IN THE COURT OF APPEAL OF MALAYSIA

Coram: Tengku Maimun Tuan Mat, JCA; Nallini Pathmanathan, JCA; Zabariah Yusof, JCA

Minmetals South-East Asia Corporation Pte Ltd v Nakhoda Logistics Sdn Bhd

Citation: [2018] MYCA 212 **Suit Number:** Rayuan Sivil No. W-02(ADM)(A)-769-04/2017

Date of Judgment: 11 July 2018

JUDGMENT

Introduction

[1] This is an appeal by Minmetals South-East Asia Corporation Pte Ltd ('the plaintiff') against the decision of the High Court dismissing its claim against Nakhoda Logistics Sdn Bhd ('the defendant-carrier') for breach of a contract to carry and deliver cargo to the plaintiff. The learned High Court judge found that the plaintiff failed to prove its claim for USD13,591,622-65 premised on the defendant-carrier's failure to deliver the cargo on presentation on the original bills of lading. The learned High Court judge also stated alternatively that, if she was wrong on the issue of liability, then the defendant-carrier would only be liable for the sum of RM2,256,968-70. We allowed the plaintiff's appeal on both liability and quantum. The facts are not in dispute and are set out below.

The Salient Facts

[2] The facts have been comprehensively set out by the parties in their submissions. We adopt the factual matrix from these submissions, particularly those of the appellant which are set out in some detail. The parties will be referred to as they were in the court below.

[3] The plaintiff is a company incorporated in Singapore. It is in the business of trading in commodities and selling retail building material. The plaintiff is lawfully entitled to the cargo shipped under the bills of lading issued by the carrier, i.e. the defendant.

[4] The defendant-carrier is a company based in Malaysia. It carries out its business based in Port Klang, providing freight, shipping and logistics services. In this case, the defendant-carrier is a Non-Vessel Owning Common Carrier (NVOCC) contracted as carrier of cargo comprising several consignments of timber ('the cargo') for the plaintiff. It is the carrier that issued 25 bills of lading for carriage of the cargo from Port Klang to Shanghai ('House B/Ls'). These are the voyage bills of

lading.

[5] Yang Ming Marine Transport Corporation ('Yang Ming') are ocean liners based in Taiwan.

[6] Yang Ming are the authorised agents of the Taiwan company who issued the Yang Ming ocean bills of lading for the cargo ('Yang Ming B/Ls').

[7] Between 5 November 2014 to 8 March 2015, the plaintiff entered into several contracts for the purchase of timber wood ('purchase contracts') from Trinity Tripartners Private Limited ('Trinity') and Oriental Century Limited ('Oriental').

[8] Trinity and Oriental are the sellers of the cargo to the plaintiff under a set of purchase contracts. Jiangsu Sopo Group Shangai Co Ltd ('Jiangsu Sopo') and Shanghai Unidev Import & Export Co Ltd ('Shanghai Unidev') are buyers of the cargo from Minmetals under a set of sales contracts.

[9] Between 21 November 2014 and 4 May 2015 invoices issued under the purchase orders were fully paid up by the plaintiff who thus became the lawful legal and beneficial owner of the batches of timber. It is pertinent to note that the plaintiff's witness PW1 explained under cross-examination that there was no physical purchase of timber, but only the purchase of the 25 sets of House B/Ls. This would enable the plaintiff to onsell the timber to another buyer where delivery could be effected.

[10] Between 10 December 2014 and 19 April 2015 the plaintiff entered into contracts with Shanghai Unidev for the sale of the timber in separate batches. It was agreed that the payment for the timber would be made by way of Letters of Credit ('LCs') or direct payment by Shanghai Unidev.

[11] Between 21 November 2014 to 28 April 2015, the plaintiff entered into contracts of carriage with the defendant-carrier vide the earlier referenced 25 "made out to order and blank endorsed" bills of lading ('House B/Ls') issued by the defendant-carrier for the carriage of the cargo from Port Klang to Shanghai. The freight was fully paid.

[12] In the House B/Ls, the word "shipper" refers to the local shippers of the cargo, OEL Timber Sdn Bhd ('OEL') or Tan Chin Huat & Brothers Sdn Bhd ('TCH'). The notify party stated in the House B/Ls was Jiangsu Sopo.

[13] Between 21 November 2014 to 30 April 2015, an original set of ocean bills of lading ('Ocean B/Ls') were issued by the ocean liners in favour of the shipper and given to the defendant-carrier for the voyage from Port Klang to Shanghai Port. The Ocean B/Ls contained the same terms as the House B/Ls.

