SUN MOBILITY
Insurance and Claims Services Limited

27 May 2011
Ref : Chans advice/125

To: Transport Industry Operators

BIFA STC - set off & time bar

The English Court of Appeal issued a Judgment on 20/1/2011 holding two clauses in the standard trading conditions of the British International Freight Association valid. One of them was about all sums due to the forwarder to be paid without reduction or deferment on account of any claim, counterclaim or set-off. The other was about the 9-month suit time limit. [2011] All ER (D) 128 (Jan); [2011] EWCA Civ 18

This was an appeal against the order of His Honour Judge Mackie Q.C. granting a forwarder summary judgment for £100,000 against an importer on its claim for £134,617.96 and directing that the importer pay the sum of £24,617.96 into court as a condition of being allowed to defend the balance of the claim. The importer ran a garden centre which supplied, among other things, sandstone paving imported from India which was bought from the suppliers on f.o.b. terms. The stone was loaded into containers, carried to a convenient port, shipped by sea to a United Kingdom port and transported by lorry to the importer's premises. The forwarder carried on business as a freight forwarder and was engaged by the importer to arrange the carriage of the stone from the port of loading in India to its destination in the United Kingdom. The two companies began doing business together in 2002 and apart from a short interlude between 2004 and 2005 continued to do so until about November 2008. The forwarder started these proceedings in January 2009 seeking to recover charges in respect of the carriage and importation of various parcels of stone between April and December 2008. On 2/3/2009 the importer served a defence and counterclaim in which it alleged that the forwarder had provided it with freight forwarding services pursuant to a contract entered into between the parties orally in June 2005 under which the forwarder agreed to act as its agent to arrange the carriage of the goods from India to the United Kingdom, but on terms that the forwarder would be solely liable on the contracts it made with third parties for that purpose. The importer also alleged that it was agreed that the forwarder would be entitled to recover in respect of the ocean carriage only such amounts as it paid to the carrier. It said that in breach of contract and of its fiduciary duty as agent the forwarder had overcharged it in respect of the expenses of ocean carriage and other transport charges. Accordingly, the importer said that it was not liable to pay the whole of the amounts shown in the invoices on which the claim was based and, moreover, that it was entitled to recover the amounts by which it had been overcharged in the past. They were estimated at between £300,000 and £400,000. The forwarder contended that the contract incorporated the standard trading conditions of the British International Freight Association ("BIFA"), which provided as follows:

> "21(A) The Customer shall pay to the Company in cash, or as otherwise agreed, all sums when due, immediately and without reduction or deferment on account of any claim, counterclaim or set-off.
> 27(B) . . . the Company shall in any event be discharged of all liability whatsoever and howsoever arising in respect of any service provided for the Customer . . . unless suit be brought and written notice thereof given to the Company within nine months from the date of the event or occurrence alleged to give rise to a cause of action against the Company."

The forwarder denied that it had agreed to act as the importer's agent. It relied on the fact that it had provided a written quotation of charges for the various services it was willing to provide and maintained that the two of them had contracted as principals. It was therefore entitled to charge the rates set out in its quotation, as varied by agreement from time to time, for the various services it performed regardless of the terms it agreed with third parties, such as the ocean carriers. It also relied on the two clauses in the BIFA conditions and argued that clause 21(A) prevented the importer from setting off against its liability under the invoices any claims it might have in respect of earlier charges, which were in any event barred by clause 27(B). In response the importer sought to rely on the Unfair Contract Terms Act 1977, arguing that both clauses were unreasonable and therefore unenforceable. That was the shape of the dispute when the matter came before the judge on the forwarder's application for summary judgment. The judge thought it unlikely that the importer would establish its case on agency, but he did not feel able to decide the matter summarily. He did hold, however, that the claim was bound to succeed insofar as it would do so if the relationship were one of agency. Next, he held that the contract incorporated the BIFA conditions. He held that clause 21(A) meant what it said and that it prevented the importer from setting up cross-claims in answer to forwarder's claim. He also found that it satisfied the requirement of reasonableness. He then held that clause 27(B) was wide enough to discharge any liability in restitution in respect of any previous overcharging and found that it also satisfied the requirement of reasonableness. In the light of those conclusions he made the order that, even if the importer were to persuade the court that its relationship with the forwarder was one of agency, a sum of £100,000 would still be due.

It was accepted in the Court of Appeal proceedings that the BIFA conditions were incorporated into the contract, but the importer challenged both the correctness of judge's construction of clauses 21(A) and 27(B) and his finding that both clauses satisfied the requirement of reasonableness of the Unfair Contract Terms Act.

