**Neutral Citation Number: [2021] EWHC 1465 (Comm)**
Claim No. LM-2020-000036

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**LONDON CIRCUIT COMMERCIAL COURT**
**(SHORTER TRIALS SCHEME)**

Business and Property Courts of England
via Microsoft Teams
26 May 2021

B e f o r e :

**HIS HONOUR JUDGE PELLING QC**

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**(1) JTI POLSKA Sp. Z o.o.**
**(2) GALLAHER LIMITED**
**(3) JT INTERNATIONAL S.A.** **Claimants**

**-v-**

**(1) MAREK JAKUBOWSKI trading as MARK-TRANS-SPED MAREK JAKUBOWSKI and/or trading as MARK-TRANS-SPED TRANSPORT-SPEDYCIA MAREK JAKUBOWSKI**
**(2) MARK-TRANS-SPED TRANSPORT-SPEDYCIA MAREK JAKUBOWSKI (CORPORATE BODY)**
**(3) MARK-TRANS-SPED TRANSPORT-SPEDYCIA (CORPORATE BODY)** **Defendants**

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**BEN GARDNER (Instructed by Gateley Plc) appeared on behalf of the Claimants**
**JOHN KIMBELL QC (Instructed by DWF Law LLP) appeared on behalf of the Defendants**
**Wednesday, 26 May 2021**

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**HTML VERSION OF JUDGMENT**

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**HHJ PELLING QC:**

1. This is an application by the defendant at what was to have been the trial of this claim for an order under section 12 of the Administration of Justice Act 1969 for a certificate that a sufficient case has been made out for an application to be made to the Supreme Court for permission to appeal. The argument has taken place over a period of about two hours and has been supported by written submissions, citations from various English authorities as well as texts and judgments from a number of the highest courts of a various European jurisdictions. I mean no discourtesy by keeping this judgment relatively short.

2. The background to the application is straightforward. I can take it from the statement of agreed facts

filed in these proceedings. On or about 18 February 2013, the third claimant, on behalf of itself and others within its group, entered into a Land Master Transport Services Agreement ("MTSA") with the defendants, to govern carriage by the defendants of the claimants' goods.

3. The parties entered into a contract of carriage within the framework of the MTSA for the carriage of a consignment of 129 cases of cigarettes from Gostkow to Crewe. As the contract was for international carriage of goods by road to the United Kingdom, the Convention on the Contract for the International Carriage of Goods by Road (" CMR") applied compulsorily to the contract. The first claimant sold the cigarettes to the third claimant on Free Carrier ("FCA") Gostkow terms, and the third claimant sold the cigarettes to the second claimant on Delivered At Place ("DAP") Crewe terms, free of excise duty.

4. The consignment was loaded into the defendant's vehicle on 5 March 2019 for carriage to Crewe. The vehicle proceeded to England where the driver parked at Clacket Lane Services on the M25 at about 1.33 in the morning of 8 March 2019. Whilst parked there, 389 cases of cigarettes were stolen by thieves who cut a hole in the side of the vehicle. The claimant incurred excise duty of £499,557 which they paid on 4 November 2019. The duty was levied by HMRC pursuant to Directive 20/24EC and section 12(12A) of the Finance Act 1994 on the basis that the stolen cigarettes were deemed to have entered into circulation within the UK following the theft. The duty would not have been levied on the claimants, or paid by them in the ordinary course of carriage, and arose only because of the theft.

5. The parties have settled all claims aside from a claim under article 23.4 of CMR for recoupment of the duty paid as referred to above.

6. Article 23 of the CMR provides insofar as is material as follows:

> "(1) When, under the provisions of this Convention, a carrier is liable for compensation in respect of total or partial loss of goods, such compensation shall be calculated by reference to the value of the goods at the place and time at which they were accepted for carriage ...
>
> (3) Compensation shall not, however, exceed 8.33 units of account per kilogram of gross weight short.
>
> (4) in addition, the carriage charge, Customs duties and other charges incurred in respect of the carriage of the goods should be refunded in full in the case of total loss ... but no further damages should be payable
>
> (6) Higher compensation may only be claimed where the value of the goods of a special interest in delivery has been declared in accordance with articles 24 and 26."

7. The question that I would have had to resolve, but for the concession to which I refer below, was whether the words "... *carriage charges, customs duties and other charges incurred in respect of the carriage of the goods* ..." in article 23.4 include excise duty that becomes payable in the circumstances that I have described. If the defendants are correct in maintaining the answer is negative, then the claim must be dismissed but if the answer is yes, then the claimants are entitled to the sum identified in my narrative as set out above.

