IN THE COURT OF APPEAL OF SEYCHELLES

Beoliere Aqua (Proprietary) Limited	Appellant
VS	
Air Seychelles Ltd	Respondent

CR SCA No: 28/2010

BEFORE: MacGregor, President; Fernando; Twomey; JJA

Counsel: Mr. D. Sabino, for the Appellant
Mr. K. Shah, for the Respondent

Date of Hearing: 5th April 2012
Date of Judgment: 13th April 2012

JUDGMENT

Anthony F. T. Fernando JA.

1) This an appeal against a judgment of the Supreme Court dismissing a claim of SR 63,250 and interest at 4% and costs, by the Appellant (then Plaintiff) made against the Respondent (then Defendant) and awarding the Respondent a sum SR 7,457.92 that was counter claimed.

2) The Appellant's claim was based on an alleged breach of contract by the Respondent in delaying by one week, to bring into the Seychelles, a compressor, by air freight, which resulted in loss of business to the Appellant.

3) The Respondent while denying any breach on its part had counter claimed a sum of SR. 7,597.92 which was the freight cost for bringing the compressor that weighed 631 kg.

4) The Appellant has raised the following grounds of appeal:

   i) The learned Judge erred in failing to correctly apply the law to the facts. He had found that it was an essential term of the contract between the parties that the goods arrive in Seychelles on time; he had found that the goods did not arrive on time, but he fails to correctly attribute liability on the Respondent.
   ii) With regards to the counterclaim, the Learned Judge failed to realize when the actual offer and acceptance was made, and in so failing to recognize such, failed to discern the actual terms of the contract.
   iii) The learned Judge ignored an email from one Joeleen Hulley of Jonen Freight, dated April 19, 2007, in which she states to Christopher Samsoodin of Air Seychelles that the cargo was delivered on time but that the Respondent did not take it.

5) In dealing with the first ground of appeal it is pertinent to see how the Learned Trial judge dealt with issue of liability in connection with the delayed arrival of the cargo in question. Having correctly identified that this was essentially a question of fact to be determined on the basis of the evidence on record, the learned trial judge had stated that he believed the defendant's (now Respondent's) witness Mr. Samsoodin, the Chief of Air Seychelles Cargo Section, in every aspect of his testimony and as to how and under what circumstances the delay occurred in transporting the cargo from South Africa to Seychelles. According to the findings of the trial judge, the freight forwarding agent **Jonen Freight Pty Ltd**, the agent of the supplier/consignor of the compressor, which the Appellant had ordered, was

the one responsible and involved in preparing the airway bill, export-documentation and of forwarding or entrusting the cargo to the Respondent's agent, **Aviation GSA International PTY Ltd,** in Johannesburg, South Africa, for transportation to Seychelles. The learned trial Judge states that the Appellant's witness, Mr. White, admitted in cross-examination that he did not know, whether it was the Respondent or **Abac Air compressors (SA)(Pty) Ltd** (supplier of the compressor/consignor) that was responsible for appointing **Jonen Freight Pty Ltd,** as cargo forwarding agent. Commenting further on White's evidence the learned trial Judge had gone on to state that Mr. White admitted that the freight forwarding agent is the one responsible for signing and completing the airway bill before the cargo being uplifted and that the goods cannot be exported by the suppliers in South Africa unless and until the customs formalities are completed and the cargo is delivered to the carrier's agent by the cargo forwarding-agent with proper and necessary documents. The learned Trial Judge thus finds: "In the circumstances, I find on evidence that the freight forwarding agent **Jonen Freight Pty Ltd,** did not deliver the cargo with necessary documents to the defendant (now Respondent) in time so as to be loaded on board and transported by the scheduled Air Seychelles flight that left Johannesburg on the 18th April, 2007 for Seychelles. Therefore I conclude that the defendant (Respondent) was not directly or vicariously responsible for the delayed arrival of the cargo in question and such delay was caused by the act/s of third parties who were not the agent/servant/prepose of the defendant company. Hence, I find that the defendant (Respondent) is not liable to compensate the plaintiff for any loss or damage, which the plaintiff might have suffered due do delayed arrival of the said cargo. Having said that, I note the defendant-company (Respondent) has taken all reasonable and necessary steps as a prudent carrier, to transport the cargo with minimal delay by using the next available flight to Seychelles. Obviously, the plaintiff's claim against the defendant in this matter is devoid of merits…." We see no reason to disturb this finding of fact by the Trial Judge.

