SUN MOBILITY
Insurance and Claims Services Limited
新移動保賠顧問有限公司

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To: Transport Industry Operators

Sea / Air / Road freight charges v Cargo claims

It is an important common law rule in relation to the carriage of goods by sea, air or road that a claim in respect of cargo cannot be asserted by way of deduction from a claim for freight charges. One authority is the Hong Kong High Court's Decision dated 16 December 1998 between RAF Forwarding and JMT Company. (Actions no. 2446 and 5533 of 1998)

The facts

In November 1997, a shipper JMT Company and a forwarder RAF Forwarding entered into an agreement for the carriage of goods from Hong Kong to Toronto. The shipper delivered the first lot of goods to the forwarder on 10 November 1997. The first lot of goods arrived in New York on 12 November and was then taken by road to Toronto, arriving on 22 November 1997. A discussion took place on 24 November between the shipper and the forwarder concerning invoices issued by the forwarder in respect of the carriage of the first lot of goods aggregating $326,342 which remained unpaid. A cheque post-dated to 1 December was issued on 24 November for the freight charges in respect of the first lot of goods. On 24 November, the shipper delivered the second lot of goods to the forwarder. This arrived in Chicago on 29 November and was then taken by road to Toronto, arriving on 8 December.

The cheque was presented on 8 December and dishonoured. The forwarder issued demand letters on 16 December and 20 January, but met with no response. On 18 February 1998, the forwarder commenced its action in respect of freight charges against the shipper. On 8 April 1998, the shipper commenced its action against the forwarder for breach of the agreement. The shipper's case was that the forwarder breached the agreement by not delivering the goods from Hong Kong to Toronto by air in time and as a result of the delay, the shipper's customers either asked for a discount in the price or rejected the goods. By the Court's order dated 23 June 1998, the two actions were consolidated.

Master Lok of the Court gave an order granting the forwarder a summary judgment in respect of its claim for the airfreight charges in the sum of $569,344.1 together with interest. The shipper appealed against the order.

The Issues

The main issues that arised in the appeal were:

(i) whether the common law rule in relation to the carriage of goods by sea that a defendant will not be allowed to set up a defence or counterclaim in an action for freight charges applied to air freight;

(ii) if the rule was held to be inapplicable, then, whether triable issues existed such as to warrant an order that the shipper be given leave (conditional or unconditional) to defend.

Common law rule as to freight charges

The common law rule was restated by the House of Lords in *Aries Tanker Corp v Total Transport Ltd, The Aries [1977] 1 WLR 185* at 189G-H as follows:

> "That a claim in respect of cargo cannot be asserted by way of deduction from the freight, is a long established rule in English law. It dates at least from *Sheels v. Davies* (1814) 4 Camp.119: it received authoritative approval in 1864 from an eminent court in *Dakin v. Oxley*, 15 C.B.N.S. 646 and again from the same court in *Meyer v. Dresser* (1864) 16 C.B.N.S.646 where the rule was called 'settled law'. As a rule it has never been judicially doubted or questioned or criticised; it has received the approval of authoritative text books...."

Lord Wilberforce went on to observe (at 190H-191A) that:

> "...there is a decisive reason here why this House should not alter the rule approved in *The Brede* [1974] Q.B.233 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. Such a case as this, in fact, marks out very decisively the possible limits of judicial intervention: for it would be undesirable in this, or in any other case where the same question arose, for the courts to declare that a rule, clearly shown to exist, and shown to be the basis of the contract before the court, ought to be replaced by a different rule which would have to operate on the contract in question. However convinced the courts might be of the latter's merits, to substitute it could be no part of a judicial process. This is all the less so since the parties themselves, if they dislike the rule, can perfectly well provide otherwise in their contract."

