Trafigura Pte Ltd v TKK Shipping Pte Ltd (The "Thorco Lineage") [2023] EWHC 26 (Comm)

Can a loss in value count as damage to goods?

The Thorco Lineage sought to answer the following question: should the entitlement to limit liability for economic loss of goods under the Hague-Visby Rules be calculated by reference to the weight of goods suffering physical damage?

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The Thorco Lineage: the facts

In May 2018, laden with about 10,300 wmt of zinc calcine owned by the claimants, the vessel Thorco Lineage embarked on a voyage from the USA to Australia. The carriage was evidenced by a bill of lading governed by the Hague-Visby Rules (the Rules).

En route in June 2018, the vessel ran aground following an engine failure and was refloated by salvors. She was then towed to South Korea for repairs. Following the salvage services, the salvors had a maritime lien over the property salved with the effect being that the property could not be removed without the salvors' consent. As security for the salvors' claim, the claimants provided a guarantee for US$8 million in November 2018. Some of the cargo was then transhipped to the discharge port where it was delivered. Overall, about 764 wmt were lost or physically damaged.

The claimants claimed about US$8.42 million against the carrier for (among others) the following: (i) liability to pay the salvors; (ii) the physical loss and damage to the cargo; (iii) on-shipment costs; and (iv) costs incurred in arranging for the salvage sale and disposal of the cargo.

Carrier's limitation of liability

The carrier relied on article IV rule 5(a) of the Rules to limit its liability as the rule entitles a carrier to limit liability for "loss or damage to or in connection with the goods" to the higher of 667.67 SDR per package or 2 SDR per kg of gross weight of the "goods lost or damaged". As only a small percentage of the goods were physically damaged, the carrier claimed to be able to limit its liability to US$800,000, being a mere 10 per cent of the total claim. The claimant, on the other hand, argued that the carrier's liability should be calculated by reference to the whole cargo. This is because the whole cargo suffered economic damage following the claimant's liability to pay salvage and on-shipment costs.

Economic damage to cargo

The claimant argues that a plain reading of the phrase "any loss of damage to or in connection with the goods" includes economic damage and the phrase "goods lost or damaged" is a mere shorthand reference to the earlier phrase. That is to say, the phrase in no way limits (as the carrier argued) the damage to physical damage.

The claimant also submitted that unless economic damage was included, the carrier would not be able to limit liability where (say) there is delay in the delivery of the goods or where goods (for whatever reason) do not suffer physical damage.

Alternatively, the carrier's liability should be calculated by reference to the whole cargo because the claimant's proprietary or possessory title was damaged by the salvors' maritime lien. Further alternatively, the carrier's liability to pay salvage and the on-shipment costs are not subject to limitation of liability under article IV rule 5.

Physical damage to cargo

The carrier suggested that the phrase "goods lost or damaged" must be contrasted with the wider phrase "loss or damage to or in connection with the goods" that appears earlier in the Rules. The consequence being that although a carrier is in principle entitled to limit its liability if goods are economically damaged, the monetary sum that the carrier is liable for is calculated by reference only to the goods that are physically damaged, to the exclusion of the goods that are economically damaged. Put another way, when it comes to the calculation of the limitation sum, all that matters is the weight of the goods physically damaged. The carrier went on to argue that this position is fortified by the judgment of The Limnos.1 Alternatively, the goods were not damaged by reason of being subject to a maritime lien and the carrier's liability was not unlimited.

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The Limnos and the decision

The key decision that Sir Nigel Teare (sitting as a High Court Judge) had to examine was, as alluded to earlier, The Limnos. The case concerned a shipment of corn from Louisiana to Jordan, on terms which incorporated the Hague-Visby Rules. During the carriage a small amount of the cargo suffered from wetting damage due to leakages in the vessel's hatch covers. Therefore, as a condition to allowing discharge, the Jordanian government required the whole of the cargo to be, among other measures, fumigated and transferred to disinfected silos. As a result, the entire cargo acquired a reputation as distressed cargo and its market value was reduced.

In the cargo claim, the cargo owners submitted that the limitation that the carrier could enjoy was per kg of the whole cargo. The carrier argued that the limit of its liability was the limit per kg of the goods physically damaged. They accepted that in cases of delay, there was no limit to liability. The Limnos was decided in favour of the defendant carrier.

Burton J in The Limnos held that on a plain reading of the words in the Rules, the goods that were not physically damaged cannot be described as "damaged" (within the meaning of article IV rule 5(a)), even if their value may be affected or their price depressed.2 This interpretation was supported by GH Renton & Co Ltd v Palmyra Trading Corporation3 where the words "loss or damage to or in connection with goods" in article III rule8 of the Hague Rules were examined.

