Summary

The Court of First Instance granted summary judgment against the defendant contractual carriers for mis-delivery of goods by the sub-contracting terminal. It was held that the limitation period in the Express Cargo bill of lading did not apply. The defendants could not rely on the exclusion clause as they failed to ensure that the terminal adopted proper procedures to ensure delivery of cargo to authorised personnel. However, the limitation clause applied such that their liability was limited to US$2 per kilogram of gross weight of goods lost.

Background

In August 2007, the Plaintiffs consigned 11 containers to the first Defendant and the second Defendant, both of whom were contractual carriers, for carriage from Asia to Northern Europe. These included a container containing Computer Game Consoles ("Container X").

The contract of carriage was evidenced by an Express Cargo Bill of Lading (ECB). Clause 3 provided that:

> *"The Carrier shall be discharged of all liability... unless suit is brought within 9 months after:- (i) the delivery of the Goods or, (ii) the date when the Goods should have been delivered..."*

Clause 17(B)I(2)(k) provided that:

> *"The Carrier shall... be relieved of liability for any loss or damage if such loss or damage arose or result (sic) from: ...*
>
> *(k) any other cause or event which the Carrier could not avoid and the consequences whereof it could not prevent by the exercise of reasonable diligence."*

Clauses 18.3 provided that:

> *"18.3 If in case of Combined Transport it can… not be proved where the loss or damage occurred compensation shall not exceed US$2., per kilogram of gross weight of the goods lost or damage (sic)…*

Clause 23.2 provided that:

> *"The Carrier shall not be entitled to the benefit of limitation of liability provided for in clause 18.3, if it is proved that the loss or damage resulted from an act or omission of the Carrier itself, done with intent to cause damage or recklessly and with knowledge that damage would probably result."*

The sea carriage of the containers was sub-contracted to a 3rd party Performing Carrier. Upon arrival in Europe in September 2007, the containers were stored at the sub-contracted Terminal pursuant to a pre-existing terminal contract.

The Carrier's agents cleared the consignment through customs, obtained the requisite customs clearance document (known as the "Sagitta") and arranged for their carriage to the final port of delivery by barge. As a result, the containers were registered in the sub-contracted Terminal's barge system.

A trucking company, was instructed to collect Container X and was given a copy of the Sagitta document from an unknown fraudster. Later in September 2007, a truck driver presented the Sattiga document and asked for Container X to be released for onward carriage by truck. The sub-contracted Terminal's employee handling the request noticed that Container X was registered for delivery via the sub-contracted Terminal's barge system and not the trucking system. However, he did not follow internal procedures to check whether Container X had in fact been re-routed to the trucking system. He re-routed it himself and released it to the truck Driver. Container X was in turn delivered to the fraudster who then disappeared with the cargo.

In 2008, the Plaintiffs commenced action to recover the value of the lost goods in Container X. Judgment was previously entered against the sub-contracted Terminal. The present hearing was an application by the Plaintiffs for summary judgment against the first, second and fourth Defendants, who were contractual Carriers.

The Defendant contractual Carriers contended that: (a) the Plaintiffs' claims were time barred under Clause 3; (b) they were relieved of liability under Clause 17(B)I(2)(k) for loss resulting from any cause or event which they could not avoid and the consequences whereof they could not prevent by the exercise of reasonable diligence; and (c) their liability was limited to US$2 per kilogram of gross weight of goods lost under Clause 18.

Judgment

The Court entered summary judgment against the contractual Carrier Defendants.

With respect to Issue (a), the Court held that on a proper construction of Clause 3, the word "delivery" must mean delivery in accordance with the terms of the ECB. Claims in respect of goods which were delivered but damaged in transit fell under Clause 3(i). Thus, Clause 3(i) did not apply as the goods in Container X were never delivered.

Clause 3(ii) also did not apply. Applying the Hong Kong Court of Appeal decision in Cheong Yuk Fai v China International Freight Forwarders (HK) Co Ltd [2005] 4 HKLRD 544, Clause 3(ii) referred to the situation when the goods should have been, but were not, delivered to the person entitled to them upon his making a claim for them with the relevant documents. Container X never reached the final delivery Port of destination. Neither did the Carriers notify the Plaintiffs that it was available for collection, nor did the Plaintiffs demand delivery.

With respect to Issue (b), the judge emphasised that the first and second Defendants (the "contractual carrier Defendants") assumed under the Express Cargo bill of lading an almost strict liability in respect of loss and damage to the cargo under their care. The exceptions in Clause 17(B)I(2) – including (k) - were not related to the acts or omissions of the Defendants but to matters to which they were not privy or which were outside their control. In the light of this almost strict liability regime, Clause

17(B)I(2)(k) could not have been intended to cover entirely preventable acts of persons for whom those Defendants were expressly contractually responsible. In the judge's view, that sub-clause only excluded the carrier Defendants from liability for loss and damage arising from external events akin to frustration or force majeure

The judge recognised that, while the contractual carrier Defendants, as non-vessel owning carriers, might sub-contract the performance to another carrier, they were under a non-delegable duty to ensure that the immediate and subsequent subcontractors were reputable and competent and would adopt proper procedures to ensure due and proper delivery of containers. They had to ensure the sub-contracted Terminal's cargo terminal would adopt and carry out proper procedures for the safekeeping and delivery of the containers to authorised personnel only and in accordance with the cargo owners' instructions. This duty was not discharged by merely exercising reasonable diligence in selecting a carrier.

Through its long standing working relation with the sub-contracted Terminal, the fourth Defendant should know about the ease with which unauthorised re-routing could be effected and that the sub-contracted Terminal's cargo handling system allowed cargo to be released against a copy of the Sagitta documents, which was not a title document. Such procedures were at best lax, if not downright reckless, given the potential risks involved. However, the Defendants did nothing to require the 3rd party Carrier or the sub-contracted Terminal to improve the security measures until after the theft occurred. Measures requiring the haulier to provide a delivery note issued by the fourth Defendant were implemented only after the theft occurred. This was strong prima facie evidence of the contractual Carrier Defendants' negligence in selecting the 3rd party Carrier and breach of duty in ensuring the safekeeping and proper delivery of the cargo. Thus, the exemption in Clause 17(B)I(2)(k) did not apply.

With respect to Issue (c), the Court noted that limitation clauses were not regarded by the courts with the same hostility as exclusion clauses: see Ailsa Carig Fishing Co Ltd v Malvern Fishing Co Ltd [1983] 1 WLR 964. Although there were no words such as "whatever" and "howsoever arising" in Clause 18.3, it was clear that the clause applied to all instances of loss and damage, subject only to Clause 23.2. But that clause did not apply here as it only had the effect of avoiding or annulling the limit under Clause 18.3 for loss or damage caused by deliberate or reckless conduct of the carrier, but not by negligent conduct. Thus, the liability of the contractual Carriers Defendant was limited pursuant to Clause 18.3 to US$24,392 (about 1.9% of the amount claimed!).

This note has been contributed by Ken T.C. Lee, LLB (Hons), PCLL (University of Hong Kong), BCL (Oxon) and barrister-at-law in Hong Kong.

Case Note from : *Maintek Computer (Suzhou) Co Ltd v Blue Anchor Line, Hong Kong Court of First Instance, 2 April 2013*