This well established rule that a carrier's claim for freight charges is to be paid in full on delivery of the cargo and cannot be subject to any deduction or abatement by way of a set-off counterclaiming against the carrier in respect of the cargo, whether the counterclaim be for loss or damage to the cargo or for delay in delivery, is not confined to contracts of carriage by sea. In *RH & D International Ltd v IAS Animal Air Services Ltd [1984] 2 All ER 203*, Neill J held that it extends to claims for freight charges for the carriage of goods by road.

In *Emery Air Freight Corp v Equus Tricots Ltd [1989] 2 HKLR 554*, after referring to the common law rule as restated in *Aries Tanker Corp* and applied to contracts of carriage by road in *RH & D International Ltd*, Godfrey J held:

> "There should be no stay of execution against an admitted claim for air freight. The defendant had contracted out of his right of set off. The common law rule in relation to the carriage of goods by sea that a claim in respect of cargo cannot be asserted by way of deduction from a claim for freight (see *Aries Tanker Corpn. v. Total Transport Ltd.* [1971] 1 All ER 398) which also applies to contracts of carriage by road (see *R.H. & D. International Ltd. v. IAS Animal Air Services Ltd. [1984] 2 All ER 203*) was equally applicable to air freight."

In Judge Le Pichon's judgment, the common law rule for freight charges also applied to a contract of freight by air. That was the basis upon which the parties contracted and the forwarder's entitlement to freight charges was not subject to any claim by way of set-off or counterclaim by the shipper.

In view of the answer to the first issue which was that the common law rule extended to air freight, the second issue did not arise. Nevertheless, the Judge also dealt with the second issue if she were held to be wrong on the first point.

Whether leave to defend should be granted

The forwarder's statement of claim encompassed within it a claim on the dishonoured cheque. Since the total freight charges claimed exceeded the amount of the dishonoured cheque, certain parts of the pleading therefore related to that part of the claim that was not covered by the dishonoured cheque. In the Judge's judgment, there was plainly no defence as regards the sum of $326,342 which was the amount of the dishonoured cheque.

Did the shipper raise triable issues as would entitle it to leave to defend in relation to the freight charges claim less the amount of the dishonoured cheque? The shipper's case was that it was not bound by the standard terms and conditions of the agreement, that there was a warranty by the forwarder as to the delivery time which was to be within three or four days of receiving the goods, that consequently there was a failure of consideration and because of the breach which amounted to a repudiatory breach, the shipper was under no obligation to make payment for the freight charges. It was evident from the chronology of events that if there had been any warranty as alleged, the forwarder were already in breach in respect of the delivery of the first lot of goods. That apparently did not deter the shipper from delivering the second lot of goods to the forwarder two days later. It was alleged that the second lot was delivered against fresh warranties. Even if this were the case, it would have been evident well before 1 December, which was the date of the post-dated cheque, that the forwarder had again breached the alleged warranties given. Yet, the shipper took no steps to countermand the cheque which was only presented on 8 December when it was returned marked 'refer to drawer'. This of course meant that there were insufficient funds in the shipper's account, which was something wholly different from the shipper refusing to pay by countermanding the cheque because of the forwarder's alleged breach.

The shipper also did not exhibit any documentary evidence to substantiate the loss alleged to have been suffered by reason of the delay in delivery.

Having regard to all these matters, the shipper's case was extremely weak and would certainly not warrant the grant of unconditional leave to defend. In respect of the amount of the dishonoured cheque, there was simply no defence. Leave, if granted at all, would be limited to the balance of the sum claimed in respect of freight charges all of which should be paid into court.

For the reasons above, the shipper's appeal was dismissed by the Court.

Please feel free to contact us if you have any questions on the Decision or if you would like to have a copy of it.

Simon Chan
Director
E-mail: simonchan@smicsl.com

Richard Chan
Director
E-mail: richardchan@smicsl.com

23/F, Excel Centre, 483A Castle Peak Road, Lai Chi Kok, Kowloon, Hong Kong
香港九龍荔枝角青山道 483A 卓匯中心 23 樓 Tel: 2299 5566 Fax: 2866 7096
E-mail: gm@smicsl.com Website: www.sun-mobility.com
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