1988 September 5

(PIKIS, J)

ABDUL HAMID BORGHOL & CO.

Plaintiffs,

v.

THE SHIP «AKAK PROGRESS» NOW LYING AT THE PORT OF LIMASSOL,

Defendant.

(Admiralty Action No. 20/85).

Evidence — Evidential burden — Written contract — Allegation that it was varied — Burden rests on party propounding such allegation

Damages — Breach of contract — Confined to what is objectively foreseeable.

The agreement between the parties provided for transportation of cargo of goods by the defendant ship from Italy «to Limassol in transit». The cargo was not discharged at Limassol, but at Tripoli, Lebanon.

Hence this action for damages for breach of contract. The plaintiffs' claims as finally formulated, are: (i) U.S. $3,500.- the expense incurred for recovering the goods, less U.S. $750.- the freight that they would have to pay in any event.

(ii) U.S. $2,000.- loss occasioned by the delay causing the plaintiffs to sell the goods below cost.

The defendants denied liability alleging that the port of discharge changed on the instructions of the plaintiffs.

Held: (1) The evidential burden to substantiate variation of a written agreement rests on the party propounding the occurrence of such change. In this case the defendant failed to substantiate their allegation.

(2) The defendants are guilty of a breach of contract in that contrary to the terms of the agreement -

(a) they discharged the goods at a port other than the one specified in the agreement; and

(b) delivered the goods to a person other than the plaintiffs the owner of the goods.

(3) Claim (i) has been proved.

(4) In the absence of evidence as to a drop in the market value of the products between the time at which the plaintiffs could reasonably expect to receive the goods at Limassol and the time of sale claim (ii) is unsustainable.

Judgment for the plaintiffs for U.S. 2,750 plus costs.

Cases referred to:

Saab and Another v. Holy Monastery of Ayios Neofytos (1982) 1 C.L.R. 499.

Admiralty action.

Admiralty action for damages for breach of contract of carriage of goods by sea.

A. Georghadjis, for the plaintiffs.

A. Haviaras, for the defendant ship.

Cur. adv. vult.

PIKIS J. read the following judgment. This is an admiralty action for damages for breach of a contract of carriage of goods by sea (evidenced by a Bill of Lading), concluded between plaintiffs and defendants. The agreement provided for the transportation of a cargo of 528 cartons of camping gas from Italy «to Limassol in transit». The freight was agreed at U.S. $750.-- payable at the port of destination.

The cargo was not discharged at Limassol but at the port of Tripoli in the Lebanon. The case for the plaintiffs is that the failure of the defendants to deliver the goods to the plaintiffs at the specified port of destination constituted a breach of their agreement for which they should be held answerable in damages. The plaintiffs, after some probing, identified the recipients and located the goods in the Becaa Valley in the hands of the Lebanese firm of Hilbaowi & Borghol. According to plaintiffs this is a classic case of misdelivery of goods occasioned by circumstances wholly within the knowledge of the defendants and

largely unexplained. To recover the goods the plaintiffs paid to Hilbaowi & Borghol, and others, the sum of U.S. $3,500.-- representing -

(a) U.S. $750.--freight, and

(b) U.S. $2,750.-- warehousing and transportation of the goods.

Because of the misdelivery of the goods in breach of the agreement they lost, in addition to the above -

(i) U.S. $5,000.-- estimated profit from the sale of the goods to a Saudi-Arabian customer, and

(ii) U.S $2,000.-- arising from the eventual sale of the goods in the Lebanon at a price below cost.

In addition, they suffered - so it was alleged - inestimable damage resulting from the loss of the customer of the Saudi Arabian buyer.

The defendants refuted the claim and denied liability for the loss allegedly suffered by the plaintiffs. In the answer to the petition it is alleged «that the final destination of the cargo in question was Lebanon and that the freight was payable at destination». In evidence, it was suggested to the witness for the plaintiffs that there was a deviation from the terms of the agreement respecting the port of the discharge of the goods on the instructions of the plaintiffs.

Abdul Hamid Borghol, the chairman of the plaintiff company, testified in support of the claim and produced the Bill of Lading (three original copies) confirming that Limassol was the port of destination. Also he produced a delivery order evidencing receipt of the goods from Hilbaowi & Borghol and the charges paid for their recovery. The existence of the Bills of Lading in the hands of the plaintiffs notwithstanding delivery of the goods, tends to support their case that the third parties were not in any way their privies or agents. Mr. Borghol denied the existence of any family or commercial connection with the recipients of the goods. The cargo was delivered to them without their consent or authority. He denied, as earlier indicated, the issuance of any instructions to the defendants to discharge the goods to the Lebanon at variance to the specific terms of the agreement.

Despite the defence, the allegation in particular that an agreement was reached between the parties to vary the terms of

the agreement as to the port of destination, no evidence was adduced to support it. The evidential burden to substantiate variation of a written agreement rests on the party propounding the occurrence of such change, in this case the defendants. The only witness who testified for the defendants was Emil Houri, their local representative. The goods were, as he testified, redirected to the Lebanon on instructions from their head office in the Lebanon. He attributed the non recovery of the Bill of Lading by his principals to the warlike situation in the Lebanon. In his contention, Mr. Borghol tried to exploit this inability of the defendants and made several suggestions for the conferment to him of extra advantages that he refused; whereupon the present proceedings were instituted. Mr. Borghol testified that he suggested to Mr. Houri the transportation of the goods to Limassol, a contention denied by the latter.

On consideration of the rival allegations as to what was exchanged between the two witnesses, no clear conclusion can be drawn therefrom. The case for the defendants that the original agreement was varied, remains unsubstantiated. Also unsubstantiated remains the contention of the defendants that the recipients of the goods in the Lebanon, namely Hilbaowi & Borghol, were in any way connected with the plaintiffs.

Having duly appraised the facts before me in their totality, I find that the defendants are guilty of a breach of contract in that contrary to the terms of the agreement -

(a) they discharged the goods at Tripoli that is a port other than the one specified in the agreement; and

(b) delivered the goods to a person other than the plaintiffs, the owner of the goods.

There remains to decide the damages to which the plaintiffs are entitled.

Counsel for the plaintiffs abandoned, correctly in my view, the claim for economic loss arising from the loss of the contract of sale to the Saudi-Arabian customer. In the absence of evidence that defendants were aware of this contract, damage is confined to what is objectively foreseeable (*Saab and Another v. Holy Monastery of Ayios Neophytos**). He confined the claim to -

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* *(1982) 1 C.L.R. 499 at 519, 520.*

(i) U.S. $3,500.-- the expense incurred for recovering the goods, less

U.S. $750.-- the freight that they would have to pay in any event, and

(ii) U.S. $2,000.-- loss occasioned by the delay causing the plaintiffs to sell the goods below cost.

Of the two claims only the first is sustainable. I find as a fact that the plaintiffs did incur an expense of U.S. $3,500.- for recovering the goods and that their action was, in the circumstances, within reason and good sense. Therefore, they are entitled to U.S. $2,750.-- damages.

The second part of their case to damages cannot be upheld in the absence of evidence as to a drop in the market value of the products between the time at which they could reasonably expect to receive the goods at Limassol and the time of sale. In the absence of such evidence it is impossible to discern any noticeable damage arising from the breach of the defendants.

In the result judgment is given for the plaintiffs for U.S. $2,750.-- or its equivalent in Cyprus Pounds, plus costs on the scale of claims corresponding to the amount recovered.

Judgment for U.S. $2,750.- plus costs.