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Burden of proof in cargo claims: the Supreme Court ruling in Volcafe

In *Volcafe Ltd v Compania Sud America De Vapores* [2018] UKSC 61 the Supreme Court has provided a clear answer to a point on which no definitive precedent existed.

We have reported on this case in our January 2017 issue – it concerned a routine shipment of bagged green coffee beans carried in unventilated containers from Colombia to Bremen. The carriers bore responsibility for preparing and loading the containers.

Since it is well known that the beans give off moisture which can condense on the interior surfaces of the container and damage the cargo, containers are generally lined with protective Kraft paper. The carriers did this.

At discharge the cargo was found to be damaged and a cargo claim resulted. As is usual with such cases, the claimants argued that the carriers had failed in their duties as bailees of the cargo to deliver it in the same condition as recorded at loading on the bill of lading. Alternatively, they said, the carrier was in breach of their Article III, Rule 2 Hague Rules duty to *"properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried"*. Equally routinely, the carriers relied, in their defence, on the Article IV, Rule 2(m) *"inherent vice"* exception.

At trial the evidential issue was really a very simple one. Had the carriers used adequate or sufficient Kraft paper? At this juncture the really interesting point arises. The first instance judge had not been satisfied that the expert or factual evidence was sufficient to

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decide the question either way. Whilst the Court of Appeal had dealt with this by deciding to review the evidence themselves, this approach was disapproved of by the Supreme Court who looked at the problem on the basis of the findings of the trial judge.

As a result, the question the Supreme Court had to decide was: which party had the burden of proof?

Did the cargo owner have to prove the carrier was negligent? Or did the carrier have to prove they had not been negligent?

Lord Sumption gave the sole judgment of the court. He started by looking at what the position was prior to the Hague Rules. A contract for carriage by sea falls within the English common law bailment for reward. In this instance, that means a carrier takes the cargo into their custody and undertakes to transport it to the agreed destination in return for a payment.

Bailment, by itself, does not impose anything approaching strict liability for damage to the cargo. The requirement is to exercise reasonable care over the goods and importantly it places the burden on the carrier of showing that any damage was caused without their negligence.

The Hague Rules, of course, greatly modified this simplistic bailment relationship found at common law. For Lord Sumption though it was equally consistent to find that the carrier's burden survived under a Hague Rules regime:

"When one examines the scheme of the Hague Rules, it is apparent that they assume that the carrier does indeed have the burden of disproving negligence albeit without imposing that burden on him in terms."

The explanation for that is to be found in examining the way Articles III and IV work. The former contains the general duties of the carrier and the latter a varied list of carrier's defences and exceptions, some of which expressly refer to negligent acts, which would otherwise constitute a clear breach of the Article III duties.

It is for a carrier to bring themselves within the Article IV exceptions. Lord Sumption's reasoning is that this indicates that the burden of proof is also on the carrier in relation to the Article III duty.

In his words:

"It would be incoherent for the law to impose the burden of the proving the same fact on the carrier for the purpose of Article IV but on

the cargo owner for the purposes of Article III."

This answers the first part of the question. In relation to the Article III duties the carrier had to prove they had not been negligent rather than the cargo interests having to prove that they had been.

The next part of the question was how the Article IV Rule 2(m) *"inherent…vice"* exception affects the position and is to be applied. It is well known that green coffee beans absorb and give off moisture. The carrier had, therefore, no difficulty establishing this characteristic of the cargo. Equally however, there are well known precautions designed to avoid the damage caused by this characteristic. So, as Lord Sumption says:

"If…reasonable care would have prevented the cargo's inherent propensity from causing damage, then the cargo is fit to withstand the ordinary incidents of the carriage contracted for and there is no inherent vice."

It has to follow, therefore, that in order to show that it was the inherent vice in the cargo that caused the damage, the carrier must show they applied the appropriate standards of care in the preparation they took for its carriage. In this case, therefore, they again had the burden of showing they had not been negligent.

In the absence of cogent factual evidence one way or another on the point, the carriers could not bring themselves within the exception.

