

**BETWEEN**

**FOO Ltd**  
APPLICANT

**AND**

**TL**  
RESPONDENT

**TLL Ltd**  
SECOND RESPONDENT

Date of Order:

3 March 2017

Referee:

Referee Paton-Simpson

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**ORDER OF THE DISPUTES TRIBUNAL**

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**The Tribunal hereby orders that TL trading as TLL Limited is not liable to pay FOO Ltd the sum of \$8,942.40 for the freight services supplied from February to May 2015.**

### **Facts**

[1] Mr TL, who trades as TLL Limited, supplies cut and packaged pumpkins and other cucurbits to WXW Limited (WXW) for sale in XYX supermarkets. In 2013, Mr TL was looking for a new carrier between his farm in Y city and the distribution centre in Z city. He entered into an arrangement with FOO Limited. The arrangement worked well until 29 December 2014, when FOO Limited failed to pick up the pumpkins, resulting in WXW cancelling its purchase order for that load. Mr TL continued to use FOO Limited's freight services until May 2015, but has refused to pay \$8,942.40 of the freight service charges due to the incident on 29 December 2014.

[2] FOO Limited now claims the outstanding balance of \$8,942.40. Mr TL admits incurring these charges, but counterclaims for non-liability in that sum by way of damages for FOO Limited's failure to pick up the pumpkins.

### **Issues**

[3] The issues to be determined are:

- (a) What were the terms of the contract? Did FOO Limited breach the contract by failing to pick up the pumpkins?
- (b) If so, what loss was caused? Did Mr TL fail to take reasonable steps to mitigate the loss?

### **What were the terms of the contract? Did FOO Limited breach the contract by failing to pick up the pumpkins?**

[4] The relevant law is the common law of contract, under which parties can enter into legally binding agreements. Mr TL also sought to rely on the Carriage of Goods Act 1979 (COGA), on the basis that "loss" is defined in COGA s 2 to include "non-delivery". However, I find that "non-delivery" applies to the situation where goods have been picked up but not delivered, rather than where goods are never picked up by the carrier in the first place. The COGA makes no provision for the latter situation since, under s 9(2) and s 10(6), liability under the COGA does not commence until the goods are accepted for carriage.

[5] FOO Limited sought to rely on exclusion and notification clauses contained in its standard terms and conditions. However, there was no evidence that Mr TL had ever been given notice of these terms and conditions, and Mr TL gave evidence that he had never seen them. I note that even if these terms had been incorporated into the contract, it is doubtful that they would have helped FOO Limited in this instance, since the clauses did not clearly cover the situation of a refusal to pick up goods. It is a well established principle of law that exclusion clauses are interpreted strictly, and any ambiguity is resolved against the party who seeks to rely on the exclusion of liability.

[6] FOO Limited argued that there was no agreement to pick up the goods, and that no contract was formed until FOO Limited picked up the goods each day. However, this would be a commercially unrealistic arrangement in view of the perishable nature of the goods, and FOO Limited was unable to present any evidence to prove that these were the terms agreed. Mr TL gave evidence that he made it clear in discussion with FOO Limited branch manager Mr FO that the truck must arrive in Z city no later than 5 pm each day, and that they agreed the truck would arrive at his packing facility each day (Monday to Friday) no later than 2:30 pm. I therefore find that FOO Limited was obliged to pick up the pumpkins each day as arranged and could not refuse to do so, at least not without providing reasonably sufficient notice for Mr TL to make other arrangements.

[7] FOO Limited gave evidence that it did not pick the pumpkins because there was no room on the truck. Mr TL said that he was told the truck had been sent to a “more important” client. Whether or not FOO Limited had other uses for the truck, I find that its failure to pick up the pumpkins was a breach of its contract with Mr TL, so FOO Limited is responsible to pay for any loss suffered by Mr TL as a result of the breach.

**If so, what loss was caused? Did Mr TL fail to take reasonable steps to mitigate the loss?**

[8] Mr TL produced evidence of two cancelled purchase orders from WXW totalling \$9,008.30 including GST relating to the load of pumpkins: one for XYX V city and one for XYX Z city.

[9] FOO Limited suggested that Mr TL could have mitigated his losses by relabelling the pumpkins and selling them elsewhere. However, Mr TL produced evidence that he had dumped the pumpkins in accordance with WXW's food safety and quality management programme. He explained that the pumpkins were individually wrapped with XYX labelling that

would not peel off. I find that it was reasonable for him to dump the pumpkins since it would have been too costly to rewrap them and it would have jeopardised the reputation of TLL Limited and his relationship with WXW.

[10] Since the money Mr TL owes to Mainstream for freight services is completely offset by damages for the loss caused by TL's breach, I find that Mr TL is not liable to pay Mainstream the sum of \$8,942.40.