[14] Between 10 December 2014 to 19 May 2015, notices of arrival were issued by the respective ocean liners.

[15] Between 12 February 2015 to 30 April 2015, Shanghai Unidev's bank issued LCs to the plaintiff.

[16] Discrepancies however were noted in the LCs between 20 April 2015 and 19 May 2015. The

plaintiff's bankers, DBS Bank advised the plaintiff that the LCs could not be utilised. In other words, there was no payment received by the plaintiff from Shanghai Unidev. Accordingly DBS Bank returned the original House B/Ls to the plaintiff.

[17] The plaintiff then requested Shanghai Unidev to make the payment directly to them. Notwithstanding this no payment was received. It follows therefore that Shanghai Unidev did not receive any original House B/Ls.

[18] On 6 July 2015, the plaintiff decided to collect the cargo itself as it remained the owner of the cargo and it was holding the original B/Ls which were blank endorsed. In other words, the fact that the plaintiff held the original Bills of Lading was evidence of their title to the cargo and not any other party. Accordingly, the plaintiff granted authorisation to Minmetals Shipping & Forwarding Shanghai Co. Ltd ('Minmetals Shanghai') to take delivery of the cargo at Shanghai Port.

[19] The plaintiff sent the original House B/Ls to Minmetals Shanghai. When these B/Ls were checked it was found that they bore no particulars of carriers/ agents in Shanghai for the plaintiff to collect the cargo from. It was also discovered that these were house bills of lading and there ought to be a corresponding set of ocean bills. However, there was no information of the ocean carriers or Ocean B/Ls to be exchanged with the House B/Ls in order for the plaintiff to collect the cargo.

[20] On 18 July 2015, the plaintiff's representative, Mr Sun Rufei emailed the defendant-carrier's Ms May requesting for the agent's details and contact number. No response was given. However the plaintiff kept requesting for information even after the commencement of trial in August 2016, to no avail.

[21] On 25 September 2015, the plaintiff issued a legal notice through its solicitors in Singapore, Kennedys Legal Solutions, demanding delivery of the cargo. Again no response was given by the defendant.

[22] The plaintiff commenced this action on **18 January 2016** seeking damages for the defendant-carrier's failure to deliver the cargo despite demands made on the presentation of the original B/Ls. The date of commencement is relevant to the issue of limitation under the **Hague Rules**.

The Trial in the High Court

[23] The High Court set out the triable issues as follows:

(i) Whether the plaintiff is the owner of the consignment of timber (the cargo) and/or persons entitled to take delivery or possession of the cargo and/or the consignees and/or the endorsees and/or the lawful holders and/or the persons in possession of the House B/Ls to whom property in the cargo passed upon or by reason of the endorsement;

(ii) Whether the defendant-carrier's duty to deliver the cargo upon presentation of the original House B/Ls is discharged once the goods are landed in Shanghai Port;

(iii) Whether the defendant-carrier is in breach of its duty in contract or tort in its failure to deliver the cargo at Shanghai, China upon presentation of the original House B/Ls by the plaintiff or its agent and in the same order and condition as shipped;

(iv) Whether the plaintiff proved the quantum of its claim in the sum of USD13,591,622-65;

(v) Whether the defendan-carriert's liability is limited to RM2,256,968-70, i.e. the cargo's declared value, in the event it is found liable; and

(vi) Whether the plaintiff's claim under the House B/Ls (all or in part) against the defendant-carrier is time-barred by law.

The Decision of the High Court

[24] The High Court accepted the plaintiff's submission that the defendant-carrier, had to deliver the cargo only to the person in possession of the original bills of lading and only on production of the original bills of lading. The High Court held that since the plaintiff was the holder of the House B/Ls, therefore the plaintiff was the owner of the cargo and was entitled to delivery and possession of the same. As holder of the House B/Ls, and thereby title to the cargo, the plaintiff had the legal right to sue the defendant-carrier, premised on the contractual terms of the House B/Ls.

[25] The learned High Court judge also agreed with the plaintiff's submission that the defendant-carrier's obligation in relation to the cargo was not merely to deliver and discharge the cargo at Shanghai Port, but to deliver the cargo to the person entitled under the bill of lading, upon production of the original bill of lading.

[26] However, the learned High Court judge held that the plaintiff failed to prove that the defendant-carrier had breached its duty in relation to the delivery of the cargo, because the plaintiff did not adduce evidence of attempts it made to collect the cargo at Shanghai Port with production of the original B/Ls. The plaintiff submitted that Mr Sun Rufei was the person who tried to collect the cargo but did not call him as a witness.