8. Mr Kimbell QC, who appears for the defendant, accepts that courts beneath the Supreme Court are bound to answer the question affirmatively following the decision of the majority in the House of Lords in James Buchanan & Co Ltd v Babco Forwarding & Shipping Limited [1978] AC 141 ("Buchanan"). I agree. He submits, therefore, in paragraph 7 of his skeleton argument that judgment must be entered for the claimant for the sum claimed. Again I agree.

9. Mr Kimbell submits, however, that the decision of the majority is seriously arguably wrong, that the Supreme Court has power to reverse both itself and previous decisions of the House of Lords, and that in the circumstances I should grant a certificate under section 12 so as to facilitate an application for permission to appeal to the Supreme Court.

10. He submits that this is the appropriate course because an application for permission to appeal to the Court of Appeal is bound to fail but even if that is not so, in any event, it is pointless because even if granted the Court of Appeal would be as bound by the decision of the majority in Buchanan as I am, and in those circumstances it is undesirable in terms of cost and time that an application be made to the Court of Appeal - see R (on the application of Hodgkin and others) v Registrar of General Births, Deaths

and Marriages [2012] EWHC 3751 (Admin) per Ouseley J at paragraph 7.

11. Mr Kimbell submits, and Mr Gardner does not dispute, that in the circumstances of this case, for an application under section 12 to succeed, the defendant must satisfy me:

    a. That the issue identified earlier is a point of law of general public importance;

    b. It relates wholly or mainly to the construction of a enactment;

    c. The judge is bound in relation to that point of law by the decision of either the Court of Appeal or the Supreme Court in previous proceedings; and

    d. The issue was fully considered in the judgments by which the judge is bound.

    If those threshold conditions are satisfied, then it is submitted and I agree that the court then has discretion as to whether or not to grant the certificate sought.

12. As to these issues, subject to (a) being satisfied, it is common ground that (b) is satisfied since the CMR is given effect as a matter of English law by the Carriage of Goods by Road Act 1965; (c) is satisfied because I am bound by the decision of the majority in Buchanan, and as to issue (d), the issue that I identified earlier in this judgment was fully considered by each of the law lords who sat in Buchanan.

13. There are thus two issues that I have to determine, being (1), whether the point of law is one of general public importance; and, assuming that it is, (2) whether I should exercise the discretion conferred by section 12 by granting the certificate so as to permit an application for permission to appeal to be made to the Supreme Court.

14. It is submitted on behalf of the defendant that the decision of the majority in Buchanan is not merely strongly arguably wrong (something that plainly would not of itself justify issuing a certificate) but has been the subject of adverse criticism since virtually the date of its publication. It is convenient to start with this because as the argument developed nit is something which is material to each of the issues I have to decide.

15. It is necessary to start by summarising the reasoning of the majority in Buchanan. Each of the law lords who delivered opinions did so in slightly different terms. Lord Wilberforce resolved the issue in these terms:

> *"'In respect of*' is wide enough to include the way in which the goods were carried, miscarried or lost. I think this is right and I do a not consider that it is answered by saying that the charge would not have arisen if the thieves had exported the goods or if the whisky had flowed away. No doubt this is true, but the fact that an exemption might have arisen does not prevent the charge which did arise of being *'in respect of the carriage'*. The carrier's duty was to carry the whisky to the port of embarkation. The failure to do so might or might not bring a charge into existence, but if it did I think it right to say that the charge was in respect of carriage."

Viscount Dilhorne put it this way, at page 158:

> "If *'in respect of*' is given the broad interpretation of *'in consequence of'* content can be given to the words in question. They will clearly cover a far wider ambit than carriage charges. While it would not be right to seek to import common law doctrines into the Convention, it cannot be right, in my opinion, to construe *'in respect of*' as meaning '*for*', with the result that the article would read *'carriage, charges ... and other charges for carriage'*. They must be given a wider meaning than that and in my opinion the right meaning to give them is that in the context in which they mean *'in consequence of*' or *'arising out of*'."

and Lord Salmon said at page 160 to 161:

> "Were the charges for excise duty which the respondents have been obliged to pay incurred *'in respect of the carriage of the goods'*? No doubt these words are flexible and somewhat imprecise, but, especially as they appear in an international convention relating

