



Certificate not so final: The Mercini Lady in the Court of Appeal

It is highly unusual for trading companies to have a real and urgent interest in a case in the English Court of Appeal. However the Court of Appeal recently heard the appeal by FOB Sellers on the decision of "The Mercini Lady" (*KG Bominflot Bunkergellschaft fur Mineralole mbh & Co KG v Petroplus Marketing AG [2009] EWHC 1088 (Comm)(22 May 2009)*), and this case requires all traders to watch and listen.

The initial judgment by Mr Justice Field in the Commercial Court caused much controversy for two reasons. First, it exposed FOB sellers to the risk of goods deteriorating after loading, even in a "certificates final on loading" contract. Second, it decided that standard exclusion wording was ineffective based on a very precise and legalistic interpretation of the wording. Reed Smith attended the Court of Appeal hearing to assess whether this controversial position is likely to change.

The Trade View

Before the "Mercini Lady" case, most traders would have said categorically that:

- Risk passes on shipment on both FOB and CIF contracts; and
- A "certificate final on loading" provision and a clean certificate would protect sellers absolutely if goods were found deteriorated/outside specification/in poor condition on discharge.

At present, this view is not correct and the issue is of particular relevance for anyone trading commodities which may deteriorate over time.

The First Instance Decision

In the absence of an inconsistent contractual term, a condition will now be implied into every FOB contract under Section 14 of the Sale of Goods Act 1979 ("SGA") that the goods will be of satisfactory quality not only when the cargo was delivered onto the vessel but also for a "reasonable time thereafter"¹. Further, this term should also be implied at common law, with the additional factor that the goods should also remain in accordance with the contractual specification (if any) for such a time. This would not be the answer given by most traders, who work on the firm basis of "risk passes on shipment".

Essentially this is an extension of the longstanding (but little used) rule set out in *Mash v Murrell Ltd v Joseph I Emanuel Ltd [1961] 1 All ER 485*, that all CIF/C&F contracts will include an implied term that goods will be of satisfactory quality when loaded and also in a state capable of enduring the "normal journey" to remain of satisfactory quality upon arrival. Importantly, in the "Mercini Lady", this principle was extended even despite a certificate as to quality final on loading provision being included in the FOB contract.

The court said that FOB buyers are entitled to expect that the goods will be sufficiently "durable" to be of satisfactory quality upon delivery. With this rationale in mind, the court ruled that this entitlement be protected by the implied "condition".

The second point related to the exclusion. The contract had specifically excluded any "guarantees, warranties or

representations, express or implied, or merchantability, fitness or suitability of the oil for any particular purpose or otherwise". However, the clause did not contain the word "condition". As a result this exclusion clause was ineffective in protecting Sellers against the obligations implied pursuant to Section 14 SGA because these are "conditions" as per s14(6) SGA.

The Court of Appeal Hearing

Appellant Sellers advanced submissions on the distinction between the obligations of sellers in relation to satisfactory quality of goods as under SGA as distinct from the obligation relating to specifications under common law. They contended that where the contract contained an express "certificate final on loading" term there was no need to rely on any implied contradictory term.

Additionally, in relation to the exclusion clause, Sellers contended that the commercial approach would be to recognise that the parties intended to exclude the conditions as implied under the SGA. Sellers highlighted the "floodgates" argument that the current approach leads to uncertainty by having to calculate what a "reasonable time" may be in each case. Sellers also offered examples of where the word "guarantee" had been treated as meaning condition by the courts.

Respondent Buyers replied that in the absence of express wording excluding the guarantee that the goods would remain of such quality and condition after loading there was no rationale for not implying the additional term. Where the parties intended (or rather did not expressly exclude) that the goods would remain of a satisfactory quality for a reasonable time after loading it would be illogical that they did not intend exactly the same for specifications. Buyers also relied on established authority in case law that to exclude conditions the word "condition" must be expressly used in the contract.

FOB Seller Protection

It remains to be seen whether Sellers convinced the Court of Appeal and until judgment is handed down (no date for which was confirmed at the hearing) FOB sellers may wish to take additional precautions to avoid liability for deterioration of the goods after loading.

? Including an Express Exclusion

It would appear that if the word "condition" had indeed been included in the exclusion clause in the "Mercini Lady" the Sellers' case would have prevailed. The wording below or similar may be included in any FOB contract to expressly exclude the effect of breached conditions:

["All warranties, conditions and other terms implied by statute or common law are to the fullest extent permitted by law, excluded from the contract"]

? What about your Quality Certificate clause?

In any certificate final clause, sellers may also be prudent to specify that there is no guarantee that the goods will remain in the condition certified on loading for any period after, also expressly excluding any liability for the condition and quantity of the goods after shipment. Using the clause in this case, example wording is suggested below as:

["Quality, condition and quantity to be determined by a mutually agreed independent inspector at the loading installation, in the manner customary at such installation. Such determination shall be final and binding for both parties, except in case of fraud or manifest error, with no guarantee, condition, warranty or undertaking that the goods will remain of such quality and/or condition thereafter.

Sellers' obligation as to the condition and quality of the goods shall cease on shipment. Sellers shall have no liability for any deterioration in the condition and/or quality of the goods after shipment for any reason whatsoever, including inherent vice.]"

? No Express Exclusion

If FOB buyers refuse to allow the exclusion clause, or if implied conditions are not excluded in a contract already entered, sellers must look outside of the contract for protection.

One possibility might be for the FOB sellers to extend the validity of the certificate of quality beyond the time of shipment,

requesting that the surveyor at the load port make it clear on the load certificates that the goods are in compliance with the requirements of s14(2) of the Sale of Goods Act 1979 by including a statement tailored to the specific goods mentioning that:

- (a) the goods are within above reported specifications;
- (b) the goods are fit for the purpose for which the goods are commonly supplied;
- (c) the goods are "durable" and able to withstand the normal journey that such goods would be subject to.

Even this may not be sufficient (and surveyors will be reluctant, we think, to extend their certificates by adding such wording) but we would hope that doing so would demonstrate compliance with Section 14(2) as now implied into FOB contracts as a result of the "Mercini Lady" first instance decision.

We shall report on the outcome of the appeal once it is known.

1. What is a reasonable time is to be judged according to the specific circumstances of the relevant contract, including the likelihood that the goods would be carried by sea before use or on-sale, the nature of the goods and the knowledge of the intended use for the goods.

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