JUDGEMENT : Mr Ian Glick QC: Commercial Court. 15th December 2004

Introduction

1. This is the determination of a preliminary issue, one of three ordered to be tried by Tomlinson J on 26 March 2004.

2. The action concerns cargoes of perishable goods shipped from Brazil to Japan, between October 2001 and January 2002, under bills of lading each of which contained an extensive carrier's exemption clause. The issue is whether this clause (clause 4), *"is effective to exempt the defendants from any potential liability for the claims in this case."*

3. The other two preliminary issues ordered to be tried concern questions no longer in dispute between the parties, and have thus fallen away.

The pleadings

4. According to the claimant, it is the lawful holder of 19 bills of lading by which the defendants as carrier acknowledged the shipment on board their vessel "Irbenskiy Proliv" of 155,895 cartons of fresh frozen chicken parts for carriage from Itajai in Brazil to various ports of discharge in Japan. The goods are said to have been in good order and condition when shipped.

5. The claimant, in its Particulars of Claim, alleges, so far as material:

"5. … the carrier, pursuant to the contracts of carriage contained in or evidenced by the bills, and/or as a carrier for reward and/or as a bailee of the goods owed the claimant duties:

a. To take reasonable care to make and keep the vessel seaworthy and cargoworthy at all material times; and/or

b. To take reasonable care of the goods and to deliver them at the ports of discharge in the same good order and condition as when shipped …

8. In breach of the said … duty set out at paragraph 5(b) above … and/or negligently the carrier failed to take reasonable care of the goods and to deliver them in the same good order and condition as when shipped in that 109,344 cartons of the goods which had been carried in holds 2 and 4 were delivered in a damaged state having been exposed to warm air during the carriage… Without prejudice to the burden of proof, which is on the carrier:

a. The carrier failed to exercise reasonable care in that it caused or permitted wooden gratings used for cooling air circulation to be missing in holds 2 and 4 thus preventing the refrigeration systems from working properly; and/or

b. The refrigeration systems were not working properly in any event; and/or

c. The fact of the damage is sufficient evidence of a failure to take reasonable care.

9. Further or alternatively, the damage caused [to] the goods was caused by the carrier's breach of the … duty set out in paragraphs … 5(a) above … The vessel was uncargoworthy in that the wooden gratings referred to in paragraph 8 above were missing thus preventing the refrigeration systems from working properly and/or the refrigeration systems were not working properly in any event. Without prejudice to the burden of proof, the fact that the gratings were missing and/or that the refrigeration systems were not working properly is sufficient evidence of a want of due diligence."

6. The defendants, in their Defence, so far as material rely on clause 4 as exempting them from liability for any damage caused by reason of the vessel's refrigeration system not working properly.

7. In its Reply, the claimant asserts that clause 4 is unenforceable as being incompatible with, and repugnant to, the commercial purpose of the contracts of carriage contained in or evidenced by the bills of lading.

The bills of lading

8. Each of the bills of lading sets out on its face, amongst other things, the following:

"SHIPPED in apparent good order and condition unless otherwise stated herein, on board the above Ocean Vessel … the goods or packages said to contain goods, hereinafter called "the Goods", specified above for carriage from the above named Port of Loading …by the above Ocean Vessel … on a voyage as described and agreed by clauses 7, 8, 9, 10, 11, 12 and 19 of this Bill of Lading and discharge, such carriage and discharge being always subject to the exceptions, limitations, conditions and liberties hereinafter agreed, in like order and condition at the Port of Discharge named above or such other port or place as is provided in the Clauses hereinbefore referred to, or so near thereunto as she may safely get, always afloat, where the Carrier's responsibilities and liabilities shall in all cases and in all circumstances whatsoever finally cease, for delivery unto the above-mentioned Consignee or to his or their assigns.

…

Full freight hereunder shall be due and payable at the place where this Bill of Lading is issued by the Shipper in cash without deduction on receipt of the Goods or part thereof by the Carrier for shipment …

In accepting this Bill of Lading any local customs or privileges to the contrary notwithstanding the Shipper, Consignee and Owner of the goods and the Holder of this Bill of Lading agree to be bound by all the stipulations, exceptions and conditions stated herein whether written, printed, stamped or incorporated on the front or reverse side hereof, as fully as if they were all signed by such Shipper, Consignee, Owner or Holder.