[27] The learned High Court judge accepted the evidence of DW3, for the defendant-carrier, who testified that the cargo was discharged at Shanghai Port, but as the consignee did not come to collect the cargo, it was left there. As at 8 April 2015, the cargo remained there, incurring charges for wharfage and demurrage.

[28] Further, the High Court judge held that the plaintiff failed to prove that the defendant-carrier breached its duty by not helping to facilitate the plaintiff to take delivery of the cargo. Her Ladyship held that the plaintiff should have gone through the notify party in the House B/Ls, i.e. Jiangsu Sopo. The plaintiff's witness, PW1 admitted that the plaintiff did not hand over the House B/Ls to the party to be notified (in the column marked 'notify party') specified in the House B/Ls.

[29] The learned High Court judge accepted as reasonable the defendant-carrier's explanation that it did not reply to the plaintiff's inquiries regarding the details of the agent, because the defendant-

carrier was unaware that the plaintiff had purchased the House B/Ls (and thereby title to the goods) from the original vendors of the timber, Trinity and Oriental.

[30] DW3 testified that at the material time, not only the plaintiff but Trinity, (the vendor who had sold the timber to the plaintiff and received payment in full) had contacted the defendant-carrier requesting information regarding the shipments. According to DW3, the defendant-carrier replied to both the plaintiff and Trinity that they should make inquiries of Jiangsu Sopo. The plaintiff failed to explain the failure to go through Jiangsu Sopo.

[31] Therefore, the learned High Court judge held that the defendant-carrier did not breach the contract by refusing to facilitate the exchange of the Master B/Ls for the House B/Ls because the plaintiff is the party who failed to take delivery of the cargo through the proper procedure.

[32] The High Court also found that there was an inexplicable delay of 7 months from the discharge of the cargo in Shanghai Port, to the plaintiff's query for the cargo with the defendant-carrier on 18 July 2015. The learned High Court judge found that the plaintiff failed to plausibly explain the delay.

Quantum of Claim

[33] The High Court judge held that in the event that she was wrong and the defendant-carrier was liable for breach of contract, it would only be to the extent of RM2,256,968-70. Her Ladyship accepted the evidence of DW2 that the cargo was sold at that price, as his evidence was supported by the Customs Declaration. Her Ladyship was of the view that it would be contrary to common business transactions and practice for the plaintiff to have sold the cargo at a lower price (CNY 6 million which is equal to USD1 million) than the purchase price, i.e. USD2.4 million, which meant a loss of USD1.4 million was incurred. She did not accept PW1's explanation of the discrepancy as 'tolerance level' which PW1 testified could only be +/- 10%, and held that this issue was not pleaded.

[34] Further, the High Court held that the plaintiff's claim was barred by limitation under **Article III rule 6 of the Hague Rules**, because the cargo was discharged more than a year before the filing of this suit on 18 January 2016.

Our Decision and Analysis

[35] We were of the unanimous decision that the appeal should be allowed both in terms of liability and quantum. Our reasons for so holding are set out below.

On the issue of liability

[36] The central issue in this case turns on the well-established and renowned principle that a shipowner or NVOCC like the defendant-carrier here is bound to deliver against the production of original bills of lading to the person entitled under the bill of lading. Delivery without production of such original bills of lading is undertaken by the shipowner at its own peril.

[37] Where the defendant-carrier fails to deliver to the person holding the original bills of lading, it

opens itself to liability under both contract and tort. It may be liable for breach of contract under the former and for conversion under the latter.

[38] In the instant case, the plaintiff's complaint in essence is that the failure, refusal or neglect on the part of the defendant-carrier to deliver goods when the original bills of lading were presented amounted to a fundamental breach of the underlying contract to carry goods that would subject the carrier to liability for breach of the contract of carriage and/or conversion.

