Press Summary

14 June 2023

JTI POLSKA Sp. Z o.o. and others (Respondents) v Jakubowski and others (Appellants)

[2023] UKSC 19
On appeal from: [2021] EWHC 1465 (Comm)

Justices: Lord Reed (President), Lord Hodge (Deputy President), Lord Briggs, Lord Sales, Lord Hamblen, Lady Rose, Lord Richards

Background to the Appeal

The appellants are road hauliers based in Poland. The respondents are part of a group of companies that buy and sell tobacco products internationally. The respondents contracted the appellants to transport a consignment of cigarettes from Poland to England. The road carriage was undertaken subject to the Convention on the Contract for the International Carriage of Goods by Road 1956 (the "**CMR**"), an international treaty which widely governs international transport by road and has the force of law in the UK under domestic legislation. Under a European excise duty suspension arrangement, excise duty on the cigarettes was suspended until such time as the consignment was released for commercial consumption, or was deemed to have been released for commercial consumption, as in the case of non-delivery or partial delivery due to theft.

During transit, whilst the driver's vehicle was parked in a motorway service station in England, thieves stole 289 cases of cigarettes with a market value of £72,512. As a result of the theft, the respondents incurred an excise duty of £449,557 as the cigarettes were deemed to have been released for commercial consumption in the UK.

The respondents claimed compensation from the appellants under the CMR. The parties settled the claim save as to the excise duty, which the respondents claimed under article 23.4 of the CMR. Article 23.4 provides that, in the case of the loss of goods, a cargo claimant may claim "carriage charges, Customs duties and other charges incurred in respect of the carriage of the goods", in addition to the value of the goods. Courts in states that are parties to the CMR have interpreted the phrase "other charges incurred in respect of the carriage of the goods" in two main ways. The 'broad interpretation' is that it encompasses charges incurred because of the way that the goods were actually carried and lost, so that the cargo claimant can recover excise duty levied on goods lost in transit. The 'narrow interpretation' is that it is limited to those charges which would have been incurred if the carriage had been performed without incident, and so excludes such excise duty. In *James Buchanan & Co. Ltd v Babco Forwarding & Shipping (UK) Ltd*. [1978] AC 141 ("***Buchanan***"), the House of Lords decided by a 3:2 majority that the broad interpretation should be adopted.

Before the High Court, the appellants accepted that following *Buchanan* the Judge was bound to hold that the excise duty was recoverable, but they contended that the decision

was wrong and should be departed from. They therefore applied for a certificate to appeal directly to the Supreme Court. The Judge granted the certificate and the Supreme Court subsequently granted permission to appeal.

Judgment

The Supreme Court unanimously dismisses the appeal, holding that the Court should not depart from the House of Lords' decision in *Buchanan* pursuant to the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 (the "**Practice Statement**"). Lord Hamblen gives the judgment, with which all the other members of the Court agree.

Reasons for the Judgment

The approach to interpretation of the CMR

Buchanan remains a leading authority on the proper approach to the interpretation of international treaties in general and the CMR in particular. The correct approach is to interpret the text on broad principles that are generally accepted. The expressed objective of the CMR is to produce uniformity in all contracting states, and the Court should try to harmonise interpretation if possible. It is appropriate to have regard to the case law of other contracting states **[22]**.

Since *Buchanan* was decided, there has been increasing recognition by English courts of the role of the rules of interpretation set out in articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969 (the "**Vienna Convention**") **[23]**. Article 31 focuses on seeking to ascertain the ordinary meaning of the relevant terms of the treaty, having regard to their context and the object and purpose of the treaty **[26]**. Article 32 then allows for recourse to be had to supplementary material including the preparatory work of the treaty and the circumstances of its conclusion **[28]**.

There is no published preparatory work for the CMR. Nevertheless, the appellants have sought to put together documents which they say should be regarded as the preparatory work **[33]**. It is doubtful that those documents can assist as they do not identify a common intention or understanding of the states that are parties to the CMR **[35-36]**.

The 1966 Practice Statement

In the Practice Statement it was resolved that while House of Lords decisions (and now Supreme Court judgments) will be normally binding, they can be departed from when it appears right to do so **[37]**. It is not possible to be categorical about when the Supreme Court will invoke the Practice Statement and depart from an earlier decision, but examples include: where previous decisions were generally thought to be impeding the proper development of the law or to have led to results which were unjust or contrary to public policy; where they have created uncertainty in the law; where there has been a material change in circumstances; and, in the context of an international trade law treaty, where a decision has been demonstrated to work unsatisfactorily in the market place and to produce manifestly unjust results **[40]**. There is less scope for reconsideration of a decision involving a question of interpretation, whether of a statute or other document, than one involving a common law rule. One reason for this is that interpretation is a matter of impression in relation to which it will rarely be possible to say that one view is demonstrably right or wrong **[41]**. It will always be necessary to do more than to persuade the present panel of

Justices that the prior decision is wrong **[42]**. A previous decision on interpretation will not be departed from if it reflects a tenable view **[43]**.

