JUDGMENT
SAIPOL S.A. (Claimant/Respondent) v INERCO TRADE S.A
(Defendant/Apellant)before
MR JUSTICE FIELD
JUDGMENT GIVES ON
20 June 2014

1. **MR JUSTICE FIELD**: This is an appeal with leave under section 69 of the Arbitration Act, 1996 ("the Act") brought by Saipol SA ("Saipol"). There is a parallel application under section 68(2) of the Act but at the hearing the sole issue before the court was the questions of law for which leave had been given to argue.

2. The questions of law are: *(1) Whether the Sale of Goods Act, 1979, limited the recoverable damages to the difference in value between sound and defective goods. (2) Whether the comingling of the respondent's 3,000 MT with the other sellers' parcels had the effect that the respondent was not liable for third party liabilities or for expenses.*

3. The background to the appeal is this. There was a contract between Saipol as buyer and Inerco Trade SA ("Inerco") as seller for the sale and purchase of 3,000 MT of Ukrainian crude sunflower seed oil in bulk at US$1,275 per MT delivery FOB Ilyichevsk between 15 March and 15 April 2008. The contract incorporated the terms of FOSFA Contract 53, Clause 29 of which provides for arbitration in accordance with FOSFA's rules of arbitration and appeal.

4. Inerco shipped 3,000 MT of product as part of a total cargo of about 16,600 MT of Ukrainian crude sunflower seed oil which was loaded on board the vessel MT Selandra Swan on about 16 March 2008. The 13,600 MT balance of the cargo was shipped by four other sellers, Rizoil, AWB, Cargill AT and Cargill International.

5. As the FOFSA tribunal that determined liability found in paragraph 5.6 of their award, before loading the entire cargo had been comingled with other oil including that shipped by the other sellers in seven shore tanks and it was loaded, comingled into Selandra Swan's tanks. Paragraph 5.6 reads:

> It was common ground that the whole shipment of about 16,600 metric tons was comingled in several storage tanks prior to loading and it was common ground that goods were loaded comingled into the ships' tanks. The storage tanks were identified as tanks numbers 5, 6, 9, 12, 13, 17 and 18 from the Rizoil terminal, although tanks 17 and 18 were apparently the source exclusively for a different shipper. Loading commenced at 21.40 on 13 March and completed on 00.15 on 16 March 2008.

6. The cargo was discharged at Dunkirk on 31 March 2008 and Saipol began drawing upon it to make delivery to sub-purchasers who were food stuffs manufacturers. On 8 April 2008 a sub-purchaser complained of mineral oil contamination. In the following weeks it became clear there was a serious contamination problem with Ukrainian sunflower seed oil. The EU authorities took emergency action which included recalls of food stuffs containing Ukrainian sunflower seed oil and a temporary prohibition on imports of Ukrainian sunflower seed oil.

7. Saipol claimed that the 3,000 metric tons sold by Inerco was in breach of sections 13 and 14 of the Sale of Goods Act ("the SGA"). Inerco denied the claim and the dispute went to a first tier FOSFA arbitration. The tribunal upheld Saipol's claim that in respect of the 3,000 metric

tons sold by Inerco, Inerco was in breach of sections 13 and 14 of the SGA. The tribunal observed that the intended use of the sunflower seed oil was for use in foodstuffs for human consumption. The question of damages was dealt with in a separate arbitration at the first tier level. The buyers claimed for consequential losses resulting from financing and storage charges and also in respect of sums paid to sub-purchasers to whom contaminated oil had been sold. It was contended that the buyers could recover in respect of the entire cargo of 16,600 metric tons and not only in respect of the 3,000 metric tons sold by Inerco. The buyers claim was advanced under section 53(2) and section 54 of the SGA.

8. Sections 53 and 54 of the SGA provide (in relevant part):

> 53. (1) Where there is a breach of warranty by the seller, or where the buyer elects (or is compelled) to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may—
> (a) set up against the seller the breach of warranty in diminution or extinction of the price, or
> (b) maintain an action against the seller for damages for the breach of warranty.
> (2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.
> (3) In the case of breach of warranty of quality such loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had fulfilled the warranty.
> (4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.
>
> 54. Nothing in this Act affects the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

9. For the reasons given in paragraphs 9.1(4) to 9.1(8) of their award the first tier tribunal held that the buyers were entitled only to damages representing the difference in value between the goods as they were warranted and their actual value. In addition, the buyers were awarded on a pro-rata basis as consequential damages, costs in respect of storage and financing. The sellers appealed the quantum award. Saipol responded to that appeal and maintained their own cross-appeal. Inerco's appeal was on the basis that the tribunal had ignored the contract price in fixing the damages and was wrong to have found that there was no market for the unsound goods in computing the damages for the difference between warranted as warranted and as delivered. Inerco also argued that no award should have been made in respect of storage and financial costs since these were consequential losses and the only measure of recovery was that provided for in section 53(3).