> to commercial affairs, they should not be construed pedantically or rigidly but sensibly and broadly. So construed, I agree with the view of expressed by Master Jacob in his judgment that they are wide enough to include 'in consequence of the way in which the goods were carried by the appellants'. They were certainly carried in such a way as caused the respondents to be charged with £30,000 in respect of excise duty ...
>
> "My Lords, in my view, the language of article 23 is capable of bearing and does bear the meaning attached to it by Master Jacob. This meaning accords with both reason and justice. And duty of £30,000 has become chargeable against the respondent exporters solely because of the result of the appellant carriers' servant for which the carriers are vicariously liable. Reason and justice seem to demand that the burden of paying the £30,000 should rest on the shoulders of the carriers rather than those of the innocent exporters."

This collective analysis of the majority has been referred to in this case, and in the commentaries, as "the wider construction" or "the wider interpretation". It is relevant to note, since the CMR is an international convention, that this approach has been followed expressly by a majority of the Danish Supreme Court - see Walter Hansen Transport v Denska Assurance, U.1987.481H at page 3 - and it was common ground between the parties that the French Supreme Court has adopted this approach as well, although a report of the decision of that court was not provided.

*The narrow construction and the one for which Mr Kimbell contends was that set out in the opinion of Lord Edmund-Davies at page 167 to 168 and was in these terms:*

> "... I cannot fit excise duty into the genus of charges which have been *'incurred in respect of the carriage of the goods'*, a phrase which, as Lord Denning rightly said, at p[age] 213, would be appropriate for such charges as those in respect of '... *packing insurance, certificate of quality and so forth'*. But excise duty became exigible not simply by the failure to complete the contract of carriage properly but because thereafter the unattended goods were stolen and, the place and manner of their disposal being unknown, it could not be shown by the consignor that (in the words of section 85(1) of the Customs and Excise Act 1952) '... *their absence and or deficiency can be accounted for by natural waste or other legitimate cause* ... '. Thus, it is common ground that no excise duty would have been payable had the plaintiffs been in a position to demonstrate that, although the goods were stolen, they never became available for sale in this country because, for example, the thieves' getaway vehicle crashed and the entire load of whisky was destroyed. In other words the liability to pay the duty was in no sense incurred *'in respect of the carriage of the goods'*; it arose as a consequence of their having been irretrievably lost through theft before their transit in this country was completed. Such being the case, in my judgment recovery of the excise duty paid is excluded by the concluding words of article 23(4) that '... *no further damages shall be payable'."*

16. Mr Kimbell submits that the view of the majority has been the subject of sustained criticism by all the leading English commentators on the CMR. I agree. It is not necessary, that I set out that criticism in full because Mr Gardner does not dispute the point, as far as it goes. What he submits, however, is that whilst each commentators have criticised the decision of the majority, they are not, and never have been, agreed as to the solution that should be adopted. Again, I agree that that is correct, and indeed it is not disputed by Mr Kimbell. His point is that if the criticism is justified, and if the Supreme Court gives permission to appeal, it would be for the Supreme Court to arrive at what the correct construction of the convention requires. In other words is not necessary that the commentators should speak with a single voice as to the answer to the problem, but rather should merely for these purposes be unified in their criticism of the solution that has been arrived at. I proceed, therefore, on the basis that all the English commentators criticise in fairly trenchant terms the reasoning of the majority in Buchanan.

17. Next Mr Kimbell submits that the weight of European authorities supports the narrow construction. This would be material if correct, since in most cases English law would encourage the construction of an international convention in a way that provides the same result across all state parties to the relevant convention applying the principles of construction set out in the Vienna Convention. However, I am not satisfied that the weight of European jurisprudence points in the direction that Mr Kimbell suggests. Some do (see the decisions by the Dutch and German Supreme Courts), but, as I have explained, others do not.

18. In the end, Mr Kimbell's main point is that decision of the majority has been the subject of such severe criticism by the Court of Appeal that the effect has been to create confusion in an area critical to the

everyday conduct of commerce in England and Wales that the only safe conclusion to reach is that there is a point of law of general public importance that has to be resolved and that permission under section 12 should be granted because the issue can only be resolved by the Supreme Court.

