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Volcafe v CSAV

The burden of proof in cargo claims where the carrier relies on inherent vice

The dispute

- 20 containers of bagged green coffee beans
- Shipped from Columbia to Germany in winter 2012
- Containers prepared for carriage and stuffed by CSAV
- Held at first instance and in CA that Hague Rules applied to those operations

The dispute

- On discharge, wetting damage to some bags
- Common ground that wetting caused by condensation on roof/ walls of containers
- Held that source of condensation was moisture in the cargo
- The sum in dispute: US$62,500

Cargo's case

- Proof of damage established a cause of action
- It was for Carrier to bring itself within an Article IV exception
- As a matter of fact, the cause of wetting damage was the insufficiency of the paper lining

Carrier's case

- Inherent vice- wetting damage was inevitable
- Carrier had properly and carefully looked after the cargo
- Paper lining had been carefully applied in accordance with industry standards

Focus of the case: paper lining

First instance- David Donaldson QC

- On the burden of proof- an evidential analysis
  - Proof of damage entitled the court to **infer** a breach of Article III(2)
  - Carrier then required to produce evidence to negate the breach
  - “Whether this is achieved by an invocation of a specific sub-rule, such as proof of inherent vice, or the general reserve catch-all of sub-rule(q), or direct refutation of Article III(2) would appear unimportant.”
  - That may lead to a need for Cargo to reinforce the original proof

First instance- David Donaldson QC

- On inherent vice
  - Definition of inherent vice is ". . . the unfitness of the goods to withstand the ordinary incidents of the voyage given the degree of care which the shipowner is required by the contract to exercise in relation to the goods."
  - Therefore, a "complete circularity" between Article III(2) and the Article IV(2)(m) exception.
  - Inherent vice not "in any real sense" an excepted peril.
  - "It is no more than a category of case in which breach of article III(2) is necessarily negatived."

First instance- David Donaldson QC

- On the facts
  - Cargo's proof of damage did shift evidential burden to Carrier
  - Carrier's evidence did not prove that damage was inevitable regardless of preventative measures
  - Carrier could not prove that its system was proper- no theoretical or empirical study to show that the paper used would prevent damage
  - Even if the system was a proper one, Carrier's evidence did not prove that it had been carefully implemented

First instance- David Donaldson QC

- But-
  - No- or very few- clear findings of fact
  - No finding as to what thickness of paper was used
  - No positive finding as to whether or not Carrier had been negligent

Court of Appeal

- On burden of proof:
  - Proof of damage creates a "**sustainable** cause of action".
  - If the Carrier relies on an Article IV exception, the **legal burden of proof** is on the Carrier to establish that the exception applies.

Court of Appeal

- On burden of proof:
  - BUT-

> "In my judgment, the correct analysis, at the third stage, is that once the carrier has shown **a prima facie case** for the application of the exception of inherent vice, the burden then shifts to the cargo claimant to establish negligence on the part of the carrier, such as will negative the operation of the exception." [OR- the carrier shows that "the loss **apparently** falls within the inherent vice exception"]

Court of Appeal

- Approach to burden of proof:
  - In part, consistent with the pre-Hague Rules decision in *The Glendarroch*
  - At least arguably, consistent with the balance of subsequent authority

Court of Appeal

- Approach to burden of proof:
  - BUT-
    - Negligence burden inconsistent with carriage as a species of bailment
    - Internally inconsistent- bailment analysis at stage 1, but not stage 3
    - How can a prima facie case discharge a legal burden?

Court of Appeal

- On inherent vice:

  "…the question whether there was 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 there was negligence on the part of the carrier or breach of the duty to properly and carefully care for and carry the cargo (on which the burden is on the claimant to disprove the operation of the exception)."

- The judge's "complete circularity" analysis ignored the burden of proof, which is on Cargo to prove negligence.

Court of Appeal

- BUT- CA's approach- two questions:
  - Does it give sufficient weight to the fact that *"given the degree of care which the carrier is required by the contract to exercise"* is part of definition of "inherent vice"?

Court of Appeal

- BUT- CA's approach- two questions:
  - Does it give sufficient weight to dicta of Lord Pearson in *The Albacora* and Roskill J in *The Flowergate:*

> "… while the shipowner need not exclude negligence, he may in effect have to do so in order to establish his primary defence of inherent vice, a point of considerable practical importance in the present case."
>
> "…proof of the existence of the excepted peril or cause may and often will involve disproof of the possibility of the operation of other and unexcepted perils and causes."

Court of Appeal

- On the facts:
  - Judge wrong to find no proper system
  - Judge wrong to find damage not inevitable (but did not really grapple with proof of extent of inevitable damage- see *The Torenia*)
  - Judge even wrong as to the number of layers of paper used

To the Supreme Court

- Permission granted in relation to 3 broad legal issues:
  - The nature of a legal burden of proof- what is needed to discharge it?
  - Inherent vice- what has to be proved, in particular with regard to negligence of carrier?
  - More generally- burden of proof in relation to negligence: *The Glendarroch*, or a bailment analysis

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