Clause 21(A) contains a prohibition against set-off of a kind commonly found in commercial contracts. Its purpose is to ensure that amounts falling due in respect of goods or services are paid promptly, thereby ensuring that cash-flow, which has been described as "the life-blood of business", is not interrupted. The meaning of clause 21(A) was clear on its face: it did not prevent the customer from pursuing claims against the supplier, but it did prevent him from withholding payment in satisfaction of a claim or (if his claim was unjustified) from withholding payment until the merits have been determined. On the other hand, the clause does not prevent the customer from withholding payment on the grounds that the sum claimed has not fallen due at all. The forwarder's claim was to recover the sums shown in the various invoices, each of which identified the various services or disbursements in respect of which payment was claimed. The importer's case was that the forwarder had overcharged it for ocean freight and had sought to recover charges for repositioning containers and handling charges at the port of loading which were for the account of the suppliers under the contract of sale. However, an analysis of the invoices showed that the disputed amounts came to no more than £15,771.74 in all. To the extent that the amounts claimed in the invoices were not, or could not properly be, contested, they were "due" in any sense of the word. The Court of Appeal was unable to accept the suggestion that if any part of the sum claimed in an invoice was disputed or could be shown not to be payable nothing was "due" and the provision against set-off did not apply. That was not what the clause said, nor was it consistent with the ordinary use of language. Clause 21(A) simply provided that any sums that were due must be paid without deduction. The judge accepted that the invoices were disputed in part and made allowance for the importer's arguments by limiting the amount in respect of which he gave judgment to £100,000, a sum which on the evidence was indisputably due, whatever the merits of those arguments. He refused to give credit for the much larger amounts that were the subject of the counterclaim because he held that clause 21(A) prevented the importer from setting them off against the sums due under the invoices. The purpose of the clause was not to affect the underlying obligations, merely to ensure that sums due for services rendered were paid promptly without deduction, leaving the customer free to seek such remedies as he might be entitled to by separate action.

It was common ground that the Unfair Contract Terms Act 1977 applied in this case because the importer, although not a consumer within the meaning of the Act, contracted on the forwarder's standard terms of business: see section 3(1). Section 11(1) of the Act provides as follows:

> "In relation to a contract term, the requirement of reasonableness for the purposes of this part of this Act ... is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made."

The circumstances described in Schedule 2 give some indication of the matters that are likely to be of relevance when determining whether the term in question is reasonable. They include: the relative strength of the parties' bargaining positions, whether the customer should have known of the existence and extent of the term, and whether the customer could have entered into a contract with an alternative supplier without having to accept a similar term.

The judge recognised that the importer was a small business, but he found that it was an experienced commercial enterprise. He was satisfied that there were many businesses offering freight forwarding services which the importer could have chosen instead of the forwarder, had it wished to do so. He could also have found that the importer had done business with the forwarder in the past, and that the importer was, or should have been, aware that the forwarder contracted on BIFA terms, because it had made that clear in all its business documents. The importer would have had no difficulty in obtaining a copy of the BIFA terms, had it wanted to do so. The judge could also have found from his own experience that clauses requiring payment of invoices without set-off were common in commercial contracts of many different kinds. In the Court of Appeal's view the judge had sufficient material before him to enable him to determine whether Clause 21(A) satisfied the requirement of reasonableness in this case. In the Court of Appeal's view the judge's finding that clause 21(A) satisfied the requirement of reasonableness was plainly open to him on the material before the court and was fully justified. The relative sizes in corporate terms of the parties to the contract was unlikely to be a significant factor in cases of this kind where a small but commercially experienced organisation contracted to obtain services of a kind that were available from a large number of competing suppliers. Moreover, where standard terms of this kind had been negotiated between representatives of suppliers and customers (as was the case with the BIFA conditions - see *Schenkers Ltd v Overland Shoes Ltd*) they were likely to represent a fair balance of competing interests. The importer had done business with the forwarder over a considerable period and could be expected to be aware of its use of the BIFA conditions. In those circumstances the Court of Appeal could see no basis on which the importer could hope to persuade the court that the requirement of reasonableness was not met in this case.

