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Transport, Trade and Logistics Update

Cargo claims: re-visiting inherent vice, delay in delivery and claims in bailment
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A September 2023 judgment of the London High Court in JB Cocoa SDN BHD & Ors v Maersk Line AS [2023] EWHC 2203 (Comm) dealt with moisture and mould damage to consignments of containerised cocoa beans. The court confirmed the approach to be taken with regard to inherent vice, the carrier's period of responsibility, liability for damage after discharge, and the question of onus in claims of bailment. In doing so, the court endorsed previous decisions on these issues and has not introduced anything new. The judgment is however a timely reminder to cargo claimants on the liability of a carrier particularly where there is a delay in taking delivery of the cargo.

The claimants purchased a cargo of bagged cocoa beans stuffed in 12 x 40ft containers and carried from Nigeria to Malaysia. The sales contract provided for the cargo to have a maximum moisture content of 7.5% and a maximum number of defective beans of 7%. It was accepted that the cargo was in good order and condition when stuffed into the containers and that the unventilated containers had been properly prepared by being lined with corrugated cardboard and packed with bags of desiccant to attract moisture. The vessel proceeded around the South African coast to Malaysia during the southern hemisphere spring and the cargo was discharged.

As a result of a dispute between buyers and the sellers, payment of demurrage charges and problems with original documents, the containers spent six weeks at the container terminal before ultimately being released to the buyer. On opening the containers, it was discovered there was extensive moisture and mould damage to the contents of all of the containers. The buyers were indemnified by underwriters who proceeded with a subrogated recovery against Maersk as the contractual carrier under the bill of lading.

The carrier denied liability for the claim on the basis either that the loss arose as a result of inherent vice of the cargo and/or that the damage was occasioned during the lengthy storage at the container terminal in Malaysia. The former was a defence available to the carrier under the Hague Rules incorporated into the bill of lading and the latter arose as Maersk contended that their obligation to take care of the cargo ceased on discharge. In passing, it is assumed that cargo underwriters did not take the view that the loss was incurred by inherent vice which would normally be a defence under a cargo policy and further that the period of insurance was extended beyond that contained in the usual cargo policy.

The court had to deal with numerous issues which included: the cause of the loss; the onus on proving a defence under the Hague Rules; the date on which the carrier's liability terminated under a bill of lading; and liability for care of the cargo by a bailee.

Expert evidence was advanced by both parties with the carrier contending that the moisture content of the beans on loading, although within the sales contract specifications, ultimately resulted in the mould and accordingly entitled them to rely on the inherent vice defence. The claimants contended that the carrier had failed to properly care for the cargo in that container sweat would have been occasioned whilst the vessel was in warmer waters and that, after discharge, the terminal acting as an agent for the carrier, should have opened the containers to ventilate them. The court rejected the carrier's contention that the loss arose as a result of inherent vice and also rejected the claimant's contention that the carrier had failed to properly care for the cargo during the ocean voyage.

This left the claimant with the contention that firstly, delivery under the bill of lading did not take place until the cargo was released because a proper arrival notification had not been served on the buyer and holder of the bill of lading and/or that it had a claim in bailment if the cargo was damaged after discharge.

Having considered the appeal court decision in *Volcafe Limited vs Cia Sud Americana de Vapores SA* [2019] AC 358 and the terms of the bill of lading contract and incorporated Maersk tariff, the court held that the carrier's obligation under the bill of lading was limited to the period between the time of loading and the time of discharge. The fact that the cargo was only delivered to the buyer when they took delivery several weeks after discharge did not extend that period of liability under the bill of lading beyond the period set out in the Hague Rules (which is identical to the Hague-Visby Rules) even though an arrival notification had not been properly served on the buyer.

The court held that reasonable notice had been given to the parties of the incorporation of Maersk's tariff into the bill of lading and accordingly the terms of the tariff would apply. The seven day period during which no storage or demurrage charges would apply after discharge contained in the tariff was displaced by a 15 day period in the bill of lading. The court however was of the view that even if this did extend the carrier's liability to the end of the free storage period, it was not material in this case as the delay was five weeks. There was no evidence that the loss occurred during the first 15 days after discharge.

The court accepted that if Maersk remained responsible for the cargo between discharge and devanning, it would have been held liable on the grounds that it failed to take reasonable care of the cocoa beans by opening the container doors to provide ventilation. It rejected Maersk's arguments that it was impractical to open the doors or that doing so would risk rodent infestation. This point however was moot as the court held that Maersk was only liable up until the point of discharge.

In passing and insofar as bailment was concerned, the court confirmed the approach taken in the *Volcafe* decision namely that:

1 Where there is cargo loss or damage on outturn, the legal burden is on the carrier to prove that it used reasonable and proper skill and care for the goods or that, even if it had used reasonable skill and care, there still would have been loss or damage;

2 The legal burden is also on the carrier to show that the loss or damage was caused by an excepted peril under the bill of lading; and

3 The cargo owner has no legal burden at all beyond proving the existence of damage on outturn, but may wish to discharge an evidential burden to rebut the carrier's case.

As Maersk were no longer in possession of the containers after discharge, the question of bailment did not arise as against Maersk after discharge. This implies that a claim in bailment might have succeeded against the container terminal which was not a party to these proceedings.

Finally, although it was not relevant, the court rejected Maersk's defence that the claimant had failed to mitigate its loss because they had failed to carry out a manual sorting operation immediately on delivery whereafter they could have dried the beans and analysed them for mould. This was on the basis that Maersk had failed to discharge the onus of proving a failure to mitigate and secondly that because Maersk was the wrongdoer, the court would not impose a high standard on the claimant with regard to mitigation. The claimant is only required to act in accordance with the practices in the ordinary course of business.

The claim against Maersk accordingly failed, but the decision is a timely reminder of the need for cargo interests to ensure that cargo is properly prepared for the anticipated voyage. With regard to sensitive cargo such as this, this includes ensuring that the various weather conditions including the temperature and moisture content of the atmosphere, are taken into account for the anticipated voyage. This is particularly the case when the vessel passes through both hemispheres and accordingly the weather conditions may vary considerably. The decision also confirms that the carrier's obligation under a bill of lading ceases on discharge and the onus is on the consignee/receiver of the cargo to take delivery as soon as possible. The risk of delays arising out of the demurrage/storage dispute, the delay in receipt of the original documents and a dispute between the seller and the buyer, falls on the consignee/receiver of the cargo.

The extensive delays being experienced in releasing containers from storage after discharge as a result of numerous causes must be borne in mind by the buyer/receiver. If that delay is being occasioned by a demand for demurrage or storage charges, the buyer should pay them under protest or secure them and take delivery as soon as possible.