Shipping News Bulletin

The Court of Appeal's decision in VOLCAFE v CSAV: Giving guidance on the order and burden of proof in cargo claims and resolving the GOSSE MILLARD "heresy"

The Court of Appeal handed down judgment today (10th November 2016) in *Volcafe Ltd and other v Compania Sud Americana de Vapores SA* ("CSAV") [2016] EWCA Civ 1103 upholding an appeal brought by the defendant shipowners. In doing so, it determined the much-debated question as to whether a defendant carrier must first disprove negligence on its part before it can rely on its defences under Article IV Rule 2 of the Hague Rules.

This is a debate which dates all the way back to the dictum of Wright J that the carrier is under such a burden. He expressed this view in *Gosse Millard v Canadian Government Merchant Marine* [1927] 2 KB 432, a case decided shortly after the Hague Rules came into force. It was subsequently denounced as "heresy" in the early editions of *Carver*, and has been the subject of various English and Commonwealth judicial dicta over the intervening 90 years. However, the correctness of Wright J's view has never been squarely before an appellate court for decision before.

The Court of Appeal (Lady Justice Gloster, Lady Justice King and Mr Justice Flaux, sitting in the Court of Appeal) has now unanimously held that the answer to this question is "no".

The leading judgment of Mr Justice Flaux also contains valuable guidance at to (i) the assessment of whether a system is "sound" for the purposes of determining whether a carrier is in breach of its obligations to properly care for and carry the cargo under Article III Rule 2, (ii) the scope of the inherent vice defence, (iii) the interplay between Article III Rule 2 and Article IV Rule 2 (m) and (iv) the temporal scope of the application of the Hague Rules.

David Semark (led by Simon Bryan QC) appeared for the successful Appellant shipowners. John Russell QC and Benjamin Coffer appeared for the Respondent cargo claimants.

The Facts

The claims brought were for condensation damage to 9 consignments of bagged coffee beans carried by the defendant container line in 20 unventilated 20' containers lined with kraft paper, under bills of lading incorporating the Hague Rules, from Colombia to various destinations in Northern Europe between January and April 2012. The containers were carried on "LCL/FCL" terms pursuant to which the container line was responsible for the stevedores who prepared and stuffed the containers at the loadport. The overall outturn damage was minor, amounting to some 2.6% of the total value of the consignments.

It was common ground between the experts at trial that (i) condensation is inevitable when hygroscopic cargo, such as coffee beans, is carried by sea from a warm climate to a cold climate, and (ii) there was no certain way to prevent condensation damage when bagged coffee is carried in lined, ventilated containers.

At trial the defendant carrier relied on the inherent vice defence conferred by Article IV Rule 2 (m) of the Hague Rules and also alleged that the condensation damage was inevitable. The carrier also argued that its obligations under Article III Rule 2 of the Hague Rules did not apply to the act of stuffing and lining the containers at the container terminal because these operations were carried out several days prior to the containers being loaded on the carrying vessels.

The Decision of the Trial Judge

The claimants' case that the bags had been negligently stowed in the containers was rejected by the trial judge.

Nevertheless, the trial judge held that the defendant owners were liable for the damage. He did so principally on the basis that the owners could not show that they had cared for and carried the goods "properly" as required by Article III Rule 2 of the Hague Rules because they could not, he said, demonstrate that the goods had been carried "in accordance with a sound system", (this being a well-established gloss on the meaning of "properly" (*G. H. Renton v Palmyra Trading* [1957] AC 149 and *Albacora v Westcott & Laurence Line Ltd* 1966 S.C. (H.L.) 19.))