As said, this is a somewhat unusual case. There did seem to be contemporaneous survey evidence. It is perhaps surprising this left the evidential position so open. Nonetheless it does mean that the previously unanswered question on the burden of proof now has an answer and has helped to tidy up what existing case law there was in this area. It will also considerably strengthen the cargo claimant's hand in similar circumstances. If nothing else, a much harder attitude to compromise and settlement can be expected.

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Settlements and arbitration agreement in the underlying dispute

Sonact Group Limited v Premuda Spa **(The "FOUR ISLAND") [2018] EWHC 3820 (Comm) started as a run of the mill finalisation of final accounts on a voyage charter, each party having different views on what, primarily, demurrage had and had not been earned. They reached agreement on a figure with a date for payment.**

That agreement was not drawn up in a separate settlement agreement. Instead it was evidenced by exchanges through the broking channels.

The charterer failed to pay. The owner commenced London arbitration by appointing an arbitrator. The charterer ignored this, but a tribunal was then validly constituted in accordance with the charterparty arbitration clause.

It would have been open to the owner to treat the settlement agreement as repudiated and revert to the full amount of their original claim. They chose not to do this but instead claimed only for the agreed settlement amount.

The arbitrators decided they had jurisdiction to consider this and then duly awarded the settlement amount. But could it be truly said that the tribunal had jurisdiction over the settlement agreement. After all, the agreement had said nothing in express terms about the law governing it, far less the forum in which claims under it should be pursued.

The charterer challenged the award before the High Court pursuant to Section 67 of the Arbitration Act.

The charterer's first line of attack was to argue that the settlement replaced the legal relationship under the charterparty with a new one under the settlement. The judge pointed out that even though there was this new relationship there was no legal principle to support the contention that *"the underlying contract necessarily can no longer apply."*

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This left Males J to review the matter overall. He found the charterer's arguments unpersuasive:

"….it is obvious that the parties intended that the arbitration clause in the arbitration would continue to apply…It is inconceivable that the parties intended…the owner…instead would have to commence court proceedings…"

That leaves a second point. The arbitration notice as given did not refer expressly to the settlement agreement, only to claims for demurrage and related costs. The judge noted that, with limitations, English legal precedent supported a "*broad and flexible approach*" to arbitration notices. Although, strictly the agreed sum gives rise to a new cause of action, not specifically mentioned in the arbitration notice, nonetheless it *"…could properly be regarded as a claim for demurrage…It is not stretching language to do so…"*

This decision is to be applauded. A purist might say a formal settlement agreement ought to have been drawn up complete with its own law, jurisdiction and dispute resolution clause. That does not, however, recognise that the vast majority of charterparty accounts are, quite sensibly and rightly, finalised simply on the basis of the parties' exchanges through broking channels.

Arrests and cross undertakings in damages

In *Stallion Eight Shipping Co. S.A. v Natwest Markets* (The "ALKYON") [2018] EWCA Civ 2760 the Court of Appeal reviewed this area and has left a tantalising door open for the future.

"However, the release of the ship once arrested is a matter for the judge's discretion. The owner of the ship can point to nothing which, as of right, would oblige a judge to release the ship. As a matter of practice, of course, that discretion will be exercised where the judge is satisfied that adequate security has been provided for the underlying claim."

Where a party has a claim involving a ship and falling within the *in rem* jurisdiction of the Admiralty Court it is open to that party, as of right, to arrest the ship in question. However, the release of the ship once arrested is a matter for the judge's discretion. The owner of the ship can point to nothing which, as of right, would oblige a judge to release the ship. As a matter of practice, of course, that discretion will be exercised where the judge is satisfied that adequate security has been provided for the underlying claim.

In this case, the owner had applied to the Admiralty Court at first instance arguing that the judge's discretion should also be exercised if the claimant failed to provide a cross undertaking in damages. That is to say security covering the owner's losses in the event that the underlying claim failed.

Although such an application had not been made to the courts before, it has been subject to long debate. The suggestion is that the position could and should be brought into line

with the court's powers in relation to freezing orders. Here the applicant is required to provide a cross undertaking.

