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CASE NOTE: *TRAFIGURA PTE LTD V TKK SHIPPING PTE LTD (THE THORCO LINEAGE)* [2023] EWHC 26

A recent decision of the England and Wales High Court has clarified the interpretation of the carrier's limit of liability pursuant to Art IV r 5(a) of the Hague/Visby Rules

Summary and key points

In *Trafigura Pte Ltd v TKK Shipping Pte Ltd (The Thorco Lineage)* [2023] EWHC 26, the Court held that:

- Art IV r 5(a) relates to claims for economic loss in relation to cargo (like reduction in market value), not merely physical damage; and
- the limits in Art IV r 5(a) are to be calculated by reference not just to the physically damaged cargo, but also to the cargo that is subject to economic loss.

Background

The claim concerned a bulk cargo of zinc calcine[1] carried on board the THORCO LINEAGE from Baltimore, USA to Hobart, Australia in May 2018.

The vessel suffered an engine failure en route and ran aground in French Polynesia. It was successfully re-floated by salvors under an LOF agreement with SCOPIC invoked. After being re-floated, the vessel underwent temporary repairs in Tahiti, then later in South Korea. Cargo was discharged at two ports in South Korea before the LOF was terminated and the salvage operation came to an end.

Most of the cargo was subsequently on-shipped to Hobart on a different vessel. A relatively small proportion of the original cargo was lost or physically damaged.

Cargo owners incurred loss and damage amounting to more than US$8.5 million comprising a significant contribution to salvage, on-shipment costs, physical loss or damage to the cargo, and costs relating to the salvage sale and disposal of the damaged cargo. They claimed an indemnity in relation to that loss and damage from the carrier, alleging it was caused by the carrier's breach (as to seaworthiness) of the relevant contract of carriage.

In an ensuing arbitration, the carrier raised a limitation defence, pointing to Art IV r 5(a) of the Hague/Visby Rules to assert that its liability ought to be limited to a sum of around US$800,000. The proper construction and operation of Art IV r 5(a) was removed to the High Court to be determined as a point of law under s 45 of the *Arbitration Act 1996* (UK).

Art IV r 5(a) provides:

> Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any ***loss or damage to or in connection with the goods*** *in an amount exceeding* ***667.67 units of account per package or 2 units of account per kilogram of gross weight of the goods lost or damaged***, whichever is the higher.

The emphases are ours.

The first emphasised phrase - *loss or damage to or in connection with the goods* – may be thought of as the *Subject Provision*. This is the subject to which the limitation is directed.

The second emphasised phrase - *667.67 units of account per package or 2 units of account per kilogram of gross weight of the goods lost or damaged* – may be described as the *Limit Provision*. It describes how to calculate the

[1] a type of impure zinc oxide which is used to produce zinc

relevant limit. It has two components – a per package or per kilo figure, and the description of the cargo to which that figure is to be applied. It is the second component that concerned the Court in this case.

Competing arguments

Essentially, cargo owners argued that the Subject Provision encompasses claims for economic loss or damage – like loss of market value. It gave the carrier the right to limit in relation to such claims. They argued that the phrase '*goods lost or damaged*' in the Limit Provision was merely a 'shorthand' for the goods the subject of such claims. In other words, the Subject Provision and the Limit Provision are coterminous – they concern the same goods – and therefore the limit must be calculated by reference to the whole of the cargo that is subject to physical or economic loss.

The carrier argued that the Subject Provision may be directed at claims arising from wider circumstances than mere physical damage. However, the Limit Provision allowed the carrier to calculate the limit of its liability in relation to those claims only by reference to the lost or physically damaged cargo. In other words, even if a large proportion of the cargo was subject to economic loss or damage, the limit of the carrier's liability is to be calculated by reference only to the physically damaged cargo.

The decision

After carefully examining the text of the Hague/Visby Rules, the *travaux preparatoires* to the conventions leading to Visby Protocol (which amended the original wording of art IV r 5(a) of the Hague Rules), the case law and the academic authorities, Teare J agreed with the cargo owners.

