

CASE DIGEST

CONTRACT: PRIVACY OF CONTRACT;
CONTRACTUAL TERMS; WHEN WILL
THE COURT INTERFERE IN PARTIES'
COMMERCIAL CONTRACTUAL TERMS?

SEEMS NIGERIA LIMITED v. SHARAF
SHIPPING AGENCY LIMITED

CONTRACT: PRIVACY OF CONTRACT; CONTRACTUAL TERMS; WHEN WILL THE COURT INTERFERE IN PARTIES' COMMERCIAL CONTRACTUAL TERMS?

SEEMS NIGERIA LIMITED v. SHARAF SHIPPING AGENCY LIMITED

COURT OF APPEAL (NIGERIA)
(LAGOS DIVISION)

(DANIEL-KALIO; OTISI; SIRAJO, JJ.CA)

Background Facts

Seems Nigeria Limited (Appellant) purchased a total 4380 sheets of standard Gypsum Board, at the total cost of US\$15,321.24 from Shandong Baier Building Materials Company Limited based at Shandong, China. The Nigerian Naira equivalent of the cost of the consigned goods was ₦2,390,000.00. The cost of freight to ship the goods to Nigeria through Sunny Worldwide Logistics Shenzhen Limited was US\$7,800.00, and same was packaged by Pingyi Baier International Import-Export Company Limited aboard the vessel Ocean Motor Vessel named CSAV Lingue/01114/S, owned by Compania Sud-Americana De Vapores S. A. (CSAV, S.A.). Sharaf Shipping Agency Limited (Respondent) was the Nigeria Shipping agent of the said company. The case of the Appellant was that the Bill of Lading, issued in favour of the Appellant, was lost by STO Courier Service, which was engaged by Sunny Worldwide Logistics Shenzhen Limited. When the vessel berthed at the Apapa Port, Lagos, Nigeria, the Appellant's director was verbally informed by the Respondent that the cargo would be released upon the Appellant fulfilling some conditions in lieu of presentation of the original bill of lading, i.e., Affidavit of loss of original bill of lading; Newspaper advert to the effect that the original bill of lading is missing; and Police report.



The Appellant obtained and presented the said documents to the Respondent. However, the Respondent further requested a Bank Guarantee to cover the value of the consignment, which the Appellant obtained, but the Respondent rejected the said Bank Guarantee and requested for another Bank Guarantee to cover 200% of the value of goods to be valid for a tenor of 2 years. The Appellant, in compliance with the new directives of the Respondent, obtained another Bank Guarantee from Union Bank of Nigeria Plc, but the Respondent again rejected the said Bank Guarantee from Union Bank of Nigeria Plc on the ground that Union Bank of Nigeria Pic was not a First-Class Nigerian Bank. As a result of the Respondent's unending demands, which the Appellant saw as being unreasonable, the Appellant instituted this action at the Federal High Court (lower court), seeking certain reliefs, which the Respondent contested against.

At the conclusion of the hearing, the learned trial Judge in the judgment dismissed the Appellant's claims, holding that the Appellant had failed to meet the terms for the release of its cargo by the Respondent.

Dissatisfied with the decision of the lower court, the Appellant appealed to the Court of Appeal. One of the issues raised for determination was: *Whether the learned trial court was right having earlier held that the alteration of the terms and conditions for the release of the Appellant's consignment imported via Bill of Lading in lieu of presentation of the original Bill of Lading is arbitrary and unreasonable but to hold later that the act of the Respondent imposing the arbitrary terms and conditions on the Appellant in lieu of presentation of the original bill of lading cannot be interfered with by the court and that the Appellant failed to meet the conditions imposed by the Respondent.*

Arguments

Learned Counsel for the Appellant contended that the Bank Guarantee obtained from Union Bank of Nigeria Pic, being for the sum of ₦5,000,000.00, was in excess of the 200% cover requested by the Respondent, and that the tenor of the Bank Guarantee was for a minimum period of 6 months and the life span was at the pleasure of the Respondent, which meant that the tenor was more than the 2 years requested by the Respondent. Counsel further stated that Union Bank of Nigeria Plc, which was one of the foremost banks and regarded as an "old generation bank", has a capital base of over ₦100 Billion, which could absorb an indemnity of ₦5,000,000.00, and that the Respondent classification of only Zenith Bank Plc as a first-class bank in Nigeria, was described as strange and absurd. That there are no such classifications of banks in Nigeria, more so as Union Bank Nigeria Pic is a reputable bank with huge financial base. The Appellant counsel submitted that the lower court having not seen the reasonability of the Respondent's insistence that the Bank Guarantee must be from Zenith Bank Plc, ought to have interfered with the exercise of discretion by the Respondent by holding that the classification of banks as first class was illogical and unreasonable, that the Respondent discretion was unreasonably exercised and, hold that the Appellant complied with the conditions imposed by the Respondent to enable the Respondent release the consignment to the Appellant in lieu of presentation of the original Bill of Lading.

In contention Learned Counsel for the Respondent argued that the Respondent was under no contractual obligation to deliver the cargo to the Appellant without production of the original bill of lading, and that since the Appellant could not produce the original bill of lading in order to take delivery of the cargo from the carrier or its agent, it had no basis to claim that it was entitled to the delivery of the cargo. Counsel further stated that CSAV through its agent, the Respondent, gave their procedure for the loss of original bill of lading procedure, which are measures taken to protect the carrier for which it is risky to deliver the cargo without production of the original bill of lading in the peculiar circumstances of this case. It was submitted that since the Appellants failed to comply with the conditions given by the Respondent's principal in order for them to undertake the risks involved, the Appellant was solely to blame, as the carrier was not under any contractual obligation to release the cargo without the production of the original bill of lading. Counsel argued further that the issue of whether or not the Respondent's principal exercised its discretion properly is inconsequential and that it would no longer be a discretion in a commercial sense if the Respondent's principal could be coerced as to what the terms of the alternative conditions for releasing the cargo to the Appellant should be, in the absence of the production of the original bill of lading.

Decision of the Court

In resolving this issue, the Court of Appeal held that:

Commercial contracts that afford one party a discretion as to whether or how it exercises its rights or fulfils its obligations are not uncommon. Also, a Court lacks the vires to re-write the agreement of the parties, which gives one of them power to exercise a discretion, for the Court cannot substitute itself for the contractually agreed decision-maker. Furthermore, it is clear that circumstances in which the Court will interfere with the exercise by a party to a contract of a contractual discretion given to it by another party are extremely limited. However, a Court may inquire into the reasonableness of an exercise of discretion by a party in a commercial contract, and if the result of such exercise is found to be completely unreasonable, the Court may interfere. The concern is that the exercise of discretion should not be abused. A contractual discretion must therefore be exercised in good faith and not be irrational, arbitrary or capricious.

Issue partly resolved in favour of the Appellant.

Abayomi Adeniran, Esq., for the Appellant

Paul Omaidu, Esq., Folashade Callisto, Esq., and Michael Popola for the Respondent.

This summary is fully reported at (2023) 4 CLRN.

www.clrndirect.com

info@clrndirect.com