

***Contract of carriage — forwarder as consignee's agent — Hague Rules, Article IV, Rule 2(q)***

*KIM MELLER IMPORTS PTY LIMITED v EUROLEVANT SPA & ORS*

New South Wales Supreme Court decision of Rogers J, Chief Judge, Commercial Division, 6 February 1989

Within days of giving judgment in a case involving a freight forwarder, Mr Justice Rogers has given a further judgment involving such an organisation, thus highlighting the ever increasing role played by freight forwarding organisations in the international transportation of goods. It is particularly interesting that in two cases in which decisions have been delivered within four days of each other the freight forwarder's role was found by the same Judge to have been different. In one case the forwarder was seen to be acting as a principal and in the other as an agent. The difference seems to have been caused by the fact that in the case in which it was held that the forwarder acted as a principal, the forwarder clearly intended to be regarded as the "carrier" under the document which it issued, whereas in the latter case the document was at least ambiguous in that regard.

This decision is also important as it allowed affidavit evidence to be called without the deponent of the affidavit being available for cross-examination.

This is also a rare case in which a court has been required to determine whether or not the defence based upon Article IV Rule 2(q) of the Hague Rules has been made out by a carrier. It shows the difficult burden of proof which a carrier is required to discharge when so doing.

**I. FACTS**

The plaintiff company imported shoes from Italy. The first defendant forwarding company organised the shipment of the goods with the agents of Eagle Container Line SA, which was the second defendant.

The container was loaded on board the *Australian Eagle* in late May 1985 at La Spezia. The vessel then proceeded to Salerno where it anchored in the roads approximately 600 metres from a breakwater. Whilst there, customs officers in a helicopter sighted a motor boat

acting suspiciously. They ultimately recovered seven cartons containing 111 pairs of women's shoes which had been part of the cargo consigned to the plaintiff on the vessel. The customs officers boarded the vessel and found the container seal broken. Only 22 cartons of shoes were found. Seven cartons were also found in a gorge where they had been deposited by those in the boat which had been seen acting suspiciously by the customs officers. The remaining part of the original 123 cartons had not been found. The plaintiff's action was for damages suffered as a result of the loss of 101 cartons of shoes.

The first defendant freight forwarder was not represented at the hearing and played no part in the proceedings. The judge indicated that he did not think the plaintiff had a cause of action against the first defendant but invited further submissions from the plaintiff in that regard. The judge noted that he invited the parties to bring the claim in Europe where all the evidence in relation to the case was to be found. Notwithstanding that, the matter proceeded.

## II. EVIDENCE

The critical evidence in the case was contained in an affidavit of an employee of the first defendant, the Sea Freight Manager, who said that at the time when the cargo was loaded into the container she saw "many more than 29 cartons in the container". The second defendant put in issue the receipt by it of the missing cartons of shoes. As Mr Justice Rogers said in his judgment, if that evidence was accepted, there could be no room for doubt that the cartons of shoes were packed into the container at the premises of the first defendant and received by the agent of the second defendant, the road carrier, who transported the goods from the forwarder's premises to the port of La Spezia. The only other evidence relating to that aspect of the matter was a bordereau acknowledging the receipt of 123 cartons signed by the driver of the truck which collected the shoes from the first defendant.

As Mr Justice Rogers said in his judgment —

It is a very serious step to deny to a party who is not in any way at fault the opportunity of cross-examining one of the other party's crucial witnesses.

Notwithstanding a decision of the New South Wales Court of Appeal in *Clyne v Law Society of New South Wales*<sup>1</sup> in which Kirby P and Mahoney J A made comments to the effect that the right of cross examination should not ordinarily be dispensed with because of the detriment to a party from being deprived of the right to cross examine, Mr Justice Rogers took the view that justice and fairness did not require the witness to be cross-examined or to have her evidence taken on commission in Italy.

<sup>1</sup> Unreported, 4 September 1987.

## III. CONTRACT OF CARRIAGE

The second defendant carrier sought to argue that the contract of carriage made by the plaintiff was made with the first defendant, the forwarder, and not the second defendant. The forwarder had issued a "combined transport through bill of lading", upon which the action by the plaintiff against the first defendant was based. That document did not define the "carrier", but under the heading "shipper" referred to the forwarder and after its name the words, "as forwarding agent". The plaintiff was noted as the consignee. Rogers J commented that the conditions on the bill of lading seemed to contemplate that "the shipper" and "the carrier" would be different entities.

