IN THE SUPREME COURT OF THE TURKS AND CAICOS ISLANDS

Action No. CL 59/2016

AIR AND SEA AGENCY LIMITED

and

DAVID MCGEE

Before the Chief Justice, the Ho
Ramsay-Hale Mr. Tony Gruchot
Thompson for the Plaintiff The
person Heard on 13 June 2018

---

1. This is the decision on proceedings commenced by Writ of Summons issued the 7 April 2016 in which the Plaintiff company, Air and Sea Agency Ltd, a freight company ("the Company") claimed $15,743.31, plus interest, for services rendered to the Defendant, Mr. McGee, for clearing a container of goods purchased in the

United States shipped through Seacor Island Lines LLC ("Seacor") from Florida to the Turks and Caicos Islands which arrived on Providenciales on or about 20 June 2015.

2. The Company raised an invoice for $15,743.71 which included a charge for freight in the sum of $5,709.20 which it paid to Seacor. On proof by Mr. McGee that he had paid the freight charges directly to Seacor, the Company pursued a refund from Seacor and abandoned its claim for that sum in these proceedings.

3. In the course of his *viva voce* testimony, Mr. McGee accepted that he owed the balance due on the Company's invoice save

for a sum which he alleged the Company had paid to Customs in error as and for duty and he seeks in his Counterclaim to set that sum off against the sum now due to the Company.

4. The error in calculating the duty, which led to Mr. McGee being overcharged, arose because a duplicate invoice had been mistakenly included by Mr. McGee in the receipts he tendered to the Company to facilitate the preparation of the Customs declaration form. It is Mr. McGee's case that the Company provides a professional service on behalf of their clients and should, in the course of

preparing the Customs, have discovered the duplicate invoice and not included it.

5. The Company, through its witness, Mr. Terry Selver, says in its defence - and I agree - that its responsibility is to ensure the Customs Declaration is properly prepared and that the proper codes

are assigned to the goods which are being imported as represented by the customer and that it is the customer's responsibility to provide the Company with accurate information.

6. The claim to set off any sum paid as duty in respect of the duplicate invoice is dismissed.

7. The remaining question for determination is whether the Company is in breach of an agreement to expedite the clearing of the container as alleged by Mr. McGee in his (unparticularised) counterclaim for $16,000 in damages.'

8. In his *viva voce* testimony, Mr. McGee stated that he had used the Company several times before 2015. In June 2015, he had tried to contact the Company by email addressed to his usual contact to get their assistance in clearing two shipments. He received no response and, in consequence, the earlier of the two shipments was cleared by Tropical Shipping. Mr. Selver eventually responded to the email, asking him to call as soon as possible [z] which he did. In that call with Mr. Selver, which was made on 17 June 2015, Mr. McGee says he explained to Mr. Selver that he needed to "*get this done*" and had others flying into the Island.

9. In his oral testimony he said, "I *believe I was clear on the phone that this was a priority, it was urgent.*"

10. It was his evidence that Mr. Selver said he could "*expedite things, get the container cleared within 48 and 72 hours*" and that, at Mr. Selver's request, he provided all the documents upfront.

11. This is the evidence on which Mr. McGee relies as establishing an agreement to expedite.

12. The container arrived on or before 20 June 2015 but it was not cleared until 30 June 2015. McGee complains that the delay in clearing the shipment - which delay constitutes the alleged breach —was due to the Company's failure among other things, to prepare the Customs declaration ("the spreadsheet") "*done and ready to go first thing on Monday morning*" - the 22' - so the duty could be paid and Customs scheduled for inspection of the container. Instead, the paperwork was not completed until the 23r[d] and, on his case, led to the delay in the inspection and release of the shipment.

13. Mr. Selver in his *viva voce* testimony denied that he made any promise to expedite the shipment. His evidence was that he had advised Mr. McGee that a container could be cleared within 48 to 72 hours but that he gave no guarantee for the reason that there are many variables involved in clearing containers over which the Company has no control.

14. Mr. Selver asserted further in his evidence, that such delay as Mr. McGee complains of was not caused by the Company but in fact caused by Mr. McGee and he relied on a series of emails exchanged between the parties as demonstrating this.

