

Straight Bill of Lading Leaves Cargo Interests in Dire Straits

Sumanu Natural Resources Ltd v Mediterranean Shipping Co SA [2016] EWCA Civ 34

In this case cargo interests brought a claim against the carriers, MSC, seeking damages of \$3 million in relation to the alleged loss of a cargo of coltan ore. In 2014 the English High Court ruled that MSC was entitled to summary judgment. The English Court of Appeal has now rejected an application by cargo interests for permission to appeal that decision.

Sumanu v MSC is not a groundbreaking judgment. However, it does illustrate a number of pitfalls that can arise where straight bills of lading are used, and more generally the dangers of not aligning the parties to a sale contract with the parties to the bill of lading contract. Indeed, from the point of view of buyers and sellers of goods carried by sea, it serves as a timely reminder of what not to do!

FACTS

The key facts are as follows:

- in May 2012 a consignment of coltan ore worth around US\$3 million was shipped from Tanzania to China. Coltan ore is a key component in many electronic devices;
- the ore was sold by SJM Gems International Ltd to Sumanu Natural Resources Ltd (together the "Claimants"), who on sold the cargo to King Tan Tantalum Industry Ltd (the "Buyers"). Originally the sale was to have been on FOB terms, but it was later changed to a CIF sale;
- a straight bill of lading was issued naming a freight forwarder, CMF Investment Ltd, as shipper, and the Buyers as consignee. The only reference to either Claimant on the face of the B/L was to Sumanu Natural Resources Ltd as the notify party;
- the ore was packed into 266 sealed drums, which were then placed in a number of containers. The containers were themselves subsequently sealed and placed in storage awaiting export clearance, to be arranged by CMF Investment Ltd;
- upon arrival of the cargo at the discharge port in China, the Buyers discovered that the drums were full of sand and pebbles rather than coltan ore, and refused to take delivery. Clearly a major fraud of some kind had been perpetrated, although the judgment does not address the question of who the perpetrator(s) was, or how the fraud

was carried out;

- the Claimants commenced proceedings in the English-High Court against the carriers, MSC, alleging that the substitution of the contents of the drums must have occurred during the period when MSC was responsible for the safe carriage of the containers. They claimed \$3 million by way of damages which, although unclear from the judgment, presumably represented the value of the missing cargo. Importantly, SJM Gems International Ltd did not commence proceedings within the one year time bar under the Hague Visby Rules.

HIGH COURT DECISION

In the High Court proceedings, MSC sought summary judgment on the claim. (A summary judgment is a judgment handed down without a full trial in circumstances where the claim stands no real prospect of success, and is relatively rarely encountered in the English Courts.)

MSC's application for summary judgment was accepted for a number of reasons. First, as MSC pointed out, cargo interests' case relied on an argument that approximately 44 tonnes of sand and pebbles were hidden on the Vessel and substituted for the coltan ore at some point during the voyage, with the cargo subsequently being hidden somewhere on the vessel. Furthermore, the containers were delivered with at least two of the three seals intact. The sheer implausibility of cargo interests' argument meant that the appeal had no real prospect of success.

Secondly, as the Claimants eventually conceded, they did not have title to sue in contract. This was because the contract of carriage was a straight bill of lading naming the Buyers as the consignee, and under English law therefore the Claimants were not party to the contract of carriage. Sumanu's claim in bailment was dismissed because, as an intermediate party in the sale chain, it never had possession of the cargo and could not therefore be a bailee.

Finally, even if SJM Gems International Ltd could put forward a realistic alternative non-contractual claim, based on tort or bailment, it was in any case also time-barred under the Hague Visby Rules.

COURT OF APPEAL DECISION

The Court of Appeal did not take long to dismiss the Claimants' application to appeal, largely relying on the same grounds as the judge in the first instance proceedings.



The Claimants were thus unable to pursue a claim against carriers. Furthermore, although it is not expressly addressed in the judgment, it seems clear that they were not paid by the Buyers, and were therefore left nursing losses of approximately US\$3 million.

COMMENT

Clearly the result in this case was the right one. Irrespective of the issues concerning title to sue and time bars, the Claimants were always going to face an uphill struggle in claiming against MSC, given that tonnes of bulk cargo do not generally go missing from sealed containers during the middle of a voyage. It seems almost certain that the fraud was perpetrated at some point before or after the sea leg of the voyage.

Given the above, it could be argued that the title to sue and timebar issues were somewhat peripheral, given the rather hopeless nature of the cargo interests' claim as a whole. Nevertheless, they were clearly instrumental in the summary judgment application succeeding.

Furthermore, the case serves as a good illustration of a number of wider issues. For example, it seems clear that a straight bill of lading naming the freight forwarder as shipper and the Buyers as consignee was inappropriate for the (eventual) CIF sale. Straight bills of lading are normally only used where payment for the goods has already been received. The use of a straight bill of lading in this case had a number of serious consequences for the Claimants:

- a. the Buyers were apparently able to take delivery of, inspect, and reject the goods, despite the Claimants having not been paid. In CIF sales it is usual for sellers to organise a negotiable bill of lading that can be endorsed to the buyers only after payment is received. Sellers of course often give themselves additional protection by insisting on a letter of credit. By using a straight bill of lading, it appears that the Claimants lost control of the *keys to the warehouse*; and
- b. moreover, not only had they not been paid, but the Claimants were left unable to bring a claim under the bill of lading.

The key point is that the contract of carriage apparently did not dovetail with the sale contract arrangements.

CONCLUSION

Sumanu v MSC does not make any new law, but for parties involved in international trade it is a useful reminder of what can go wrong. There are a few key lessons, for sellers especial-

ly, to take away:

- (i) be careful only to use straight bills of lading where appropriate i.e. normally when the goods have already been paid for;
- (ii) consider whether extra security, such as a letter of credit, is required for a particular transaction; and
- (iii) make sure timebars are noted and protected!

Where necessary, specialist legal advice on the above issues should be sought.

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