The Admiralty Judge, Mr Justice Teare, declined to exercise his discretion in this way. His reasoning was that it would run contrary to the principle that a claimant has an unfettered right to arrest. Further, that it would be inconsistent with long established practice and not sit comfortably with Court of Appeal precedents which he should respect.

The question for the Court of Appeal was whether he had exercised that discretion correctly or misdirected himself as to the existing law. They were clear that Teare J was not, in fact, bound by any existing precedent. He had though exercised his discretion correctly and been right not to make an *"overnight"* change to settled practice.

At the same time, their view was that a judge could find differently but would have to *"…think long and hard before departing from the usual practice"*. As further guidance as to what that might mean, the judgment records that it was open to the courts to reconsider the law on arrests if *"properly informed as to the views of the maritime community, including the practical ramifications of any proposed changes and the preferred route to be adopted if any such changes are decided upon."*

That is an interesting way to put it as normally one might think this is the role of the legislature and not the courts.

The conclusion has to be that law and practice remains as before. In the standard type of case, the Admiralty Judge is not going to require a cross undertaking in damages when a claimant exercises their right to arrest for a claim *in rem.* There is, though, a clear indication that flexibility may be exercised in other areas.

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The "government interferences" exception under the Sugar Charterparty form

Strictly *Sucden Middle-East v Yagci Denizcilik ve Ticaret* (The "MUAMMER YAGCI") is limited to the proper construction of the "Strikes and Force Majeure" at Clause 28 of the Sugar Charter Party 1999 against the very particular facts of the case itself. It can easily be seen, though, that it could provide general guidance in broader circumstances.

The relevant part of the provisions states:

"In the event that…the discharging of the vessel is prevented or delayed by…government interference…time so lost shall not count as laytime or time on demurrage or detention"

The receivers of the cargo presented defective import documents in respect of a cargo of sugar intended for discharge in Algeria. The customs authorities took the view that this was part of an illegal attempt to transfer capital abroad. The cargo was seized, sold and the proceeds held by the treasury.

It was a protracted process. The ship was held up for four and a half months. The charterer took the position that the exceptions clause operated so as to mean the lost time did not count for laytime and demurrage purposes. The matter first went to arbitration where the tribunal found that the exemption clause did not apply. The charterer was able to obtain leave to appeal to the High Court.

"Knowles J held that *"...action on the part of local customs authorities is, in this context, the action of government through its appropriate arm or agency."*

The arbitration and the subsequent appeal revolved very narrowly around the construction of the two words *"government interferences"*. That divides into two overlapping elements.

Firstly, could it truly be said that the customs authorities' actions amounted to those of a "*government*". There does seem force in the argument that they are a local organisation administering their legal powers and not, as such, the government. However, in seizing the cargo Knowles J held that *"…action on the part of local customs authorities is, in this context, the action of government through its appropriate arm or agency."* Another way of putting it is to say they were acting in a *"sovereign capacity"*.

The question then turns to the second overlapping element, the quality of the act itself. A local authority, even acting in a sovereign capacity, will take a whole variety of routine decisions that could delay a ship. For example, the day to day allocation of berths or the more dramatic ordering of ships off berth for safety reasons.

It would be absurd to treat these routine acts as *"government interference"*. Although the judge did not quite agree with the terminology, the tribunal's characterisation of these as being *"ordinary"* events is quite a helpful way of looking at the position.

In seeking to avoid the operation of the clause, a central theme of the owner's arguments was that the steps taken were simply part of the routine process of discharging the cargo. That would include the presentation of the documents. The steps then taken by the customs authority in response were, owners argued, a routine reaction to that. It is not so much local authority *"interference"* more that they simply constitute the process of discharge itself.

The judge had little difficulty accepting the underlying logic of the argument based, as it is, on existing precedent. He could not see, however, how it could be applied to the present circumstances. As he says

"in the usual course of things cargo is not seized and property rights invaded…that remains the case…even when the seizure is predictable as when, for example, there is a suspicion of forged documents".

In the balance the judge allowed the appeal. The exception did apply.