6) It is clear from a perusal of the record of proceedings that the supplier/consignor of the compressor ordered by the Appellant (consignee),

was **Abac Air compressors (SA)(Pty) Ltd;** the freight forwarding agent was **Jonen Freight Pty Ltd;** and the Respondent's agent in Johannesburg, South Africa, was **Aviation GSA International PTY Ltd.** Each of them had a role to play in this shipment. **Abac Air compressors (SA)(Pty) Ltd,** to supply the compressor, **Jonen Freight Pty Ltd** to do all necessary formalities in preparing the airway bill, export-documentation and forwarding or entrusting the cargo to **Aviation GSA International PTY Ltd,** in Johannesburg, South Africa; and **Aviation GSA International PTY Ltd** to ensure that the compressor is loaded on to the aircraft for shipment to Seychelles.

7) Article 16 of the Carriage By Air (Overseas Territories) Order, 1967 (Cap 22) states:

1. The consignor must furnish such information and attach to the airway bill such documents as are necessary to meet the formalities of customs, ……..before the cargo can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier or his servants or agents.
2. The carrier is under no obligation to enquire into the correctness of such information or documents

It is therefore clear that it was not the responsibility of the Respondent to deal with the South African customs formalities.

8) Mr. Samsoodin testifying before the Court has categorically said that **Jonen Freight Pty Ltd** was not the agent of the Respondent and in 90% of transactions it is the supplier/consignor who contacts the forwarding agency and especially when the consignee is in a different country. He had said that it is the forwarding agent who does all the logistics which regards to the shipment, that is customs clearance, completion of the airway bill and booking with Air Seychelles Cargo, namely **Aviation GSA International PTY Ltd.** It had been Mr. Samsoodin's position that the delay arose because customs formalities for

the export of the cargo had not been completed in good time for Air Seychelles to take the cargo and without customs authorization Air Seychelles cannot uplift the goods. According to D1, an e-mail dated 19th April 2007, sent by Mario Turketti of **Aviation GSA International PTY Ltd** to Mr. Samsoodin: "Jonen Freight who handled the shipment received the cargo Monday afternoon – 16 April 2007. The company who delivered didn't have correct ctc details and Jonen Freight had to phone around trying to get details. Jonen also struggled to obtain the Export Code number (without this cannot export) and also advised there was no F 178. They received these documents on Wednesday from Raymond/Jack. Jonen Freight then started with the customs formalities and was released from customs late Wed afternoon, this after the flight departure."(verbatim). Mr. Samsoodin had said that he has no reason to disbelieve what is stated in the e-mail. There was no objection to the production of this document. When all formalities are over, the cargo is taken onboard the plane and the original of the airway bill given to the cabin crew, and the other two to the consignee and the shipper. It had been Mr. Samsoodin's position that there is no airway bill for the 18th of April 2007, because the cargo was not ready for shipment.

9) Mr.Austin White, testifying on behalf of the Appellant, before the Court had stated that the Respondent had informed him that the cargo could not be brought on the 18th April flight because the documentation was not complete since Customs had not authorized the shipment. He had admitted that if the customs formalities are not completed, the goods cannot be exported. The Appellant, which had to prove its case on a balance of probabilities, that it was the Respondent that was responsible for the delay in the delivery of the compressor to the Appellant on the 18th of April 2007; was unable to inform Court as to who had engaged the freight agent, Jonen Freight. It is always the normal practice for the supplier or consignor to arrange the freight agent and there was no evidence to indicate that there was a departure from this normal procedure and more so that it was the Respondent which had undertaken this responsibility. Mr. White's evidence after having categorically stated that "Everyone needs a freight agent apparently when you book something to travel" is of importance:

Q. So Jonen Freight Pty Ltd was your freight?
A. No, nothing to do with me at all.
Q. How did they get into contact?
A. I assumed it was either appointed by ABac or by the company representing Air Seychelles.
Q. But it was not contacted by Air Seychelles for that?
A. Possibly. But we do not know for sure who actually booked Jonen and Freight. (verbatim and underlining by us).

This evidence is most unconvincing to lay blame on the Respondent for a default on the part of the freight agent or supplier.

