CASE NOTES*

Quota system — pro rata shipment

COBELFRET (UK) LIMITED v *AUSTEN AND BUTTA (SALES) PTY LIMITED*

New South Wales Supreme Court, 24 February 1988

Mr Justice Brownie's recent decision concerning a charterparty dispute deals with an important question, previously undecided in Australia, that is, whether a supplier is entitled to pro rata its goods among customers in the event of a quota system restricting the supply of their goods.

The plaintiff shipping company entered into a contract of affreightment with the defendant coal exporter, which was a subsidiary of Austen and Butta Limited which mined and exported coal from New South Wales. The Contract of Affreightment (COA) provided for the carriage of coal from Port Kembla, Sydney or Newcastle to a number of ports in Northern Europe. The contract was dated 29 November 1979 and was for the export of coal in the "years" 1 April 1980 to 15 March 1981, 1 April 1981 to 15 March 1982 and 1 April 1982 to 15 March 1983. It set out a minimum/maximum tonnage to be carried. The coal was part of the defendant's contractual obligations to supply a European customer.

In 1980 it became apparent that the ports of Port Kembla and Sydney were so congested because of industrial problems and the inadequacy of coal loading facilities that the ports could not cope with the volume of coal that the exporters wished to ship. The movement of coal was controlled by the Joint Coal Board (JCB), an authority set up by the Federal and New South Wales Governments. These powers were under both Commonwealth and State legislation. The JCB adopted a quota scheme with effect from 1 August 1980 to reduce the quantity of coal which the exporters shipped through Port Kembla and Sydney. The quota system continued until September 1982. The defendant's quota reduction was such as to reduce its capacity to export coal by 21%. The defendants sought to persuade each of its customers and carriers to accept for purchase or carriage a reduced quantity of coal. Reduced quantities were shipped, including reduced quantities carried by the plaintiff. Subsequently the plaintiff asserted that the defendant was in breach of its contractual obligations to ship the full tonnages under the COA and sued for damages for its loss of profits.

The defendant raised a number of matters in defence. Firstly, it maintained that at a meeting in Sydney shortly after imposition of the quota

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scheme, at which executives of both the plaintiff and the defendant were present together with the plaintiff's broker and the defendant's broker, it was agreed that the plaintiff would accept a proportionate reduction in tonnage. Secondly, the defendant maintained that it notified the plaintiff of the scheme and proposed a schedule of shipments so that the tonnages would be reduced pro rata among customers, and the plaintiff nominated consistently with this proposal. Thus the plaintiff was estopped from asserting that it was entitled to have the full amount of coal shipped.

The third defence relied on was that the force majeure provision in the charterparty relieved the defendant from its liability to the plaintiff.

Fourthly the defendant maintained that because of the quota system and the inability of the three ports to service the requirements of the coal exporters, the contract was frustrated. Fifthly, the defendant maintained that there was an implied term in the contract that it was a condition precedent to the defendant's obligation to ship coal, that it had obtained the consent of the JCB, and that that consent was not given in respect of the shortfall of tonnage.

The plaintiff maintained that the defendant had procured and encouraged in the creation of the quota system. The defendant said that if there was an oral agreement it was made as a result of a misrepresentation. Furthermore, the plaintiff asserted that in relation to the oral variation defence and the estoppel defence, it was subject to a formal addendum to the COA.

The judge accepted the defendant's oral variation defence. He relied heavily on the contemporaneous records that supported the defendant's contention. He said that the subsequent conduct of the parties and his views on the credit of the representative of the plaintiff who was at the meeting also supported the defendant's case. The judge said that the oral variation was limited to so much of the plaintiff's claim as was covered by the operation of the quota system.

The force majeure clause stated —

> Act of God, etc
>
> Neither party shall be liable for any failure to perform its obligations under this Charter Party if such failure is caused by Acts of God, the Queen's enemies, restraints of Princes and rulers . ..

