Sour Grapes in the Reefer Trade? – The Exportadora case

David A Glass (Cardiff University) comments on the High Court decision in Exportadora Valle de Colina S.A. v. A.P. Moller-Maersk A/S *concerning the burden of proof in reefer container carriage.*

Introduction

Claiming for loss or damage to goods occurring during carriage, whether against the carrier or an insurer, can raise difficult issues of proof, particularly where the goods are perishable and arrive at their destination suffering deterioration. The judge of fact may be faced with competing theories of causation: some pointing to the goods themselves (for example inherent vice or bad packing) and some to the course of carriage usually involving a suggestion of some failure of care. Goods requiring additional protection such as refrigeration are especially prone. The competing assertions and evidence are developed within a framework of defences to which attaching and applying the appropriate burden of proof may be problematic especially if the contract contains terms similar to the complex provisions which appear in the CMR Convention. The *Exportadora* case [2010] EWHC 3224 (Comm) is a recent example. This case also gives an interesting insight into the practice and problems of reefer container transport.

The facts of the case

The dispute was between Chilean growers and exporters of premium table grapes and the defendant ship owners and Maersk, arising out of the outturn condition of grapes from the 2005/2006 Chilean grape harvest. The grapes were carried in 57 Maersk reefer containers on 10 separate voyages from Chile to Europe (the United Kingdom, Holland and Sweden) in the period February to April 2006. In previous seasons the grapes had been exported breakbulk in reefer vessels but the exporters were persuaded to use Maersk's container services to carry 35 per cent of that season's harvest on the basis that container carriage facilitated land and sea transit door to door, reducing handling and ambient temperature factors which could adversely affect the fruit and ensuring that the fruit was kept at a constant temperature during carriage.

The Maersk containers were stuffed at the departure cold store by agents of the exporters using both standard and Euro pallets. Unlike standard pallets, Euro pallets left free space requiring cardboard padding to prevent short-circuiting of air in the containers. Two thermographs (or 'temptales') were positioned at either end of each container to record transit temperatures. The containers were carried by road to the terminal, shipped to their respective destinations, depending on which involved discharge on to a feeder vessel or discharge at a destination port. Delivery to the final cold store was by road. On de-stuffing, higher than usual temperatures in the temptales and the grapes themselves were found. There were indications on outturn of physical damage in the form particularly of decay or dehydration, but most striking was the extent to which there was a rapid deterioration in the grapes in question once in ambient temperatures and which resulted in the rejection of them by the ultimate supermarket customers.

The factual dispute centred around the condition of the grapes, the growing and harvesting conditions, the process of shipping including the methods of stowage especially in light of the different types of pallet. These factors, as well as the outturn condition of the grapes were contrasted against possible carriage conditions particularly the periods of possible interruption in the refrigeration supply (so-called power-offs).

The bill of lading terms

The main legal discussion revolved around the terms of the Maersk trading conditions expressed in the bill of lading. The terms applicable were those relating to multimodal transport. These terms have, in fact, a long history. They derive, ultimately, from the old P&O container bill of lading which in turn had sought to comply, as nearly as practicable with the ICC Rules for Combined Transport dating back to 1973 derived from the TCM draft Convention 1971. Since Chile, as the country of shipment, had not adopted the Hague Rules or any of the other compulsory carriage regimes the way was clear to proceed simply on the basis of the liability regime set out in the trading conditions. These conditions drew a distinction between circumstances where the stage of carriage when the loss or damage occurred is known and circumstances where it is unknown. Since the stage was not known the exclusions in clause 6.1 applied. This clause lists several exclusions available as defences for the carrier (for example, an act or omission of the Merchant).

The framework of liability and the burden of proof

This type of framework of liability setting out a series of possible defences available to the carrier would be generally familiar to those well versed in the Hague Rules.

i) Prima facie case against carrier

The judge accepted that once the claimant has established a prima facie case, i.e. once the claimant has established that loss and damage has occurred while the cargo was in the custody of Maersk, even if the stage at which it occurred is not known (and the claimant establishes this in the normal way by showing loading

in the container in good order and condition and discharge from the container in a damaged condition) then it is for Maersk to show that the loss or damage was caused by one of the exclusions in clause 6(a). If it cannot do so, then it is liable for the loss and damage, because it is not "relieved of liability" within the opening words of the clause. A similar interpretation would apply also to the Hague Rules.

ii) Reduction of carrier's burden of proof

However, there is an extra dimension which, as noted in the case, is reminiscent of the Convention on the International Carriage of Goods by Road (CMR). This is the reduction, in some cases, of the carrier's burden of proof indicated in cl. 6(1)(b). In the particular cases of defective packing, loading and stowage by cargo interests and inherent vice, once the carrier has established that the damage 'could be attributed' to one of these causes the burden shifts to the claimant to prove that they were not the cause.

