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Notes from the Bar: when is a bill of lading not a bill of lading?

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In this update, we look at the case of *The Star Quest* [2016] 3 SLR 1280; [2016] SGHC 100, where the Singapore High Court granted the shipowner unconditional leave to defend a claim for misdelivery on the ground that it is arguable that the bills of lading issued neither operated as contractual documents nor documents of title; accordingly, there was no requirement for the cargoes to be delivered against presentation of the bills of lading.

The Facts

Phillips 66 International Trading Pte Ltd (the "**Appellant**"), a physical supplier of bunkers, entered into three materially identical contracts for sale of bunkers with two subsidiaries of OW Bunker A/S (the "**Buyers**").

The bunkers were shipped on board the Respondents' bunker barges (the "**Vessels**") and bills of lading were issued to the Appellant as shipper. The bills of lading stated that goods are to be delivered "*TO THE ORDER OF PHILLIPS 66 INTERNATIONAL TRADING PTE LTD or assigns*".

While the bills of lading stated that the cargoes were to be delivered to the Appellant "*or assigns*", the exact destination of the bunkers were unclear on the face of the bills of lading as they only made reference to "*OCEAN GOING VESSELS*".

Upon loading the cargoes and receiving the bills of lading, the Appellant invoiced the Buyers for the bunkers. By that time, the Vessels, being bunker barges, had already supplied the bunkers to other vessels for their consumption. Notably, these deliveries were made without presentation of the bills of lading, which remained in the Appellant's possession at all times.

Subsequently, OW Bunker A/S went into insolvency and the Appellant, having not receive payment from the Buyers, commenced an action against the Respondents for breaches of contract, bailment and tort of conversion on the basis that the cargoes were delivered without the presentation of the bills of lading. The Appellants then applied for summary judgment against the Respondents.

In resisting the summary judgment application, the Respondents raised the following discrete defences:

- First, the bills of lading were merely serving a receipt function and did not operate as either as a contract of carriage or a document of title and so the claim for misdelivery in breach of contract should be rejected;
- Second, title and possession of the cargoes had passed on loading and so the claims in bailment and/or conversion should be rejected;

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- Third, the cargoes were delivered pursuant to the custom of the discharge port which permits delivery without presentation of the bills (“**Customs of the Local Bunker Industry Defence**”);
- Fourth, the Appellant is estopped from denying that the Respondents were permitted to deliver the bunkers without production of the bills of lading by reason of previous course of dealing (“**Estoppel Defence**”); and
- Fifth, the Respondents are not liable because the bills of lading were not signed by the master, but by the chief officer or cargo officer without authority (“**Want of Authority Defence**”).

The Decision

The Singapore High Court dismissed the appeals and held that the Respondents were entitled to unconditional leave to defend the Appellant’s claims in contract, bailment and tort of conversion.

In particular, while the Court found that the Customs of the Local Bunkering Industry Defence to be a “*tenuous argument*” (at [60]) and the Want of Authority Defence “*unarguable*” (at [64]), it was convinced that the rest of the defences raised triable issues which were sufficient for the Court to grant an unconditional leave to defend.

The Reasoning

The judgment contained discussions on some of the commonly raised defences to a claim for misdelivery, and the following points are particularly noteworthy.

Issue 1: when is a bill of lading not a bill of lading?

The Court started by recognising that it was trite that a bill of lading serves three functions: (a) receipt of goods; (b) evidence of the contract of carriage; and (c) document of title (*The Rafaela S* [2005] 2 AC 423 at [38]). However, depending on the circumstances, a bill of lading issued may not always serve all three functions.

First, in relation to the contractual function, the Court found that while the bills of lading had the usual indicia of an “order” bill, for instance, they were issued in triplicates, contained the notation “*one of which is accomplished, the others stand void*”, and that they were expressly labelled as “*Vopak BILL OF LADING*”, there were other features which tended to show that the bills of lading did not serve the contractual function.

