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To: Transport Industry Operators

NVOC agent's contractual liability to shipper?

Does an NVOC's agent have any contractual liability to the shipper under the NVOC's bill of lading? The Court of Appeal of Hong Kong said no in its Judgment dated 25 February 2000 concerning a cargo misdelivery claim of US$144,312.55. [CACV 356/1999]

This appeal case was in respect of losses incurred by a shipper (Hong Kong Yau Luen Hong) in consequence of seven containers of Chinese food and condiments having been released in the United States to the consignee (Dai Woo Wholesale Company, "Dai Woo") without production of any of the six bills of lading covering the same. Dai Woo had contracted to buy the goods from the shipper but had not paid for them. After the goods were released, Dai Woo could not be contacted and the shipper remained unpaid. The bills of lading were issued by Fortune Network Limited ("Fortune Network"), and Dai Woo secured release of the goods against an indemnity given by it to Fortune Network's agent Multi Express Inc ("Multi Express").

The High Court of Hong Kong in its first instance Judgment held Fortune Network's agent (Fordpointer Shipping) liable to the shipper for the cargo misdelivery, and found that Fordpointer Shipping had entered into a contract with the shipper whereby Fordpointer Shipping undertook liability for the entire carriage of the containers to the destinations and that such carriage involved not merely the ocean carriage but also overland carriage by road or rail. The High Court held that this contract had arisen concurrently with another contract entered into between the shipper and Fortune Network through the agency of Fordpointer Shipping in respect of the ocean voyage segment of the carriage. As to the contract found to exist between the shipper and Fordpointer Shipping, the High Court held that the shipper had given an express instruction that "the goods should not be released to the consignee without express instructions." The High Court also held that such contract contained an implied term that "the goods were not to be released even to the named consignee without production of the original bills of lading," relying on *Sze Hai Tong Limited v Rambler Cycle Company Limited* [1959] AC 576. The High Court found that the misdelivery occurred after discharge of the containers and that the loss therefore fell outside the confines of the contract of carriage with Fortune Network so that it was Fordpointer Shipping which was to be held responsible. The exemption or limitation clauses contained in the bills of lading were held not to cover losses occurring after discharge.

Fordpointer Shipping argued in the appeal that the High Court had erred in finding that there was a contract between Fordpointer Shipping and the shipper. Fordpointer Shipping contended that the only contract of carriage in existence was that between the shipper and Fortune Network, concluded through Fordpointer Shipping acting as the latter's agent. Such contract was evidenced by the bills of lading issued by Fortune Network, nominating Multi Express as Fortune Network's agent in the United States for the purpose of effecting delivery of the containers. Fordpointer Shipping therefore submitted that any liability for misdelivery was that of Fortune Network or Multi Express and not Fordpointer Shipping.

In the Court of Appeal's view, there was much force in Fordpointer Shipping's contentions and the High Court's judgment could not be supported. The Court of Appeal could not discern the evidential basis upon which a contract between the shipper and Fordpointer Shipping was found to exist. No document of any kind existed containing or evidencing any contract of carriage between the shipper and Fordpointer Shipping. In the absence of any such documents, it is difficult to accept that Hong Kong Yau Luen Hong and Fordpointer Shipping intended to contract as shipper and carrier respectively. When each of the containers was handed over by the shipper, a bill of lading *was* issued to the shipper by Fortune Network. These bills of lading operated in law as a receipt for the goods, as evidence of the contract of carriage and as documents of title in respect of the goods shipped. They represented the *only* shipping documents issued in respect of the carriage and they expressly identified Fortune Network as the contractual carrier, evidencing a contract of carriage between itself and the shipper. The bills of lading provided that the containers were shipped on "freight collect" terms and, on arrival, Multi Express issued invoices claiming payment not only of ocean freight but also of charges for drayage and other expenses incurred in Hong Kong.

