IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2004 HCV 000238

BETWEEN	ZIM ISRAEL NAVIGATION COMPANY LIMITED	CLAIMANT
AND	KINGSTON TERMINAL OPERATORS LIMITED	1ST DEFENDANT
AND	SGS SUPERVISE JAMAICA LTD.	2ND DEFENDANT

Mr. Alan Wood and Mr. Hugh Hyman instructed by Hugh C. Hyman and Co. for Claimant.

Miss Sherry-Ann McGregor and Ms. Anna Harry instructed by Nunes, Scholefield, DeLeon and Co. for 1st Defendant

Mrs. Denise Kitson instructed by Grant, Stewart, Phillips and Co. for 2nd Defendant.

Contract – Exclusionary Clause – Whether implied by course of dealing – Whether limitation period incorporated into contract

Negligence – Causation – Goods shipped abroad rejected by Food Inspection Agency – Whether rejection caused by method of packing the shipping container

9th, 10th, 11th November 2009 and 7th January 2010

BROOKS, J.

The port of Kingston is a significant trans-shipment point for the transportation of goods by sea, either to or from some North American ports. In this case, frozen cooked beef destined for Canada from Argentina, was routed through Kingston. A malfunction of the refrigerated forty-foot container in which the beef was packed resulted in it being transferred to another container. When the beef reached Canada it was refused entry by

the Canadian Food Inspection Agency (CFIA) and was eventually destroyed.

Zim Israel Navigation Company Ltd., the carrier charged with transporting the beef, alleges that Kingston Terminal Operators Ltd. (KTO) and SGS Supervise Jamaica Ltd. (SGS), or one of them, were negligent. KTO provided the manpower and security for the transfer of the beef and SGS supervised the exercise. Both defendants deny liability.

It is for the court to determine whether any liability, either in contract or in tort lies against these defendants or either of them.

Zim's status as Claimant

It was Zim's agent, Carib Star Shipping Ltd. (Carib Star) that contracted the services of the defendants. Zim claims to recover from the defendants the sum of Can. $145,000.00 it says that it paid to settle a claim brought against it by the consignees of the beef; Campbell Soup Co. Ltd. Campbell Soup had brought that claim in the Federal Court of Canada for recovery of the loss which resulted from the destruction of the beef. Shortly before the trial date, Zim settled with Campbell Soup.

The claim against KTO

Zim produced very little evidence as to what happened on June 7, 2000, the day of the transfer of the goods, or on June 21, 2000, at the time of the inspection by the CFIA. It had no agent present on either occasion and

did not seek to call, as a witness, any other person who was then present. Zim was therefore hard-pressed to prove its allegations at paragraph 26 of its particulars of claim that KTO had:

> "(i) handled the cartons of beef roughly, improperly and without due care during the transloading operations; and
>
> (ii) failed to exercise the requisite care in stowing the cargo in the replacement container during the transfer operations..."

Nor could Zim advance any evidence in support of its allegation, again at paragraph 26, that:

> "...the fact of the state of the packaging and the cargo upon inspection in Canada...is in the circumstances evidence of the negligence of the First Defendant."

The inspection was done by the CFIA at a facility operated by Associated Freezers Ltd. in Dartmouth, Nova Scotia. The container had been transported there by road after being landed at Halifax, Nova Scotia. Mr. David Silver attended Associated Freezers Ltd's warehouse on Zim's behalf. He did so, however, after the container had already been opened, after at least some of the beef had been removed and put on pallets in the warehouse and after the CFIA's inspection was finished. Mr. Silver, nonetheless, saw some of the cargo in the container, made observations of the container and the cargo and took photographs of what he saw.

As he had no opportunity to observe the container when it was first opened, Mr. Silver could not say what the condition of the cargo was before he got to the location. So, despite the fact that he saw that the cartons were,

"randomly stowed instead of tier by tier and row by row" and that "cartons across the top of the container were stowed at various angles", he could not say what had caused them to be in that state.

In contrast to Mr. Silver's observations was the evidence of Mr. Omar Bignall. He was the only person to testify who was present at the transfer. Mr. Bignall gave evidence that the new container was repacked in a manner similar to that which he observed in the original container. He agreed that the repacked container had a disorderly appearance but when showed the photographs which Mr. Silver had taken, Mr. Bignall said they were not representative of the way the 2nd container was re-packed.

I accept that Mr. Bignall, despite the fact that he is no longer employed to SGS, may have an interest to serve. However, in light of the fact that this container had travelled on the high seas between Kingston and Halifax and thereafter, by road to Dartmouth, I am not prepared to say that Mr. Bignall is not being truthful in this aspect of his testimony.