Paras 3, 4 Defence and Counterclaim [2] Email dated 17 June 2015

15. The emails disclosed that the Company wrote to Mr. McGee on 23 June 2015 about scheduling delivery the next day.[3] On the same day, Josephine from the accounts department by separate email to Mr. McGee made a request for payment.. Mr. McGee did not respond until 25 June 2015. He then advised Josephine that the shipping costs which were included in her request for payment had already been paid by him and asking if delivery could be scheduled for the following day.

16. I understood from Mr. Selver's evidence that a shipment cannot be cleared until the shipping costs are paid. On the Company's case, it had paid the shipping costs and Mr. Selver exhibited his cheque to Seacor which cleared on 24 June 2015.

17. As it transpired, however, Mr. McGee had indeed agreed to pay the shipper directly and his records show that he paid Seacor in two tranches, the second being paid on 26 June 2015 [A].

18. There was undoubtedly some confusion surrounding payment as the Company's accounting officer was still chasing Mr. McGee for freight payments on Friday the 26' June 2015[5].

19. Whatever the reason for the confusion, what is certain is that the container **would not** be released by Seacor until it was paid. On Mr. McGee's case then - which is that he was responsible for paying Seacor and did pay Seacor - the earliest Seacor would have released the container was 26 June 2015, well outside the 48 to 72 hour window within which the Company had allegedly promised to deliver the container and was a delay caused by his tardiness in settling his account with the shipping company.

20. As the **4** day delay in obtaining the release of the container from Seacor to Customs, was on Mr. McGee's own evidence, a result of his own default, it is difficult to comprehend his pleaded case that the Company had acted without due diligence and had breached its promise to expedite the container and deliver it within 48 to 72 hours.

21. Despite the residual confusion about the payment of the freight charges, the Company advanced credit to Mr. McGee and made all requisite payments to Customs on his behalf to clear the container on the 26 June. The container was then, however, flagged for inspection by Customs. According to Mr. Selver, once a container is flagged for inspection, the Company can do nothing but wait until Customs Officers are available to do the inspection. The inspection was scheduled for the 30 June. Asked by the Court about the length of time between the payment of duties and the inspection, Mr. Selver, himself a former Customs Officer, explained that there are, on average, 250 containers arriving in Providenciales every week and only six (6) Customs Officers in what he termed the "Container Unit" available to inspect them.

Email from Coree at page 25 Trial bundle

[4] Page 48 Trial Bundle

[5] Page 28 Trial Bundle

22. Having considered the evidence in the round, I am satisfied and find on a balance of probability that no promise was made by Mr. Selver to expedite the clearing of the container. His evidence that the Company does not give guarantees as there are too many variables they cannot control accords with commonsense and is amply demonstrated by the facts of this case. I am also satisfied and find that the delivery of the container on 30 June did not constitute unreasonable delay in the circumstances where Mr, McGee did not pay the freight charges until 26 June and Customs flagged the container for an inspection which was not concluded until 30 June.

23. Mr. McGee's claim that that there was an agreement to expedite the clearing and delivery of the container is unsupported by any evidence. The only unrefuted evidence of him seeking delivery of the shipment by a certain date is his email to the Plaintiff on 25 June 2015, requesting delivery by 26 June 2015, the date on which he finally paid the freight costs in full. The only way the container could have been cleared and delivered on that day is if Customs did not flag the container for inspection, a matter which was entirely beyond the Company's control.

24. Although those findings dispose of the claim, I go further and say that even if it had been a term of their agreement that the clearing of the container would be expedited, none of the losses claimed by Mr. McGee would be recoverable.

25. Mr. McGee's claims among his losses $1,500 for his time wasted in Providenciales waiting for the first container to be cleared.' This claim has no legal or factual basis as the Company was under no duty to respond to his email inquiries with respect to clearing two containers and his contract for clearing the first container was made with Tropical Shipping.

