Federal Court  Cour fédérale

Date: 20101217

Docket: T-1968-08

Citation: 2010 FC 1303

Ottawa, Ontario, December 17, 2010

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

KUEHNE + NAGEL LTD.

Plaintiff

and

AGRIMAX LTD.

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

[1] The defendant Agrimax Ltd. refuses to pay Kuehne + Nagel Ltd.'s account because it did the right thing. It refused to issue a fraudulent bill of lading. This defence is utterly without merit and so I grant the plaintiff's motion for summary judgment.

[2] Kuehne + Nagel is an international freight forwarder. The traditional role of a freight forwarder is to arrange for the carriage of goods on behalf of the shipper. It often has credit facilities with the carrier and pays freight and related charges on the shipper's behalf. That was done in this

case. It frequently happens that the freight forwarder also acts as agent for the ocean carrier. In this case it held the pen of Transpac Container System Ltd., carrying on business as Blue Anchor Line, and was authorized to issue bills of lading on its behalf. Blue Anchor Line is a NVOCC (non-vessel operating common carrier).

[3] Pursuant to its contract with Agrimax, Kuehne + Nagel made arrangements with Blue Anchor Line for the shipment of 22 containers of crude sulphur to be received at Irricana, Alberta (some 50 kilometres north-east of Calgary), for pre-carriage by truck and rail to Vancouver where the cargo was to be loaded on board the OOCL Kuala Lumpur for carriage to and discharge at Haldia, India. Agrimax called for a combined transport bill of lading consigned to the order of HDFC Bank Limited, Kolkata, India, its purchaser's bank. The purchaser was Hindusthan Heavy Chemicals Prop. who was to pay for the shipment by means of a HDFC letter of credit. According to the evidence of Agrimax's former treasurer, David Gaskin, it was a requirement of the contract that an on board bill of lading be issued because Hindusthan Heavy Chemicals had concerns that the containers might be left for some time before loading at Vancouver. These instructions were passed on to Kuehne + Nagel. "On board" means on board the carrying ship, not the conveyance which brings the cargo to the carrying ship.

[4] The bill of lading issued by Kuehne + Nagel, as agent for Blue Anchor Line, states that it was dated at Calgary on 25 August 2008. The cargo was said to have been "received for shipment in apparent good order and condition" at Irricana and shipped on board the OOCL Kuala Lumpur on 4 September 2008. These dates are absolutely correct.

[5] Rightly or wrongly, the Bank refused to take up the bill of lading and refused to honour the letter of credit on the grounds that the shipment was to have commenced by 31 August 2008. As a result of the refusal of anyone to take delivery, the containers remained for some time at Haldia, running up demurrage charges. Through its credit arrangements, Kuehne + Nagel was obliged to honour those charges, although in the circumstances it was able to negotiate a compromise settlement.

[6] Once the Bank refused to take up the bill of lading, Agrimax requested it be altered to remove the date on which the cargo had been shipped on board of the OOCL Kuala Lumpur. According to Mr. Gaskin, it wanted the "erroneous date of September 4, 2008" to be removed. However it still called for an on board bill. Kuehne + Nagel refused on the grounds that such removal would be illegal. It must be kept in mind that Irricana is more than 1,000 km from Vancouver.

THE PLAINTIFF'S CASE

[7] Discussions ensued for some time, with Agrimax taking the position that Kuehne + Nagel was in breach of contract. It refused to pay the freight and demurrage charges which had been incurred. Eventually Kuehne + Nagel took action in this Court for an amount in Canadian funds sufficient to purchase US$108,790 (the freight claim) as of the date of judgment together with commercial interest, and for indemnity with respect to future amounts it would have to pay; the demurrage claim which turned out to be US$61,388.

[8] Agrimax defended on the basis that the on board loading date was wrong in that it referred to the date upon which the cargo was loaded on board the ship in Vancouver, and not the date when the shipment began, which was 25 August 2008. It also took the position that as part of the credit arrangements it had assigned the proceeds of the letter of credit to Kuehne + Nagel. Since there were no proceeds, Kuehne + Nagel is owed nothing.

[9] Rather than file a counterclaim, Agrimax then instituted an action in the Court of Queen's Bench of Alberta for US$235,000, interest and costs.

[10] Kuehne + Nagel moved for summary judgment in this Court. Agrimax filed a motion record in reply. Thereafter its solicitor was granted leave to withdraw from the case. He also withdrew from the Alberta action.