[39] The authorities for this trite proposition are numerous. It suffices to refer to the often cited Privy Council decision in **Sze Hai Tong Bank Ltd v Rambler Cycle Co. Ltd.** [1959] 25 MLJ 200 (per Denning LJ) **('Rambler Cycle')** where it was held, *inter alia*:

> *"...It is perfectly clear law that a shipowner who delivers without production of the bill of lading does so at his peril. The contract is to deliver, on production of the bill of lading to the person entitled under the bill of lading. In this case it was "unto Order or his or their assigns" that is to say, to the order of the Rambler Cycle Company, if they had not assigned the bill of lading, or to their assigns, if they had. The shipping company did not deliver the goods to any such person. They are therefore liable for breach of contract unless there is some term in the bill of lading protecting them. And they delivered the goods, without production of the bill of lading, to a person who was not entitled to receive them. They are therefore liable in conversion unless likewise so protected."*

[40] This position has been adopted in Malaysia as seen in the case of **Pemunya Kargo Atas Kapal "Istana VI" v Pemilik Kapal Atau Vesel "Filma Satu"** [2010] 1 LNS 804. In that case, it was held:

> *"... As for the terms of the letter of credit between the Plaintiff and Summerwind which required the presentation of the original bills of lading to ensure payment to the Plaintiff, this in itself does not detract from the shipowner's duty to discharge cargo against the production of original bills of lading, a principle long accepted and applied in such cases. In the Singapore case of The Pacific Vigorous [2006] 3 SLR 374 the court noted:-*
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> > *"... Agritrade was able to and did produce the original bills of lading at the hearing before the assistant registrar. As lawful holders of the bills of lading, Agritrade has a right to possession of the cargo against the defendant even after the cargo has been wrongly delivered to Bhatia."*
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> *In the case of 'The Cherry' (above) it was said:-*
>
> > *"... The bill of lading thus provided for delivery at Fujairah. There was nothing in it to contradict the normal understanding that the carrier was required to physically discharge the cargo from the vessel at the discharge port and thereafter deliver it to the bill of lading holder. As stated above, in order to excuse non-performance of the discharge obligation by the carrier, there would have to be evidence that such was also the intention and/or instruction of the respondents as the other party to the contract of carriage.*

> *As far as the instructions received by the carrier are concerned, for him to avoid liability he would have to show that those instructions emanated from the bill of lading holder or were given with his authority..."*
>
> *The case clearly sets out the position that the shipowner is required to discharge the cargo against production of the bills of lading in accordance with the terms of that bill of lading."*

[41] Applying the foregoing principles, it would follow that the defendant-carrier was under an obligation (albeit in contract or in tort) to ensure that delivery of the goods was against the original bills of lading, i.e. the House B/Ls. Those House B/Ls were in the possession of the plaintiff as the purchaser Shanghai Unidev had not paid for the timber. There was an on-sale to Jiangsu Sopo, but by right this could not ensue because the intermediate purchaser who wanted to onsell to Jiangsu Sopo, namely Shanghai Unidev had not paid the plaintiff for the timber. As such Jiangsu Sopo should not have been able to take delivery as neither it nor its agent could take delivery as these entities did not have in their possession nor could produce the original House B/Ls.

[42] The House B/Ls remained in the possession of the plaintiff who had passed it on to their related company in Shanghai, Minmetal Shanghai for collection, as they remained the owners of the cargo, both legally and beneficially. As emphasised earlier, the original House B/Ls represented title to the cargo. Notwithstanding this the defendant had allowed delivery without production of the original bills of lading, in breach of the contract of carriage.

[43] In other words, the principle enunciated in **Rambler Cycle (above)** places the burden on the defendant-carrier not to deliver the cargo, save against the production of original bills of lading at the port of delivery, unless it is expressly otherwise exempted or protected under the terms of the bills of lading. This too it does at its peril, as it merely enables the carrier to seek an indemnity from the party requiring it to deliver without production of the original bills of lading.

[44] It is not for the party holding the original bills of lading to establish why there was a delay in its initiating collection. That is a matter of delay which is measurable and compensable to the carrier in terms of demurrage, wharfage and storage costs that might arise as a result. What it is not open to the carrier to do, as was done in the present case was to allow delivery to a party other than that holding the original bills of lading. If such a practice were allowed, then there would be very difficult to safeguard the title to goods in the shipping industry, as collection could theoretically be taken by any party claiming ownership albeit without production of the original bills of lading.

[45] Accordingly we were of the considered view that the learned High Court judge erred in concluding that the plaintiff failed to make sufficient attempts to procure delivery of the cargo in this case, given the position in law that it is the defendant-carrier that was under a duty to deliver goods carried only against the production of the original House B/Ls.

[46] In the instant case, not only was the plaintiff in possession of the original House B/Ls, it had made known to the defendant-carrier that it held the original House B/Ls. Despite this, the defendant-carrier failed to facilitate delivery in any manner whatsoever. In our view, it was insufficient for the

defendant-carrier to merely ask the plaintiff to liaise with Jiangsu Sopo.