The second defendant also issued a combined transport through bill of lading identifying the forwarder as the shipper and the consignee as another freighter forward, an Australian company. The carrier was described as Eagle Container Line.

The plaintiff argued that in obtaining the second defendant's bill of lading, the first defendant was acting as the plaintiff's agent. By suing on that bill, the plaintiff continued its argument that it had ratified the action of the first defendant. Rogers J referred to his judgment in *Carrington Slipways Pty Limited v Pacific Austral Pty Limited*<sup>2</sup> in which he found that the forwarder was not acting as the agent of the plaintiff in arranging for a bill of lading to be issued by the second defendant time charterer, but was acting as a principal. In this case however Rogers J found that the forwarder was acting as the agent for the plaintiff in arranging for the carriage of the shoes by, and the issue of a bill of lading on behalf of, the second defendant. He relied strongly on the fact that the forwarder's bill of lading contained no terms and conditions.

## IV. DAMAGES

Another important aspect of the decision concerned the appropriate measure for the calculation of damages. The plaintiff claimed the sum of \$56,768.65 as loss of profit. As the shoes in question were part of the range for the spring/summer season for 1985 and were due to arrive in Sydney on 4 July, for delivery to retailers in August, the plaintiff missed the market.

In calculating its loss of profits, the plaintiff took the sale price for which the shoes had previously been sold by the plaintiff to its customers and added to that figure 8.5%, which amount was added to all sale prices from about July 1985 to reflect the then devaluation of the Australian dollar. That amount was calculated as being \$153,330

<sup>2</sup> Unreported, 2 February 1989.

from which was deducted the cost of the goods, \$60,690, as well as other costs and expenses not incurred as a result of the non-arrival of the goods, leaving a claim for loss of profits of \$56,768.65. Rogers J declined to permit the plaintiff to recover the 8.5% amount as it was not in "any true sense a loss of profit". Rogers J pointed out that the plaintiff would not suffer any exchange loss in the matter as it was entitled to be compensated in Italian lire.

In dealing with the claim for loss of profits, Mr Justice Rogers pointed out that it was rare for an importer whose goods are lost to be able to recover loss of profits. He referred to earlier authorities in which such claims have been refused. The justification for that rule was that ordinary market value is usually sufficient because a claimant can go into the market and mitigate its damages by replacing the lost goods. That was not the case in this matter as the goods could not be replaced in time to meet the market. This question was discussed by Goff J (as he then was) in *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA*<sup>3</sup> where His Lordship accepted that damages based upon a resale price may be recoverable, although generally for the purposes of assessment of damages, resale price is not taken into consideration. Rogers J commented that a profit of almost 100% may be thought to set the level too high for recovery as being more than a "reasonable profit". His Honour has sought further submissions from counsel on that question. This raised another issue concerning a provision in the bill of lading which excluded liability for indirect or consequential losses. His Honour has expressed the opinion that the claim for loss of profits cannot be regarded as such a loss within the meaning of the bill of lading.

#### V. HAGUE RULES DEFENCES

A further defence relied upon by the second defendant was that available to it under Article IV Rule 2(q) of the Hague Rules, namely that the loss arose from "any other cause arising without the actual fault or privity of the carrier." Notwithstanding an expression of sympathy for the captain of the ship his Honour declined to allow the second defendant to rely on that exclusion. This finding was made despite other findings that there were regular rounds of the ship by officers of the watch and the operation by which the theft was performed "was a highly skilled one". It was argued by the plaintiff however that as no other container was tampered with and it was only this particularly expensive and easily saleable commodity which was taken from an extremely restricted space on the deck of the vessel, it could be inferred that the thieves must have been in possession of two

pieces of information obtainable from only two documents. One was the stowage plan of the ship and the other the manifest. Rogers J took the view that the second defendant had not satisfactorily shown that there was no complicity by any of its servants or agents. Furthermore, he pointed to other factual matters, such as the fact that an intruder could approach the container without being seen from the bridge and the fact that the vessel which took the cartons must have been reasonably substantial in order to take the number of cartons which were taken.

<sup>3</sup> [1981] 1 Lloyd's Rep 175.