Mr. Wood, on behalf of Zim, submitted that it was clear that the transfer of the cargo was not properly done and that it was carried out in a disorderly manner. The substance of Mr. Wood's submission is that KTO has failed in its duty to properly transfer the cartons from one container to the other. He said that the fact that the transfer ought to have been supervised by SGS did not relieve KTO of that duty.

As explained above, there is no evidential foundation for counsel's submission concerning the execution of the transfer. I find that Zim has failed to prove the allegations of negligence which it has made against KTO.

The claim against SGS

The Particulars of Claim

The pleading of the complaint against SGS was almost terse. The Particulars of Claim only alleged that SGS failed to secure government certification of the transfer. At paragraphs 23 and 24 thereof Zim said:

> "23. So far as concerns [SGS], the person supervising the transloading operations in Kingston on June 7, 2000, did not ensure that a government seal was affixed to the replacement container and that government documents were issued to verify the transfer.
>
> 24. Had the steps mentioned in the preceding paragraph been taken, the Canadian authorities would have been able to verify with counterparts in Jamaica that the shipment had not been at risk for contamination."

The defence filed by SGS

SGS, in answer to the Particulars of Claim, alleged that it monitored the transfer as it had been contracted to do and that its opening of three of the cartons of beef to inspect the contents was in accordance with its duties. It denied that it had any responsibility to affix any seal to the container. It asserted that the duty of affixing a seal belonged to Carib Star.

SGS further pleaded that it had, for years prior to 2000, provided similar reports to Zim. Each of these, bore terms and conditions excluding SGS from liability, or restricting that liability. The essence of the relevant

conditions is that the quantum of the liability for loss was limited and the time for making claims against SGS for compensation was also limited.

The evidence

The evidence led, greatly amplified Zim's complaint against SGS. When summarized, the main complaints are that SGS failed in its contractual duty or was negligent, in that:

a. it opened three of the cartons without authority;

b. it placed the three cartons in the replacement container in such a position that they would immediately raise the suspicions of the authorities of any importing country that the shipment had been compromised;

c. it failed to ensure that there was official documentation explaining the opening of three of the cartons;

d. it failed to secure official certification of the transfer.

The evidence led did not support the complaints set out in the Particulars of Claim that SGS had failed to secure a government seal. Mr. George Jackson was Carib Star's officer who had requested SGS' services. His demeanour was poor. He was obliged to retract critical aspects of his evidence in chief. He admitted in cross examination that only Carib Star was entitled to open the container. He further agreed that Carib Star was the only party responsible for placing a seal on the replacement container. He

said that it was he who provided that seal to the persons doing the transfer. He also admitted that over the period that SGS had been providing certification for Carib Star on behalf of Zim, SGS only provided certification reports. It was such a report which was provided in this case.

Other evidence came from Mr. Ethelbert Brown on behalf of SGS which suggested that it was not SGS' remit to secure the attendance of a public health inspector at the time of the transfer. Nor, according to Mr. Brown, did SGS have any responsibility to secure a report from a public health inspector concerning the safety or otherwise of the meat. Mr. Brown asserted that those areas were the responsibility of Carib Star. He did concede however, that Mr. Bignall, having opened the three cartons, should have advised Carib Star to have a government inspector do a report before the container was resealed.

Has Zim proved its claim against SGS?

The main difficulty with Zim's claim is that it has failed to directly establish a link between the destruction of the cargo and any act or omission by SGS. It provided no reason for failing to adduce evidence from the CFIA, other than that an attendance by an official required a formal request.

There is no evidence as to the CFIA's reason for refusing the cargo entry to Canada. A document entitled "Import Inspection Report" which was tendered in evidence bears the handwritten notes "Product

Compromised" and "Refused Entry". Another CFIA document directed the cargo's "Removal from Canada within 90 days". Neither document was made by any of the parties and was rightly criticized as being hearsay. Campbell Soup did not export the beef and it was destroyed under the supervision of the CFIA six months later.

There is no evidence explaining Campbell Soup's not exporting the cargo in accordance with the CFIA's direction. Zim has not shown that removal was impractical or impossible. What Zim asks this court to do, is to draw the inference that the fact that the cargo was in the condition that Mr. Silver described and the fact that SGS had opened three cartons of the beef and left them prominently at the entrance of the container, the CFIA was left with no option but to deem the cargo contaminated.

I find that that inference is not, on a balance of probabilities, sufficient to ground liability. Indeed, in its defence to Campbell Soup's claim, Zim had denied liability on the basis that the CFIA had improperly rejected the cargo. Zim averred that the rejection was because of the CFIA's incorrect assertion that there was a possibility of exposure to cattle foot and mouth disease in Jamaica. In the present claim, Zim has not raised the reason for the rejection above the level of speculation.

