When is a *"clean bill"* not clean?

Breffka & Hehnke GmbH & Co KG and others v. Navire Shipping Co. Ltd and others (Saga Explorer) [2012] EWHC 3124 (Comm)

Cargo interests brought a claim under the bills of lading in relation to a heavily rusted cargo of steel pipes. The pipes were in fact rusty on shipment, but the bills of lading contained a standard form RETLA clause (named after the US case, *Tokio Marine & Fire Insurance v. Retla Shipping*), on which the owners sought to rely in order to defeat the claim. The RETLA clause sometimes appears on the face of a bill of lading where the carriage involves iron, steel, metal products or timber. The aim of the clause is to qualify the term *"apparent good order and condition"* by clarifying that, when the cargo was received for shipment, it was not necessarily free of visible rust or moisture, staining, chaffing etc. This means the carrier can issue clean bills of lading, even though the mate's receipts have been claused. The decision of Mr Justice Simon in this case is the first time that the English courts have considered this clause. He disagreed with the reasoning behind the decision in *Tokio Marine* and held that the representation made in the bills as to the cargo's apparent condition was false.

The background facts

The vessel loaded a cargo of steel pipes at Ulsan, for carriage to Los Angeles, San Francisco and Vancouver. The bills of lading contained a US General Paramount Clause incorporating US COGSA. They also contained the usual statement that the goods were shipped *"in apparent good order and condition"*. In addition, however, the bills included a RETLA clause, which provided in material terms as follows:

> *"If the goods as described by the Merchant are iron, steel [or] metal..., the phrase 'apparent good order and condition' set out in the preceding paragraph does not mean the Goods were received… free of visible rust or moisture... If the Merchant so requests, a substitute Bill of Lading will be issued omitting this definition and setting forth any notations which may appear on the mate's or tally clerk's receipt."*

A load port survey contained a number of comments relating to rust staining and surface oxidisation of the steel pipes and recommended clausing the bills and mate's receipts. The mate's receipts also included a RETLA clause and specified that the condition of the cargo was as per the surveyor's report. The surveyor's report was not, however, attached. The relevant booking note stated that bills were to be issued as per the mate's receipt.

The owners did not, however, clause the bills. Instead, at the shippers' request, they issued clean bills, containing the RETLA clause. They did this against a LOI from the shippers. When the cargo was discharged at each of the three discharge ports, it was found to be significantly rust damaged. The cargo interests sued the owners for their resulting losses.

The Commercial Court decision

There was no suggestion that there had been significant deterioration in the condition of the cargo during the voyage, so the main issue was the nature of the representation as to the condition of the cargo made by the owners on shipment. The owners relied on the RETLA clause and argued that the clause should be interpreted as meaning that all surface rust, of whatever degree and extent, was excluded from their representation as to the apparent good order and condition of the cargo. They cited the decision in *Tokio Marine & Fire Insurance Company Ltd v. Retla Steamship Company* [1970] 2 Lloyd's Rep 91 in support of their

argument. In that case, the US Court of Appeals (Ninth Circuit) took the view that the clause meant, reading the bill of lading as a whole, that there was no representation that the pipes loaded were free of rust or moisture.

The cargo interests contended that the RETLA clause qualified the representation as to apparent order and condition, but that the two provisions still had to be read together. They further argued that, since the clause sought to avoid liability, it ought to be read restrictively and should only be effective to exclude liability for surface rust likely to be found in any normal cargo and that would not detract from the cargo's overall quality or merchantability.

The judge broadly agreed with the interpretation argued for by the cargo interests, taking the view that the RETLA clause had to be read together with the standard statement as to condition. He, therefore, concluded that it was, in effect, a qualification "*directed to the superficial appearance* [of the cargo]".

The judge went on to set out two reasons for disagreeing with the owners' interpretation:

1. it would rob the representation of apparent good condition of all effect; and
2. the reasoning in the US case on which the owners relied was flawed. The US court placed great emphasis on the fact that the shippers had the right, if they so wished, to have substitute bills of lading issued, noting the actual condition of the cargo (in practice, referring to the surveyor's report). In reality, a shipper would be very unlikely to do this, given the difficulties a seller will generally have in obtaining payment against a claused bill.

The judge concluded that the representation made by the owners in the bills was fundamentally false (deceitful in fact) and that that representation had been relied upon by the cargo interests, to their detriment. He, therefore, found in favour of the cargo interests.

Comment

This decision highlights the Master's duty to record the cargo's apparent order and condition accurately, based on his honest and reasonable opinion. There is therefore no real substitute for clausing the bills where the condition of the cargo at the time of shipment requires it. Failure to properly describe the condition of the cargo leaves the owners open to allegations of being party to a misrepresentation, particularly from third party purchasers of the cargo who have only contracted to do so based on a bill of lading and who have not been shown any pre-shipment survey by the sellers.

In English law at least, the incorporation of a RETLA clause in a bill of lading will not protect owners, except in cases where the cargo displays only superficial rust or moisture. A LOI from shippers, such as the one issued in this case, will provide no recourse for owners where they knew, through the Master, of the actual condition of the cargo at the time the clean bills were issued and the LOI given. In those circumstances, their actions will be deemed wrongful and the LOI will consequently be unenforceable.

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