…"

9. On the reverse side of each of the bills appear 37 clauses, including the following:

"4. Carrier's exemption clause. Subject to clause 1 hereof the Carrier shall not be responsible for loss or damage to or in connection with the Goods of any kind whatsoever (including deterioration, delay or loss of market) however caused (whether by unseaworthiness or unfitness of the vessel or any other vessel, tender, lighter or craft or any other mode of conveyance whatsoever or by faults, errors or negligence, or otherwise howsoever).

in particular and without prejudice to the generality of the foregoing

A. The Carrier shall be under no such responsibility:

(i) at any time prior to the loading of the Goods on to and subsequent to the discharge of the Goods or part thereof from the vessel when but for the provisions of this clause such goods would be the responsibility of the Carrier and (ii) in the case of live animals or of cargo which in this Bill of Lading is stated as being carried on deck and is so carried none of which is subject to the Convention or legislation referred to in Clause 1 hereof at any time when, but for the provisions of this clause such goods would be the responsibility of the carrier.

B. Unless this Bill of Lading is subject to the Hague-Visby Rules in accordance with paragraphs (A) and/or (E) of Clause 1 or to the Hague Rules in accordance with paragraphs (b) and/or (D) of Clause 1, the carrier shall not be liable for loss of or damage to or in connection with the Goods or part thereof of any kind whatsoever (including deterioration, delay or loss of market) arising or resulting from: unseaworthiness (whether or not due diligence shall have been exercised by the Carrier, his servants or agents or others to make the vessel seaworthy); Act, neglect of default of the Master, mariner, pilot or the servants or agents of the Carrier in the navigation or in the management of the vessel or in the care of the cargo; fire, perils, dangers and accidents of the sea or other navigable waters; act of God; act of War; act of public enemies; arrest or restraint of princes, rulers or people, or seizure under legal process; quarantine restrictions; act or omission of the Shipper, Consignee, Owner of the Goods, or Holder of this Bill of Lading, his agents or representatives, strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general; riots and civil commotions; saving or attempting to save life or property at sea; wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the Goods; insufficiency of packing; insufficiency or inadequacy of marks; latent defects; any other cause whatsoever, whether or not of a like kind to those above mentioned, and including negligence on the part of the Carrier, his servants, agents or others.

37. Jurisdiction. The contract evidenced by this Bill of Lading shall be governed by English Law and any disputes thereunder shall be determined in England by the High Court of Justice in London according to English Law to the exclusion of the Courts of any other country."

The parties' cases

10. What follows is necessarily only a summary of the parties' respective arguments. These were set out in detail in their Skeleton Arguments, and extensively canvassed in oral argument. I do not pretend to recite exhaustively every point made.

The claimant's case

11. The claimant argues that it is for the defendants to demonstrate they are entitled to rely on clause 4. Where a party against whom such a provision is set up says that, properly construed, it is repugnant to the contract and should be rejected, it is for the party relying on the provision to demonstrate that, properly construed, it is not repugnant to the contract.

12. The clause purports to exclude liability for loss or damage to or in connection with the goods of any kind whatsoever, however caused: see the opening words, and the final limb of Part B, of the clause.

13. On its ordinary and natural meaning, the clause gives the defendants complete freedom whether or not to render any performance under the contracts of carriage, and how to render any performance they choose to provide. It results in the defendants having no liabilities at all for any breaches of contract. Using the terminology employed by Lord Diplock in ***Photo Production Limited v. Securicor Transport Limited*** [1980] AC 827, clause 4 purports to exclude entirely what would otherwise be the defendants' secondary obligations under each contract (that is, its obligations to pay monetary compensation for any breach of a primary obligation imposed by the contract), thus, if effective, reducing each contract of carriage to what Lord Wilberforce, in ***Suisse Atlantique Société d' Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale*** [1967] AC 361 at 432B-C, called, "a mere declaration of intent".

14. Clause 4 thus nullifies the contracts. Without secondary obligations the contracts are illusory because there is no sanction for any breach of the defendants' primary obligations.

15. The essential object and intent of a contract of carriage is that the carrier should carry and deliver the goods. Clause 4, if effective, would deny the claimant any remedy for breach of those basic obligations. It is therefore inconsistent with, and repugnant to, the main object of each contract.

