

**Blue Banana – OT sines v Magee
Sportswear: exclusive jurisdiction
clauses**

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MLAANZ Conference Paper

Laws in Conflict - *OT Africa Line Ltd v Magic Sportswear Corp*¹

The “conflict of laws” is an appropriate description of litigation in Canada and England resulting from an alleged shortage in a shipment of goods carried from New York to Monrovia in February 2002 under a bill of lading issued in Toronto. The amount in issue was CAD\$30,000. It is the sort of litigation which gives lawyers (and litigants) a bad name and warns the Australian maritime legal profession raising the question: how can and will the Australian courts deal with their own “Blue Banana”?

The Facts

OT Africa Line Ltd (as Carrier) issued a bill of lading on 5 February 2002 in Toronto, Canada, to Magic Sportswear Corp (“Magic”) for the shipment of 170 cartons of merchandise from New York to “Blue Banana” in Monrovia. Blue Banana claimed that 99 cartons never arrived.

The cargo was insured by a Toronto based insurer and the claim was paid. The subrogated underwriters commenced proceedings on 1 August 2003 in the Federal Court of Canada in the names of Magic and Blue Banana (collectively “Cargo Interests”) and served OT Africa Line Ltd (“the Carrier”) at its Toronto office on 15 August 2003.

On 2nd or 3rd September 2003 the Carrier commenced proceedings in the High Court in London for a determination that it was not liable for the Cargo Interests’ loss.² Cargo Interests acknowledged service of process and indicated that they would challenge the jurisdiction of the High Court.

In the meantime, the Carrier filed a motion in the Canadian proceedings seeking a stay.

Jurisdiction

The battle over jurisdiction was on familiar ground.

The Carrier relied on the exclusive English law and jurisdiction clause contained in the bill, which read:

“Any claim or dispute whatsoever arising in connection with the carriage under the Bill of Lading shall exclusively be governed by English law and determined by the High Court of London.”

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² Langley J (at first instance in the High Court in London) describes the claims as a declaration that the cargo shortage claim was false and an anti-suit injunction and damages relying on the jurisdiction clause in the bill of lading.

The Cargo Interest's relied on the Canadian *Marine Liability Act (SC) 2001* which contained a provision with similar effect to section 11 of the Australian *Carriage of Goods by Sea Act 1991 (Cth)* ("COGSA").

The Canadian legislation said:

46(1) If a contract for the carriage of goods by water to which the Hamburg Rules do not apply provides for the adjudication or arbitration of claims arising under the contract in a place other than Canada, a claimant may institute judicial or arbitral proceedings in a court or arbitral tribunal in Canada that would be competent to determine the claim if the contract had referred the claim to Canada where;

- (a) the actual port of loading or discharge, or the intended port of loading or discharge under the contract, is in Canada;*
- (b) the person against whom the claim is made resides or has a place of business branch or agency in Canada; or*
- (c) the contract was made in Canada.*

The Litigation

Following the institution of proceedings in London, the Carrier sought and obtained *ex parte* an anti-suit injunction restraining the Cargo Interests from proceeding before the Canadian Court.

The Carrier then sought a stay of the Canadian proceedings.

In her judgment delivered on 22 December 2003 declining to grant the Carrier's motion for a stay³, Madam Prothonotary Milczynski recognized that notwithstanding section 46, the Court retained a discretion in appropriate circumstances to grant a stay. The effect of section 46 was to negate the binding effect of exclusive jurisdiction clauses, but not to deprive the court of its power to grant a stay on grounds of *forum non conveniens*.

In determining whether to grant a stay, the Court would consider various matters, such as

- (a) the jurisdiction in which the evidence is situate;
- (b) the application of foreign law;
- (c) with what country each party has a connection;
- (d) whether the defendant is seeking a procedural advantage by relying on the forum selection clause; and
- (e) whether the plaintiff would suffer prejudice.