The appellants' case

The principal reasons why the appellants contended that it is appropriate to depart from *Buchanan* are: (i) there are a number of decisions in other CMR jurisdictions which have adopted the narrow interpretation **[70-71]**; (ii) academic criticism of *Buchanan* **[53-58]***;* (iii) criticism of *Buchanan* in the Court of Appeal decision in *Sandeman Coprimar SA v Transitos Intergrales SL* [2003] EWCA Civ 113 ("***Sandeman***") **[63-67]**; (iv) the ordinary meaning of "other charges", the context, the object and purpose of the CMR in general and of the liability provisions in chapter IV in particular **[76-85]**; (v) the preparatory work for the CMR **[86-87]**; and (vi) the fact that the narrow interpretation applies under the related convention covering the international carriage of goods by rail (the "**CIM**") **[88-91]**.

Is the broad interpretation tenable?

There are powerful arguments in favour of the narrow interpretation. In particular, there is considerable force in the arguments based on the object and purpose of chapter IV of the CMR, in which article 23.4 is located, and on the structure of the compensation scheme for loss of goods under the CMR **[98]**. However, the broad interpretation is tenable. This is supported by the fact that it reflects the conclusion of the judges at all levels in *Buchanan* (other than the minority in the House of Lords) and that reached by the Supreme Courts of Denmark, The Czech Republic, Lithuania and (arguably) Belgium, as well as the Italian Court of Appeal **[99]**.

It is also supported by the reasoning of the majority in *Buchanan* **[100]**. As to ordinary meaning, the relevant wording is widely drawn. The words "in respect of" are commonly understood as equating to "in connection with". As a matter of language, it is very difficult to say that a loss which occurs during the course of road carriage and as a result of the way in which that carriage is performed is not connected with that carriage **[101]**. There is also force in the argument that the wording of article 23.4 is different to that in article 6.1(i) of the CMR, which refers to charges "incurred from the making of the contract to the time of delivery", a formulation which can be more readily understood to refer to charges incurred for the purpose of carriage in line with the narrow interpretation – that formulation was not used in article 23.4 **[102]**. Some of the criticisms of the broad interpretation are also unjustified or overstated **[103]**.

Is this an appropriate case for the Court to exercise its power under the Practice Statement?

The appellants argued that uncertainty in the law has arisen following the decision in *Sandeman* in which the Court of Appeal stated that *Buchanan* should not be applied any more widely than respect for the doctrine of precedent requires. However, any resulting uncertainty arises from that statement in *Sandeman*, which was inappropriate and should not be followed, and not from *Buchanan* itself **[113]**. The appellants also argued that there had been a material change in circumstances given: the *Sandeman* decision; academic disapproval of *Buchanan*; German and Swedish Supreme Court decisions upholding the narrow interpretation; and the emergence of a settled view in relation to the same issue when it arises under the CIM **[115]**.

None of these arguments were persuasive. *Sandeman*'s disapproval of *Buchanan* was inappropriate. Academic disapproval is not unanimous and in any event is somewhat muted and is not in itself a material change. The German and Swedish Supreme Court decisions have to be balanced against contrary decisions reached in other jurisdictions; there is no

international consensus. The emergence of a settled view under the CIM was achieved through amendment to that treaty. That may be a reason for the parties to the CMR convening to consider making a similar amendment, but it does not inform the proper interpretation of article 23.4 **[116]**. It has not been shown that the *Buchanan* decision works unsatisfactorily in the market place **[117]**, nor is it suggested that *Buchanan* produces manifestly unjust results **[118]**. This is not an appropriate case for the Court to exercise its power under the Practice Statement and so depart from *Buchanan*.

While it is desirable that there be a uniform view as to the proper interpretation of article 23.4, reversing *Buchanan* would not achieve that, as the broad interpretation either is or may be followed in many other countries. In order to achieve uniformity, it would be necessary to amend article 23.4 to the CMR. That, however, is a matter for the parties to the CMR **[120]**.

References in square brackets are to paragraphs in the judgment