16. It follows that clause 4 should be rejected in its entirety, in accordance with the principle laid down by Lord Halsbury in ***Glynn v. Margetson & Co*** [1893] AC 351 at 357, to which I refer below. In this connection I was also referred to ***J. Evans & Son (Portsmouth) Limited v. Andrea Mezario Limited*** [1976] 1 WLR 1078, per Lord Denning MR at 1082A-C, per Roskill LJ at 1084A-C and per Geoffrey Lane LJ 1084H-1085F; ***Watling v. Lewis*** [1911] 1 Ch 414, per Warrington J at 424; ***In re Tewkesbury Gas Company*** [1911] 2 Ch 279, affirmed at [1912] 1 Ch. 1; and ***Prudential Assurance Co Limited v. London Residuary Body*** [1992] 2 AC 386.

17. It was wrong to suggest, as the defendants did, that the court should simply consider whether the claimant's allegations of breach of contract were, if true, covered by the clause and go no further. The court should start by deciding what the clause meant and whether, in the light of that, it could stand.

18. The defendants had not advanced, and could not advance, a plausible narrower interpretation of clause 4. Any such interpretation would produce a result too uncertain to be applied. Moreover, in this case, the court should construe clause 4 against the party that had issued the bills, and sought to rely on the clause, by interpreting it as widely as possible and then finding it repugnant to the object of the contract of which it supposedly formed a part. Moreover even if, as a matter of law, the clause could not exclude liability for fraud (as indicated by Lord Hoffmann in *HIH Casualty and General Insurance Limited v. Chase Manhattan Bank* [2003] 2 LL.R. 61, at paragraph 76), that would still leave the defendants virtually without enforceable obligations under the contracts, which could not have been the intention of the parties.

The defendants' case

19. The defendants argue that the question in issue is whether clause 4 applies in the present case, not what might be the position in other, hypothetical, cases. Whether, and to what extent, an exclusion clause is to be applied to a breach of contract is a matter of construction. Though exclusion clauses are construed strictly, in commercial matters, where risks are normally borne by insurers, parties should be free to apportion those risks as they think fit. There is no rule of law by which such clauses are to be eliminated or deprived of effect, regardless of their terms; and if an exclusion clause is clear, the court is not entitled to reject it just because it thinks it unreasonable. Indeed dicta of Atkin LJ in ***The Cap Palos*** [1921] P.458 at pages 471 to 472, approved by Lord Hodson and Lord Wilberforce in ***Suisse Atlantique*** (at pages 410 and 432), suggest that a party may exclude liability for any failure to perform his contract, "*including even wilful default*".

20. The true effect of ***Glynn v Margetson & Co***. is that a court will limit the effect of an exclusion clause to avoid absurd results, and in order to give effect to the real intention of the parties.

21. In the present case clause 4 does not produce absurdity or reduce the contracts to mere declarations of intent. The court will construe it restrictively to ensure that it is not inconsistent with the main object and intent of the contracts. Thus clause 4 does not apply if the carrier is dishonest, or if it deliberately decides to jettison the cargo in order to carry out other business, or where the carrier delivers the cargo to a third person knowing that person is not entitled to take it, or where the carrier refuses to perform the contract altogether by refusing to ship the goods at all.

22. There is nothing uncertain about the contract. In any given set of circumstances the court can give effect to it. The *contra proferentem* rule operates, if at all, against the carrier. The claimant cannot use it to widen the effect of the clause so as to make its effects absurd.

23. Clause 4 does not exclude all the defendant's secondary obligations. Moreover even if it does, there is no rule of law against making such a contract.

Discussion

24. Whether, and to what extent, the defendants can rely on clause 4 falls to be determined as a matter of common law. The Unfair Contract Terms Act 1977 has no relevant application to this case: see Schedule 1, paragraph 2(c); nor are these contracts ones to which the Unfair Terms in Consumer Contracts Regulations 1999 apply.

25. Clause 4 says that the carrier shall not be responsible for loss (it must be, "of") or damage to or in connection with the goods shipped of any kind whatsoever, "*however caused*". The clause goes on to make clear that these words include loss or damage caused by unseaworthiness or unfitness of the vessel, or by "faults, errors or negligence, or otherwise howsoever". Moreover, part B of the clause exempts the carrier from liability for loss of or damage to or in connection with the goods shipped, "*of any kind whatsoever … arising or resulting from*", a large number of specific causes, including (again) unseaworthiness, and finally from "*any other cause whatsoever, whether or not of a like kind to those above-mentioned, and including negligence on the part of the Carrier, his servants, agents or others*".

