

The Cottonex Case¹



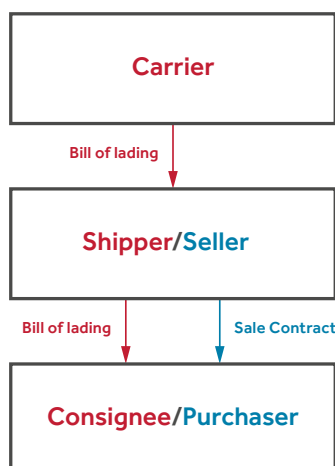
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On its facts, this case simply concerned a shipper's liability for container demurrage, when a consignee failed to take delivery of containerised cargo. However, the case has wider implications, by extending the common law requirement to exercise good faith to the carrier's (in)ability to continuously claim demurrage with no end date.

Background

The carrier in this case agreed to ship 35 containers of cotton to Chittagong. The carrier supplied the containers and the contract of carriage provided that the containers should be unpacked and returned to the carrier within 14 days of the containers being delivered at the port/place of discharge, demurrage being payable thereafter.

The containers were discharged to a container yard at Chittagong around May 2011. Shortly prior to this, the shipper sold the goods to the consignee. The consignee never collected the goods, nor did anyone else.



The carrier's position was that the shipper or consignee was responsible for unpacking and returning the containers. In September 2011, the shipper wrote to the carrier explaining that, as the shipper had been paid for the goods, title had passed to the consignee and the shipper was not entitled to unpack the containers.

Two years later, the carrier commenced court proceedings against the shipper in England, claiming demurrage. When the dispute came to trial, the containers remained at Chittagong and the demurrage exceeded \$1m, almost 10 times the value of the containers.

The shipper argued that demurrage stopped running in 2011, because its inability or failure to collect the containers amounted to a repudiation of the contract of carriage, which brought the obligation to pay demurrage to an end.

The judgment

The English High Court judge accepted that demurrage ceased to accrue on termination of the contract. He also accepted that the shipper was in repudiatory breach of contract in 2011, when the shipper gave notice to the carrier that it was unable to perform its obligations under the contract. The question was whether this repudiation terminated the contract.

The judge recognised the general position that a repudiatory breach does not automatically terminate a contract. Rather, the innocent party (here the carrier) has a choice whether to accept the repudiation as terminating the contract or to keep the contract in force. In this case, the carrier had not accepted the repudiation, instead choosing for the demurrage to continuously accrue.

Does an innocent party always have a choice?

The judge then considered whether there was any limitation on an innocent party's choice to accept, or perhaps not, a repudiatory breach of contract. He referred to the well-known case of *White & Carter v. McGregor*² in which the House of Lords identified that unless an innocent party has a '*legitimate interest, financial or otherwise*', it should not be permitted to insist on the continuance (i.e. the affirmation) of a repudiated contract.

The 'legitimate interest' principle has been recognised in a number of cases. For example, in *The Aquafaith*,³ the court concluded that an innocent party can only be said to have a legitimate interest in maintaining a contract if: (a) damages are not an adequate remedy; and (b) maintaining the contract would be reasonable.

In the *Cottonex* case, the judge highlighted the developing principle of good faith in contractual dealings and specifically that, in the absence of very clear language to the contrary, any contractual discretion must be exercised in good faith and must not be exercised '*arbitrarily, capriciously or unreasonably (in the sense of irrationally)*'.

Did the carrier have a legitimate interest?

The judge found in this case that the carrier's only interest in affirming the contract was to keep claiming demurrage. He asked: can the carrier keep the contract in force after the repudiation solely to claim demurrage? He concluded that the carrier had no legitimate interest in doing so.

The carrier had not been keeping the contract alive in order to invoke the demurrage clause for a '*proper purpose but in order to seek to generate an unending stream of free income*'.

The judge emphasised that the carrier was not suffering financial loss as a result of the shipper's breach of contract. He said that in order to keep the contract in force to claim demurrage after the repudiation, there would need to be at least some basis for supposing that the carrier's inability to use the containers was causing it to suffer financial loss. The carrier would need to show in good faith '*that the demurrage clause was being used to provide compensation for loss*'.

Comment

Although this was a case dealing with the discrete issue of container demurrage, it is important because it clarifies that a party's discretion to affirm a repudiated contract is limited by the good faith requirement.

1 [2015] 1 Lloyd's Rep 359.

2 [1962] AC 827.

3 [2012] 2 Lloyd's Rep 61.