[47] In law the duty of the defendant-carrier extended to a duty to exchange the Ocean B/Ls (which were in their possession) with the original House B/Ls so that the plaintiff, through its agent, could take delivery of the cargo. Their failure to do so amounted to a fundamental breach.

[48] The learned High Court judge erred in failing to apply this principle of law which is universally recognised and practiced. By requiring the plaintiff to have obtained the exchange of the original Ocean B/Ls for the original House B/Ls from the "notify party" i.e. Jiangsu Sopo rather than the defendant-carrier, the learned judge erred in imposing an onerous duty on the plaintiffs, which is contrary to the well-established position in law as set out in **Rambler Cycle (above)**. As stated in **Bills of Lading by Aikens Lord and Bools** at paragraph 3.120:

> *"On the face of most forms of bill of lading there is a space for identifying the "notify party". **The notify party is not a party to the bill of lading contract, nor a person entitled to possession of the goods**. Typically the "notify party" will be the receiver or ultimate buyer of the goods, but the bill of lading will identify "the consignee" as being "to order" or "to order" of the seller, or to the order of the seller's or buyer's bank. It has been suggested that there is a legal duty on the carrier to "notify" the notify party of the vessel's arrival, but this legal duty would be unenforceable by the notify party, who is not a party to the bill of lading contract, and it is difficult to envisage how a breach of this duty could cause damage to a party to the bill of lading contract."* (emphasis ours).

[49] The stance taken by Her Ladyship also contradicted the learned judge's own confirmation of settled law that it is the defendant-carrier's obligation under the House B/Ls to deliver the cargo only against the production or presentation of those original House B/Ls. As stated by Her Ladyship:

> *"However I am of the considered opinion that the duty of the defendant under the BOLs is not simply to deliver and discharge the cargo at the Shanghai Port but to deliver to the person entitled under the bill of lading on production of the original bill of lading."*

[50] In these circumstances it was clear to us that the defendant-carrier was liable for the losses suffered by the plaintiff.

Limitation of Liability

[51] A second legal point which arose is that of limitation of liability under the **Hague Rules** as raised by the defendant-carrier against the plaintiff's claim.

Article III rule 6 of the **Hague Rules** provides as follows:

> *"...In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage **unless suit is brought within one year after delivery of the goods** or the date when the goods should have been delivered."* (emphasis ours).

[52] It follows therefore that the limitation period of one year comes into effect one year after the delivery of the goods. One of the key questions here is whether there was in fact delivery of the goods. This in turn begs the question: "what amounts to delivery?" Does it include misdelivery or wrongful discharge of goods? Delivery should necessarily be construed as the cargo being delivered to or received by the party or consignee correctly entitled to such receipt. In the instant case that would be the plaintiff. It is not in dispute however that such delivery was never effected to the plaintiff. There was therefore no delivery of the goods to the plaintiff.

[53] In the absence of delivery against the production of the original House B/Ls to the plaintiff, can this limitation be triggered? Would a misdelivery of cargo be covered? It would appear not.

[54] More importantly however in this context, the plaintiff submitted, in our view correctly, that the one year time bar in **Article III rule 6 of the Hague Rules** does not apply to **claims for non-delivery of Cargo**, because "delivery" is outside the scope of the **Hague Rules**. The **Hague Rules** apply to breaches of contract or duty that took place between loading to discharge only. This is borne out by **Article II** which sets out the scope and applicability of the **Hague Rules**. It excludes limitation for time and liability limits in respect of cases relating to the delivery of cargo. It provides:

> *"... Subject to Article VI, under every contract of carriage of goods by sea by the carrier, **in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods**, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth."*

[55] It is evident that delivery does not fall within the scope of matters which are subject to the limitation as stipulated in **Article III Rule 6**.

[56] This is borne out by the case of Peninsular **Peninsular & Oriental Steam Navigation Co Ltd & Ors v Rambler Cycle Co Ltd** [1964] 30 MLJ 443, a decision of our Federal Court:

> *"(1) the shipowner's liability under a contract evidenced by a bill of lading in respect of shipments from a United Kingdom port is only subject to the provisions of the Hague Rules (that is the rules set out in the Schedule to the Carriage of Goods by Sea Act) from the time when the goods were loaded on the ship to the time when they were discharged from the ship;*
>
> *(2) as in this case the liability of the shipping company arose after the discharge of the goods, article III rule 6 of the Rules set out in the Schedule to the Carriage of Goods by Sea Act 1924, did not apply and therefore the period of limitation applicable was the ordinary period of limitation of six years.*
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> *This was a simple and clear case where the 'loss' arose in relation in the delivery of such goods. Can it be plausibly suggested that though the loss was due to the goods being delivered by the carrier to a party other than the shipper after the goods had been discharged from the ship and had been placed in storage in a godown and the next duty of the carrier under the bill of lading was to deliver the goods to the shipper, it was nonetheless a loss which arose 'in relation to the*

discharge of goods' within the meaning of article II and therefore a 'loss' within the meaning of article III rule 6 of paragraph 3? I think not. ***The operation of discharge is different from the operation of delivery. If the intention and object of the Hague Rules were to also provide for the responsibilities and liabilities, rights and immunities of a carrier in relation to the delivery of goods under a contract of carriage of goods by sea to which the Hague Rules apply nothing would have been simpler than to insert the word 'delivery' after 'discharge' in article II ...***

... Outside the ambit of the rules the liability is governed by the general law of contract and the period of limitation is the general period of limitation.

In the present ***case the liability of the shipping company which it is sought to enforce, whether it be in contract or whether it be in tort, arose after the discharge of the goods, that is to say after the expiration of the period during which the Hague Rules applied, and in the circumstances the period of limitation applicable is the ordinary period of limitation of six years.***

... In my view therefore the appellants must show that, on the admitted facts and circumstances the "loss" arose "in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods." In my opinion, they have not." (emphasis ours).

[57] The foregoing issue of a time bar was also considered and applied in **PT Karya Sumiden Indonesia v Oceanmasters Marine Services Sdn Bhd & Anor** [2016] 7 MLJ 589:

"[75] Article III rule 6 provides that any claim against the carrier by the cargo owner must be made within one year from "delivery" or when "delivery" ought to have occurred. The reason given for this normally is that a carrier cannot be expected to keep records for long periods and should be able to ascertain quickly and while events remain relatively fresh, the number of claims that it may be subjected to. As stated by Lord Bingham in the English Court of Appeal in the case of Compania Portorafti Commerciale S.A. v Ultramar Panama Inc. and Others, Captain Gregos [1990] 1 Lloyd's Rep 310, the purpose of Article III rule 6 "... like any time bar intended to achieve finality, ... to enable the shipowner to clear his books."

[76] In order to succeed in establishing the time bar, thereby extinguishing KSI's claim, the defendants must establish:-

(1) the cargo was carried under a contract of carriage by sea;

(2) the legal regime of the Hague Rules are operative; and

(3) the suit to establish liability under the Rules in respect of "loss or damage to the goods" under the contract has not been brought within a year. Such time bar runs from the time of delivery.

[77] The moot point for consideration here turns on the definition to be accorded to the word 'delivery'. Does it encompass 'misdelivery'? In other words, the issue is whether misdelivery at

the port of discharge falls within the operational ambit of the Hague Rules. In other words, as at the moment of misdelivery of goods without production of the bill of lading, can it properly be said that "discharge" was complete, such that the carrier may proceed to place reliance upon the contractual provisions of the time bar under the contract of carriage?

[78] Put another way, does the carrier's misdelivery or wrongful release of the consignment come within 'carriage of goods' as defined in the Hague Rules, thereby attracting the time bar under Article III rule 6?

[79] "Carriage of goods" under the Hague Rules covers "... the period from the time when the goods are loaded on to the time when they are discharged from the ship."

...

[81] These matters referred to are functions for the carrier beginning when the goods are put on board the vessel and ending when they are unloaded from the vessel. A strict reading of the Hague Rules therefore suggests that they do not apply prior to "loading" or after "discharge". It may therefore be argued, as KSI does, that the Hague Rules govern only the time between the goods having been hoisted on board over the ship's rail and the goods having been hoisted over the ship's rail and placed on the quay. As such, the contention put forward by cargo owners such as KSI is that the one year time bar ought not to apply to misdelivery because delivery is outside the scope of the Hague Rules.

[82] The line of authorities on this subject has been somewhat chequered over the years. However in Malaysia at least, there is binding authority dating from 1964 to the effect that the Hague Rules do not encompass 'delivery' or 'misdelivery' but cease to have effect upon 'discharge'.

...

[83] Based on the foregoing reasoning of the Federal Court it would follow that article III rule 6 of the Hague Rules does not apply to encompass misdelivery as the application of the rules ceases upon discharge of the cargo, as opposed to delivery ...

[90] Given the foregoing and more significantly the decision of the Federal Court in Peninsular & Oriental Steam Navigation Co. Ltd. & Ors v Rambler Cycle Co Ltd [1964] 1 MLJ 443, the preferable view to be adopted in relation to the interpretation of article III rule 6 of the Hague Rules is that it encompasses the contract of carriage from the point of loading until the point of discharge and does not extend to delivery ..."