26. With respect to the claim for "*labourers that were brought in unnecessarily to unload the container - $500*" and "*Additional staff that I had to hire to supervise the unloading of the 2"d container which was ultimately not delivered until after I had flown home- $1500,*" *Mr.* McGee's evidence is that he flew into Providenciales on 16 June 2015 ***for one week*** to supervise the unloading of both containers and that, because the second container was not cleared "*promptly*" by the Company, he incurred these expenses. The claim is not readily understood in the circumstances where his email of 25 June 2015 asks for delivery of the container by 26 June - the date he paid the freight charges - by which time he was already off- island and could not possibly have intended to supervise the unloading of the container.

27. He also claims "*Lost time/money for partners who flew in from Canada to help decorate with contents of the container - $4500,*" In his pleaded case, the claim is phrased as "*loss of income and expenses incurred by partners...because of Plaintiff's failure to clear the first container as requested and the Plaintiff's' failure to clear the second container on a timely basis.*"

28. It is his evidence that his partners had come down on 27 June 2015 to furnish some 24 apartments for rental but because they didn't have access to the furniture in the container until 1 July, they

'Para 17 of Mr. McGee's affidavit filed 15 May 2017 Para 16 *ibid*

were unable to do so. As they had to leave the Island before all the units were staged, the Company should reimburse him for their airfares and meals for which he paid, as well as pay some other unidentified sum as dam ges for *"their time as they could have been back home working."*

29. The claim is unintelligible. As pl aded, it is a claim by his partners, who are not parties to the suit, for reimbursement and must f il. In his evidence, Mr. McGee seeks to suggest that he is in fact the claimant as he paid their ex enses. Even if the claim were amended to align with his viva voce testimony it would still fail: it is unsupported by any evidence except that of the cost of the airfares and the airline tickets were not, in any event, purchased on the back of any promise made by the Company to expedite the clearing and delivery of the container. They were purchased on 29 May 2015.

30. Further, for the Company to be able for those costs, it would have had to know that Mr. McGee's e container and agreed to have the container cleared in time for l partners were flying in to clear t their arrival.

31. In *Transfield Shipping Inc v Mer ator Shipping Inc* [2008] UKHL 48 where the issue of remoteness of damage was considered by the Supreme Court, Lord Rodger stated at para 53,

"...it is important not to lose sight of the basic point that, in the absence of special knowledge, a party entering into a contract ca only be supposed to contemplate losses which are likely to result from the breach in question - i other words, those losses which will generally happen in the ordinary course of things if the breach occurs. Those are losses for the party in breach is held responsible- the stated rational being that, other losses not having been in contemplation, the parties had no opportunity to provide for them."

32. The wasted cost of airfares for persons to travel to Provo to stage apartments from the contents of the container are not losses likely to result from a failure to deliver a container within a specific time and are irrecoverable.

33. The internal inconsistencies in Mr. McGee's counterclaim and its inherent improbability suggest that the claim was not brought in good faith. It appears from all the evidence that Mr. McGee simply could not pay his bill. This is apparent from the correspondence between the Company chasing payment and Mr. McGee in which he never once raised any issue of any breach of agreement but instead apologises for the delay, stating that funds are not available [8], offers to pay some 6 months later from the proceeds of a pending sale or, alternatively, with *"a few postdated cheques to clear everything up in the New Year"* [9]. In an email dated 9 December 2015, Mr. McGee apologised again, stating *"You have handled several shipments for me without issue"* and advised that he was unable to d• anything about the outstanding invoice *"immediately"* .[10]

[8] Page 32 Trial Bundle

[9] Page 35 Trial Bundle
[10] Page 36 Trial Bundle

34. Mr. McGee was clearly experiencing financial hardship and I am satisfied and find that the counterclaim was an insincere attempt to avoid his liability to the Company which has resulted in the Company incurring unnecessary costs in defending the claim.

35. Mr. McGee's counterclaim is dismissed and judgment entered for the Company on the claim and the counterclaim. Costs follow the event and I order that and Mr. McGee's pay the Company's costs of the claim and the counterclaim. Given the manifest insincerity of the counterclaim, I order that the costs of the counterclaim be paid on an indemnity basis.

DATED 3 OCTOBER 2018

CHIEF
JUSTICE