The Court considered that, as the "true" plaintiffs were in Canada, the Carrier had business interests in Canada, and "*most particularly the fact that most if not all of the material witnesses will come from Monrovia and/or New York (a factor which favoured*

³ *Magic Sportswear Corp v OT Africa Line Ltd* 2003 FC 1513 (CanLII)

neither England or Canada)” the Canadian Court was the most convenient and appropriate forum for the determination of the claim.

The Canadian Court also rejected an argument that the Cargo Interests had “attorned” to the jurisdiction of the High Court in that while they had expressed their intention to contest jurisdiction, they had not brought their application on within the time specified in the English Court rules. The Canadian Court observed that the Court Rules contemplated that applications could still be made out of time.

The Carrier appealed.

In his judgment on 23 August 2004⁴, Mr Justice O’Keefe, dismissing the Carrier’s appeal, agreed that the effect of s46 was to deprive an exclusive jurisdiction clause of its otherwise determinative effect, but did not then mean that the court should not consider a *forum non conveniens* argument but in which he agreed with the Prothonotary.

The Carrier appealed.

In the meantime the matter came before Justice Langley in the High Court in London.

Significantly, on 5 April 2004 the Carrier had obtained leave to join the Canadian insurers to the London proceedings.

The claims against the insurers were in tort (in procuring the breach by the Cargo Interests of their obligations under the exclusive jurisdiction clause) and an order for costs directly against the insurers.

In his judgment⁵, Langley J took a stricter view of the consequences of the Cargo Interests failure to challenge jurisdiction within time, and held that the Cargo Interests had in fact accepted that the High Court had jurisdiction.

The applications before Langley J were to set aside the service of proceedings on the insurers; to stay the proceedings against the Cargo Interests and to discharge the anti-suit injunctions.

The Carrier in turn sought to extend the anti-suit injunctions to the insurers.

For reasons that do not necessarily concern us here, Langley J agreed that the service of the tort claim against the insurers should be set aside but that the claim for costs should not.

The anti-suit injunction against the insurers was evidently pursued under CPR 6.20(3) under which the Carrier had to establish that the insurers were “necessary or proper parties” to the claim against the Cargo Interests. On the basis that it was apparent that it

⁴ *Magic Sportswear Corp v Mathilde Maersk (The)*, 2004 FC 1165 (CanLII)

⁵ *OT Africa Line Ltd v Magic Sportswear Corporation & Ors* [2004] EWHC 2441 (Comm)

was in fact the insurers who were pursuing the Canadian proceedings against the carrier in breach of the London Court's anti-suit injunctions, Langley J agreed to extend the injunctions against the insurers.

In relation to the application to discharge the anti-suit injunctions against the Cargo Interests, their counsel evidently tried to appeal to common sense; the proceeding was before the Canadian court, and that court should be left to deal with it.

Counsel for the Carrier relied on the Cargo Interests' (constructive) submission to the jurisdiction and to the exclusive jurisdiction clause.

Langley J referred to the well established principles to be applied when dealing with such applications, which include giving effect to the exclusive jurisdiction clause unless there are "strong reasons" or "exceptional justification" for not doing so.

Could the Canadian statute be a "strong reason"? His Honour said:

"I see nothing in the present circumstances which could begin to justify such an exceptional course, unless it is to be found in the very fact that Canadian legislation seeks to override the agreement of the parties."

His Honour identified this as the "overriding issue".

He first considered what might be described as conventional issues. He observed that apart from the fact that the bill was issued in Canada and that the Carrier had a place of business in Canada, nothing else in the dispute pointed to Canada being an appropriate jurisdiction.

In determining the "overriding issue" in favour of the Carrier, His Honour considered that:

- (a) Anti-suit injunctions by their very nature involve conflict with the jurisdictions of other courts;
- (b) They operate personally on the party restrained, not on the Court;
- (c) The Canadian court had not finally determined the matter;
- (d) Whether any remedy could be enforced against the insurers if they chose to act in breach of the injunction;
- (e) S. 46 of the Canadian statute was not the product of international convention.

The Cargo Interests appealed.

The Court of Appeal dismissed the appeal, confirming the stay and the anti-suit injunctions.