DISCUSSION

[11] A bill of lading is a multi-faceted document. It is not the contract of carriage, but may, and usually does, evidence its terms. It may, or may not, be a negotiable instrument. It contains various representations on behalf of the carrier, such as the apparent order and condition of the goods, whether freight was pre-paid or is owing, and the date when the cargo was "received for shipment", or "shipped" on board as the case may be. Under the *Hague-Visby Rules*, Schedule I to the *Marine Liability Act*, a shipper may simply demand a "received for shipment" bill of lading. However, and irrespective of whether or not it demanded a "received for shipment" bill of lading, it may also demand a "shipped" bill of lading once the cargo is loaded on board the carrying ship.

[12] In this case it demanded, after the fact, an amendment to the bill of lading so that the date the cargo was taken on board the OOCK Kuala Lumpur would not appear. Put in its most charitable light, Agrimax did not know what it was doing.

[13] Kuehne + Nagel was absolutely right in its refusal to amend the bill of lading. If, on behalf of the carrier, it issued a bill of lading showing the cargo was both received for shipment and on board under a single date, 25 August 2008, the only conclusion to draw would be that the cargo was loaded on board the ship in Vancouver that very day. That would be a lie.

[14] Carriers are often pressured to issue false documents. The document may be false with respect to its date, or with respect to the apparent order and condition of the cargo. Some carriers have, at their folly, issued such documents against letters of indemnity.

[15] As stated by Mr. Justice Wright, as he then was, in *United Baltic Corporation, Ltd. v. Dundee, Perth & London Shipping Company, Ltd.* (1928), 32 Ll. L.R. 272 at page 272: "The practice of issuing clean bills of lading when goods are damaged is very reprehensible. It leads to trouble, and the people who do it ought to suffer trouble."

[16] Kuehne + Nagel avoided trouble by doing the right thing.

[17] Such letters of indemnity are unenforceable. See *Brown, Jenkinson & Co., Ltd. v. Percy Dolton (London), Ltd.*, [1957] 2 All E.R. 844, 2 Lloyd's Rep. 1, and *H. Paulin & Co. v. A Plus Freight Forwarder Co.*, 2009 FC 727, 349 F.T.R. 192.

[18] Even if there is some merit to the Alberta action by Agrimax, the terms and conditions of the contract between the parties incorporate those of the Canadian International Freight Forwarders Association (CIFFA). Those terms specifically provide that a claim with respect to cargo cannot be used in set off of a freight claim. The very clause in question was upheld by Mr. Justice Hugessen in *Locher Evers International v. Canada Garlic Distribution Inc.*, 2008 FC 319, [2008] F.C.J. No. 388 (QL). The contract simply incorporates the old admiralty rule that cargo claims cannot be pleaded to set off a freight claim (*Aries Tanker Corporation v. Total Transport Ltd. (The "Aries")*, [1977] 1 All. E.R. 398, 1 Lloyd's Rep. 334 (H.L.)).

FOREIGN CURRENCY

[19] During argument, I asked counsel if he was aware of any jurisprudence overruling the decision of the Federal Court of Appeal in *N.V. Bocimar S.A. v. Century Insurance Co. (The Hasselt)* (1984), 53 N.R. 383, 7 C.C.L.I. 165, reversed on other grounds, which held that the breach day rule applied to the conversion of obligations in foreign currency into Canadian dollars. Counsel was not aware of any such decision, and was given leave to orally amend the statement of claim to assert the breach day rule. That centuries old rule was changed in England by the House of Lords in *Miliangos v. George Frank Textiles Ltd.*, [1976] A.C. 443, in favour of the judgment date. This is said to be in the interest of justice, but in reality it was a recognition that the pound sterling was falling against other currencies. The Ontario Superior Court took this approach in *Bavaria Times Publishing Co. v. Davis* (1978), 20 O.R. (2d) 437, favourably commented upon in Harvin D. Pitch and Ronald M. Snyder, *Damages for Breach of Contract*, looseleaf (Toronto: Carswell, 1989) at

chapter 13 and S.M. Waddams, *The Law of Contracts*, 5th ed. (Aurora: Canada Law Books, 2005) at page 515.

