Incisive Law LLC

Article
2 September 2021

When is a 'bill of lading' not a true bill of lading?

incisivelaw.co

When is a 'bill of lading' not a true bill of lading?

The LUNA [2021] SGCA 84

A bill of lading has three distinct functions: (i) as a receipt by the carrier of the goods for shipment; (ii) as a contract of carriage or as evidence of a contract of carriage; and (iii) as a document of title.

As a document of title, a bill of lading allows the lawful holder of the bill to demand delivery of the goods from the carrier and, if necessary, to sue for misdelivery. This is particularly important for financial institutions who hold the bills of lading as security for financing the sale and purchase of goods, and who may need to assert their right of possession over the goods where loans are not repaid.

In this recent decision of the Singapore Court of Appeal, the Court found that the holders of the bills of lading were not entitled to bring a claim for misdelivery against the ship interests because, on their true construction and taking into account the terms of the underlying sale contract, those bills did not operate either as contracts of carriage or as documents of title.

The background facts

The case involved bills of lading issued in respect of a cargo of bunkers that were loaded onto various bunker barges, including the *LUNA* ("the Ship Interests"). The bills of lading were issued by the Vopak Terminal in Singapore from which the bunkers originated ("the Vopak BLs"), and were "owners" bills in that they were regarded as having been issued by each of the bunker barges that received the cargoes.

The Shippers were also the Sellers and had entered into sale contracts for the bunkers with the Buyers on a FOB basis. The Buyers were companies within the OW Bunkers group which subsequently became insolvent. The Shippers/Sellers, who had not been paid for the bunkers, tried to rely on the Vopak BLs to bring a misdelivery claim against the Ship Interests, who had received the bunkers for the purpose of discharging them to oceangoing vessels pursuant to various downstream sale contracts that the Buyers had entered into. The Shippers commenced admiralty actions in Singapore and arrested the Ship Interests' vessels.

The Singapore courts considered whether the bills of lading issued on behalf of the Ship Interests were true bills of lading that gave the Shippers (who would ordinarily hold on to the bills of lading until they were paid, and which were not ordinarily required to be presented when such cargoes were discharged from the bunker barges onto oceangoing vessels) rights of suit for misdelivery of cargoes. At first instance, the High Court found in favour of the Shippers. The decision was overturned on appeal.

The Court of Appeal decision

The Court of Appeal held that the bills of lading in question were neither documents of title nor contracts of carriage. The Court stated that the bill of lading is normally separate to and distinct from the underlying contract of sale and its terms should be interpreted independently of any considerations as to how the sale contract operates.

However, in determining whether there was a contract at all, the Court should consider the wider background and evidence on what the parties had objectively intended when the Vopak BLs were issued. The perspectives of the Shippers/Sellers, Ship Interests and the Buyers were all relevant.

Unusually, the terms of the sale contracts in this case neither mentioned nor provided for the issue of the Vopak BLs, nor did they specify how the bills would operate as between the Shippers/Sellers and Ship Interests. The sale contracts were structured to allow the Buyers to sell on the bunkers within the given 30 day credit period and to then use the sale proceeds to pay the Sellers prior to the expiry of the credit. In fact, the bunkers, upon being shipped onto the bunker barges, would very quickly be loaded onto oceangoing vessels, prior to expiry of the 30 day credit period. Furthermore, the terms of sale were such that payment would be made against a commercial invoice and an original Certificate of Quality, not against a bill of lading. The terms of sale also did not refer to bills of lading and their role in any other context.

The Court also noted that the Shippers "*knew that the Vopak BLs would not allow it to regain possession of the bunkers that it had sold by presenting the [bills] to the Ship Interests and demanding delivery*". Rather, the Shippers "*had always looked to the Buyers for payment, rather than regarding the Vopak BLs as security against the risk of non-payment*".

Furthermore, despite retaining the original Vopak BLs at all material times, the Shippers/Sellers did not retain any right to direct where the cargoes were to be discharged to and, as between the Buyers and the Ship Interests, the Vopak BLs were non-essential documents with no contractual force or effect as contracts of carriage or as documents of title. The risk of non-payment by the Buyers was a risk that the Shippers/Sellers had assumed and, given the way in which the underlying sale contracts were intended to operate, the Seller/Shippers could not rely on the Vopak BLs to act as contracts of carriage or documents of title.

The Court of Appeal also took into account the fact that the Vopak BLs had omitted to mention a port of destination, but instead described the loadport and discharge port as *"PULAU SEBAROK, SINGAPORE and bound for BUNKERS FOR OCEAN GOING VESSELS*". This further indicated, in the Court's view, that the bills were not intended to be contracts of carriage and/or documents of title. Consequently, the misdelivery claims failed.

Comment

The Singapore Court of Appeal decision highlights the importance of ensuring that an underlying sale contract does not, by its terms, preclude a bill of lading from being more than a mere receipt for the goods. It also clarifies that the Court will be entitled to look at the underlying sale contract and the transportation arrangements with the carrier where the question is whether a contract came into existence at all, rather than merely establishing the terms of a subsisting contract.

Authors

If you have any questions regarding this article, please contact:

Loh Wai Yue
Joint Managing Director
Senior Accredited Specialist
(Maritime & Shipping Law), SAL
T: +65 6505 0160
E: WaiYue.Loh@incisivelaw.com

Grace Goh
Senior Associate
T: +65 6505 3411
E: Grace.Goh@incisivelaw.com