

**Date: 20070504**

**Docket: T-557-04**

**Citation: 2007 FC 491**

**Toronto, Ontario, May 4, 2007**

**PRESENT: Madam Prothonotary Milczynski**

**BETWEEN:**

**LOVAT INC. and  
GURIS INSASAT VE MUHENDISLIK, A.S.**

**Plaintiffs**

**and**

**BLUE ANCHOR LINE,  
KUEHNE & NAGEL INTERNATIONAL LTD.,  
carrying on business as "Blue Anchor Line"  
and the owners and charters and all others interested in  
the ship "ATLANTIC ACTION" and the Ship "TYRUSLAND"  
and NORDANA LINE A.S.**

**Defendants**

**REASONS FOR JUDGMENT AND JUDGMENT**

**Issue and Summary**

[1] This is an action for damages in respect of cargo sent from Etobicoke, Canada by the Plaintiff, Lovat Inc. ("Lovat") to the Plaintiff, Guris Insasat Ve Muhendislik, A.S. ("Guris") in Ankara, Turkey, in respect of which the carrier services of the Defendants were rendered. The

Plaintiffs allege that the cargo, a main bearing, was damaged en route, alleging specifically that the damage occurred during the overseas portion of the shipping.

[2] In that respect, any finding of where and how the damage occurred has an impact on liability as between the Defendants and possibly, the limitation of liability and quantum of damages. These issues, however, must remain academic since for the reasons set out below, the action is dismissed. The liability of the carriers under the terms of their respective bills of lading ended on discharge of the main bearing in the port of Istanbul. In that respect, the Defendants have established that the main bearing was discharged in Istanbul in the same apparent good order and condition as when it was shipped from the Plaintiff Lovat's premises and when it was loaded for overseas shipping. The Plaintiffs have failed to prove, on a balance of probabilities, that the damage to the cargo was caused while under the responsibility or in the hands of any of the Defendants.

### **Facts**

[3] The cargo in this case is a main bearing that is a part to be installed on a tunnel boring machine. The bearing was manufactured in the United States by Rotek Incorporated and shipped to Lovat in Canada in August 1996, where it was stored in Lovat's warehouse. Some seven years later, on July 7, 2003, the bearing was purchased by Guris.

[4] At the time of the Guris' order, Lovat had the bearing inspected. Some rust was found on the bearing, and it was Lovat's evidence that this rusting was superficial in nature, and likely caused

by humidity in the warehouse where the bearing had been stored. The bearing was cleaned with an abrasive “scotch-brite” pad and some light oil.

[5] The bearing was prepared for shipping by Lovat. After the rust was removed, the bearing was greased, sprayed with an anti-rust protectant and wrapped with one layer of paper moisture wrap and another layer of shrink plastic wrap. The bearing was then strapped on a wooden skid and secured with steel strapping. It was the evidence of Lovat that this preparation and wrapping would be adequate for the bearing to be shipped, and that it would withstand the elements, including rain and even hurricane force winds.

[6] To ship the bearing to Guris in Ankara, Turkey, Lovat entered into a contract for shipping with the defendant, Blue Anchor Line, through Blue Anchor’s agent Kuehne and Nagel International Ltd. (together, “Kuehne & Nagel”). Blue Anchor Line issued bill of lading No. 6120-4046-309.21 in Toronto. The bill of lading states that it is for carriage of the bearing from Toronto to Istanbul. Under the clear terms and conditions of this bill of lading, the contract was for carriage overland from Toronto to Baltimore and by sea to Istanbul. Carriage under this contract ended in Istanbul.

[7] Kuehne & Nagel retained the defendant and third party, Nordana Line AS (“Nordana”) to conduct the overseas phase of the shipping from Baltimore, Maryland, to Istanbul, Turkey. Nordana issued bill of lading No. NODAS320BAPIR001 regarding the overseas phase of the

transport. This transport was comprised of shipment on the vessel “Atlantic Action” from Baltimore to Piraeus, Greece, and from Piraeus to Istanbul, Turkey on the vessel, “Tyrusland”.

[8] As the final destination for the bearing were Guris’ premises in Ankara, Turkey, arrangements needed to be made for transportation of the main bearing from Istanbul. On the documentation filed, and on the basis of evidence adduced during the hearing, I find that these arrangements were made by Kuehne & Nagel as agent for Lovat. These arrangements were not part of the contract of carriage as evidenced in the bills of lading. On behalf of Lovat, Kuehne & Nagel instructed a Kuehne & Nagel company in Istanbul (K&N Turkey) to engage the services of a local Turkish trucker to move the bearing from the customs shed in Istanbul to Ankara. The fact that there is some documentation in the form of invoices is insufficient to establish a contract for “door to door” shipping as is submitted by the Plaintiffs. Other documents filed by Kuehne & Nagel clearly show that the different services provided are not purporting to provide door to door service, but itemize each service: all inclusive carriage (overland and by sea) from Etobicoke to Istanbul as set out by the bills of lading, and the on-carriage in Turkey are listed separately, as are the customs clearance and the fee that generates profit for Kuehne & Nagel as agent.

