IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS 111/2015

[2017] SCSC 922

NEDDY NOURRICE

Plaintiff

versus

BENELUX SHIPPING SEYCHELLES COMPANY LIMITED

Defendant

Heard:	16 March, 29 May, 12 July, 6 September 2017
Counsel:	A Derjacques for plaintiff
	L Pool for defendant
Delivered:	6 October 2017

JUDGMENT

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[1] The Plaintiff Neddy Nourrice runs a business of PR and events management under the trade name of Organisers Seychelles, which requires the Plaintiff to import goods and other logistics from overseas. On 17th September, 2015 the Plaintiff entered into an agreement with Constance Lemuria Resort to organise the end of the year festive activities and provide decorations to the hotel. The Plaintiff purchased goods for the events and decoration from the United States amounting to a total weight of 90.08

kilograms and sought the services of the Defendant, Benelux Shipping (Seychelles) Company Limited to transport the goods to Seychelles by air.

[2] By exchange of electronic mails, on the 10th November, 2015, the Plaintiff was given the quotation of US$ 6.5 per kilo to freight the goods from the United to Seychelles plus TRN US$ 35 flat, P/U US$ 225 flat, Export Doc US$ 50 flat fee, screening US$ 25 flat fee, TT 4 days and weight 80kg. The same quotation was repeated minus the TRN and P/U by email of 24th November, 2015 but with addition of the phrase *Pls note the air freight for 100+*.

[3] On the 24th November, 2015, the Plaintiff gave the go-ahead by email for the goods, which weighed at ().08 kg to be airfreighted from Colorado, USA to Seychelles. The airway bill quoting the weight of the goods at 90.08 kg was received on the 4th December, 2015. The goods landed in Seychelles on the 10th December, 2015. When the Plaintiff went to collect the goods, the Defendant objected to the release of the goods, claiming a lien over the goods unless the Plaintiff paid in addition to the other above quoted sums, the sum of US$6.5 per kg for the minimum weight of 331 kg.

[4] The Plaintiff refused to pay that amount filed for a Court order for the release of the goods. The Court duly made an order for the release of the goods with condition that the Plaintiff pays the sum Rs28,937.67 cents as claimed by the Defendant pending the conclusion of the case on the merits. The sum was duly deposited and the Plaintiff took delivery of the goods in time for her to honour her contract with Constance Lemuria Resort but had to pay additional costs being Rs3,500 handling fee to John Dixie, Rs332 delivery charge to Air Seychelles and Rs2,621.31 tax to Government of Seychelles.

[5] The Plaintiff testified according to the above sequence of events. She added further that all along she was given the quotation of US$ 6.5 per kilo and no mention was made of minimum payable weight. Only on the 5th December, 2015 was she informed by email that the freight charges will be calculated on 331kg. By then it was too late for her to cancel as it would have led to her being unable to perform her contract with Constance Lemuria Resort.

[6] The witness for the Defendant, Samentha Eugenie, also admitted in her testimony to the sequence of events as related above but maintained that the Plaintiff had been informed by email on the 5th December that she will be charged the chargeable rate of 100kg+ and that the Plaintiff had already agreed to personally bear the costs as she could not afford to ruin her business reputation. She testified further that since the airline, Emirates, charged a minimum chargeable rate of 331kg, the same was calculated for the Plaintiff's cargo. The Plaintiff was informed by email on the 5th December, 2015. The invoice for the amount was raised on the 14th December, 2017 but she has not paid to date. The Plaintiff has also not paid the local costs as counterclaimed.

[7] The submissions of learned counsel for the Plaintiff and Defendant are reproduced hereunder.

[8] Learned counsel for the Plaintiff Mr Anthony Derjacques submitted:

> *Plaintiff was a long-time customer. The Defendant provided services and imported freight and goods into Seychelles, for the Plaintiff, inter alia. For the first time, the agreement concerned air freight, and from the United States of America.*
>
> *There is no single contract, but a series of emails indicating a meeting of the minds. The freight concerned goods to be utilized in the New Year festivities by a single client Lemuria Resorts. The date and time factor was therefore of major importance.*
>
> *Plaintiff has proven the following:*
>
> *The agreed price of US$6.50 per kilo of freight. This is clearly established as per EX D1 an email from the Defendant to the Plaintiff.*
>
> *Exhibit D3, dated 25.11.2015 clearly states that the Plaintiff was clear she did not agree on further fees or freight charges to Defendant.*
>
> *There is no documentary evidence on record that the Plaintiff agreed that the chargeable weight of 331 kg was the agreed sum payable at US$6.50 per kilo. The Plaintiff did not ship the 331 freight weight. She did not agree at the time of the agreement, that the minimum chargeable weight, her liability was a minimum 331 kilograms, payable at US$6.50 per kilogram.*
>
> *EX P4 established the actual weight of the freight brought to Seychelles. EX P7 is the airway bill and manifest EX P11, is the receipt from Air*

Seychelles giving the exact weight of the freight belong, to the Plaintiff as 90.8 kg. EX P10 is the bill of entry for the freight.