19. The criticism to which Mr Kimbell refers is contained in the single judgment of the Court of Appeal in Sandeman (ibid). Before turning to the relevant part of the judgment it is necessary to note that that case was not concerned with excise duty, as is this case, and as was the case in Buchanan, but was concerned with liability of the claimant which arose under a guarantee that, unknown to any of the defendants, had been given by the claimant to the Spanish tax authorities, under which the claimant was obliged to meet the tax represented by some seals supplied by the Spanish tax authorities to the claimant for it to apply to bottles of whisky destined for export to Spain. The seals disappeared in the course of transit, and the Spanish authorities demanded the tax represented by the seals from the claimant pursuant to the guarantee. The claimants sought to recover its outlay, under article 23.4 of the CMR. The trial judge held himself bound by the decision in Buchanan, that there was no distinction of principle to be drawn between the facts in Buchanan and the facts of Sandeman, and so ordered the defendants to pay the claimant in respect of its liability under the guarantees.

20. The Court of Appeal overturned that decision and held, at paragraph 39 of the judgment, that:

> *"In the Buchanan case [1978] Appeal Cases 141 the excise duty payable was a charge on the goods carried. It was, as a matter of English law, an automatic consequence of the loss of the goods within the jurisdiction. It could be said to be similar in kind to the customs duty payable upon importation of the goods into another country. The liability under the guarantee in this case is not a duty payable in respect of the goods carried. It is a liability arising under the guarantee that arose as a result of the inability of Seagram to account for the seals. Not only is the liability a more remote consequence of the loss of the seals than is excise duty payable on whisky that is stolen, as to which see the next issue, but it does not in our view fall within the meaning of a 'charge incurred in respect of the carriage of goods'. For this reason we hold that the payment under the guarantee is not recoverable under article 23(4)."*

21. That outcome means that technically at least what the Court of Appeal said about Buchanan was obiter. However, that does not of itself detract from the points made by Mr Kimbell or from the practical effect of what the Court of Appeal had to say about the decision in Buchanan. The Court of Appeal's remarks that are pertinent for present purposes are those set out in paragraphs 37 and 38 of its judgment, which were in these terms:

> *"*Each of the majority proceeded on the basis that article 23 was the only route by which liability for excise tax could be recovered. None made any reference to article 26. Their speeches extend the meaning of the words 'in respect of the carriage' to embrace 'if consequence of miscarriage'.
>
> "38. The decision in the Buchanan case is critically discussed in Clarke's International Carriage of Goods by Road, CMR, 3rd edition 1997, page 368, paragraph 98, and in Hill and Messent, CMR Contracts for the International Carriage of Goods by Road, 3rd edition, 2000, at pages 202 to 206, paragraphs 9.25 to 9.34. Each suggests that the approach of the majority of the House of Lords must be subject to some restriction. We refer to some of the observations of the authors of these words when we come to address the next issue. Nor is the decision one which lies happily with the approach of the ambit of article 23 of the courts of most of the other signatories of the Convention, France being an exception. For our part we do not consider that the decision should be applied any more widely by the reports of this country than respect for the doctrine of precedent requires".

22. It was submitted that this fundamental clash left the law in a state of uncertainty, and in a state that encouraged the drawing of very fine distinctions that makes the operation of the law in a critical economic sector uncertain. I accept that the result of the Court of Appeal's approach has been to encourage the drawing of fine distinctions. In Sandeman the trial judge had held:

> *"*I find it impossible to make any rational distinction between the statutory liability for duty, which was the subject matter of that case, and the liability under the guarantee in the present case.*"*

but the Court of Appeal disagreed for the reasons which I have set out earlier, and which are set out in paragraph 39 of the Court of Appeal judgment by reference to the distinction it drew between the duty

payable in Buchanan and the claimant's obligations under its guarantees to the Spanish tax authorities in Sandeman. The Court of Appeal did not explain why one could be a relevant charge but the other not. It identifies remoteness as the grounds of distinction but without explaining the distinction of principle that applied, particularly having regard to what the Court of Appeal said at paragraph 42 in its judgment.