[9] In any event, the bearing was picked up on September 8, 2003 at Lovat’s premises and transported from Etobicoke to Baltimore by a trucking company retained by Blue Anchor Line, Trendway Transportation Services Inc. It arrived at CNX Marine Terminal in Baltimore on September 11, 2003.

[10] The bearing remained in Baltimore from September 11, 2003 until September 23, 2003. During this time it was stored at a shed at one of the piers at the terminal (Pier 10 Southeast).

[11] Also during this time, Baltimore was struck by a hurricane - Hurricane Isabel. The storm hit on September 18-19, 2003 and caused significant flooding at the CNX Marine Terminal. Much of the terminal was flooded, and the evidence indicates clearly that flooding was severe and that a good deal of cargo was damaged.

[12] The main bearing, however, appears to have escaped the ravages of the hurricane.

[13] Prior to any cargo being loaded on to the "Atlantic Action", a survey was arranged by Nordana to have their cargo surveyor evaluate whether any damage had occurred to cargo destined to be loaded on their vessels. Nordana would not load cargo which, in their opinion, required corrective measures to avoid further damage. I accept Nordana's evidence in that respect, that it had no intention to load cargo which had been exposed to wetting. It was in Nordana's interest to seek out possible damage from the hurricane, and in fact, Nordana refused to load cargo that was found to have suffered wetting – it was either returned to shippers, or Nordana received specific instructions to ship the cargo in that condition.

[14] Captain Heiner Popp conducted the survey on September 19 and 20, 2003 and reported, in writing on the 23<sup>rd</sup>, that the main bearing, which was stored on Pier 10SE was in "good order" and

had not been subjected to flooding or water damage. The Plaintiffs accept and agree with this assessment.

[15] The main bearing was loaded on board the vessel “Atlantic Action” at Baltimore on September 23, 2003.

[16] The voyage from Baltimore to Pireaus was uneventful. Reports indicate that the seas and weather were typical and not excessive for the season.

[17] The main bearing was discharged from the Atlantic Action at Pireaus, Greece on October 15, 2003. It was discharged without any negative remarks being made about its condition or subsequent handling by the Pireaus stevedores.

[18] The main bearing was then stored on the Pireaus terminal awaiting shipment to Istanbul. On November 6, 2003, the main bearing was loaded on board the vessel “Tyrusland” at Pireaus. The Tyrusland bill of lading is without any negative remarks as to the condition of the bearing.

[19] The main bearing was discharged from the Tyrusland at Istanbul, Turkey on November 12, 2003. The documents signed at the time of discharge and the evidence of the witnesses present and on board the Tyrusland at the time of discharge indicate clearly that at discharge, the main bearing was in its original as shipped condition, wrapped in plastic and on a skid.

[20] The bearing was inspected visually by Veli Kosali, the terminal manager for Soyak Port Administration at the Port of Istanbul and Serdar Bilgili, the Port operations manager, responsible for all operational matters including ship arrivals, ship clearance, planning for suitable docking, and cargo unloading.

[21] Mr. Kosali was onboard the Tyrusland when it docked in Istanbul. His evidence was that he reviewed the stowage plan and saw the location of the main bearing. He remembered seeing the main bearing and that there was no visible damage. Most importantly, he remembered seeing that it was wrapped and secured to a skid.

[22] Mr. Bilgili was onboard the Tyrusland to attend the cargo unloading and to inspect for cargo damage prior to any cargo being offloaded in Istanbul. He too remembers the main bearing being onboard in its stowage position, intact, wrapped and on a skid.

[23] Mr. Kosali's evidence was also that the bearing remained in a secure depot after offloading from the Tyrusland until it was picked up by the trucker. Mr. Bilgili also stated that the main bearing was unloaded from the Tyrusland and brought to the warehouse for storage. He took notes and stated that the warehouse officers checked every piece of cargo that is received for signs or evidence of damage. No damage reports or notations were made of any kind - the bearing was delivered intact and good order.

[24] Mr. Bilgili also reviewed the terminal delivery report for the main bearing. It was issued and completed when the main bearing was picked by the trucker. The delivery report was signed by the terminal officers, the customs officers and the receivers' representatives. The delivery report contains no remarks or statements to signify that the main bearing showed any signs of damage at the time of delivery.

