Insight Article

Hague-Visby Rules - Negligent navigation defence

Carrier's negligent navigation defence survives despite "reprehensible" conduct by the master.

An article in Gard News issue No. 1991 contained a brief report on a New Zealand Supreme Court decision concerning a carrier's negligent navigation exemption under the Hague-Visby Rules.2 This article provides a more detailed analysis of the decision.

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Background

The case arose as a result of a vessel grounding 3 after the master took a shortcut through a narrow channel off Japan because his vessel was behind schedule. The vessel took on water but, despite this, the master did not stop to assess the damage and seek salvage assistance. Instead, he sailed the vessel back towards the course which would have originally taken the vessel on the longer seaward route. This caused further ingress of water and, by the time salvage assistance was finally sought, the cargo was a total loss. Apparently motivated by a concern for his own position, the master sought to tamper with evidence that the vessel had grounded in the narrow channel and claimed to have hit a semi-submerged object. The master also tried to influence crew members to mislead investigators.

High Court judgment

In the court of first instance, cargo interests argued that the post-grounding conduct of the master fell outside the carrier's negligent navigation exemption under the Hague-Visby Rules. It is notable that the claim referred to cargo carried on deck, and expert evidence at court was that such cargo could have been saved but for the master's post-grounding actions.

The relevant wording of the Hague-Visby Rules exemption is "act, neglect or default of the master...in the navigation or in the management of the ship". 4 The court decided that the master was not acting in bona fide in the navigation or management of the ship, as his actions were those of a master motivated to implement a plan to absolve himself from responsibility or blame for the grounding. The court went on to hold that there was an implied obligation of good faith and where the actions of the master are not in good faith, as in the subject case, the exemption was not available to the carrier.

The Court of Appeal judgment

The case proceeded to appeal, and although they also found for cargo interests, the Court of Appeal did not adopt the same reasoning as the court of first instance. The Court of Appeal did agree with the High Court in that the master's conduct up to the grounding was legitimate and within the scope of the exemption. However, the master's post-grounding conduct was considered by the leading judge to be "outrageous" and "fundamentally at odds with the purpose of both the contract of carriage and the legislative regime designed to achieve a sensible compromise between competing interests". In conclusion, therefore, the majority decision of the Court of Appeal was that such behaviour was not conduct within the meaning of the exemption.

Interestingly, the Court of Appeal decision was reached despite one judge dissenting. The dissenting judge made reference to law on treaty interpretation, which required treaties to be interpreted in accordance with the ordinary meaning of the terms in their context and in light of its object and purpose. The dissenting judge's view was that the natural meaning of the words "act, neglect or default of the master" included intentional conduct and that there was nothing to suggest that its application depended on the motive of the master. As for the object and purpose of the Hague/ Hague-Visby Rules, the dissenting judge took the view that there was no indication in the conference deliberations leading to the Hague Rules (the Rules) suggesting a policy to make the shipowner liable for consequences of navigational decisions by

the master. The dissenting judge's views were supported by English case law, but much of the authority pre-dated the Hague Rules. The view of the two judges in the majority was that to rely on such authority would risk adopting a construction inconsistent with the policy of the Hague Rules, which was generally to prevent shipowners contracting out of liability for negligence as freely as they had done under common law before the Hague Rules.

Having made its decision, it was not necessary for the Appeal Court to decide on the "good faith" finding of the High Court, but the leading judge was inclined to regard the lack of good faith as bearing on the wider issue of whether the conduct took the carrier outside the terms of its statutory and contractual obligations rather than to imply a term of good faith into the Rules.

Supreme Court judgement

On appeal from the Court of Appeal, the Supreme Court's approach was first to look at the scheme of the Hague-Visby Rules. They found the scheme to be clear in that carriers are responsible for loss or damage caused by matters within their direct control (sometimes called "commercial fault"), such as seaworthiness and manning of the ship at the commencement of the voyage, but not for loss or damage due to other causes, including acts or omissions of the master and crew during the voyage ("nautical fault"). The Supreme Court went on to say that "the allocation of responsibility between the carrier and the ship on the one hand and the cargo interests on the other promotes certainty and provides a clear basis on which the parties can make their insurance arrangements and their insurers can set premiums". The Supreme Court went on to express similar views to those expressed by the dissenting judge in the Court of Appeal. In disagreeing with the majority view in the Court of Appeal, the Supreme Court found that common law cases pre-Hague Rules were relevant (indeed, reference could be found to support this in the conference deliberations leading to the Hague Rules) and that the exemption did apply when the Rules were read purposively, since the purpose was to make the carrier responsible only for loss or damage caused by matters within their direct control. Giving full effect to the ordinary meaning of the words of the exemption was considered to be entirely consistent with that purpose. The words "act, neglect or default" were considered by the Supreme Court to be "sufficiently wide to encompass all acts or omissions of the master or crew" and they went on to conclude that "however culpable the conduct [which the Supreme Court considered reprehensible in the subject case] and whether or not it is intentional, the owner or charterer is not, subject only to barratry, deprived of the benefit of the exemption". The Supreme Court also found that there was no support in the cases referred to by the High Court for implying a term of good faith.

However, that was not the end of the matter because it was common ground that barratry (damage caused to the ship or cargo by the master or crew with intent) would deprive the carrier of the benefit of the exemption. The Supreme Court therefore set about defining exactly what that meant for the purposes of the Rules. They decided that this should be taken from the provision within the Rules dealing with the circumstances when the carrier loses the right to limit liability, that is, when "the damage resulted from an act or omission of the carrier done with intent to cause damage or recklessly and with knowledge that damage would probably result". 5 The Supreme Court went on to find that the cargo interests failed to plead a case of barratry. Although that in itself was not fatal, the cargo interests' pleading that the

master's intention was to derive personal benefit (i.e., to try to avoid blame for the grounding) was.

Conclusion

By careful analysis, the New Zealand Supreme Court found that the degree of culpability of the master and/or the crew in bringing about cargo loss or damage by "error in navigation" and subsequent acts and omissions (save for "barratry", which was not proved) should not result in the owner/carrier being denied the "error in navigation" defence, as laid down in the Hague-Visby Rules. It is worthy a reminder in this context that the "error in navigation" defence is not available to carriers under the Rotterdam Rules, which were adopted in 2009, but are yet to come into force. 6

Footnotes

1. See article
"Hague-Visby Rules - 'Act, neglect or default' in the navigation or management of the vessel"
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2. *Tasman Orient Line CV v. New Zealand China Clays Ltd*
[2010] NZSC 37 (16 April 2010).

3. The detailed facts of the case can be found in the various judgments, which are available at
www.courtsofnz.govt.nz
.

4. Article 4 Rule 2 (a).

5. Article IV Rule 5.

6. See
www.rotterdamrules.com/en/
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