STEPHENSON HARWOOD

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(1) JB Cocoa Sdn Bhd (2) JB Foods Global Pte Ltd (3) Baloise Belgium Nv/Sa (4) XL Insurance Company SE, Succursale Francais v Maersk Line AS (t/a Safmarine) [2023] EWHC 2203 (Comm)

In a recent English Commercial Court judgment in *JB Cocoa SDN BHD and others v Maersk Line AS* [2023] EWHC 2203 (Comm), the Commercial Court revisited several concepts relevant to cargo claims and handed down a judgment which, although it did not establish any new law, illustrates the importance of knowing where the carrier's responsibility for the cargo ends, in circumstances where discharge and delivery are not simultaneous.

Facts

A cargo of cocoa beans (the "**Cargo**") was shipped in non-ventilated containers from Lagos, Nigeria to Tanjung Pelepas, Malaysia on MV MAERSK CHENNAI (the "**Vessel**").[1] The Vessel sailed from Lagos on 8 September 2017 and the Cargo was discharged in Tanjung Pelepas, Malaysia by 1 October 2017. Following discharge, all the containers were stored in the container yard. The containers were eventually collected around 28 November 2017 and at devanning the Cargo was found to be suffering from condensation and mould damage.

The Claimants commenced proceedings against Maersk Line AS, the carrier, seeking damages in the amount of €185,355.78.

The BL, which incorporated the Hague Rules, contained, *inter alia*, the following terms:

"1. Definitions

'Carriage' means the whole or any part of the carriage, loading, unloading, handling and any and all other services whatsoever undertaken by the Carrier in relation to the Goods.

5. Carrier's Responsibility: Ocean Transport

5.1 Where the Carriage is Ocean Transport, the Carrier undertakes to perform and/or in his own name to procure performance of the Carriage from the Port of Loading to the Port of Discharge. The liability of the Carrier for loss of or damage to the Goods occurring between the time of acceptance by the Carrier of custody of the Goods at the Port of Loading and the time of the Carrier tendering the Goods for delivery at the Port of Discharge shall be determined in accordance with Articles 1-8 of the Hague Rules save as is otherwise provided in these Terms and Conditions. These articles of the Hague Rules shall apply as a matter of contract.

5.2 The Carrier shall have no liability whatsoever for any loss or damage to the Goods, howsoever caused, if such loss or damage arises before acceptance by the Carrier of custody of the Goods or after the Carrier tendering the cargo for delivery. Notwithstanding the above, to the extent any applicable compulsory law provides to the contrary, the Carrier shall have the benefit of every right, defence, limitation and liberty in the Hague Rules as applied by clause 5.1 during such additional compulsory period of responsibility, notwithstanding that the loss or damage did not occur at sea."

[1] One container out of the 12 containers was shipped separately on the MV MAERSK CAMEROUN, which arrived a week later, and which was collected sooner, however it was still found to be damaged upon devanning.

The Claimants' case was that the Cargo was in sound condition at the time of loading and the Defendant was obliged to take reasonable care of the Cargo following discharge of the Cargo from the Vessel until its delivery. The Claimants argued that the Cargo suffered mould and wet damage because of the length of time the Cargo was kept in closed containers and that amounted to a failure to take reasonable care of the Cargo. The Claimants further contended that the Defendant was not entitled to rely on exceptions or exemptions from liability in the BL or under the Hague Rules and were liable for damages.

The Defendant, on the other hand, argued that the terms of the BL exempt it from any liability for any damage occurring following discharge from the Vessel as it was not responsible for the Cargo before loading and after discharge. In addition, the Defendant also contended that in any event, it had done everything to take reasonable care of the Cargo, but the Cargo deteriorated because of inherent vice.

There were also arguments raised in respect of standing of some of the Claimants to bring a claim, failure to mitigate as well as a short delivery claim.

Both sides adduced expert evidence, mainly dealing with the probable causes of the damage to the Cargo.

Decision

Having considered the expert evidence, the Judge found that the damage to the Cargo had occurred after discharge, during the containers' prolonged stay in the container yard without the doors having been opened, and that the Cargo had not suffered from inherent vice.

Following the English Court of Appeal's decision in *The Giant Ace*[2] where it was held that "discharge" was not the same as "delivery" the Judge said that it was clear that that the Hague Rules only applied compulsorily in respect of the period from loading to discharge. The responsibilities before loading and after discharge would be a matter of contract. The Judge then proceeded to consider, whether, on the true construction of Clause 5.1 of the BL, the Hague Rules would continue to apply after discharge of the Cargo from the vessel until delivery, as argued by the Claimants or whether the Hague Rules ceased to apply after the Cargo was discharged from the Vessel, as was the Defendant's position.

The Judge considered the wording of the BL as a whole and considered that the phrase "tendering the goods for delivery" equated to discharge, as opposed to delivery. The Judge held that, on the true construction of the BL, first sentence of Clause 5.1 required the carrier to contractually perform any acts in relation to the cargo that the carrier undertook to perform and the second sentence of Clause 5.1 meant that insofar as those acts fell within the scope of the Hague Rules, meaning from loading until discharge, then liability of the carrier would be determined in accordance with the Hague Rules. The Judge considered this construction also consistent with Clause 5.2 which reinforces the temporal limits of the Hague Rules with the second sentence extending the defences and limitations of the Hague Rules outside their normal operations, should the obligations of the carrier be extended outside the scope of their normal operation.

The Judge therefore found that Clause 5 of the BL excluded the carrier's liability for loss of or damage to the goods occurring before loading or after delivery, which meant that as the damage to the Cargo occurred after the Cargo had been discharged from the Vessel, the Defendant was not liable for the damage and the Claimants' claim failed.

Comment

Whilst the judgment analyses in detail the approach to inherent vice, burden of proof in bailment cases as well as party's standing to bring a cargo claim, it highlights the importance of knowing where the responsibility of the carrier ends as otherwise the party entitled to the cargo could be left with no recourse for damaged cargo. The terms governing the carrier's obligations where delivery and discharge do not occur simultaneously come down to how the contractual terms between the parties are construed, which will differ from one case to another. To illustrate the importance of this point, in this case, if the terms of the contract had provided that the carrier remained responsible for the Cargo between discharge and devanning, the Judge said that it would have found the carrier liable on the basis that the damage to the Cargo had been caused by its failure to take reasonable care of the cocoa beans by ventilating the containers by opening the doors.

Please click here for a copy of the full judgment.

[2] Click here to read the CIF Weekly Issue 34 commenting on the judgment in Fimbank Plc v KCH Shipping Co Ltd [2023] EWCA Civ 569

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