10) The Appellant relies on an e-mail sent by Joeleen Hulley of **Jonen Freight Pty Ltd**, dated 19th April addressed to Mr. Samsoodin, to lay blame on the Respondent for the delay in bringing the cargo. The e-mail reads: "As I said earlier we handed the cargo in on time but if the airline cannot take it here this is completely out of our control."(underlining by us). The 3rd ground of appeal is based on the failure of the Judge to take this e-mail into consideration. What is to be noted is that even if cargo is delivered to **Aviation GSA International PTY Ltd,** if the customs formalities are not completed, the goods cannot be airlifted. Further if the cargo was handed over to **Aviation GSA International PTY Ltd** as claimed in the e-mail after all formalities were completed the question arises as to why the Appellant had not produced an airway bill for the 18th of April 2007, which necessarily should have been in their possession. The burden was on the Appellant to prove on a balance of probabilities that the contents of Joeleen Hulley's e-mail were true and not on the Respondent to refute it. We therefore dismiss the 1st and 3rd grounds of appeal.

11) The 2nd ground of appeal is against the order of the trial court, to the Appellant to pay the sum of R 7,457.92 to the Respondent as freight costs in respect of 631 kg of cargo, namely the compressor, the Respondent transported for the Appellant on the 25th April 2007, from South Africa to Seychelles. The Appellant contends that it need pay only $1 as freight. Mr. Austin White testifying for the Appellant had stated that in February 2007 the Appellant had contracted with the Respondent for an immediate airlifting of 7 cartons of raw

material needed for their plastic bottling plant. According to Mr. White only 2 cartons were delivered on the agreed date and the balance 5, a couple of days later, causing them losses. The Respondent had accepted responsibility for the delay and had agreed to compensate the Appellant by offering a concessionary rate of freight when the Appellant next required their services. In an e-mail dated 7th March 2007, Mr. J. Bonnelame on behalf of the Respondent had stated: "…….In view of the above, we will offer as compensation a concessionary freight 'rate of' USD 1.00 on your next shipment from JNB based on 1600 kilos….."(exhibit P1, emphasis by us). By its e-mail of 11th April the Appellant had responded stating: " We wish to take you up on this free offer of 1600 kg free cargo for USD 1 and use part of it on next Wednesday flight 18th April from J'burg. The cargo will only be approximately 600 kg still in credit…."(verbatim) The Respondent had, by way of response confirmed the agreement.

12) Article 1156 of the Civil Code of Seychelles Act states: "In the interpretation of contracts, the common intention of the contracting parties shall be sought rather than the literal meaning of the words. However, in the absence of clear evidence, the court shall be entitled to assume that the parties have used the words in the sense in which they are reasonably understood." We are therefore in agreement with the Trial Judge when he states: "Any reasonable reader of exhibit **P1** would undoubtedly, understand that the defendant(Appellant) has agreed to apply only the concessionary rate of US$1 per kilogram in respect of 1600 kilos of cargo, which the plaintiff had intended to import from Johannesburg to Seychelles. No reasonable person would construe and equate the above offer of concessionary rate to an offer free of charge. Also pertinent to note that the crucial term "rate" used by the Defendant(Appellant) in its natural and ordinary sense would mean and means that the concessionary rate was offered only per kilogram of cargo." We are of the view that if the Appellant had meant free freight of 1600 kilos they would have simply said so, without any reference to "a concessionary freight rate". Mr. Austin White testifying on behalf of the Appellant had admitted that P1 "is not very well written basically". Mr. Austin, in answer to the question from his Counsel in his examination-in-chief: "As a result of these delays, what happened?", had said: "Air Seychelles admitted full liability for not delivering

my cartons as contracted and offered me a concessionary rate on my next cargo uplift……" This in our view cannot be understood as a concession of free cargo of 1600 kg. The normal freight rate been US$ 2.16 the Appellant had been offered a discount of US$ 1.16 per each kilo up to 1600 kg. The basis for the discount of US$ 1.16 or the limit on 1600 kg is not borne out in the evidence. The evidence of Mr. Samsoodin in answer to Court, clearly shows that at the time of delivery of the compressor the Appellant was very much aware that the freight charges for the compressor was US$ 631, but did not make any protest at the time he took delivery, on the issue of freight. This evidence has not been contradicted.

13) Counsel for the Appellant tried to argue that the e-mail of 7th March 2007 from Mr. J. Bonnelame on behalf of the Respondent was only an invitation to tender and the real offer was made by the Appellant by its e-mail of the same date in response to Mr. Bonnelame's e-mail. He tried to argue that the Respondent had, by its response accepted the Respondent's offer. We are not impressed by this argument and see no merit in the 2nd ground of appeal.

14) We therefore dismiss this appeal with costs to the Respondent.

A.F. T. Fernando
Justice of Appeal

I agree

F. MacGregor
President, Court of Appeal

I agree

M. Twomey
Justice of Appeal

Dated this 13th day of April 2012, Victoria, Seychelles