



Campbell Johnston Clark

Abandoned containers: affirmation of contract not an option *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2015] EWHC 283.

The recent High Court judgment is noteworthy as the Court considered how liquidated damages, such as demurrage, interact with the principle of mitigation of loss. Further, the Court considered whether affirmation of the contract by a carrier, as an alternative remedy to acceptance of a repudiatory breach of the bill of lading by the merchant, would be permitted so that carriers could continue to claim demurrage throughout periods of detention of containers by merchants.

BACKGROUND

Thirty five containers of raw cotton were shipped from various ports in the Middle East to Bangladesh pursuant to five bills of lading. Following discharge in May 2011, the consignee failed to collect the containers because following conclusion of the sale contract and shipment of the cargo, the market price of raw cotton fell. Thereafter, the consignee sought to cancel payment of the sale contract price under the letter of credit and litigation proceedings were commenced in Bangladesh by the consignee against the shipper resulting in an interim injunction being issued in June 2011 to restrain the issuing bank from making any payment. However, prior to the proceedings the shipper had received payment for part of the cargo. In light of the proceedings, the Bangladeshi customs authorities refused to release the containers from the yard without a court order.

In August 2011 the carrier emailed the shipper asking what actions had been taken by the shipper to release the containers and sought confirmation that demurrage would be paid. The shipper responded on 27 September that it had no title to the goods as payment had been received and property had passed to the consignee. Accordingly, the shipper was not liable to return the containers to the carrier.

The carrier commenced proceedings in the English High Court against the shipper claiming container demurrage pursuant to clause 14.8 of the bill of lading which provided that:

The Carrier allows a period of free time for the use of the Containers and other equipment in accordance with the Tariff and as advised by the local MSC agent at the Ports of Loading and Discharge. Free time commences from the day the Container and other equipment is collected by the Merchant or is discharged from the Vessel or is delivered to the Place of Delivery as the case may be. The Merchant is required and has the responsibility to return to a place nominated by the Carrier the Container and other equipment before or at the end of the free time allowed at the Port of Discharge or the Place of Delivery.

Demurrage, per diem and detention charges will be levied and payable by the Merchant thereafter in accordance with the Tariff."

Pursuant to the bill of lading terms, the shipper had responsibilities of a "Merchant" as defined in the contract including the obligation to pay demurrage in accordance with clause 14.8. It was agreed that the period of free time stated in clause 14.8 commenced on 13 May 2011 for the first 10 containers, on 20 May for the second lot of 12 containers and on 27 June for the last four containers.

The shipper argued that demurrage had not accrued because the carrier had not nominated a place for the return of the containers and that such an obligation constituted a condition precedent of the contract. Alternatively, it was argued that the carrier failed to mitigate losses by either purchasing replacement containers or emptying the containers and arranging their removal from the yard.

DECISION

Question 1: Was it a condition precedent of the contract that the carrier nominates a place of redelivery at the time of delivery?

Decision: No. The Court took the view that there was nothing in the wording of the contract that made such an obligation a condition, and on a commercial basis, there was no requirement for the carrier to nominate a place of redelivery until after the containers had been unpacked by the merchant. It would be commercially unreasonable for the merchant to be relieved of the obligation to pay demurrage merely because no place of redelivery had been nominated before the containers were ready to be redelivered.

Question 2: Was the shipper liable to pay the carrier demurrage for each day that the containers remained unavailable to the carrier?

Decision: Clause 14.8 was a liquidated damages clause which meant damages were payable to the carrier if the merchant detained containers beyond the agreed 14 days of free time. As the container had not been collected following the expiration of free time, the merchant was in breach of the contract and liable to pay demurrage.

Question 3: Was the carrier entitled to affirm the contract and claim demurrage continuously from the expiration of free time or did the shipper's obligation to pay demurrage cease at some point?

Decision: The Court considered that on the evidence, the shipper had not shown that the carrier had failed to mitigate losses



by either unpacking the containers or by issuing proceedings in Bangladesh to seek release of the containers. Further, the carrier had not failed to mitigate losses by not replacing the detained containers as they were not needed for onward shipments. The Court further held that, in any event, where a liquidated damages clause has been agreed, there is no scope of reducing the agreed damages amount on the grounds of failure to mitigate and that liquidated damages will apply regardless of whether any loss is actually suffered.

Question 4: Did the detention of the containers amount to a repudiatory breach of the contract by the merchant and did that repudiation bring the merchant's obligation to pay demurrage at an end?

Decision: Following receipt of payment, the shipper was released from further performance of the bill of lading and the carrier had been informed of the same on 27 September 2011. Detention following 27 September was sufficiently lengthy so as to frustrate the commercial purpose of the contract.

However, a repudiatory breach does not automatically bring a contract to an end. The innocent party has the option to either accept the breach and claim damages or to keep the contract in force and claim the contract price. The Court considered whether the carrier was entitled to affirm the contract and claim demurrage by applying the test as set out in *White v Carter*, namely a) whether damages were an adequate remedy, and b) whether maintaining the contract would be wholly unreasonable. It was held that the carrier no longer had any reason to keep the contract alive solely to claim demurrage rather than unliquidated damages to which the mitigation principle applied. Clause 14.8 would operate as a penalty clause were the carrier to be permitted to affirm the contract because the sum claimed would be manifestly extravagant in comparison to the maximum amount of damages accrued by the carrier. Further, it was held that the carrier had no legitimate interest in keeping the contract alive beyond 27 September as no evidence had been adduced that the carrier was incurring any losses from that date onward.

COMMENT

Affirmation of contracts following repudiation was previously examined by the High Court in the *Aquafait*. Although owners were permitted to affirm a charterparty and claim hire up to the agreed earliest redelivery date, the same was not permitted for demurrage when containers are essentially abandoned by cargo interests. In charterparties, redelivery dates are always agreed.

When containers are carried pursuant to bills of lading and cargo interests fail to return containers to the carrier, there is no agreed date on which the obligation to return empty containers ends. The definitive criterion therefore appears to be a cut-off date where, failing the lack of an agreed date for termination of the contract then, instead, it will be a date on which the contract would come to an end had it been performed.

The Court was adamant that a carrier cannot be permitted to keep contracts alive unfettered and such a clause would not be enforceable as it will be impossible to justify on compensatory grounds when recovery of demurrage indefinitely would be unreasonable.

This leaves container owners faced with the issue of, effectively, abandoned containers often containing unwanted cargo. How container owners can recover the containers and/or sell/dispose the cargo will be a matter of both local law and, potentially, its interaction with the law of the governing contract (usually the bill of lading). This can be a time consuming process, but CJC has experience in this regard and container owners should not hesitate to contact us with any queries.



Louise Lazarou
Associate, London
louise@cjclaw.com



Allen Marks
Partner, Newcastle
allen@cjclaw.com

59 Mansell Street, London, E1 8AN, Tel: +44 (0) 207 855 9669

Campbell Johnston Clark Limited is registered in England and Wales with Company registration number 8431508 and is authorised and regulated by the Solicitors

Regulation Authority. Its registered office is at 59 Mansell Street, London, E1 8AN. SRA Number 596892.

London • Newcastle • Dublin • Singapore

www.cjclaw.com