The judge differed from the approach earlier taken by the English High Court in *The Limnos*[2]. That case stood for the proposition that the both the Subject Provision and the Limit Provision are confined to goods that are lost or physically damaged. In *The Thorco Lineage*, Teare J carefully considered the reasoning behind the earlier decision and declined to follow it.

The judge observed that as a result of fault by the carrier, goods carried by sea may be damaged physically or economically (for e.g., diminution in value). The aim of Art IV r 5 is to limit the carrier's liability in relation to loss arising from both kinds of damage. The Subject Provision therefore encompasses claims for both economic loss and physical damage.

The Limit Provision serves to '*define or quantify the limit*' of the carrier's liability for the claims encompassed by the Subject Provision. It ought to '*give effect to, and not frustrate, the aim of the Article*'. Taking the carrier's argument to its logical end, if there was only economic loss in relation to the cargo but no physical damage, the carrier's liability would be unlimited. That could not be the intention of the article.

Therefore, the words '*goods lost or damaged*' in the Limit Provision refer to goods lost or damaged physically or economically; not just lost or physically damaged goods. Put another way, the Limit Provision provided for the limit of the carrier's liability to be calculated by reference to the cargo the subject of the claim.

In this case, the entire cargo was affected economically because its value had been diminished by cargo owners having to incur salvage charges and on-shipment costs. Teare J therefore held that the carrier's limit of liability was to be calculated by reference to the whole of the cargo, not just the (relatively small) physically damaged portion.

(*The terms 'Limit Provision' and 'Subject Provision' are our own creation – for ease of illustration. They were not used in the judgment.*)

On the cargo owners' (successful) construction of Art IV r 5, the carrier's limit exceeded the more than US$8.5 million claim. On the carrier's (unsuccessful) construction, the limit would have been around US$800,000. Given the stakes for the carrier, and that there is now seemingly conflicting first instance authority on the point, it would not have been surprising if the decision had been appealed. However, we understand that leave to appeal was refused.

Why relevant?

The decision is relevant for Australian purposes because Art 4 r 5(a) of our amended Hague Rules[3] is practically in identical terms to that which the English High Court considered.

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[2] [2008] 2 Ll Rep 166

[3] Schedule 1A, *Carriage of Goods by Sea Act 1991* (Cth)

It may not impact run-of-the-mill cargo claims involving the delivery of cargo in a damaged state. A vast majority of claims crossing the desk of a carrier or its P&I Club does not reach into limitation territory, even on the (ultimately unsuccessful) construction sought by the carrier in *The Thorco Lineage*.

However, the situation may be different where, as a result of the carrier's fault, there has been significant delay or where a casualty has befallen the ship resulting in pure economic loss to cargo interests and minimal or no physical damage to the cargo. In such cases, there could be benefit to either side depending on the nature of the claim.

The Limnos is often wielded by owners in the face of a claim involving both physical damage and consequential economic loss, especially where only a part of the cargo was physically damaged. Applying *The Thorco Lineage*, that reliance would likely prove difficult to sustain, and the relevant limit is likely to be higher than under *The Limnos* formulation.

However, carriers too could benefit from the decision, especially where the claim is for economic loss, and there is no physical damage to cargo. Pursuant to *The Limnos*, the carrier's liability for such claims would be unlimited. But *The Thorco Lineage* extends the limitation umbrella for the carrier over such claims.

As an aside

There was a hint of an Antipodean flavour to Teare J's careful and closely reasoned judgment, which favourably referred to two decisions of our Federal Court – first, a reference to the examination by Allsop J (as the Chief Justice then was) in *El Greco v MSC*[4] of the *travaux preparatoires* of the 1968 conference which led to the adoption of the Visby Rules; and second, an endorsement of the analysis by Derrington J in *Tritton Resources v Ever Rock Navigation*[5] as to why the imposition of a lien on cargo diminishes the proprietary rights of cargo owners, and therefore may constitute property damage, rather than pure economic loss.

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[4] [2004] FCAFC 202

[5] [2019] FCA 276

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