[25] The main bearing was stored at the terminal warehouse at the port of Istanbul until it was picked up on November 18, 2003 by the inland trucker for carriage to final destination.

[26] There is no evidence that the apparent condition of the bearing was different at unloading than it was on receipt by Kuehne & Nagel in Etobicoke. There is no evidence to contradict that at all times during transportation from Baltimore to Istanbul, the bearing was properly handled, stowed and carried. There is also no evidence that anything occurred during the overseas portion of transport, either on the Atlantic Action or on the Tyrusland that could have caused damage after loading onboard either vessel.

[27] The main bearing arrived at the Guris warehouse in Ankara, Turkey on November 20, 2003. Lovat's technician, Heinz Brockamp, was present at the time of delivery in Ankara to assist in the bearing's installation on to the tunnel boring machine. His and other of Lovat's evidence is that the bearing arrived in very poor condition. His report, prepared on November 20<sup>th</sup> states that the bearing arrived by truck with almost none of the packing or shipping material left. There was no skid. The main bearing was very rusty and wet, with bolt holes full of water. His report also



indicated that a single lip seal had been partially ripped out of its groove. The report indicates on November 20th that the necessary repair work was not just to repair damage due to rust, but also welding work and the installation of the last double lip seal on to the envelope plate and seal ring.

[28] The main bearing was also cleaned and 17 rollers were replaced, at a total cost for parts of \$1161.60 (U.S.) plus \$560.83 (U.S.) for shipping. The bearing was put into operation, and it continued to work for approximately two years, boring tunnel for a total of 4176 metres.

[29] Lovat's evidence was that it was estimated that the lifespan of the main bearing was 5000 metres. There was, however, no evidence regarding the nature of the actual use of the main bearing or the factors that would affect its lifespan, including actual load conditions experienced by the main bearing, ground conditions – whether it bore tunnel through sand or rock, speed and cutting angles, maintenance (such as frequency of lubrication) or storage of the main bearing by Guris. There is no evidence upon which to conclude that the lifespan of the main bearing was shortened by something that occurred during its shipment from Etobicoke.

### **Discussion**

[30] The burden is on the Plaintiff to prove that the loss or damage took place in the carrier's hands. This is generally done by proving the condition of the goods when received by the carrier and the condition of the goods at discharge. As set out in *Wirth Ltd et al v. Belcan, N.V. et al* (1996), 112 FTR 81 (T.D.), the first principle of proof in a marine cargo claim is that the carrier is *prima facie* liable for loss or damage to cargo received in good order and out-turned short or in bad

order. The burden is then upon the carrier to establish that the damage is attributable to a peril for which it is not liable. Where cargo is received and delivered by the carrier in the same apparent good order and condition, the onus is on the plaintiff to demonstrate that the damage occurred while the cargo was in the care and custody of the carrier.

[31] As noted, in this case, there was an inspection of the goods after the hurricane in Baltimore that indicated that the bearing had not been submerged and was in good order and condition. The goods were received in good order in Piraeus upon offloading from the Atlantic Action. They were inspected onboard the Tyrusland in preparation for offloading in Istanbul – inspected each time specifically to look for damage. Each time the goods were found to be in good order and condition.

[32] There was much speculation as to when exposure might have occurred to cause the rusting to the main bearing. The Plaintiff accepts the Popp survey report and argues that the damage was not caused by the hurricane, but must have been incurred at sea. The difficulty is that there is no evidence as to how that might have occurred and no evidence concerning the actual rust damage to this main bearing that is the subject of this action. There was visual inspection, anecdotal evidence and much speculation or bare assertion. However, there was no analysis of the main bearing or the nature and scope of the actual rust damage.

[33] As set out in *Francosteel Corp. et al v. Fednav Ltd. et al* (1990), 37 FTR 184 (T.D.):

In order to convince the court that the damage occurred while the cargo was in the carrier's custody, the plaintiff would have to establish, by a preponderance of evidence, that the proximate cause of the rust was either precipitation or condensation forming in the ship's hold. The evidence

before me as to the proximate cause of the rust damage is insufficient to establish, on balance, that it occurred during the period of the defendant's custody....it is just as conceivable that the rusting was due to moisture entering the coils prior to loading, or that condensation which developed either during discharge operations or possibly at sea, due to circumstances beyond the defendant's control, began to cause rust when allowed to sit in warehouses for between one and two months subsequent to discharge.

[34] At best in the case at hand, there were some inconclusive water samples and silver nitrate tests, but no analysis of the actual rust damage to assist in the determination of what might have caused the rust, and when there might have been exposure to cause the rust. There was even a lack of evidence as to what the main bearing was made of that would assist in determining when and/or how the rust damage might have been inflicted.