The Court pointed out that the bills of lading lacked reference to any destination of discharge. While it is not strictly a requirement for a bill of lading to name a discharge port (e.g. it can be ship-to-ship transfer), there had to be at least a particular destination or a range of destination, which is to be nominated at a later stage, before the bill of lading can be said to evidence the contract of carriage. Otherwise, contract would be too uncertain to be enforceable.

On the facts, the provisions relating to destination provided that:

- the cargoes were shipped “*at the port of **PULAU SEBAROK**, **SINGAPORE** and bound for **BUNKERS FOR OCEAN***

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GOING VESSELS" [emphasis in bold in original]; and

- the cargoes are to be delivered "*at the aforesaid port of* ***BUNKERS FOR OCEAN GOING VESSELS*** *or so near as the vessel can safely get, always afloat*" [emphasis in bold in original].

The Court found that there was no reference to destination in the bills of lading, and even if the phrase "*OCEAN GOING VESSELS*" is construed as the destination, it is still far too vague and wide. Accordingly, the lack of reference to destination of discharge makes it arguable that the bills of lading did not serve the contractual function.

Second, in relation to the document of title function, the Court highlighted that a document can have the status of a document of title in the common law sense (i.e. a document, the transfer of which operates as a transfer of the constructive possession of the goods) only if it needs to be produced to the carrier by the person claiming delivery of goods.

On the facts, the Court said that the contemplation of multiple delivery under the bills of lading contradicted with the notation "*one of which is accomplished, the others stand to void*", which was supposed to render the other two sets of the bills of lading spent once one set is presented for delivery of a sub-parcel (See *BNP Paribas v Bandung Shipping Pte Ltd* [2003] 3 SLR(R) 611 at [26]; *The Rafaela S* at [45]; and *The Sormovskiy 3068* [1994] 2 Lloyd's Rep 266 at p272).

Given that the bills of lading expressly stipulated delivery to *multiple* vessels, it would be unworkable to expect delivery to only be made against presentation of the bills of lading.

Accordingly, the Court held that it was clearly arguable that there was no requirement for delivery to be made only against presentation of a bill of lading.

Having found that it is arguable that the bills of lading in question do not serve the contractual and document of title functions, the Court went on to examine the underlying sale contracts and commercial context, and consider how they can be used to construe the terms of the bills of lading.

In essence, the Court found that the existence of a 30 day credit period and the lack of reference to bills of lading in the sale contracts between the Appellant and the Buyers makes it commercially unworkable for the Appellant and the Respondent, both of whom were operators in the local bunker industry and had a "*working knowledge*" of the said sale contracts, to have intended for the cargoes to only be discharged upon presentation of the bills of lading.

Issue 2: when will the customs of the discharge port exception apply?

As noted earlier, one of the other discrete defence which the Respondents raised in response to the misdelivery claim is that even if the bills of lading served the contractual and document of title functions, there was no misdelivery because the cargoes were discharged according to the custom of the local bunker industry.

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The Court accepted that there are authorities supporting the proposition that customs of the discharge port may excuse the carrier from liability for delivering cargoes without presenting a bill of lading (see *The Sormovskiy 3068* at p280-282; *Olivine Electronics Pte Ltd v Seabridge Transport Pte Ltd* [1995] 2 SLR(R) 527).

However, it went on to cite the case of *Chan Cheng Kum v Wah Tat Bank Ltd* [1971-1973] SLR(R) 28 at [15] for the proposition that even if there is evidence to support the alleged custom, the Respondents would still have to show that the custom is certain, reasonable and not repugnant. In this regard, "*[i]t would be repugnant if it were inconsistent with any express term in any document it affects, whether that document be regarded as a contract or as a document of title*".

As such, the Court held that assuming that the bills of lading are construed to be regular "order" bills (i.e. serves all three functions of a regular bill of lading), the alleged custom of the local bunker industry which allows delivery without presentation would be repugnant to the bills of lading *qua* document of title.