26. This wide and somewhat repetitious language is plainly intended to relieve the carrier of liability for loss of or damage to the goods shipped caused by, amongst other things, the unseaworthiness or uncargoworthiness of the vessel, or the negligence of the carrier, its servants or agents. Thus, if effective, the clause would clearly protect the defendants against the claims made in the present action, which blame the alleged damage to the goods shipped on their negligence and the unseaworthiness, or uncargoworthiness, of their ship.

27. Indeed, read literally the words, "*however caused*", "*or otherwise howsoever*", and "*arising or resulting from … any other cause whatsoever …*" could comprehend any cause of loss of, or damage to, the goods shipped, including a deliberate refusal on the part of the carrier to perform its contract at all, or even theft by the carrier of the goods entrusted to it. On this construction the clause would operate to exclude liability for every potential cause of loss or damage and the holder of the bills of lading would have no remedy for any breach of contract by the carrier at all. As already indicated, the claimant says the clause should be read in this way and that, with this meaning, it is therefore repugnant to the main object of the contracts, and should be rejected altogether.

28. The common law's approach to the construction of contracts, however, is not a literalist one. This is illustrated by ***Glynn v. Margetson & Co.*** itself, which was decided in 1893, and is even more clearly the case today: see, for example, the speech of Lord Steyn in ***Sirius International Insurance Company (Publ) v. FAI General Insurance Limited*** [2004] UKHL 54, at paragraph 19.

29. If to give words in a contract, "*their full and complete meaning",* would produce a result at odds with the main object of the contract then, as Lord Herschell L.C. made clear in ***Glynn v. Margetson & Co.*** (at pages 354 to 355), the court will put upon those words a restricted meaning. In some cases, as Lord Halsbury pointed out (at page 357), the court may have to reject words, or even whole provisions, if they are inconsistent with the main purpose of the contract.

30. More commonly, however, and wherever possible, the court will attribute to the words used a meaning consistent with that purpose.

31. In the present case it is in my judgment plain that the words, "*however caused", "or otherwise howsoever"* and *"arising or resulting from … any other cause whatsoever*", when considered in their context as parts of contracts for the carriage of goods from one port to another, do not operate to relieve the carrier of liability for any and every breach of contract. These words bear a restricted meaning. They do not cover, for example, loss or damage caused by dishonesty on the part of the carrier. Whether this is because of a rule of law, or a principle of construction does not matter: the result is that the carrier would be liable for a breach of contract caused by its dishonesty. Moreover the words would not be strong enough to relieve the carrier from liability for loss of or damage to the goods caused by it arbitrarily refusing to ship them to the port of discharge at all. The clause shifts most risks which might result in loss of or damage to the goods shipped from the carrier to the holder of the bill of lading. But that is not inconsistent with the purpose of a commercial contract of carriage where the bearer of a risk can insure against it.

32. In my judgment it is unnecessary, and indeed impossible, to imagine all circumstances in which it might be said by the carrier that clause 4 applies, and where a court might have to decide whether it does or not. The fact that the application of the clause may have to be determined case by case does not make its meaning uncertain.

33. Moreover the principle that, in cases of doubt a contractual provision will be construed against the person who produced it, and for whose benefit it operates, does not extend to construing a contractual provision as widely as possible so as to render it repugnant to the main object of the contract read as a whole when it can be given a meaning consistent with that object.

34. For the reasons given above, in my view, clause 4 does not operate to relieve the carrier of all secondary obligations under the contracts. It follows that the question whether, if it did have the effect of reducing the contracts to mere declarations of intent, it should be rejected falls away.

Conclusion

35. The claimant's pleaded claims are that some of the goods shipped were damaged as a result of the negligence of the defendants, or the unseaworthiness or uncargoworthiness of their vessel. As I have indicated, properly construed, there is no reason to reject clause 4 as part of each of the contracts contained in or evidenced by the bills of lading; and it protects the carrier where damage to the goods shipped results from such causes. It is therefore effective to exempt the defendants from any potential liability for those claims.

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