[20] *The Hasselt* dealt with the liability of cargo interests to the shipowner in general average. The Court of Appeal found the cargo interests liable. The general average statement was in Belgium francs which had dropped dramatically against our dollar between the date of issuance of the statement and the date of trial, to the benefit of the plaintiff. However, Mr. Justice Hugessen, basing himself on *Gatineau Power Co. v. Crown Life Insurance Co.*, [1945] S.C.R. 655, and *The Custodian v. Blucher*, [1927] S.C.R. 420, held that the breach day rule applied. In commenting on the defendant's invitation to follow the lead of the House of Lords in the *Miliangos* and in the *The Despina R*, [1979] 1 All. E.R. 421, he said at p. 392 that "not without regret, I do not think it is open to this Court to change the rule adopted by the Supreme Court." I say, with no regret, that I have no choice but to follow *The Hasselt*. This Court is not in the business of currency speculation. In cases where the delay in payment is motivated by currency speculation, the Court may compensate the plaintiff by granting punitive or exemplary damages.

[21] The decision of the Federal Court of Appeal was reversed in the Supreme Court (*N.V. Bocimar SA v. Century Insurance Co. of Canada*, [1987] 1 S.C.R. 1247). The majority held that the cargo interests were not liable at all, and so did not have to deal with foreign currency conversion. In his dissent, Mr. Justice Lamer, as he then was, concluded at p. 1252 that "because my colleagues, in allowing this appeal, needed not and did not address the issue of 'currency conversion', I find no useful purpose in inuring to appellant in addressing that point."

[22] The breach day rule was again applied by the Federal Court of Appeal in *Schweizerische Metallwerke Selve & Co., Thun v. Atlantic Container Line Ltd.* (1985), 63 N.R. 104, [1985] F.C.J. No. 1039 (QL), where Mr. Justice Hugessen stated that until the Supreme Court overturns its earlier jurisprudence the breach date rule shall continue to apply. This rule was applied in *Kruger Inc. v. Baltic Shipping Co. (The Mekhanik Tarasov)*, [1988] 1 F.C. 262, [1987] F.C.J. No. 422 (QL), affirmed by the Federal Court of Appeal at (1989), 57 D.L.R. (4th) 498, [1989] F.C.J. No. 229 (QL), and in *Holt Cargo Systems Inc. v. ABC Container Line N.V. (Trustees of)* (2000), 185 F.T.R. 1.

[23] The plaintiff was given leave to file evidence in the form of Bank of Canada conversion rates. As it turns out, the breach day rule favours it. The conversion rate on the freight portion of the claim, as of 4 September 2008, was 1.0642, and on the demurrage portion, as of 24 February 2009, was 1.2470. At the time of hearing the dollars were practically at par.

INTEREST

[24] The provisions with respect to pre-judgment interest set out in section 36 of the *Federal Courts Act* do not, as provided in subsection 7 thereof, apply in respect to claims under Canadian maritime law. There is a great wealth of jurisprudence which establishes that pre-judgment interest in maritime cases is a function of damages, is at the Court's discretion, and if properly pleaded runs from the date the debt was due. One of the early cases is *Bell Telephone Co. of Canada v. Mar-Tirenno (The)*, [1974] 1 F.C. 294, affirmed by the Federal Court of Appeal at [1976] 1 F.C. 539. Although interest is often awarded at a commercial rate, given the current bank prime lending rate I consider it more appropriate, and just, to award pre-judgment and post-judgment interest at the legal rate of 5 percent, as specified in the *Interest Act*.

[25] Thus the judgment amount as of 13 December 2010 is:

Claim Item	Quantum US$	Exchange Rate	Quantum CAD$	Interest Rate	Interest	Total as at 13 Dec. 2010
Freight	$108,790	1.0642	$115,774.32	5%	$13,163.38	$128,937.70
Demurrage	$61,338	1.2470	$76,488.49	5%	$6,883.96	$83.372.45
					Total	$212,310.15

COSTS

[26] In accordance with our current practice, counsel provided a draft bill of costs. It was calculated at the high end of Column III of Tariff B, which I consider appropriate. I find it in order, save with respect to a disbursement of $2,480.41 being the retainer of Alberta counsel to defend the action in the Alberta Court of Queen's Bench. That expense is a matter for that court to decide. Fees are awarded in the amount of $8,710, which includes a previous motion on which costs have been awarded, and disbursements of $1,449.40.

JUDGMENT

FOR REASONS GIVEN;

JUDGMENT is rendered in favour of the plaintiff against the defendant in the amount of $212,310.15 plus costs of $10,159.40. Post-judgment interest on the judgment and costs is awarded at the rate of 5 percent per annum.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1968-08
STYLE OF CAUSE:	KUEHNE + NAGEL LTD. v. AGRIMAX LTD.
PLACE OF HEARING:	TORONTO, ONTARIO
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APPEARANCES:

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No one appearing	FOR THE DEFENDANT

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