Further, the Court clarified that even if the term requiring delivery of cargoes on presentation of bills of lading is an implied term, the customs of the discharge port would still not prevail as an implied term "*would no less be a term of the contract of carriage*" (at [60]).

Issue 3: when will a bill of lading holder be estopped from denying that the shipowner can discharge without presentation?

Another discrete defence raised by the Respondents was that the Appellant is estopped by acquiescence from asserting that delivery must be made on presentation of the bills of lading.

The Court agreed that the doctrine of estoppel by acquiescence is well established, citing *Nasaka Industries (S) Pte Ltd v Aspac Aircargo Services Pte Ltd* [1999] 2 SLR(R) 817 at [70]:

"*Generally, five circumstances must be present in order that the estoppel may be raised against A:*

(a) B must be mistaken as to his own legal rights;

(b) B must expand money or do some act on the faith of his mistaken belief;

(c) A must know of his own rights;

(d) A must know B's mistaken belief;

(e) A must encourage B in his expenditure of money or other act, either directly or by abstaining from asserting his legal right…"

In the present case, the parties accepted that there had been previous dealings between the Appellant and the Respondent where similar bills of lading had been issued. On those occasions, the cargoes were delivered without presentation of the bills and the Appellant did not protest against these alleged misdelivery or communicate to the Respondents that these earlier cargoes should have been delivered on presentation of bills of lading.

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It appears that the Court was persuaded by the Respondents' argument that the lack of any protest in the past showed that the Appellants regarded the bills of lading as merely a document of receipt. If so, it would be inequitable for the Respondents to now assert otherwise.

Accordingly, the estoppel defence was a *bona fide* arguable defence which ought to be fully canvassed at trial.

Issue 4: can a shipowner escape liability for misdelivery by arguing that the bill of lading was signed without authority?

The distinct defence of lack of authority to issue the bills of lading failed because the respective chief officer or cargo officer who signed the bills of lading (the "**Representatives**") had actual authority to sign the bills on behalf of the master.

On the facts, the bills of lading expressly bore the vessel's stamp, and the Representatives signed above the word "master". Moreover, the Representatives were signing the said bills in the ordinary course of their employment and not acting on their own accord. Thus, the Court found that they had express/implied authority to sign the said bills of lading.

Alternatively, the Respondents, by allowing the Representatives to sign and stamp the bills of lading, would have represented to the Appellants that they had the apparent authority to sign the said bills on behalf of the master.

In the circumstances, the Court found that the defence of lack of authority was unarguable.

Key lessons learnt:

- Be aware that for a bill of lading to serve its function as evidence of the contract of carriage, the *destination* must be certain (e.g. particular port or STS transfer) or ascertainable (e.g. range of destination to be nominated at a later stage);

- Also note that for a bill of lading to serve its function as a document of title, it cannot be unworkable in the sense that the bill contemplates delivery to *multiple* consignees and, at the same time, is expected to become spent once a single set is presented for delivery by one of the consignees.

- *The Star Quest* seems to cast some doubts as to whether customs of the discharge port remains an exception to the presentation rule since it appears that such a custom would almost always be repugnant to the term of the bill of lading which requires delivery against presentation.

- As a carrier, it would be good practice to include some form of disclaimer when delivering cargo without presentation of bill of lading, even if the delivery is against a letter of indemnity. The disclaimer should be worded such that the compliance with the request for delivery without presentation was not to be regarded as an agreement to future requests. While it may sound somewhat pedantic, it would at least give the owners some room to argue against any such estoppel by acquiesence.

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The Shipping & International Trade team at Kennedys Legal Solutions provides seamless dispute resolution support for a full spectrum of shipping and international trade matters through the firm's international network of offices and liaison firms.

Over the years, Joseph Tan and his team have gathered a good following of clients comprising of shipowners, charterers, cargo interests, offshore oil & gas support operators, and commodity trading houses. He has also been consistently recommended by Legal 500 Asia Pacific as a leading practitioner in shipping and trade related work since 2011.

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