10. In its cross-appeal Saipol contended that it was entitled to the consequential losses it had identified under section 53(2) which had primacy over section 53(3), alternatively under section 54. Saipol also argued that they were entitled to recover consequential losses flowing from the fact that the entire cargo was contaminated on the basis that each seller of the parcels making up the entire cargo was in breach of contract for delivering contaminated oil and so each had contributed to the contamination of the whole. Accordingly, Inerco, as one of those sellers, was liable for the whole of the consequential losses resulting from delivery of the entire cargo with Inerco being free to seek contribution from the other sellers.

11. In its award the Board set out in very considerable detail the submissions of the parties on the appeal and the cross-appeal and in the course of reciting Saipol's submissions in paragraph 4.12 (4) the Board noted that Saipol made reference to The Achilleas [2008] UKHL 48, a decision of the House of Lords. Saipol did so because it anticipated that Inerco would make a submission founded on that authority since it had been referred to by Inerco before the first tier quantum tribunal. In the event, however, Inerco placed no reliance in its submissions on The Achilleas in advancing its case before the Board, as the Board must have been aware.

12. In contrast to the many paragraphs taken up with reciting the parties' submissions, the Board expressed its findings in but a few paragraphs. The relevant paragraphs are 6.3 through to 6.13 which read:

> *6.3 First off, in keeping with the findings of the First Tier Award we agree and DO SO FIND for the same reasons that Sellers' contractual liability extends only in respect of their own consignment of 3,000 metric tons of contaminated Sunflowerseed Oil delivered free on board the MT SELANDIA SWAN and not to any of the other parcels delivered on board by other sellers.*
>
> > *a. The decision to load Sellers' oil along with other parcels into the Vessel's tanks without segregation was Buyers' and in their role as both FOB buyers and charterers taken at their own risk and responsibility.*
> > *b. There was no evidence before us that Sellers were directly or in any way responsible for the totality of the contaminated cargo delivered to the MT SELANDIA SWAN.*
> > *c. In so far as the findings of the First Tier Award on liability – now final and conclusive also in respect of the scope of our jurisdiction – extend only to the parties' Contract and not to any third party goods or supply of goods contract, the question of Sellers' liability in respect of other alleged contaminated goods delivered by other suppliers is not open to reconsideration.*
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> *6.4 However, it was further argued before us by Buyers that this issue also went to the principle of quantum assessment on the basis of the "one-for-all" point. Whilst this argument could be seen as a res judicata point on liability reframed into a quantum issue, we are nonetheless unpersuaded by the "one-for-all" argument on its own merits in the circumstances where Buyers commingled apparently contaminated oil from several contractual sources and are now looking in principle to recover the totality of their losses from any one supplier.*
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> *6.5 Moreover, the disputes over the other contaminated parcels on the MT SELANDIA SWAN concern contract made with other sellers on terms and conditions outside the Board's knowledge and which have been referred to other arbitration panels on grounds of liability and loss possibly very different from those argued before us. In all events then, we would have no logical, contractual or, for that matter, legal basis on which to assess the "equality of blame" in the other cases. Indeed, the trade practice in FOSFA contractual disputes and arbitration has always been to determine a referred claim and the associated quantum of damages as coming strictly under the ambit of the parties' contract, and not one entailing considerations of multiple causes of loss engendered in part under third party contract outside the scope of the parties' arbitration agreement.*
>
> *6.6 But further and equally important, our decision in this regard also follows on from the relevant principles the Board has now determined as the basis for assessing damages due Buyers in accordance with the mandate set out in our Hearing Order (precised at 6.1 above).*

6.7 Given the magnitude and the unprecedented circumstances of Buyers' losses (where the contamination remained undetected until after discharge by which time much of the oil on the vessel had been processed and in many cases sold and/or distributed into the food chain), we understand that Buyers are contending for the recovery for the full extent of all losses including special damages under Section 54 relating to third party contracts and to liabilities for fines and penalties etc in lieu of the normal measure of damages in a case of breach of warranty of quality.