The effect of this shifting of the burden of proof was the first substantive legal point addressed in the judgment having sparked debate in counsels' closing arguments. However, before addressing this it should be noted that the judge rejected the argument put forward on behalf of Maersk that even if the "attributable cause" exclusions do not apply, the burden is on Santa Elena to prove a positive case of causative breach by Maersk, i.e. that Maersk acted in breach of duty and that that breach caused recoverable loss. This is clearly wrong and certainly contrary to the accepted interpretation of the Hague Rules and is a welcome clarification by the judge.

In respect of the shifting burden of proof the debate centred on what was required of the claimant once the carrier had shown the requisite 'attribution' for the purposes of cl. 6(1)(b). By analogy with CMR the case was put that the carrier could shift the burden on to the claimant by proving that one or more of those excluded matters relied upon could ***plausibly*** have caused the damage, not that on a balance of probabilities the excluded matter ***did cause*** the damage. The question was whether the claimant, to rebut the presumption thereby acquired by the carrier, merely had to ***suggest*** but ***not prove*** (on a balance of probabilities) another plausible hypothesis sufficient to reduce the plausibility of the carrier's alleged cause, or must go further and show on a balance of probabilities that the matter relied upon by the carrier did not cause the loss.

The first possible interpretation, which would favour the claimant, drew support as a suggestion made by Professor Malcolm Clarke in *International Carriage of Goods by Road: CMR* (5th edition 2009) pp 253-4 in the context of CMR. Flaux J rejected this in favour of the second possible interpretation. He relied particularly on the fact that cl.6 is in a contract governed by English law rather than CMR so that the words meant what they said and that once the carrier sets up one of these causes or events as a plausible explanation, it is for the claimant then to show on a balance of probabilities that the cause or event did not cause the loss or damage claimed. On the evidence, it mattered little, since the judge was able to conclude that the claimant had proved this and had thereby established the liability of the carrier. In addition the judge was also prepared to make a finding that the claimant had proved that the cause of the deterioration were excessive power-offs of the refrigeration supplied to the container. These occurred mainly at times of transfers of the container for operational reasons as the containers progressed through the transit. This provides a salutary lesson, given the often suggested seamless nature of container carriage that in this type of trade rigorous supervision of temperature is necessary before any claimed improvement over breakbulk methods can really be achieved.

REFLECTIONS ON THE JUDGE'S VIEW

A few points emerge which can perhaps be taken to support the judge's approach to the special defences without necessarily agreeing that the similar wording in CMR is subject to a different meaning than the clause in the contract:

1. In his book Professor Clarke refers to a reduction of plausibility "so that the court is persuaded no longer that the loss or damage could have been caused by the special risk". As he says a few pages earlier the mere existence of other plausible possibilities does not destroy the presumption. Arguably only if the alternative cause is of such plausibility as to make the inference which the presumption is meant to give rise to untenable should the presumption be defeated. In that case the claimant has proved that the damage was not caused by the suggested defence
2. A footnote to the text in which Professor Clarke makes his suggestion says that, to English eyes the claimant seeks to traverse the points made by the carrier's defence. This suggests a sufficient attack on the defence to defeat it
3. This type of provision is concerned with the plausibility of an inference at a certain stage in the proceedings. It is similar to *res ipsa loquitor* except that there is a difference in that *res ipsa loquitor* does not effect a shift in the burden of proof whereas the defence here (both in CMR and the contract) is expressed as a presumption which once applied effects a shift of the burden to the claimant. Consequently, whenever in the proceedings it is possible to say that the inference is plausible the defendant has his presumption. Whatever happens thereafter, it has become impossible for the claimant to deny that at some stage the plausibility has been reached. These arguments seem to support the judge's view.

Nevertheless there must still remain an issue as to what evidence is sufficient to establish the initial case of plausibility. The case of counsel for the claimant might have been better put if the argument had been addressed towards denying that the presumption had ever arisen rather than seeking to rebut it. Both CMR and the special contractual defences share difficulties in this respect. CMR refers to special risks and the idea of an inference supportive of a defence is easier to see with some risks than others. One of the special risks under CMR is carriage of livestock. Animals are well known to be difficult travellers and if the evidence shows that, for example, an injured horse was healthy to start with and was properly secured in the horse box and the injury sustained during its carriage is as much consistent with fright as accident there is little difficulty in finding for the defendant in the absence of some quite concrete evidence that there was an accident. The difficulty that the defendant might have in showing exactly how the horse was injured and that no fault was involved is counterbalanced nicely by the inference that can be drawn from this circumstantial evidence.

With other defences what is required to raise the inference is much less obvious. Under CMR, for example, in the case of loading by the sender, why should the mere fact that the goods were loaded by the sender raise any inference as circumstantial evidence? Just because the sender loaded the goods and there was damage is, in itself, no more suggestive of cause as is the fact that the carrier carried the goods and there was damage. Something more seems to be required suggestive of a tie - such as evidence of some fault in the loading or in the nature of the damage consistent with a fault in loading. In a case of loading by the sender where there is no proof of fault and the damage is as consistent with faulty loading as negligent carriage the court is on a knife-edge. One can see here a stronger argument that equal plausibility destroys the presumption but really the proper question is whether the presumption has arisen at all.