[58] As stated at the outset, delivery is only effected when it is received by the party or consignee who is entitled to such receipt. Delivery can only take effect after discharge. As stated in **Carver on Bills of Lading Third Edition** at paragraph 9-188:

"The term 'delivery' in a bill of lading is ordinarily taken to refer to transfer of possession to the

consignee ... or the consignee's agent... It certainly does not mean the same thing as 'discharge'."

[59] Similarly a distinction was drawn between delivery and discharge in **Borealis AB v Stargas Ltd and another (Bergesen DY A/S third party), Borealis AB v Stargas Ltd and others** [2002] 2AC 205:

"Discharge and delivery are distinct aspects of the international carriage of goods...Although the normal time for delivering cargo to the receiver may be at the time of its discharge from the vessel, that is not necessarily so ... The delivery to which section 3 is referring is ***that which involves a full transfer of the possession of the relevant goods by the carrier to the holder of the bill of lading. The surrender of the relevant endorsed bill of lading to the carrier or his agent before or at the time of delivery will ordinarily be an incident of such delivery****." (emphasis ours).*

[60] Accordingly delivery is clearly excluded from the scope of the limitation prescribed under **Article III rule 6** by virtue of **Article II**.

[61] The learned Judge erred in concluding that the plaintiff's claim was caught by limitation under **Article III rule 6** contrary to the clear position in law as stated above, that it is inapplicable in the context of delivery by reason of **Article II**, which provides that the ambit of such limitation is only up to the point of discharge. It does not extend to delivery.

[62] What the defendant-carrier did here was to simply discharge the cargo, not deliver it to the party entitled to possession and legal ownership, namely the plaintiff, against production of the original bills of lading. If a problem had ensued up to and including discharge, the limitation under **Article III rule 6** would have been applicable. But here the issue in dispute was delivery, which falls outside the scope of the limitation in the said article.

Quantum

[63] In so far as quantum is concerned we were unable to agree with the learned High Court judge that the plaintiff failed to prove its losses or that there are serious discrepancies in the documents produced in support of the claim.

[64] The ordinary measure of damages for non-delivery of cargo is the fair market value for the cargo estimated at the destination port at the date of the breach of contract or breach of the defendant-carrier's duty resulting in damage to the plaintiff as a consequence of conversion.

[65] In the instant case the plaintiff sought by way of alternative to an assessment of the market value of the undelivered cargo, the actual price of the cargo it had paid to its original sellers, namely Oriental and Trinity. It amounted to USD13,591,622-65 which was a sum that the plaintiff had paid out and lost as a direct consequence of a breach of contract by the defendant-carrier in contract or alternatively, the damages arising as a consequence of the act of conversion on the part of the

defendant-carrier in tort. This sum sought was only in respect of the cargo shipped under the 25 House B/Ls.

[66] There was evidence of such payment in full made by the plaintiff but the learned High Court Judge failed to consider or give proper consideration to this alternative measure of damages, notwithstanding that it represented a true measure of the actual loss suffered by the plaintiff. In other words there was evidence of the actual loss the plaintiff had suffered as a consequence of paying its sellers for the timber and not having possession of the same by virtue of the acts of the defendant-carrier.

[67] We concur with the submission of learned counsel for the appellant that the learned Judge erroneously gave consideration to the alleged inconsistencies such as:

(i) the fact that PW-1 had no personal knowledge of the contracts with the sellers as these were negotiated by a witness who did not testify, namely Sun Rufei;

(ii) there was no unit price fixed;

(iii) the actual quantity of cargo was not specified;

(iv) the fact that the plaintiff's selling price was lower than the price it paid for the cargo. In this context the learned Judge failed to comprehend that the full quantity of timber purchased from Oriental and Trinity was subsequently divided into smaller batches and sold to various buyers. Accordingly the price was less because it represented the sale price for a smaller quantity of timber;

(v) failed to comprehend the concept of "tolerance level" in the timber trade. Her Ladyship found that this was not pleaded. Additionally Her Ladyship found that in the absence of the unit price and sale and quantity it was difficult to work out the tolerance level. Tolerance level in fact relates to the range of "quality" that is acceptable in order to ascertain that a certain quantity of timber as per the contract has in fact been supplied to the buyer by the seller. The final price paid is adjusted based on the final quantity of cargo that is delivered. That quantity will depend on whether the timber falls within the tolerance level or range which is specified expressly in the contract. Her Ladyship failed to appreciate that discrepancies in the tolerance, even if they existed did not alter the fact that the plaintiff had paid its sellers in full. Accordingly it represented actual loss that the plaintiff had suffered. As such it was untenable, in our view, to maintain that the plaintiff had not proved its loss.