6.8 However, we see no special circumstance arising in the surrounding "factual matrix" or commercial background to the parties' trade, neither in their agreed contractual regime of an FOB purchase on standard terms for a generic grade of a crude vegetable oil, that could be said to lead to the conclusion that there were any special damage considerations either expressed or in the contemplation of the parties at the time the Contract was concluded beyond the trade norm of either a fixed price allowance or compensation for loss in market value in the event of a quality breach.

6.9 Indeed, the underlying rationale for this latter is that such an approach effectively defines scope of loss in a trade where the value and demand for goods is in constant flux, and thereby allows for a line to be drawn under a defective performance of contract in the same way that the FOSTA default clause and its market rule for damages assessment does for cases of default of fulfilment of a contract.

6.10 Moreover, looking at the standard FOB terms and conditions on which the parties contracted both from an outside objective viewpoint and through our own commercial understanding of the expectations of the trade in the event of a quality breach, we would not consider that Sellers can be taken to have assumed contractual responsibility for losses beyond the normal measure of diminution in value, and certainly not for an open-ended liability in circumstances where the refining industry and European importers by and large did not take mineral oil contamination as a perceived risk and Buyers in the event had taken no special contractual protection vis-à-vis Sellers for any extended or third-party losses.

6.11 In that sense, we agree with the First Tier finding of 9.16 of the Award, where the Arbitrators stated:

"As Buyers did not negotiate the inclusion of any contract clause giving them additional protection beyond the normal contract terms, WE FIND THAT the correct measure of damages is to be based on Section 53(3) of the Sale of Goods Act 1979".

6.12 The starting point then as provided for in Section 53(3) is as follows:

"(3) in cases of breach of warranty of quality, such loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had fulfilled the warranty".

6.13 As such, this section of the 1979 Act sets out the formula for damages to be calculated as the difference between the value of sound goods (as contracted for) and the value of the unsound goods (as so supplied), following deliver to the buyer.

6.14 Having concluded that the principle of replacement value (sound versus actual goods) measure under Section 53(3) of Sale of Goods Act 1979 should apply in respect of Buyers' direct losses, we now look to determine the date on which the difference in values should be assessed. In this respect we have rejected the date of physical delivery (shipment in Ilychevsk) or the Contract date as contended for by Sellers, and rather followed the First Tier by taking the date when the contamination was discovered and Buyers began taking steps to contain their losses, one of which was to purchase "sound" oil in substitution for the contaminated goods they had received and delivered to third parties. We are supported in this view by well-established legal authority that allows for the assessment of the market values to be postponed from the date of delivery until the defect is discovered and to be acted upon. Indeed, it would only be realistic, and commercially sensible in our view if the values for the assessment of a buyer's recoverable damages were taken at the moment when they would have first been able to act in the market in mitigation of their losses by buying in replacement goods and/or disposing of the goods that didn't meet the warranty.

13. It is plain in my judgment that the tribunal proceeded on the basis that the only potentially applicable measures of damage were those provided for in section 53(3) of SGA and section 54. They adopted this approach notwithstanding that it is entirely clear that Saipol advanced their case in reliance on section 53(2) and in the alternative on section 54.

14. It is common ground that section 54 of the Sale of Goods Act articulates the second limb of the rules in Hadley v. Baxendale [1854] 9 Exch. 341. It is equally common ground that section 53(2) and section 53 articulate the first limb. Accordingly, under section 53(2) there can be, depending of course on the facts of the situation, a claim for consequential losses on the basis that such losses are those which will result in the usual course of things. Mr Eaton QC argues that the Board were gravely in error of law in not approaching the case on the basis of Saipol's primary case that the applicable measure was that provided in section 52(3). That, he submitted should have been the starting point. Therefore, what the tribunal should have done is to have assessed the factual situation before it and have decided whether the consequential losses claimed fell within the first limb of Hadley v. Baxendale. In such a situation one is not concerned to look at special contemplation by the parties as to the particular losses claimed. I accept that submission. In my judgment, the Board erred in law in proceeding on the basis that the only potentially applicable measures of recovery were those provided for under section 53(3) and section 54.