Burton J went on to say that consequential damage (taken to include economic damage) should be treated differently from the originally (physically) damaged goods.4 In relation to economic losses arising from delay, the clause is anomalous. This is because although it appears that a limit is imposed by reference to gross weight, and since the gross weight is limited to goods physically damaged, there is in fact no limit if none of the goods are physically damaged. However, the anomaly does not require words to be read into the Rule. Burton J was fortified in this holding by the view that claims for economic loss, without physical losses, were infrequent. Similarly, there is an anomaly in cases where cargo owners attempt to mitigate losses. Thus, it may be the case that remedial steps are taken at great expense at the cost of cargo owners when the cargo is discovered to be damaged while at sea. And as result of the remedial work, only a small percentage of the cargo is discovered physically damaged. It will then be a case that the owners are not entitled to limit liability. However, similarly, the anomaly does not justify a departure from the clear words of the Rules and instances of this occurring are rare and unusual.

However, in this case, Sir Nigel Teare declined to follow The Limnos. First, although the words used in The Limnos to describe the goods ("affected", "depressed", "depreciated") might explain what happened to the cargo as a result of a casualty at sea, they do not say whether that form of economic loss enables one to say that the whole cargo had been damaged.5 The judge went on to say that the goods can in fact be aptly described as damaged due to economic loss, when the context in which they arise is taken into account,6 as follows:

(i) where a merchant has bought goods on board a ship, the merchant will expect the goods delivered to him at the discharge port in the condition as they were when shipped;

(ii) but if in meeting that expectation, unexpected expenses (say, to pay for salvors or for on-shipment) are incurred, the goods would have diminished in value, the diminution being commensurate to the additional expenses that the merchant has incurred, plus any drop in value due to delay.

Sir Nigel Teare held that this context rings true in the case of perishable and non-perishable goods, as perishables would have deteriorated physically and non-perishables might suffer from a falling market even if not physically damaged.

The judge disagreed with Burton J's interpretation of GH Renton v Palmyra, because in GH Renton v Palmyra itself the goods did not suffer physical damage, and the House of Lords was not construing the words "loss or damage to goods" as standing on their own or as to the meaning of those words in article IV, rule 5(a).7 He accepted that there must be some contexts where the earlier expression of "loss or damage to or in connection with goods" can carry a wider meaning to include economic loss, relative to the phrase "goods lost or damaged". Indeed, he conceded, had it been intended for the limit to be defined by the weight of the goods lost or damaged "physically or economically," those words could have been easily added.8 However, the judge said, in the present context, the two phrases are closely linked. Thus, the second phrase should be construed in like manner to the first, which brings economically damaged goods within the limitation envisaged. It is only this construction that will give effect to the aim of the article.

Although Sir Nigel Teare accepted that anomalies must be treated with caution, he went on to hold that to bring economic losses within the phrase "goods lost or damaged" would be consistent with the aims of article IV, rule 5(a). This construction will correct a striking anomaly and limit the carrier's liability for salvage and on-shipment costs, both commonly incurred.9

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Alternative arguments

Sir Nigel Teare held that the imposition of a maritime lien did indeed damage the claimant's proprietary and possessory interest in them, because the lien resulted in a diminution of value over the cargo and that this is an analysis that is accepted in all maritime jurisdictions, whether based on common or civil law.10

The judge also went on to hold that the liability of the defendant to indemnify the claimant in respect of the salvage and on-shipment cost is in fact limited. This is because, in the present scenario, there was a linkage between the physical damage and economic damage in that it was the same breach of contract that caused both losses. Although this holding may result in surprising results (as it would depend on the chance that both the physical and economic damage flowed from the same breach), this alternative argument was on the assumption that Burton J's holding in The Limnos was correct.

What can be learnt from The Thorco Lineage?

This may well be a welcome decision in an area of law that has remained (surprisingly) murky despite the antiquity of the Hague-Visby Rules and the frequency in which article IV, rule 5(a) is relied upon in practice. Both cargo owners and shipowners would be able to breathe a sigh of relief following the decision. Carriers will be entitled to limit liability for claims even where there is no physical damage to goods. Cargo owners can be confident that claims arising from delay and sums expended in mitigation are similarly limited. These advantages will save cargo owners the risk of being entangled in cross-border insolvency proceedings, the likes of which was seen in the Hanjin insolvency. However, given the implications of the decision on the quantum on which the defendant's liability may be limited, this is unlikely to be the final word on the issue.

Clive Navin Selvapandian, Advocate & Solicitor (High Court of Malaya), Messrs Christopher & Lee Ong

1 Serena Navigation Ltd v Dera Commercial Establishment (The Limnos) [2008] EWHC 1036 (Comm); [2008] 2 Lloyd's Rep 166.

2 Ibid, para 39.

3 [1956] 2 Lloyd's Rep 379; [1957] AC 149.

4 The Limnos, para 39.

5 The Thorco Lineage, para 88.

6 Ibid, para 87.

7 The Thorco Lineage, para 68.

8 Ibid, para 52.

9 Ibid, para 95.

10 Ibid, para 118.

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