In considering the stay, Lord Justice Longmore identified the critical issue as the extent to which "if at all" it was appropriate for the English court to have regard to the Canadian

statute. According to His Lordship, the answer lay in the proper law of the contract, which was clearly English law.

He held that the question of the injunction should follow the stay. He dismissed an application by cargo interests that such a restraint would be a breach of comity on the basis that the English court was not restraining the Canadian law, merely restraining cargo interests from invoking the Canadian law.

Decision of the Canadian Court of Appeal

The judgment of the Canadian Court of Appeal was handed down on 23 August 2006⁶.

Somewhat against the run of play, the appeal was allowed and the Canadian proceedings stayed.

In his decision, Evans JA (with whom Decary and Sharlow JJA agreed) drew a distinction between the Canadian Act and other similar legislation (including Australian COGSA). He observed that the Australian statute purported to render foreign jurisdiction clauses void, while the Canadian statute purported only to give a claimant a choice of jurisdictions.

The decision is based on *forum non conveniens* principles which both the Prothonotary and Judge at first instance agreed were not displaced by section 46.

Section 11 of the Australian *Carriage of Goods by Sea Act* and section 46 of the Canadian *Marine Liability Act* compared

Section 11 of Australian COGSA reads;

- (1) *All parties to:*
 - (a) *A sea carriage document relating to the carriage of goods from any place in Australia to any place outside Australia; or*
 - (b) *A non negotiable document of a kind mentioned in subparagraph 10(1)(b)(iii), relating to such a carriage of goods;*
are taken to have intended to contract according to the laws in force at the place of shipment.

- (2) *An agreement (whether made in Australia or elsewhere) has no effect so far as it purports to:*
 - (a) *Preclude or limit the effect of subsection (1) in respect of a bill of lading or document mentioned in that subsection; or*
 - (b) *Preclude or limit the jurisdiction of a court of the Commonwealth or of a State or Territory in respect of a bill of lading or document mentioned in subsection (1); or*

⁶ *OT Africa Line Ltd and ors v Magic Sportswear Corp* 2006 FCA 284 (CanLII)

(c) *Preclude or limit the jurisdiction of a court of the Commonwealth or of a State or Territory in respect of:*

- i. *A sea carriage document relating to the carriage of goods from any place outside Australia to any place in Australia; or*
- ii. *A non-negotiable document of a kind mentioned in sub-paragraph 10(1)(b)(iii) relating to such a carriage of goods.*

Section 11 is in different terms to section 46. The Canadian provision is modelled on the equivalent provisions in the Hamburg Rules. It applies equally to import and export shipments. Significantly, the Canadian statute is permissive; the claimant *may* commence proceedings.

The Australian statute takes a different path. It approaches import and export shipments differently. For export shipments it imputes to the parties an intention that the proper law of the contract is the law of the Australian jurisdiction from where the goods were shipped. It then attempts to strike down any attempt to impute a contrary intention, and any attempt to oust the jurisdiction of the Australian courts, by rendering such an agreement (for example, an exclusive jurisdiction clause) of “no effect”.

In respect of import shipments, it similarly strikes down (“no effect”) any exclusive foreign jurisdiction clause in a bill of lading.

The English Court was faced with Cargo Interests whom they could genuinely say had an *option* to pursue proceedings in Canada (but should by virtue of the exclusive jurisdiction clause be restrained from doing so). Would an English court take a different view of section 11? In other words, does section 11 provide a “strong reason” where section 46 did not?

It would be a brave author who attempted to anticipate a judgment of the High Court in London. Section 46 is a relatively “lightweight” jurisdiction grabbing clause (as the Canadian Court of Appeal seem to appreciate) due possibly to its origin in the Hamburg Rules which was intended to operate as a convention, not a statute. Is section 11 any stronger?