15. Referring in particular to paragraph 6.10 of the award, it was argued with very considerable skill by Mr Collett QC for Inerco that the Board reached its decision that the consequential damages sought were irrecoverable on the basis of the principle articulated in The Achilleas. Mr Collett correctly contended that when construing the award the court should strive to uphold it and not peruse it as if it were a judgment. In Mr Collett's submission, the language used by the Board in paragraph 6.10 echoed that found in Lord Hoffman's judgment in The Achilleas and the court should infer that the Board were applying The Achilleas approach to the case before it.

16. I decline to accept Mr Collett's submission. In the first place, The Achilleas was not relied on at all by Inerco but was referred to by Saipol only in anticipation of it being cited by Inerco. That is manifest as I have already said, as the Board must have been aware. Secondly, when one looks at the reasoning in paragraphs 6.8, 6.9 and 6.10, in my judgment the Board's grounds for holding that there was no recovery for the claimed consequential losses are not rooted in The Achilleas reasoning but rather in the Board's conclusion that there was no perceived risk by either party as to a mineral oil contamination. It was that that was fundamentally the reason for the conclusion that there could be no recovery under section 54.

17. In any event, even if the Board are to be taken to have been referring to The Achilleas and deciding the case on the basis of the principles there enunciated, I would hold that they were in error of law in doing so. The Achilleas was a highly exceptional case. On its facts, there was not only a generalised understanding in the trade or the market that losses for late delivery of a vessel under a time charter were to be assessed simply by reference to the market rate at the time the vessel should have been redelivered, but that was also the considered view of the legal profession. Accordingly, it could safely be said in those circumstances that there was a legitimate expectation within the trade that a time charterer would not be liable for a loss of profit suffered by the owner in respect of a particular follow-on charter but instead, for late delivery would be liable only on a basis that took account of the difference between the rate and the market rate.

18. In the instant case, the Board refers to an approach within the trade but in my judgment this does not constitute a sufficient basis for the application of the approach taken by The

Achilleas. The approach the Board ought to have taken was first to have considered whether or not the losses were recoverable under section 53(2), that being as I have said, an expression of the first limb of Hadley v. Baxendale and the answer to that question did not require consideration as to whether or not under the contract there had been any particular assumption of liability or responsibility in respect of the sort of consequential losses that were being claimed. Accordingly I agree with the view of Flaux J who, when dealing with the permission application, concluded that the Board were obviously wrong in deciding that the only potential measures of recovery were section 53(3) or section 54.

19. I turn then to the second question. Mr Collett argued that what the Board was doing when it made its findings in paragraph 6.3 through to and including 6.5 was dealing with a liability case and was not dealing with a case that proceeded on the basis of joint contribution to the overall contamination of the cargo by the separate sellers. Mr Collett submitted that if that is all they were doing, there is really nothing for Saipol to complain about. I reject that submission. There is no doubt that the contentions that were advanced before the Board did not go simply to liability but instead involved a case founded on each of the sellers being in breach of contract for delivering contaminated goods so that it could be said of each of them that they had causally contributed to the contaminated cargo as a whole.

20. In my judgment, in paragraph 6.4 of the award, the Board were dealing with the contention that had been advanced as to joint contribution in breach of contract to the contaminated cargo as a whole, and were rejecting it. However, they nowhere gave any proper reasons for doing so. Mr Collett somewhat faintly suggested that the Board may have been deciding the question on the basis of a break in the chain of causation but I do not accept that submission either. Accordingly, the appeal on the second question of law also succeeds.

21. I have heard some short submissions on how what the disposal should be assuming that the appeal succeeds. I propose to let counsel into my thinking as it stands at the moment and will invite them to address me shortly as to whether I should be persuaded to some other course.

22. I do not think that this is a case where the tribunal should simply be left to assess the damages on the basis that the consequential losses are recoverable as a matter of principle under section 53(2). In my view, that will be too much of an intrusion into the exclusive territory of the tribunal. Subject to further argument, I think that there should be a remission to the tribunal to consider applying the law as it should have been applied, whether or not the consequential damages sought to be recovered stand to be recovered. I do not think that any special direction should be made as to a costs order but that should be left to the discretion of the board to be exercised in the light of the final outcome of these arbitral proceedings.