It as to be noted that once the airway bill was issued in the USA, to the Defendant's agent, it could not be withdrawn and payment by the agent was mandatory. This was on the 4th of December 2015. Plaintiff was thereby, now fully informed of the Defendants position vis-a-vis the claim based on 331 kg at US$6.50 per kilo. Plaintiff was informed and told she had no option but to carry on with the transaction. But was it Defendant's liability for not being clear and precise prior. Defendant should have obtained prior agreement and not sought to impose on Plaintiff (EX D2). There was no freely given legal consent on the 5th of December.

Plaintiff has paid all other fees, pertinent with respect to the importation, handling fees and tax.

Plaintiff has proven that the liability was for 90.8 kgs of freight at US$6.50 per kilogram totalling US$590.00, in total. Moral damages in the sum of SR20,000/-, should further be paid for stress and anxiety for the Plaintiff.

The counter claim should be rejected.

[9] Learned counsel for the Defendant submitted as follows:

The Plaintiff asked for a quote from the Defendant, a Shipping company with its Headquarters located in Dubai. The consignment to be transported was in Colorado Springs, USA and needed to be Air-freighted to Seychelles as fast as possible in time for a show which was to take place in December 2016. The cargo consisted of a few cartoons with a weight of around 140/175 kilos according to Plaintiff's email dated 6/11/2015. The Plaintiff's enquiry was sent to the Defendant's Dubai Office which Respondent that Air freight could be arranged and the Plaintiff was asked to give details of the cargo.

By email dated 24/11/2015 one Palax from Benelux Shipping Dubai informed the Plaintiff that Air freight for 100+ kg, was US$6.50 per kilo, export fee $50.00 flat fee and screening $25. The Plaintiff having received the above information replied in an email dated 25/11/2015 that she will bear the responsibility for additional payment or anything beyond the agreement.

The Plaintiff's initial enquiry stated 140 kgs as weight of the cargo, she did not provide the Agent in Dubai the exact weight and dimensions or the number of packages. The Defendant's email dated 5/12/2015 promptly updated the Plaintiff of chargeable weight on Emirates Airway Bill and informed her that the Company Benelux had to pay the chargeable weight

of 331 kg. The Plaintiff confirmed that she will pay for the weight as stated on the Airway Bill.

It is our submission the Plaintiff had the option of cancelling the shipment but she chose not to. The goods landed in Seychelles on time for her show and she refused to pay the Defendant.

The Defendant quoted the following rates to the Plaintiff:

331 kg x US$6.5 per kg =	*$ 2,151.50*
Export document	*$ 50.00*
Screening	*$ 25.00*
Pick up	*$ 225.00*
Total	***$ 2,451.50***

The Defendant submits that the Agent in USA prepared the draft Airway Bill for confirmation and since Dubai/Seychelles is a day ahead of USA given the times zones, the draft Airway Bill prepared on 4gh December 2015 in the USA naturally will be received in Dubai/Seychelles on 5/12/2015 a day ahead. Ms. Eugenie for the Defendant explained that a draft Airway Bill document has no relevance till the cargo is physically handed over and the Airway Bill is executed which then becomes a contractual document. In this case it was executed after confirmation from the Plaintiff.

Ms. Eugenie further explained that the shipment had been pre-booked. She said that they never charge the rate per kilo of what had quoted to the customer initially. She said it was on the final chargeable rate that was different from the gross weight that was provided to the customer initially.

The Plaintiff deposited the sum of SR28,608/- into the Registry of the Supreme Court on 21st December 2016 as a guarantee in order for her cargo to be released and the money is still being held by Registry pending the hearing and outcome of the present case.

The Defendant counter claimed for the additional local charges paid by the Defendant which amount to SR1,875.88 and not SR6,900 as stated in the counter claim.

The goods are in the possession of the Plaintiff and she has filed to prove that the Defendant was in beach of the agreement. Her goods landed in Seychelles on time and she paid nothing for them, she is clear breach of the said agreement. On the other hand the Defendant has incurred loss and damage, whilst the Plaintiff has benefited.

In the final analysis it is not disputed that the Plaintiff failed to pay the fees incurred by the Defendant to bring the cargo to Seychelles. The Defendant is therefore entitled to be refunded the amount of US$2,151.50 + SR1,875.88 local charges and the Defendant urges the Court to give judgment in its favour with interest and costs.

