Mediterranean Shipping Company SA v Glencore International AG [2017] EWCA Civ 365 - MSC Eugenia

Thu, 08 June, 2017

Mediterranean Shipping Company SA ("MSC") and Glencore International AG ("Glencore") are major carriers and traders respectively. This dispute between them involved a claim which was not large in money terms, but which raised a number of questions of some general importance in relation to (a) electronic bills of lading and delivery orders and (b) waiver and estoppel. Michael Howard QC looks at the decision.

Counsel for Appellants: Michael Howard QC and Yash Kulkarni, instructed by Duval Vassiliades

Counsel for Respondents: John Passmore QC instructed by Gateley PLC

Between January 2011 and June 2012, 70 consignments of drums of cobalt briquettes were shipped by Glencore and carried by MSC to Antwerp on a standard form MSC bill of lading. On the last occasion, when the receiver's haulier went to collect the goods from the port, two of the three containers had gone missing, and it was common ground that they had been misappropriated by persons unknown who had succeeded in penetrating the release procedures.

The bill of lading was a "to order" bill, on the front of which appeared the following provision:-

If this is a negotiable (To Order/of) Bill of Lading, one original Bill of Lading, duly endorsed must be surrendered by the Merchant to the Carrier (together with outstanding freight) in exchange for the Goods or a Delivery Order.

In 2005 the Port Authority in Antwerp had introduced a new procedure, the Electronic Release System, or ERS. Under this procedure, when bills of lading are presented, the carriers provide computer generated electronic numbers to the relevant receivers or their agents and the port terminal. These numbers are given instead of Delivery Orders or Release Notes, and are not seen by the Carriers, who generate them through the Port Authority. The holders of the bills then present the pin codes to the terminal to take delivery of the goods, normally by the collecting driver entering the pin codes at the terminal. This system is not mandatory and is not adopted by all the carriers using the port; but it had been employed for all 69 previous shipments of cobalt by MSC and Glencore's port agents, Steinweg.

MSC operated the system by sending a release note providing the pin codes by email on presentation of a bill of lading (and payment of all outstanding charges). The trial judge found that Glencore was unaware at the time of shipment that Steinweg and MSC were using the ERS. He also held that the port agents had no authority to vary the contract of carriage. These two conclusions were not challenged on appeal. He held that MSC were liable for misdelivery and that the release note, whether or not coupled with the pin code, did not amount to a delivery order as required by the bill of lading; nor in any event to a ship's delivery order within the meaning of section 1(4) of the Carriage of Goods by Sea Act 1992. He also held that Glencore were not estopped by the conduct of their agents in accepting the varied procedure on 69 previous occasions from insisting on strict performance on the seventieth.

Four grounds of appeal were advanced, namely:-

i. that there had been a symbolic delivery, because the provision of the pin codes was equivalent togiving the receiver the key to the warehouse;

ii. that the release notes coupled with the pin codes amounted to a delivery order and that was sufficient;

iii. that the release notes coupled with the pin codes did in any event amount to a delivery order within the meaning of the 1992 Act; and

iv. that the conduct of Glencore's agents gave rise to an estoppel against challenging the revised delivery procedure.

There was also an application to add a further ground on the basis of evidence coming to light after the trial, but the application was dismissed.

Ground (i), symbolic delivery failed on the facts, and calls for no further comment.

Sir Christopher Clarke gave the only reasoned judgment in the Court of Appeal, Lewison and Henderson LJJ agreeing. He held in relation to ground (ii) that the term delivery order might have several meanings, but in the context of this bill of lading meant a ship's delivery order, as that expression was defined in Section 1(4) of the Carriage of Goods by Sea Act 1992 which provides as follows:-

4. References in this Act to a ship's delivery order are references to any document which is neither a bill of lading nor a sea waybill but contains an undertaking which—

> *a. is given under or for the purposes of a contract for the carriage by sea of the goods to which the document relates, or of goods which include those goods; and*
>
> *b. is an undertaking by the carrier to a person identified in the document to deliver the goods to which the document relates to that person.*

In relation to ground (iii), he rejected Glencore's submission that the electronic release note was not a document, but he upheld their submission that it was not a delivery order within section 1(4) either because it did not contain an undertaking to deliver to anyone, or because it did not contain an undertaking to deliver specifically to Glencore or its port agent. It seems therefore that the Court required an express identification of the obligor and the obligation.

So far as estoppel, ground (iv), is concerned, the Court rejected the submission that the 69 previous transactions where the ERS had been followed by the parties gave rise to an estoppel in favour of MSC. It was held that there was no representation by Steinweg that the Release Notes coupled with the PIN codes were to be treated as the equivalent of delivery orders for the purposes of the bill of lading. Rather they were merely repeated instances of toleration by the receivers of breach of contract by the carriers in tendering documents in exchange for the bill of lading other than a delivery order as required by the terms of the bill. The decision therefore illustrates the distinction between contractual waiver and waiver/equitable estoppel. The Court also held that just as Steinweg lacked authority to vary the contract, so they lacked authority to waive the terms so as to create an equitable estoppel even though they could waive the breach.

The decision is of general interest for three main reasons. First, there was no previous guidance as the interpretation of the expression "ship's delivery order" in section 1(4) of the 1992 Act. Secondly, the case concerned a commonly used term in a bill of lading in the context of what is a procedure increasingly to be found in ports, particularly large container ports, which have throughout this century been introducing systems whereby containers may or must be retrieved from a container park by reference to computer codes rather than the presentation of physical documents. The result of the Court's decision is in effect to transfer of the risk of theft from the receiver to the carrier in such cases. Thirdly, the decision on estoppel is a striking illustration of the way in which the rules relating to variation of contract, equitable estoppel, waiver and the authority of agents as regards all of these may intersect.