It is difficult to believe that in the drafting of the clause this consequence was anticipated. The intention must surely have been to protect a charterer from actions of a government outside and much more remote from one of its local agencies exercising what look like routine statutory duties and powers in the face of a perceived attempted fraud by the cargo interests. The judge though did stress he made his decision on narrow grounds. against the precise circumstances of this case.

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Time bars and inordinate delays in arbitration

Midnight Marine v Thomas Miller (formerly Osprey) (The "LABHAULER") [2018] EWHC 3431 (Comm)

This case is an interesting illustration of some of the procedural aspects of challenges to awards under s68 & s69 of the Arbitration Act 1996.

An assured ("Midnight") claimed under a P&I Policy. Cover was declined. The policy contained a contractual one-year time bar and a London arbitration clause. For reasons which are not clear Midnight ignored this and commenced court proceedings in Canada.

The insurer's ("Miller's") response was to appoint a London arbitrator seeking a declaration of non liability. It was agreed the assured need not appoint their own arbitrator until an application to stay the Canadian proceedings had run its course.

The Canadian courts found in favour of Miller and the Canadian proceedings were stayed. In response, Midnight did nothing for years. They had gone well past the statutory 6-year time limit (the I year contractual limit had been waived) before appointing an arbitrator.

Not unsurprisingly Miller's response in the arbitration was to ask the tribunal to find that the claim was either time barred or to dismiss it on the grounds that there had been *"inordinate and inexcusable delay on the part of the claimant in pursuing his claim"* under section 41 (3) of the Arbitration Act 1996 (the "Act").

The more interesting of the points is the time bar one. Midnight's point was that time had already been protected for their claim by Miller's appointment of an arbitrator. The arbitrators found, by a majority, on this that time was not protected. Although Miller's claim for a declaration of non liability under the policy had been referred to arbitration within time, Midnight's claim under the policy had not been.

With respect, that decision does seem to be wrong. It's open to the logical incongruity that Males J identified. Miller had appointed an arbitrator so that they could state before the Canadian Courts that Midnight's claim had been referred to the contractually agreed forum in the contractually agreed jurisdiction. It is difficult to see, in those circumstances, how it did not thereby protect time both for Miller and Midnight.

Males J indicated he would have given leave to appeal further on this point had it stood alone. It didn't. It lies there open for consideration in a later case. In this case, however, it was embroiled in procedural objections and caught up by the other grounds on which the claim had been dismissed in arbitration – *"inordinate"* delay under the Act.

Midnight challenged this on purely legal grounds. They said section 41(3) applied only to delays *"on the part of the claimant"*. They, so they submitted, were not pursuing a claim but defending Miller's claim for a declaration of non liability.

Males J had little time for that argument. He noted that section 82 (1) of the Act extended section 41(3) to counterclaims and counterclaimants. He then noted that the only way in which the arbitration would actually proceed was if Midnight took the initiative and pursued their claim under the P&I policy.

As he astutely pointed out, Midnight were "*impaled on an insuperable dilemma*". There were only two choices. Firstly, if Midnight's claim was *not* referred to arbitration by the appointment, it follows that it was time barred. If it *was,* the arbitrators were entitled to find that there had been inordinate and inexcusable delay.

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Bentleys

24/7 EMERGENCY RESPONSE **+44 20 7477 2771**

Paul Griffiths	pgriffiths@bentleys.co.uk	+44 7973 228 059
Vernon Sewell	vsewell@bentleys.co.uk	+44 7770 273 623
William Chetwood	wchetwood@bentleys.co.uk	+44 7973 22 8076
Joanna Steele	jsteele@bentleys.co.uk n	+44 7976 930 386
Paul Crane	pcrane@bentleys.co.uk	+44 7787 558 140
Andrew Powell	apowell@bentleys.co.uk	+44 7590 418 714
Rachel Butlin	rbutlin@bentleys.co.uk	+44 7834 518 814
DR Lee	drlee@bentleys.co.uk	+44 7884 312 527

Bentleys, Stokes and Lowless, International House, 1 St Katharine's Way, London E1W 1YL

T +44 20 7782 0990 24/7 +44 20 7477 2771 F +44 20 7481 7978 E law@bentleys.co.uk

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