[10] Generally a contract forms when one person makes an offer, and another person accepts it by communicating their assent or performing the offeror's terms. If the terms are certain, and the parties can be presumed from their behaviour to have intended that the terms are binding, generally the agreement is enforceable. Terms in an agreement are incorporated through express promises, by reference to other terms or potentially through a course of dealing between two parties. Those terms are interpreted by the courts to seek out the true intention of the parties, from the perspective of an objective observer, in the context of their bargaining environment.

[11] While agreement is the basis for all contracts, not all agreements are enforceable. A preliminary question is whether the contract is reasonably certain in its essential terms, (*essentialia negotii*), such as price, subject matter or the identity of the parties. In the case of *Hillas & Co Ltd v Arcos Ltd*, [1932] UKHL 2, the House of Lords held that an option to buy softwood of "fair specification" was sufficiently certain to be enforced, when read in the context of previous agreements between the parties. However in the case of *Scammell and Nephew Ltd v Ouston* *1941] 1 AC 251* a clause stipulating the price of buying a new van as "on hire purchase terms" for two years was held unenforceable because there was no objective standard by which the Court could know what price was intended or what a reasonable price might be. Similarly, in *Baird Textile Holdings Ltd v M&S plc [2001] EWCA Civ 274* the Court of Appeal held that because the price and quantity to buy would be uncertain, in part, no term could be implied into the agreement.

[12] A statement can become a term, and if the contracting party has not signed any document, as in this case, then terms may be incorporated by reference to other sources, in this case communications by electronic mail or through a course of dealing. The basic rule as set out in the case of *Parker v South Eastern Railway Company (1877) 2 CPD 416* is that reasonable notice of a term is required to bind someone. In this case it was the first time the Plaintiff and the Defendant entered into such a business dealing to airfreight goods.

[13] Having gone through all the exhibits admitted in this case, it is obvious that the first time the Plaintiff was informed of the exact minimum weight on which she would be charged was by email on 5th December, 2015 at 15.08 hours. The Defendant stated correctly that the email of 24th November, 2014 stated that the airfreight was for 100+. The witness attempted to explain that the quotation 100+ meant that the chargeable weight would be for over 100kg. However no such explanation is found anywhere in the correspondence until the 5th December, 2015 at 15.08 hours. Applying the concept of the perspective of an objective observer, in the context of their bargaining environment in this case, I am of the firm opinion that a person dealing with the Defendant for the first time would not have known what the Defendant meant by airfreight for 100+. This is more so when one considers that two previous emails clearly stated that the rate was US$ 6.50 per kg and the email of 10th November, 2015 stated the weight as 80kg.

[14] Furthermore, on the 24th November,2014, the Plaintiff specifically requested the Defendant "*Can you please provide with the whole cost of 140kg, i.e .how much I have to pay in total excl PU & TRN*". The Defendant's answer was "Please note the air freight for 100+, US$6.5/kg, Export Doc fee US$ 50 flat fee, screening US$ 25 flat fee, TT 4 days. Short of concluding that the Defendant appeared to have been deliberately concealing the true cost to the Plaintiff, I find that the only possible conclusion a reasonable person dealing with the Defendant for the first time would come to was that the weight of the cargo would be determined at US$6.5 per kilogram. Hence this can be the only conclusion that can be reached as a reasonable term of the contract.

[15] Consequently, I find that the Defendant cannot require the Plaintiff to pay more than the actual weight of the cargo in the circumstances as there was no clear term that such was meant by the Defendant until after the Plaintiff had accepted the Defendant's terms and agreed for the cargo to be flown to Seychelles. The late disclosure on the 5th December, 2015 cannot form part of the terms of the agreement.

[16] With regards to the claim for moral damage, anxiety and stress, I find that the manner in which this transaction had been conducted indeed placed the Plaintiff in a position where she had to do more than was necessary to secure the goods and to meet her commitments under her agreement with Constance Lemuria Resort. She had to further pay additional

costs to take delivery of the goods, such being Rs3,500 handling fee to John Dixie, Rs332 delivery charge to Air Seychelles and Rs2,621.31 tax to Government of Seychelles. However I am satisfied that the Plaintiff obtained the goods on time for her activities.

[17] The evidence also showed that the Defendant incurred some local costs amounting to the sum of SCR1,875.88cts for which the Defendant counter-claimed in respect of their handling of the goods.

[18] I therefore enter judgment for the Plaintiff as follows:

i. The airfreight payable by the Plaintiff is 90.8kg x US$6.5 = US$585.52

ii. Export Doc fee US$ 50 flat fee

iii. Screening US$ 25 flat fee

iv. Pick up US$ 225.00

Total US$ 885.52 or the equivalent of the day of payment rate in SCR.

v. I award moral damage in the sum of SCR 12,000 to the Plaintiff.

vi. I award the Defendant the sum of SCR1,875.88cts for expense incurred and counter-claimed.

[19] I award costs to the Plaintiff.

Signed, dated and delivered at Ile du Port on 6 October 2017

G Dodin
Judge of the Supreme Court