

To: Transport Industry Operators

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Release cargo without FCR

In his Judgment dated 7/10/2003, Deputy High Court Judge Muttrie of the High Court of the Hong Kong SAR held a forwarder not liable for release of goods without production of the original Forwarder Cargo Receipt ("FCR").

This case concerns two shipments of goods, namely candle holders, from Xingang in the PRC to New York in the United States in October and November 1999. The plaintiff was the seller of the goods. The defendant was the forwarder. Two FCRs were issued by the defendant naming the plaintiff as exporter, a bank as the consignee and the buyer as the notify party. However, the goods were released to the buyer in New York, which refused to pay the agreed price, namely US\$84,240 on the ground that the goods were defective.

The plaintiff claimed that the defendant acted in breach of the two contracts of carriage as evidenced by the FCRs by releasing the goods to the buyer without the consent of the plaintiff or of the consignee (the bank). Further, the plaintiff pleaded that the goods should only be released on production of the FCRs. The plaintiff accordingly claimed damages equivalent to the unpaid purchase price of the two consignments. The legal proceedings were issued on 7/3/2000.

The defendant pleaded that it acted for the buyer as forwarder and there were no contracts of carriage between the plaintiff and the defendant. The plaintiff was selling goods on FOB terms; on delivery of the goods to the vessels, the title in them passed to the buyer. The defendant therefore denied owing the plaintiff any duty as alleged.

The Judge found that the contracts of carriage were between the buyer and the defendant, and not between the plaintiff and the defendant. So there can be no question of any breach of contract as between the plaintiff and the defendant. It was not the plaintiff but the buyer which was paying the defendant for its services. Further, the buyer gave the defendant specific and lengthy instructions, in the form of the consolidation procedures, as to how of those services should be performed. These consolidation procedures were addressed to the defendant by the buyer and were clearly intended to regulate how the defendant should deal with shipments of goods from various ports. On the back of every FCR was printed the following:

"This document is issued only to aid the shipper in seeking negotiation of the relevant letter of credit. This document does not grant any title to the goods described on the reverse side hereof." What the printed legend shows is that the FCR was simply a receipt issued to aid the plaintiff in negotiating the letter of credit; it was not a document of title, and neither was it a contract document. In the circumstances it is very difficult to see how the FCR could be said to constitute a contract of carriage.

Regarding the question of when the property in the goods passed, this is regulated by the Sale of Goods Ordinance, Cap. 26 which provides: "Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case. Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract."

The goods were shipped “FOB Xingang”. That represented the total value of the goods sold to the buyer including transport and insurance up to the point of loading on the ship. After that the buyer paid for everything, including insurance and sea transport and the charges for taking delivery after arrival at the port. The defendant issued the FCRs to the plaintiff. The plaintiff cannot be said to have reserved the right of disposal. An order bill of lading would show such reservation of right but it appears that the plaintiff never actually instructed that bills of lading be prepared, and the plaintiff never cast its mind to them because the plaintiff could be paid on presentation of the FCRs. The letters of credit were irrevocable and, so long as the required papers were presented to it, without discrepancies, the bank would pay out on sight of them. The letters of credit specified that the FCR was acceptable. The plaintiff did in fact present the FCRs, and the bank refused to pay out because of the discrepancies it mentioned, namely the letters of credit had expired, late presentation, late shipment, and a misspelling of the name of the port of shipment.

The conduct of the parties and the other circumstances infer that property must have been intended to pass when the goods were loaded on the ship. Looking at it simply, once the goods were loaded the plaintiff would get the FCRs, and then all it needed to do was to collect the money from the bank; its money was secure and it had no further interest in what happened to the goods. The fact that the plaintiff was not paid on presentation, not because the buyer had been able to take delivery of the goods without putting the bank in funds to pay for them, but because of discrepancies found by the bank, also means that if there had been a contract and the defendant had been in breach, such breach was not the cause of the defendant’s loss. The plaintiff was not paid because of irregularities in the presentation of documents to the bank. The non-payment did not result from any action on the defendant’s part.

Since property in the goods passed to the buyer, the defendant could not be the plaintiff’s bailee of the goods. The plaintiff was not the bailor. The defendant did not owe the plaintiff any duty in respect of the goods. Since there was no contract of carriage between the plaintiff and the defendant, and no bailment, it follows that the defendant was not in breach of contract nor of the duties of a bailee when it delivered the goods to the buyer.

The plaintiff’s claim is accordingly dismissed with costs to the defendant to be taxed if not agreed.

Should you have any questions or want to have a copy of the Judgment, please feel free to contact us.

Simon Chan and Richard Chan

Coming from a strong shipping and air transport background, Richard and Simon have ample experience in designing liability and property insurance for forwarders, logistic service providers, shipping companies, feeder operators, air cargo terminals, container terminals, and container lessors in Asia Pacific. Richard and Simon are independent risk management advisors able to offer full array of risk management services, including full-scale professional claims handling, loss prevention advice and prudent sourcing of insurance for your ease of mind. Their blended transport and insurance expertise are unique in the market. They are eager to answer whatever claims handling and insurance needs you may have as a transport operator.