Clause 27(B) was of a very different nature, being a time-bar provision of a kind that was commonly found in contracts for the carriage of goods by sea and road. Its operative language (". . . shall in any event be discharged of all liability whatsoever and howsoever arising . . .") closely resembles that of Article III, rule 6 of the Hague-Visby Rules, which has been held to discharge the carrier from substantive liability, not merely to operate as a procedural time-bar: see *Aries Tanker Corporation v Total Transport Ltd (The 'Aries')* [1977] 1 W.L.R. 185. In the Court of Appeal's view clause 27(B) had the same effect. It was deliberately framed in very broad terms ("all liability whatsoever and howsoever arising") and was on its face intended to discharge the company from all liability. The effect, as Lord Wilberforce put it in the *The Aries* (at page 188F), was that once the prescribed time had expired any claim had "not merely become unenforceable by action, it [has] simply ceased to exist". By its counterclaim the importer sought to recover various amounts paid in respect of invoices previously rendered by the forwarder which it alleged were not properly due. However, the counterclaim was not served until 2/3/ 2009, so that insofar as it was based on liabilities arising before 2/6/2008 it was subject to the operation of clause 27(B). Before the judge the importer contended that the clause was not apt to cover claims in

restitution, but the judge dismissed that argument on the grounds that there was no reason to construe it in a restrictive way. It appeared to have been common ground that liability to make restitution arose when the overpayment was received. The importer submitted that clause 27(B) did not apply to causes of action which could not reasonably have been discovered before the time-bar expired. Clause 27(B) was a contractual term, whose meaning was to be derived from the words read in their commercial context. One began, therefore, by considering the natural and ordinary meaning of the words used. As to that, there could be little doubt that the clause was intended to discharge the company from all liability of whatever kind in respect of any service provided for the customer. When one added to that the commercial background, namely, that much of the business of a freight forwarder involved the carriage of goods by sea and land, and the close resemblance of the language to that of Article III, rule 6 of the Hague-Visby Rules, it was clear in the Court of Appeal's view that the expiry of the time-bar was intended to provide a complete discharge from all liabilities, whether known or unknown. In *Granville Oil v Davis Turner* the Court of Appeal considered clause 30(B) of the relevant edition of the BIFA conditions which corresponded to clause 27(B) of the conditions that applied in the case in question. In that case the customer was not made aware of the breach of contract on which it wished to sue until after the time-bar had expired, but the Court of Appeal held nonetheless that the clause was effective to discharge the freight forwarder's liability unless it was unreasonable and therefore void under the Unfair Contract Terms Act. Whether a term satisfied the statutory requirement of reasonableness was to be judged by reference to the circumstances of each case at the time the contract was made, but the meaning of the words used, albeit in an earlier edition of the conditions, must be taken to be the same in the absence of any reason to conclude otherwise. The clause extended to "all liability ... arising in respect of any service provided for the Customer." The expression "in respect of any service" was itself capable of being read broadly and should be so read in order to give effect to the clear purpose of the clause. Although it probably did not extend to liability arising from the company's own fraud, it was in the Court of Appeal's view capable of encompassing liability arising out of errors in accounting procedures or misunderstanding of the meaning or effect of the contract which had led to overcharging. In these circumstances the Court of Appeal thought the judge was right to hold that on its true construction clause 27(B) was effective to discharge the forwarder from liability to re-pay any amounts overpaid before 2/6/2008, provided it satisfied the requirement of reasonableness.

When considering whether the requirement of reasonableness was satisfied in the case in question, the judge dealt with the question very briefly and appeared to have accepted the forwarder's submission that the matter had been authoritatively decided in its favour in *Granville Oil v Davis Turner*. In principle the question must be considered separately in each case because the circumstances surrounding the contract might differ from case to case. But where a standard condition of this kind was involved the Court of Appeal did not think that the court should be astute to draw fine distinctions between cases that in broad terms were very similar. It was important for those engaged in any commercial activity, whether as providers of goods or services or as customers, to know whether a particular clause would generally be regarded as reasonable in the context of contracts of a routine kind made between commercial parties. In *Granville Oil v Davis Turner* the parties to the contract were a large international freight forwarder and a manufacturer and exporter of paint which regularly used the services of international freight forwarders in the course of its business. The Court of Appeal explained why clause 30(B) was reasonable having regard to the nature of the business that freight forwarders undertook and the prevalence of time-bar clauses in contracts of carriage of all kinds. The circumstances in which the contract in question was entered into did not seem to the Court of Appeal to differ in any significant respect. The circumstances giving rise to the claim itself undoubtedly differed, but honest accounting errors resulting in overpayments by the customer were not intrinsically different from any other basis of liability short of fraud.

The Court of Appeal reached the conclusion that the appeal must be dismissed.

Please feel free to contact us if you have any questions or you would like to have a copy of the Judgment.

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The robust freight industry in 2009 did not sustain well to the last quarter of 2010 as worldwide governments were not in unison in their fiscal policies. The worldwide government interference in 2011, such as the U.S. QEII, is likely to impact the worldwide movement of freight even more.

As uncertain as it was the economy in 2010, we believe the number of E&O, uncollected cargo and completion of carriage claims will continue the major concerns for transport operators in 2011. If you need a cost effective professional solution to defend claims against you, our claim team of five are ready to assist. Feel free to call Carrie Chung / George Cheung at 2299 5539 / 2299 5533.