When considering the force majeure clause the judge noted that the defendant had entered into four COAs to carry coal for this particular customer over the three year period which were all in identical terms. The judge accepted that the defendant was trying to treat the four shipping companies equally, and he inferred that each of those shipping companies accepted that this was so. The plaintiff had put forward an argument that the defendant should have ignored all its other customers as its total contractual commitment to the plaintiff was less than its quota and so it

could have fulfilled the whole of its COA with the plaintiff. The judge then reviewed at length the English and United States authorities pointing out that it was not yet clearly established by any decisions as to whether proportionate rationing could be relied on. The judge opted for the American view which he thought provided a test of reasonableness where the seller acting in reliance on that test must, in disputed cases, subject his conduct to the scrutiny of the courts. The judge doubted the submission by the plaintiff that the sequence of entry into the contracts was such that some contracts were entered into after this COA. The judge did not think that the evidence justified the drawing of any inference as to the sequence of contracts. He thought the critical time was the time when the force majeure situation arose or perhaps that it was foreseeable that it would arise. He stated —

> In my respectful opinion, the American view is preferable to the view expressed by Bingham J in *Pancommerce SA* v *Veecheema BV* (1982) 1 LLR 645 and by Hudson [AH Hudson, 31 MLR 535], particularly in the context of the Defendant's "evergreen" contracts; it seems to me to be likely to lead to a more just result, and to avoid the difficulties and illogicalities which might otherwise arise from time to time, in having to arbitrarily decide whether one or some buyers should receive an appropriately proportionate part of the goods in short supply, or not at all, depending on the chance of whether their binding contract was made before or after some other contract. The American view provides a test of reasonableness, where the seller acting in reliance upon that test must, in disputed cases, subject his conduct to the scrutiny of the Courts.

The judge pointed out that the defendant had made known to its customers and carriers what it was doing in prorating, and inferred from the evidence that both of the groups accepted what was proposed as being fair. He pointed out that the plaintiff had even made its own enquiries rather than taking what it had been told by the defendant at its face value. He therefore considered that clause 22 of the COA excused the defendant from its failure to comply with its obligations, to the extent that the interaction of Order 30 of the JCB (which was the relevant order requiring the JCB's consent to the movement of coal) and the quota system resulted in there being a short shipment. Thus the force majeure defence succeeded with that limitation.

The judge rejected the frustration defence and relied on the presence of the force majeure clause in the COA and the fact that there was only a 21% reduction initially as not being the kind of event that could give rise to frustration.

The judge accepted the implied term defence that the defendant had an obligation to do all that was reasonable on its part to the end that the JCB would grant consent pursuant to Order 30 for enough coal to be exported to enable the defendant to fulfil its obligations under the COA. The judge accepted that the defendant had done all that was reasonable and that there was no reasonable chance for Order 30 consent to the forthcoming if it had applied for it. Again, he held that the defence succeeded insofar as there was a tonnage reduction because of the quota system.

In relation to the estoppel defence, the judge accepted the evidence of the defendant's senior executives that the defendant would have been placed in a crisis situation and that they would have acted in a different way, although there was no precise way it could be identified. The judge said that it was almost inconceivable that the defendant would not have acted in a different way; it was highly likely that the parties would have worked out some form of compromise. The judge therefore concluded that if the plaintiff had succeeded on the issue that the oral variation was subject to formalisation, then the defendant would have succeeded on the estoppel defence to the extent that there were reductions in accordance with the quota system.

The judge rejected the arguments that the agreement was subject to formalisation.

In relation to the misrepresentation issue and the procurement and encouragement of the quota system issue, the judge rejected the plaintiff's arguments. The judge further pointed out that the plaintiff had a difficulty in maintaining that it denied that there was any oral agreement, but if there was an agreement, it acted in reliance on the representation made.

Thus the judge found that the defendant was relieved from shipping such of the tonnage that was the subject of the reductions due to the quota system. Insofar as there was tonnage that was not caught up by the quota system, the Judge found that the defendant was liable to the plaintiff for damages for loss of profits. In this regard the quota system had expired some 6 months before the end of the COA.

The remainder of this lengthy judgment deals with the question of damages, and there were a number of issues left over for further argument which will not take place until later this year. Accordingly, the damages findings are not dealt with at this stage.