The trial judge's conclusion that the Owners could not demonstrate that they had followed a sound system was based on their inability to prove, by expert calculations of the rates of absorption of moisture by different thickness and weights of kraft paper or an empirical trial that the material used by the stevedores to line the containers could be expected to prevent the damage occurring. [17], [19]

The Court of Appeal held that it was also apparent that the judge considered that once the coffee bags were delivered in a damaged condition, the onus was then on the carrier to establish inherent vice or inevitability of damage and to disprove negligence. This, it said, was evident from his conclusion earlier in his judgment that there was "complete circularity" between Article III Rule 2 and the Article IV Rule 2 (m) inherent vice exception. [15]

The trial judge also rejected the carrier's argument that its obligations under Article III Rule 2 of the Hague Rules did not apply to the act of stuffing and lining the containers at the container terminal.

Summary of the Key Points Decided by the Court of Appeal.

1. The order and burden of proof in cases to which the Hague Rules apply does not depart from the common law position prior to the adoption of the Hague Rules as set out by Lord Esher MR in *The Glendarroch* [1894] P226. This is consistent with the weight of the English and Commonwealth authorities. [31]-[51]
2. Accordingly, once the carrier has shown a prima facie case for the application of an Article IV Rule 2 exception (here "inherent vice" Article IV Rule 2 (m)), the burden then shifts to the cargo claimant to establish negligence on the part of the carrier

which negates the operation of the exception. [50] This is so even if the burden of proving an Article IV Rule 2 exception is a legal, rather than an evidential, one. The better view is that the burden is a legal one. [35]

3. The question as to whether there is some inherent defect, quality or vice in the cargo (on which the burden of proof is on the carrier) is anterior to the question whether the carrier was negligent or in breach of its duty to care for the cargo (on which the burden is on the cargo claimant to disprove the operation of the exception). [53]

4. Although there is inevitably a degree of overlap between the "inherent vice" defence and Article III Rule 2, in the sense that the focus is on the ability of the cargo to withstand the ordinary incidents of carriage in light of the carrier's obligations under the contract of carriage, the burden remains on the cargo claimant to establish that the carrier was negligent. [55]

5. The inherent vice defence encompasses damage caused by the inherent qualities of a normal cargo. This is a different concept to inevitability of loss. [56] – [62].

6. Since it was common ground between the experts at trial that the damage to the cargoes was due to condensation and that the source of the condensation was the coffee beans themselves, the trial judge ought to have concluded that the carrier had made out a sustainable defence within Article IV Rule 2 (m). He should then have gone on to consider whether the exception was negative because the carrier had not employed a sound system in the carriage of the goods. On this issue the legal burden is on the cargo claimants. [51]

7. The trial judge's approach to a "sound system", and in particular his requirement for a scientific calculation or empirical study, went way beyond what the law requires. On the basis of the expert evidence, which was largely agreed, as to general practice in the container trade he should instead have concluded that there was a general industry practice of lining the containers with corrugated cardboard or kraft paper of 1 or 2 layers depending on thickness. The weight of the evidence showed that, with respect to these consignments, two layers of kraft paper had been used to line the containers. Accordingly he should have concluded that the cargo claimants had failed to establish that the carrier's system of lining the containers was not a sound system, and that the carrier's inherent vice defence succeeded. [64] - [92]

8. The weight of the evidence also suggested that minor condensation damage to coffee in bags carried in unventilated containers is endemic, no matter what lining was used pursuant to the general practice of the trade. The Judge should therefore have upheld the carrier's alternative defence that the damage to the consignments was inevitable. [93]-[102]

9. Parties are free to determine contractually what acts or services fall within the operation of "loading". Here they agreed that the carrier would be responsible for lining and stuffing the containers. These were therefore operations to which the

Hague Rules apply, and the carrier remained under the obligation to perform such services “properly and carefully” under Article III Rule 2, notwithstanding the fact that the stuffing and preparation of the containers took place at the container terminal, some days before they were loaded on the carrying vessels. [103]-[111]

The Court therefore upheld the defendant container line’s appeal, and set aside the first instance judgment, save for the challenge to trial judge’s findings regarding the temporal application of the Hague Rules.

A copy of the judgment can be found here.