[68] Finally the learned Judge found that even if the carrier was liable it need only pay the sum of RM2,256,968-70 on the grounds that this was the price stipulated in the Customs Declaration Form (K2 Form-Declaration of Goods to be Exported). Her Ladyship relied on the said document to conclude that this was the true price of the cargo and therefore the true measure of the plaintiff's loss.

[69] This was because the defendant-carrier pleaded that its liability for loss, if at all, was limited to the sum of RM2,256,968-70 which was the declared value of the cargo in the declaration form.

[70] However we were not satisfied that this declaration in the K2 Form represented the true loss. The plaintiff had adduced clear evidence of the actual loss it had suffered, which was evident from the actual price it had paid out for the timber. Apart from the bare declaration on the K2 Form, there was nothing to support that declaration as evidencing the true value of the timber. As such these forms in themselves are, to our minds, insufficient to comprise conclusive proof of the value of the timber. In other words, the K2 Form is not evidence of the value of the cargo. The K2 Form was premised on an alleged sales contract between the shippers and Jiangsu Sopo, which was not adduced in evidence. As the defendant-carrier sought to rely on this limit to the quantum claimed, it was incumbent upon the defendant-carrier to establish that was indeed, the sales price between the plaintiff and Jiangsu Sopo, which it did not. The K2 Form was therefore, in our view, insufficient in all the circumstances of the case, to be construed as comprising or reflecting the true value of the subject timber, and consequently the loss suffered by the plaintiff.

[71] Neither does it operate as a limit to the quantum of the claim sought by the plaintiff by virtue of the breach of contract or in tort. In order to do so, it ought to comprise a part of the contract of carriage, which it does not.

[72] Such limitation of liability as pleaded by the defendant-carrier, would normally be set out in the House B/Ls, which evidenced the contract of carriage. In the instant case, Clause 26 of the House B/Ls states that the alternate figure that the defendant-carrier wishes to rely on is to be stipulated and inserted in the Bill of Lading. However that is not the case here as the value of the cargo is not stated. We therefore conclude that the imposition of such a limitation without more, in the light of the clear evidence of the quantum paid out by the plaintiff, amounts to an error of law.

[73] Finally we would concur with learned counsel for the appellant that limitation ought not to be available to a carrier which is in fundamental breach of its clear obligations under the law (unless such limitation falls within recognised categories such as tonnage limitation or limitation under the **Hague Rules** in contract).

[74] Having considered the evidence on record in the appeal records, we are satisfied that the plaintiff has suffered a loss of USD13,591,622-00 as pleaded in their statement of claim. This sum represents the monies they paid out under the various sales contracts for the timber. This is evidenced by the remittance and payment advice documents which were all produced in Court. These documents were not specifically challenged.

Conclusion

[75] In all these circumstances, we were satisfied that the learned trial Judge had erred in respect of Her Ladyship's findings on the law with respect to liability and quantum. Appellate intervention was warranted and we therefore allowed the appeal and set aside the judgment of the learned High Court Judge. We granted judgment to the plaintiff in terms of prayer 1 of the Statement of Claim, with interest and costs. We further awarded the sum of RM70,000-00 by way of costs both here and below. The deposit was refunded.

Signed

Nallini Pathmanathan
Judge
Court of Appeal
Malaysia

Dated: 11th July 2018

COUNSEL

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LEGISLATION REFERRED TO:

Hague Rules, Article II, Article III Rule 6

JUDGMENTS REFERRED TO:

Borealis AB v Stargas Ltd and Another (Bergesen DY A/S third party), Borealis AB v Stargas Ltd and Others [2002] 2AC 205

Pemunya Kargo Atas Kapal "Istana VI" v Pemilik Kapal Atau Vesel "Filma Satu" [2010] 1 LNS 804

Peninsular & Oriental Steam Navigation Co Ltd & Ors v Rambler Cycle Co Ltd [1964] 30 MLJ 443

PT Karya Sumiden Indonesia v Oceanmasters Marine Services Sdn Bhd & Anor [2016] 7 MLJ 589

Sze Hai Tong Bank Ltd v Rambler Cycle Co. Ltd. [1959] 25 MLJ 200