The fact that the shipper entered into a contract of carriage with Fortune Network evidenced by the bills of lading was, in the Court of Appeal's view, quite inconsistent with the proposition that the shipper and Fordpointer Shipping had entered into a contract of carriage on terms making release of the goods on arrival subject to the shipper's express approval. The bills of lading taken by the shipper from Fortune Network were negotiable documents of title to the goods so that persons other than the shipper could be constituted holders of the bills of lading and so become entitled to the goods they represent. On presentation of duly endorsed bills of lading by a holder and on payment of outstanding freight, the carrier would be entitled to deliver the goods to such a holder, an implied contract thereby coming into existence between them. The carrier could not be restrained from releasing the goods to such a holder on the basis that the permission of the shipper had first to be obtained. The title to the goods was in the receiver as evidenced by its status as holder of the bill of lading as a document of title thereto. There would be no document or other matter to indicate that the shipper in some way had an overriding right to the goods. Accordingly, having opted for the issue of bills of lading, the shipper could not consistently or workably have nevertheless retained control over the goods at destination on some basis unrelated to and inconsistent with the rights of lawful holders of the bills of lading. It was a fortiori difficult to see how any such overriding right could have come into existence as a result of a contract between the shipper and Fordpointer Shipping which was not involved in the actual carriage and had no control over the goods at destination.

The second contractual obligation of Fordpointer Shipping that the High Court found to have been breached was an implied term that "the goods were not to be released even to the named consignee without production of the original bills of lading," based on *Sze Hai Tong Limited v Rambler Cycle Company Limited* [1959] AC 576. The implied term in that case was however a term implied into the contract of carriage between the shipper and the shipowner which had issued the relevant bill of lading. Lord Denning explained the position as follows :-

> "It is perfectly clear law that a shipowner who delivers without production of the bill of lading does so at his peril. The contract is to deliver, on production of the bill of lading, to the person entitled under the bill of lading. In this case it was 'unto order or his or their assigns,' that is to say, to the order of the Rambler Cycle Company, if they had not assigned the bill of lading, or to their assigns, if they had. The shipping company did not deliver the goods to any such person. They are therefore liable for breach of contract unless there is some term in the bill of lading protecting them. And they

> delivered the goods, without production of the bill of lading, to a person who was not entitled to receive them. They are therefore liable in conversion unless likewise so protected."

One can readily see why it is necessary to imply such a term as between the shipper and the carrier which issued the bill of lading and which has taken custody of the goods for the purposes of the carriage. Having constituted the shipper the original holder of the bill of lading, which operates as a negotiable document of title representing the goods shipped, the parties must be taken to have intended that the carrier would require a person's entitlement to receive the goods at destination to be established by his production of that document duly endorsed to constitute him holder. It would follow that the interest of the ultimate holder is not to be defeated by the carrier ignoring one of the main purposes for which it issued its bill of lading and delivering the goods to someone without production of that document. The Court of Appeal could not see on what basis a term to like effect should have been implied as between the shipper and Fordpointer Shipping. Fordpointer Shipping had not issued any bill of lading and was not the carrier and so was not intended by the parties to have the goods in its possession during or at the end of the carriage and accordingly, was not the party which would be making (or withholding) delivery to cargo receivers at the destination.

In the Court of Appeal's view, no basis existed for the finding that Fordpointer Shipping contracted as carrier with the shipper on the terms allegedly breached, or on any terms. The questions relating to the exemption and limitation clauses did not arise. The only connection between the shipper and Fordpointer Shipping was that, at the shipper's request, Fordpointer Shipping had arranged for the shipper's goods to be shipped to the USA, and had done so by procuring a contract for the carriage of the goods to be entered into between the shipper and Fortune Network. Fordpointer Shipping was not a party to that contract and could not be liable to the shipper for any breach of it committed by Fortune Network.

Accordingly, in the Court of Appeal's view, the finding of Fordpointer Shipping's liability for breach of contract in relation to the cargo's misdelivery could not be upheld and the appeal by Fordpointer Shipping had to be allowed.

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

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