Unlike section 46, section 11 bears separate analysis in its application to import cargoes and export cargoes. Presumably it is arguable that for export cargoes, and contracts conceived within the jurisdiction of the Commonwealth, section 11 may be stronger than for import cargoes who only gain connection with the Australian jurisdiction because the cargo is destined here and the Australian importer (presumably) resides here. However that analysis itself ignores the fact that the contract of carriage for an import cargo may just as easily be created in Sydney as Shanghai.

The critical question which may be faced by an English court will be whether the proper law of a contract for a shipment from (say) New South Wales is the law of New South

Wales (by virtue of section 11), or the law of (say) England by virtue of an express choice of law clause in a contract.

Such a question does arguably go to comity and respect for the Australian legislature. It is submitted that this may provide “strong reason” in circumstances where the Canadian statute did not, and also where the application of section 11 to import cargoes probably will not.

Some guidance may come from the approach of Mr Justice Thomas in *Akai v Peoples Insurance Co Ltd*⁷.

Like *OT Africa Line*, proceedings were taken in the UK and in Australia.

You will recall that the Australian High Court in *Akai* declined to grant a stay of proceedings involving an insurance contract that contained an exclusive English law and jurisdiction clause because of provisions of the *Insurance Contracts Act 1984* (Cth) (“ICA”), section 8 of which read;

- (1) *Subject to section 9 the application of this Act extends to contracts of insurance and proposed contracts of insurance the proper law of which is or would be the law of a State or the law of a Territory in which this Act applies or to which this Act extends.*
- (2) *For the purposes of subsection (1), where the proper law of a contract or proposed contract would, but for an express provision to the contrary included or to be included in the contract or in some other contract, be the law of a State or of a Territory in which this Act applies or to which this Act extends, then, notwithstanding that provision, the proper law of the contract is the law of that State or Territory.*

In other words, in determining the proper law of a contract of insurance, one ignores an express choice of law clause where that clause would change the proper law from the law of an Australian state or territory to the law nominated in the choice of law clause.

Section 52 of the ICA renders any provision void if it has the effect of modifying the operation of the provisions that Act to the detriment of the insured. The High Court felt that by choosing a jurisdiction that would not apply the Australian Act, the effect of the exclusive jurisdiction clause was to the detriment of the insured.

This was to be weighed against a contract of insurance which contained an exclusive English law and jurisdiction clause.

Meanwhile, in the English proceedings, the High Court in London was asked (by the insurers) to issue an anti-suit injunction against the insured and by the insured to stay the

⁷ *Akai Pty Ltd v Peoples Insurance Co Ltd* [1998] 1 LLR 90 NB

London proceedings (the Australian High Court having already held that the matter should proceed in NSW).

Having dismissed arguments that the insured was entitled to a stay as of right, the London Court then considered whether it should exercise its discretion to grant a stay.

Thomas J stated the principles relevant to his decision making process. Those principles included;

- Parties will be held to their contractual bargain, unless there is good reason to the contrary;
- Balance of convenience;
- Application of the law of a foreign court;
- Whether the parties have chosen London as a neutral forum (in which case the factors weighing the balance of convenience are lessened).

In deciding to refuse the application for a stay, Thomas J observed that the insurer would be deprived of a legitimate juridical advantage of the proceedings were to be stayed.

The existence of the Australian statute was not considered by Thomas J at all, even though it purported to modify the express choice of proper law.

In a parallel situation, therefore, the London court may be unlikely to consider Australian COGSA at all.

Comment

The purist application of conflict of law principles by the English Courts potentially places Australian courts and litigants in an impossible situation.

What is an Australian court to do but confirm its jurisdiction under section 11? While it may be tempted to grant anti-suit injunctions to restrain defendants from taking proceedings in a contractually chosen forum, is that fair in circumstances where the foreign forum (assuming it were to apply English conflicts principals) would readily commend the defendant for its choice and attempt to hold the plaintiff to its contractual bargain?

While the intention behind jurisdictional provisions such as section 11 of COGSA is meritorious (to redress the perceived imbalance of bargaining power of small Australian importers and exporters), who really benefits?

Hopefully the jurisdiction provisions of the UNCITRAL Convention on Carriage of Goods will relieve some of this pressure.