the Supreme Court of Hong Kong, High Court, and Godfrey J said at page 3 of his judgment:

> "Before me, it has been pointed out, correctly (so far as I am aware) that there is no case in which [the common law rule that a claim in respect of cargo cannot be asserted by way of deduction from a claim for freight] has been applied to a contract of freight by air. There exists in parallel but in contradistinction with the common law rule relating to claims for freight, the rule that a deduction in relation to claims arising out of a contract for sale, or work and labour, may, usually, be allowed by way of set-off or counterclaim…. I have not the least doubt that the appropriate rule to apply to a contract of freight by air is not this latter rule but the rule which has existed for a very long time in relation to carriage of goods by sea and has recently been held to apply to carriage of goods by road. There is no logical or any other sensible distinction to be made between these three different means of transport."

14. In the *RAF Forwarding* case, Le Pichon J referred to the decision in *Emery Air Freight* and held:

> "Whilst that decision is not binding on this court, I agree with the reasoning set out in the passage cited. I do not see that the fact that time was of the essence of the carriage contract is of itself sufficient reason why the common law rule should not apply to carriage by air …"

Counsel for the claimant also submitted that the court should look at the rationale behind the common law rule. He submitted that the rationale was to protect cash flow and he referred me to certain of the old shipping cases, *Dakin v Oxley [1864]* and *Meyer v Dresser* [1864], which, in my view, may not have continuing relevance today, but also to the Court of Appeal decision in *Rohlig (UK) Ltd v Rock Unique Ltd* [2011] EWCA Civ 18, paragraph 8. The Court of Appeal were considering the BIFA terms but I accept the proposition that the court was looking at the purpose behind the rule and did acknowledge that the purpose was to protect the cash flow.

15. Looking then at the evidence upon which the claimant relies, the witness statement of Mr Hardcastle at paragraph 10 states:

> "The rule forms the basis upon which we contract and I understand it to be an industry wide custom."

16. The expert report was from Mr Frugtniet who described himself as a specialist insurance broker who has worked in the freight liability insurance market and industry for 40 years. He sits on the British International Freight Association Legal and Insurance Policy Group. The key sections of his report, in my view, are at paragraph 10 where he states:

> "It is thus the understanding of the market in which I work, the freight liability insurance market, and of the freight forwarding industry, that the freight rule applies to air freight and this is the basis upon which the claimant operates and indeed upon which the freight liability insurance market operates. I am confident that this understanding has formed the basis for thousands of air freight contracts and continues to form the basis for such contracts."

17. At paragraph 11:

> "The rationale of the freight rule and clause 21(A) of the BIFA conditions is to ensure the cash flow of the freight forwarder or carrier and to ensure that those who provide credit are not disadvantaged in comparison to those who demand cash. In my view, this rationale applies equally to air freight as it does to shipping and road haulage."

18. At paragraph 15 he described the freight rule as "a firmly established rule of practice in the freight industry … which forms part of air freight custom." He said that:

> "to disapply the freight rule to air freight would throw the contractual allocation of risk between the parties into doubt and cause great difficulty in the market."

He also said that to decline the application of the freight rule to air freight:

> "would inject great uncertainty into multi-modal freight contracts which contain a road, sea and air leg."

He said that a carrier's ability to obtain freight without deduction, deferment or set-off would depend on which leg of the voyage was in dispute and he states that in his view there is no justification for this distinction.

19. For the defendant it was submitted that the rule as set out in the authorities clearly applied to shipping cases but did not extend to air freight and the defendant submitted that there was a significant difference in the cost of air freight and shipping costs and a significant difference in the time which is obviously involved between transportation by air and transportation by sea. He said that his contract was clear, that delivery was to be in seven days. He said he understood that the common law rule made sense in relation to damage so that people were not entitled to challenge or make deductions for small amounts of damage but he submitted that it would be unfair to extend the common law rule or to apply the common law rule so that it applied to delay. He said that it would be inequitable to allow the rule to apply in the current case and the court should allow time for him to bring a counterclaim.

20. It seems to me that in *The Aries* the House of Lords were only considering the shipping context but I accept that the language of Lord Wilberforce was broader than just shipping and it has been interpreted by the judges in the road haulage cases mentioned above to be of wider application. The Hong Kong authorities are not binding on me but I note the finding that there was no logical distinction to exclude air freight from the operation of the common law rule. The rule has been held to apply to road haulage, both international under *R H & D* and the earlier authorities which were referred to in that judgment, and domestic. In *United Carriers*, although May J expressed some concern given the circumstances which apply to domestic carriage, nevertheless, he ultimately concluded that it did apply and, as I have noted, he assumed that the rule would in any event apply to air although no reasons were given.

21. The witness statement from the claimant, it seems to me, is of little assistance given, as it is, by the claimant and not, therefore, in any way independent. However, the expert report is from an expert with 40 years in the industry. The evidence was unchallenged and I see no reason not to accept the evidence which is set out in that report. Noting the approach which the House of Lords took in *The Aries*, I note that the expert in his report is clear that the rule is the basis upon which the market for freight currently contracts.

22. It is not the part of the function of judges to alter a well established rule or to say that a different rule is part of our law for the sake of harmonisation. It is the position here that although English authorities have not expressly determined the point in relation to air freight, the approach in the road haulage cases extending the rule from shipping are, in my view, instructive and persuasive. I note the rationale which is advanced in relation to cash flow. However, I do not accept that this alone would justify the extension of the rule into a new area. The rule may well be said to be anomalous when contrasted with other contracts for the supply of goods and services.

23. However, given the clear and uncontradicted expert evidence that this is the basis on which the freight market contracts and the fact that it extends to carriage by sea, international and domestic road haulage, it would, in my view, be anomalous to hold that the common law freight rule did not extend to carriage by air. I, therefore, concur with the conclusion reached in the Hong Kong authorities which, though not binding on me, found that there is no logical or sensible distinction between the three means of transport for the purpose of the common law rule.

24. I have considered the issue of delay which was raised by the defendant in his submissions. The defendant submitted that the common law rule should not apply in the cases of delay. I was, however, referred by the claimant to the authority of the Court of Appeal in *The Alpha Nord* which held that in shipping the rule applies even in a case of delay. The court in *RAF Forwarding* appears to have taken a similar approach. In the absence of any authority to the contrary I see no reason at this point to draw a distinction in the operation of the rule which is not a distinction currently made in the market.

25. I understand that my conclusion is one which the defendant will struggle to accept, given the fact that goods were not delivered within the timeframe he specified and he does not see why he should pay for a service which he did not receive. However, this ruling does not affect his ability to bring a claim against the claimant for the failures which he says occurred. I note that the defendant had been given an opportunity to bring a counterclaim but for reasons which do not need to be recited in this judgment he was not in a position to bring a counterclaim prior to this matter being decided today. It is, however, still open to him to bring a claim should he choose to do so after this has been dealt with.

26. Accordingly, for all the reasons set out, I find that the common law freight rule which provides that there can be no set off against freight does extend to carriage by air.

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