Additionally, not only has Zim failed to account for Campbell Soup's failure to export the goods but Zim's "loss" has not resulted from a trial on

the merits of Campbell Soup's claim. The settlement was based on, according to a letter to Zim from Campbell's Soup, a number of factors including the continued business relationship between them.

Zim must, on these grounds, fail against SGS.

Does the SGS report import terms into the contract with Zim?

Although it is unnecessary to decide the issue of whether the limitation clauses pleaded by SGS apply, it was ably argued and a number of cases were cited by counsel. Out of deference to their industry I shall refer briefly to this aspect.

It is perhaps best to describe what occurred between SGS and Carib Star in transactions such as the one in the instant case. The evidence is that Carib Star, would call SGS and request the service. SGS would provide the service then prepare and send a report to Carib Star. The terms and conditions were prominently printed on the rear of each of the pages of the report. An invoice would either be sent with the report or shortly thereafter. Carib Star would send the report to Zim and pay for the service after receiving the invoice. In the five to seven years of their relationship, up to June 2000, SGS had provided only certification reports to Carib Star.

Mr. Wood submitted that the clauses were so inimical to SGS' clients that they ought to have been prominently brought to their attention. He also submitted that the report, being produced at the end of the transaction,

cannot import terms into the contract. Finally, Mr. Wood submitted that SGS has not established a sufficient course of dealing to fix Zim with knowledge and acceptance of these clauses. Learned counsel cited in support of these principles *Spurling v Bradshaw* [1956] 1 WLR 461, *McCutcheon v David MacBrayne Ltd.* [1964] 1WLR 125 and *Hollier v Rambler Motors* [1972] 2 QB 71 respectively.

Mrs. Kitson, for SGS, argued that the relationship between SGS and Zim, over many years was more than adequate evidence of Zim, through Carib Star, being fixed with notice of the conditions endorsed on the back of the pages of the report. In such circumstances, learned counsel submitted, the terms were incorporated into the contract made on June 7, 2000. She also cited *Spurling*, among other cases.

It is my view that the report does not, by itself, form part of the contract. It is a product of the contract. The contract is made, on my understanding of the transaction, when Carib Star's offer requesting the service, was accepted by SGS attending to carry out that service. The report and its "endorsement", that is the conditions governing the report, can only be imported into the contract if SGS can show that the conditions had previously been brought to Carib Star's attention. I think it has, on a balance of probabilities, done enough to demonstrate that they had been so brought.

The evidence concerning the previous communication of the clauses came from Mr. Ethelbert Brown, the Managing Director of SGS. At paragraph 9 of his witness statement, he referred to the period of time over which the parties had had a course of dealing and stated that SGS would carry out surveys "from time to time". He went on to say that the "limitation/exclusion of liability clauses which is (sic) attached and/or always legible (sic) printed on [SGS'] survey report". No evidence was given as to the number of reports provided over that period of time but the conditions, covering the entire rear of each page of the report, as they do, could not have been overlooked. They are in fairly large type. No other such report was admitted into evidence to support Mr. Brown's assertion.

In my judgment the onus is on SGS to establish prior knowledge in Zim, through Carib Star or otherwise. The length of time that the relationship has subsisted, the prominence of the conditions and the fact that these parties were bargaining on equal terms, satisfy me of that knowledge. Carib Star would have appreciated, when it requested the service, that SGS would have provided the service on the terms of SGS' "Standard General Conditions" and "General Conditions for Inspection and Testing Services", which had been endorsed on all reports which SGS had previously supplied.

In the event therefore, that SGS was liable for the loss which Zim has incurred, it would be entitled to rely on the limitation clause which limits its

liability "in respect of any claim or loss, damage or expense of whatsoever nature and howsoever arising" to "a total aggregate sum equal to 10 times the amount of the fee" paid for the service. SGS is also entitled to benefit from the clause which exempts it from all liability "unless suit is brought within one year after the date of the performance by the Company of the specific service which gives rise to the claim".

Conclusion

Zim, in proving its case had the burden of establishing that KTO and/or SGS had, by their respective acts or omissions caused the rejection of the cargo by the CFIA **and** its subsequent destruction. It has not discharged that burden. It has provided no evidence to contradict that of KTO's witness that the cargo was not packed in an improper manner. That witness denied that the cargo was packed in the manner which was depicted by photographs taken at the destination warehouse in Canada. In addition, Zim has failed to establish the reason for the rejection of the cargo by the CFIA. SGS is also entitled to benefit from the exclusionary and limitation clauses which form part of the contract governing its provision of the service.

It is therefore, ordered that there be:

1. Judgment for the Defendants on the Claim.

2. Costs to the Defendants to be taxed if not agreed.