23. This led Dr. Malcolm Clarke, one of the leading commentators on the CMR in England, in an article in the Journal of Business Law in May 2004 to comment on this analysis in this way. Having identified what the Court of Appeal said concerning the more remote nature of the loss of the seals than excise duty payable on whisky, he continued as follows:

> *"One must wonder why. In Buchanan as a direct result of the loss (by theft) of the goods the claimants were obliged (by law) to pay money (duty) to a third party (the UK tax authority). It was a liability to be expected in the usual course of things. In Sandeman as a direct result of the loss (cause uncertain) of the goods, the claimants were obliged (by contract) to pay (guarantee) money to a third party (Spanish tax authority). It was a liability to be expected in the particular case. As long as the goods were not recovered, the precise cause of the loss made no difference. Was the UK tax authority more likely to enforce the claimants' obligation than the Spanish tax authority? Surely not. Was the UK tax authority better placed to enforce the claimants' obligation than the Spanish tax authority? In theory, yes, but in practice no, as the claimants would not wish to prejudice their future exports to Spain. So was the Sandeman loss really more remote?*
>
> *"Whether it was or not, it is submitted with respect that such refined distinctions do not assist the efficacy of the law. The suspicion lingers that the reasoning in Sandeman is less the result of logic than of a desire to side-step the Buchanan view which, as has been contended, is unfortunate. The general result is a degree of uncertainty which is less than optimal in an international convention governing international business transactions. One might wish an appeal in Sandeman so ... that the House might have a chance to reconsider its decision in Buchanan, however at the time of writing that seems unlikely."*

24. As against that, it is submitted by Mr Gardner that the problem identified is one that is more theoretical than real not least because no reported cases exist which reflect the routine drawing of artificial distinctions. However, this case, in one sense, is an illustration of the problem, in terms of delay and cost generated by uncertainty within the law and the distinction between cases such as this and the facts in Sandeman is not one that it is not at all straightforward to discern in practice. In the context of every day, relatively low value, transport claims, this will slow settlement and add to cost in a way that is undesirable and should be avoided if possible.

25. I am satisfied that the issue is sufficiently one of general public importance to satisfy the threshold test in section 12. I say that because, (a), it concerns an issue arising under a much used international convention; (b), the terms of the article are similar to those used in another much used international convention, that governing the transport of goods by rail; (c), although there is no evidence about it, it is close to obvious that very substantial quantities of dutiable goods travel to and from England by road weekly if not daily, which implies the point has economic significance; (d), commercial law does not benefit from confusion or the drawing of fine distinctions that arise in the context everyday low value commercial disputes where the desire of all concerned is likely to be for certainty, for speed of resolution and for the elimination or reduction to the minimum amount possible of expenditure of time and money in resolving the dispute.

26. The ultimate question is whether I should exercise my discretion to grant the certificate sought. I am satisfied that I ought to grant the certificate sought for the following reasons. First, although Mr Gardner submits I should not exercise my discretion to grant the certificate, because the Supreme Court is highly unlikely to grant permission because the issue has been resolved for many years and by the majority in Buchanan In my judgment, that is not an answer to this application, given the criticism of the majority decision by the Court of Appeal and what in practice is its direction concerning the effect that is to be given to the decision in Buchanan, namely to confine it to strictly what the doctrine of precedent requires. Even if the Supreme Court consider the approach of the Court of Appeal to be wrong, an appeal would present an opportunity for that to be made clear. Secondly, but for the decision of the majority I am bound to say that I would have found the reasoning in particular of Lord Edmund-Davies compelling. Finally, I consider the point made by Professor Clarke set out earlier concerning the approach of the Court of Appeal to be of at least realistically arguable validity. Fourthly, none of this could be answered without avoidable cost or delay by giving permission to appeal to the Court of Appeal. In my judgment, all this merits a re-examination of the issue or at least according an opportunity to the Supreme Court to consider whether to do so on an application for permission to appeal.

27. The only real reason for refusing the certificate is that there is a substantial difference of view internationally as to what the correct outcome should be. Whilst that might be thought to point towards not granting the application, since whatever outcome results is likely to be the subject of criticism one way or the other, on reflection, that strikes me as an inappropriate way to proceed in the circumstances that now pertain. The real difficulty that needs resolving results from the conflict between the Court of Appeal's obiter remarks and its direction concerning how the decision of the House of Lords in Buchanan is to be approached, and the decision of the majority of the House of Lords on the other. Whilst it may be that some academic criticism will remain if the Supreme Court were to give permission and to resolve the issue by overturning Buchanan, that is likely to be so if it gives permission and upholds it. I consider that at the discretion level the Supreme Court ought to be given the opportunity of considering whether, in the light of the Court of Appeal's remarks, it considers permission to appeal ought to be granted As I have said, the issue is of importance to all concerned with international road transport in England and Wales and with their insurers. In those circumstances I propose to grant the certificate sought.