THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV2012/0680

BETWEEN:

BAF DISTRIBUTORS LTD.

Claimant

AND

GEORGE W. BENNETT BRYSONS & CO.LTD, AGENTS FOR CMA CGM, SA

Defendant

Appearances:

Mrs. Stacy Ann Saunders Osborne for the Claimant

Dr. David Dorsett for the Defendant

2014: July 23
November 13

JUDGEMENT

[1] Cottle, J.: The claimant brought the present action seeking $57,387.45 as damages for breach of a contract of carriage. The contest involves some 2020 cartons of soy milk to be delivered to St. John's Antigua from Malaysia. The shippers were CMA CGM and the defendants are the local agents of the shippers.

[2] The goods were delivered to the port of St. John's by the shippers on 31st March, 2012. The claimant says they were notified of the arrival of the goods by the defendants in August, 2012. The goods remained on an unrefrigerated shipping container for the six month period. As a result they were not fit for human consumption by August, 2012.

[3] The claimant says that the loss of the goods is entirely due to the failure of the defendants to notify the claimants of the arrival of the goods.

[4] The defendants aver that they notified the customs broker sometimes employed by the claimants of the arrival of the goods.

[5] There is a Bill of Lading which relates to the shipment in issue. The defendants say the original has not been presented to them. The claimants filed a reply to the defence. They did not plead presentation of the original bill of lading.

[6] The claimants exhibited a copy of the Bill of Lading. On it the claimants are described as the "Notify Party" as well as the consignees. They point out that in any event the contract evidenced by the Bill of Lading is between CMA CGM and the claimants and not the defendants. As the defendants are not parties to the contract they cannot avail themselves of the contractual provisions.

[7] Much of the evidence presented to the court was directed at the factual contest to determine whether or when the claimants were notified by the defendants of the presence of the goods at the port. As can be gleaned from the reasons for my decisions below I did not consider the issue of notification to be crucial to the determination of this matter. I do not discuss it in any detail but having considered the evidence on both sides I am persuaded that the defendants failed to notify the claimants about the presence of the goods at the port until August, 2012.

The Bill of Lading

[8] The relevant clauses are clauses 6(1), 6(3), 11 and 17. I reproduce them below:

6. CARRIER'S RESPONSIBILITY AND CLAUSE PARAMOUNT

(1) Port-to-Port Shipment

> "When loss or damage had occurred between the time of loading of the Goods by the Carrier, at the Port of Loading and the time of discharge by the Carrier, or any Underlying Carrier, at the Port of Discharge, the responsibility of the Carrier shall be determined in accordance with the Hague Rules or any national law incorporating or making the Hague Rules, or any amendments thereto, compulsorily applicable to this Bill of Lading. The Carrier shall be under no liability whatsoever for loss of or damage to the Goods, howsoever occurring, if such loss or damage arises prior to loading on to or subsequent to the discharge from the Vessel carrying the Goods [emphasis supplied]. Notwithstanding the foregoing, where any applicable compulsory law provides to the contrary, the Carrier shall have the benefit of every right, defence, limitation and liberty in the Hague Rules as applied by this Clause during such additional compulsory period of responsibility, notwithstanding that the loss or damage did not occur at sea. Notwithstanding that the loss or damage did not occur at sea. Notwithstanding anything else in this Bill of Lading to the contrary, on shipments to or from the United States, the rights and liabilities of the parties shall be subject exclusively to COGSA which shall also govern before the Goods are loaded on and after they are discharged from the vessel provided, however, that the Goods at the said times are in the custody of the Carrier or any Sub-Contractor."

6 (3) Agency

> "Whenever the Carrier undertakes to accomplish any act, operation or service not initially agreed to mentioned on this Bill of Lading, he shall act as Merchant's agent and shall be under no liability whatsoever for any loss or damage to the Goods or any direct, indirect or consequential loss arising out or resulting from such act, operation, or service [emphasis supplied]. If, for any reason whatsoever, the Carrier is denied the right to act as agent as mentioned above, its liability for loss, damage or delays shall be determined in accordance with this Bill of lading."

11. NOTIFICATION AND DELIVERY

(1) "Any mention herein of parties to be notified of the arrival of the Goods is solely for information of the Carrier [emphasis supplied], and failure to give such notification shall not involve the Carrier's liability nor relieve the Merchant of any obligation hereunder."

17. DESCRIPTION OF GOODS AND NOTIFICATION

"The Carrier, his Agents and servants shall not in any circumstances whatsoever be under any liability for insufficient packing or inaccuracies, obliteration or absence of marks, numbers, addresses or description, nor for misdelivery due to marks or countermarks or numbers, nor for failure to notify the Consignee of the arrival of the Goods, any custom of the port to the contrary notwithstanding [emphasis supplied]."

[9] On the face of these clauses the carrier of the goods has agreed with the claimants that they should have no liability for the loss claimed. The question now arises whether such indemnity can be extended to the defendants.

[10] In his helpful written submissions Dr. Dorsett has accurately set out the applicable law. He cites the cases of Londor Drugs Ltd v Kuehne & Nagel International Lt [1992] 3 SCR 299 where the court extended the benefit of certain exemption clauses in a contract of storage entered into between the claimants and a warehouse company to certain employees. Despite the fact that the employees were not parties to the contract, the court found that they were beneficiaries of the exemption clauses on the basis that there was an identity of interest between the employees and the warehouse company. Goode on Commercial Law 4th ed. At p. 1175 puts the hearing thus:

"It has been standard practice for many years for bills of lading to include what is known as a 'Himalaya clause' excluding any liability on the part of servants or agents of the carrier (including independent contractors) and providing that all exemptions, immunities and limitations of liability available to the carrier shall also be available to any servant or agent, including an independent contractor. The object of a Himalaya clause is, of course, to

prevent a claimant from undermining the exemptions and limitations of liability available to the carrier under the contract and the rules by suing the carrier's servants and agents."

[11] Clause 17 explicitly extends its protection to the agents of the carrier. It is to be noted that the defendants are sued as agents of the carrier.

[12] When the Bill of Lading is looked at in its entirety, it is clear that the claimants agreed that failure to notify them on the part of the carrier or its agents would found no cause of action.

[13] It is not for the court to remake a commercial contract entered into at arm's length. It was open to the claimants to put in place other arrangements to ensure that they knew when the goods arrived.

[14] I conclude that the defendants are protected by the clear terms of the contract and the claim is dismissed. The claimants will pay the defendants prescribed costs on the value of the claim as stated on the claim form.

Brian Cottle
High Court Judge