[35] The evidence of Christopher N. Mapp was particularly helpful in this respect. Mr. Mapp is metallurgical engineer and gave evidence regarding metals and rust. To determine the degree and severity of rusting, it is necessary to determine whether there is atmospheric or surface rust, which may be superficial, or whether there is uniform corrosion or pitting. Sometimes rust may look to the eye, or appear to be worse than it really is.

[36] To make any determination regarding rust damage, a number of factors must be considered, including:

- the composition of the metal;
- the type of moisture to which the metal was exposed, (whether it was atmospheric humidity, freshwater, or salt or sea water); and
- the duration of the exposure.

[37] With respect to the first factor, if the main bearing was made of low alloy steel, depending on conditions, it could rust very quickly. If the main bearing was made of high alloy steel, rusting could take longer – again depending on the conditions of exposure to moisture. There is, however, no evidence of the main bearing's composition.

[38] With respect to determining the nature of the rust damage, a visual inspection, particularly one made simply by viewing photographs, is insufficient. Mr. Mapp testified that to make an accurate assessment, specialized testing is required, including x-rays, quantitative chemical analysis and microscopic examination. This was not done in the case of the main bearing. I accept Mr. Mapp's evidence that the testing that was done, a silver nitrate test, was inadequate to determine whether metal has been affected by sea water.

[39] The evidence confirms that the main bearing arrived in Istanbul in its as-shipped condition: wrapped and secured to a skid. However, the bearing arrived at the Guris premises in Ankara unwrapped and damaged. There is no evidence of what happened to the two layers of packaging and to the skid upon which the main bearing was strapped. There is also insufficient evidence of the specific nature of the damage – whether there was uniform or surface rust, or deep pitting.

[40] The Defendants Kuehne and Nagel admit that the main bearing sustained some superficial rusting, but deny that this rusting prevented use of the equipment for its intended purpose. I agree; the superficial rust sustained by the bearing was cleaned in Ankara, Turkey, in the same manner it was cleaned by Lovat prior to and in preparation for the main bearing's shipment. With respect to

any more serious rust or other damage, there is insufficient evidence of the degree, nature and scope of the damage sustained so as to require the 17 rollers to be replaced or sufficient evidence that, on a balance of probabilities, would lead to a finding that such damage occurred due to rust from exposure while in the hands of the carriers under the terms of their respective bills of lading.

Whatever evidence there is regarding the scope of the damage indicates rust damage in a general way, but in no way does this provide a basis to determine if it was severe rust such as pitting, or uniform surface rust, or when or how it may have been incurred. There is no conclusive answer regarding rust, and whatever evidence there is regarding the scope of the damage also indicates damage other than and additional to rust. Lovat's own technician refers to physical damage to the main bearing, such as the single lip seal having been partially ripped out of its groove.

[41] There is thus no evidence other than the damage having been most likely incurred after delivery from the warehouse at the port of Istanbul – and in that regard, none of the named Defendants are responsible for the Istanbul to Ankara leg of the shipment of the main bearing under the terms of their respective bills of lading.

[42] I find that the Plaintiff has failed to discharge its burden of proof that the main bearing was damaged while in the care and custody of the Defendants pursuant to the terms of the bills of lading. Under the terms of the bills of lading, it is clear that the liability of the carriers, Kuehne & Nagel and Nordana ended once the main bearing was off-loaded and discharged in Istanbul. As noted in *Voest-Alpine Canada Corp. v. Pan Ocean Shipping Co.*, (1993), 79 B.C.L.R. (2d) 379, the Court is

left with the presumption that it was the last carrier, the trucker, who transported the bearing from Istanbul to Ankara that may be liable.

**JUDGMENT**

**THIS COURT ADJUDGES that:**

1. The action is dismissed.
2. If the party cannot agree on costs, they may file written submissions no longer than three pages in length, within twenty days of the date of this judgment.

“Martha Milczynski”

---

Prothonotary

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** T-557-04

**STYLE OF CAUSE:** LOVAT INC. ET AL v. BLUE ANCHOR LINE ET AL

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JUNE 27, 28 & 29 OF 2006

**REASONS FOR ORDER:** MILCZYNSKI P.

**DATED:** MAY 4, 2007

**APPEARANCES:**

John Carter FOR THE PLAINTIFFS

Gavin Magrath FOR THE DEFENDANTS

Victor Demarco FOR THE THIRD PARTY

**SOLICITORS OF RECORD:**

Strathy & Associates LLP FOR THE PLAINTIFFS  
Barristers and Solicitors  
Toronto, Ontario

Paterson, MacDougall LLP FOR THE DEFENDANTS  
Barristers and Solicitors  
Toronto, Ontario

Brissett Bishop LLP FOR THE THIRD PARTY  
Barristers and Solicitors  
Toronto, Ontario