Where inherent vice is involved the position is further complicated by the fact that it seems possible to identify several different forms presuming that the goods are of a type which can suffer from inherent vice:

1. The goods might already be in bad condition either externally or internally on loading;
2. The goods might have been in good condition but have a disease which develops during transit;
3. The goods might not be properly prepared for transit so that they experience deterioration in transit;
4. The goods might not be properly loaded or stowed by the sender so that they deteriorate in transit;
5. The goods may be of a type whereby deterioration might occur even if they are in good condition and are carried properly.

CMR separates out the risk in 5 for the special defence and is more easily applied in that it can be set up simply by proof that the goods are of such a type and the deterioration is consistent with it. In the other cases it is much more difficult to see what the evidential link is supposed to be in order to set up the presumption. The fact that the goods are perishable and have arrived in a deteriorated condition, in a way consistent with inherent vice, puts the court on the same knife-edge as indicated earlier if it is just as likely that the deterioration was caused by conditions in transit. What justification is there for a presumption merely because the goods might be suffering from an inherent vice particularly as there might be any of the causes 1-4 above applicable? Strong proof of inherent vice has been required of carriers under the common law to establish inherent vice (e.g. see *Bradley v. Federal SN Co* (1927) 27 Ll L R 395). Whilst the object of this type of defence is to assist the carrier, one might expect a more telling inference from the facts than a mere ***possibility*** that a defence might be present.

The position is further complicated by the fact that in respect of inherent vice as well as other defences in the special list above any evidence relevant to establishing the presumption is likely to cover the same ground as the prima facie evidence put forward by the claimant. In the horse example above, the defence does not need to work on destabilising the evidence as to the initial soundness of the horse. The presumption works on the inferences drawn from the special nature of the horse as a horse. In cases 1-4 above, however, what possible inference can be drawn in respect of well prepared goods sent in good condition? Naturally attention will turn to the claimant's evidence regarding a prima facie case in order to eke out some kind of inference which in turn means confusion as to who exactly has the ultimate burden to prove what.

THE JUDGE'S APPROACH TO THE EVIDENCE

In this case the judge naturally structured the case around the usual order i.e. in stage 1, the claimant establishes a prima facie case and at stage 2, the carrier establishes a defence. As noted above the judge noted this structure in respect of the standard defences. Unfortunately it was not made clear exactly how the sequence of proof worked in respect of the special defences. The judge proceeded to review the evidence dealing, seemingly, at the outset with inherent vice.

A general case of inherent vice put forward by Maersk was abandoned early since there was no evidence that all Chilean grapes shipped in the 2005/2006 season had enhanced susceptibility to rot, decay and botrytis caused by unseasonable frosts and rain. The evidential review then proceeded to whether the grapes were shipped in good order and condition and outturned in bad condition. In the light of the claimant's evidence and, despite the efforts of the defendant to attack it, the judge found that the claimant had established that the goods were shipped in good order and condition. The attack had been both negative, i.e. a claim that the claimant simply failed to establish good order and condition, and positive, a case built on suggested defects in the processes involved in harvesting and shipping the grapes. The evidence of shipment in good order plus the evidence of outturn in bad condition defeated any defence of inherent vice. In addition, the efforts of the defence to establish insufficient or defective condition of the packing or handling or stowage of the goods by the merchant, was similarly defeated by the claimant's evidence on these matters.

FINAL COMMENTS

The claimant was able to draw on a good number of witnesses to show what was done prior to shipment. The defendant was left to try to find gaps and anomalies from this and the other documentary evidence supplied. The case demonstrates clearly that in the face of strong evidence from the claimant that the goods were fit, properly prepared for shipment and then shipped correctly there is really no room for any presumption to be derived in favour of the defendants from the special defences in a Maersk or similarly expressed bill of lading. It leaves unclear exactly how and at what level of evidence, in this type of case, the presumption can be established. It may be that these 'special' defences do little more than reinforce the need for the claimant to establish its prima facie case ensuring that this includes the processes up to shipment (as usually would be the case: see Tetley *Marine Cargo Claims* (4th ed.), Chapters 6 and 20). The failure to establish its prima facie case would mean the claimant fails unless it can make a positive case that the damage is traceable to a cause within the carrier's responsibility (see *The Ida* (1875) 32 LT 541 - compare *Delmondi Import-Export Inc (Delfrutti) v. OOCL Ltd* [2005] noted by Tetley at p.1152). Although the Maersk bill of lading mainly contemplates the application of English law, the origins of these special defences derive from uniform law efforts to enable their use in a range of jurisdictions some of which might involve trial procedures to which they fit more naturally. In an English context their impact may well be constrained.