GRENADA

IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)

Claim No. GDAHCV 1999/0199

ADMIRALTY ACTION IN REM AGAINST THE SHIP M. V. MARKAB

BETWEEN:

GEO. F. HUGGINS & COMPANY (GRENADA) LIMITED

Claimant

and

THE SHIP M. V. MARKAB

Defendant

Appearances:

Mr. Dickon A. Mitchell of Grant, Joseph & Co., for the Claimant
Mr. Anslem Clouden for the Defendant

2008: March 19

JUDGMENT

[1] **HENRY, J:** In this action in rem, the claimant claims against the ship M. V. Markab the sum of $22,907.77 for damage to cargo carried on board the said ship during its voyage from Trinidad to Grenada on or about 30th April, 1999, in addition to interest and costs.

[2] Pursuant to the agreed statement of facts filed by the parties, by Bill of Lading dated 29th April, 1999, 9415 bags of ordinary Portland cement in 42.5 kg bags were shipped from Claxton Bay Trinidad to St. Georges, Grenada. The Shipper was Trinidad Cement Limited of Claxton Bay, South Trinidad. The Consignee was Geo. F. Huggins & Co., Ltd. The ship arrived in Grenada on 30th April, 1999. In the process of off-loading the cement, the

claimant's clerk observed wet and hard cement on the ship. Of the 9415 bags shipped from Trinidad, 6685 bags were off-loaded and 2730 bags were left on board the ship. On May 3, 1999, the Captain and owner of the ship lodged a minute of protest in which he described the events that lead to the damage to the cargo.

[3] In the Minute of Protest, the Captain relates that the vessel left Claxton Bay, Trinidad on Thursday 29th April, 1999 at about 10:30 p.m., bound for Grenada with a crew of five men. According to him, at about 14:45hrs the vessel came through the first Bocas. At about 15:30 hrs the vessel started to experience heavy seas from the north-east which caused the vessel to list to the starboard side. He states that as a consequence water ran over the hatches. Sailing continued and the vessel arrived in Grenada at about 3:00 am on Friday 30th April,1999. Having arrived in Grenada, he inspected the hatches and found that some of the cargo on the starboard side of the vessel were wet. He thereafter carried out a full inspection which revealed damage to the cargo on the starboard side of the hatch. He concludes the Minute by giving notice of his intention to protest all loss and damage.

[4] The claimant submits that the Carriage of Goods by Sea Act Cap 43 of the Revised Laws of Grenada is inapplicable to the present facts, as the goods were not shipped from any port in Grenada to another port in or outside of Grenada; that the liability of the owner will have to be determined in accordance with the common law and further that the Minute of Protest lodged by the Master cannot operate to exonerate the defendant from liability for the damages claimed.

[5] Defendant, on the other hand, submits that the said Carriage of Goods by Sea Act does apply and that the defendant is exempted from liability under well accepted maritime practices and customary International Maritime Law.

[6] The applicability of the Carriage of Goods by Sea Act, Cap 43 of the Revised Laws of Grenada, is set out in section 3 of the Act. That section provides that the Act shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in Grenada to any other port whether in or outside of Grenada. In the

case at bar, the goods were shipped from Claxton Bay Trinidad to St. Georges, Grenada. Therefore, the said Act is not applicable to the present facts.

[7] The goods in question were shipped from Trinidad and evidenced by a bill of lading executed at Claxton Bay, Trinidad. Every bill of lading issued in Trinidad which contains or is evidence of a contract for the carriage of goods by sea from any port in Trinidad and Tobago to any other port, whether in or outside of Trinidad and Tobago, carries an express statement that it is to have effect subject to the provisions of the Rules of Trinidad's Carriage of Goods by Sea Act (See Section 4, Carriage of Goods by Sea Act Chap. 50:02, Laws of T&T). The Rules referred to are in reality the codification of The Hague Rules adopted at the International Conference on Maritime Law held at Brussels in October 1922. As of the time of shipment, Trinidad had not by then ratified the Brussels Protocol of 1968 amending the Hague Rules, commonly known as the Hague-Visby Rules which are scheduled to the COGSA of 1971.

[8] The broad objective of the Hague Rules has been expressed by Lord Steyn in the **Giannis K** [1978] C.C. 605, 221 as "intended to rein in the unbridled freedom of contract of owners to impose terms which were so unreasonable and unjust in their terms as to exempt from almost every conceivable risk and responsibility."

[9] Article 3 of the Hague Rules provides in part that the carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cold chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

[10] Article 4 provides:

"1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy and to secure that the ship is properly manned, equipped and supplied and to make the holds, refrigeration and cold chamber, and all other parts of the ship in which good are carried fit

and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article 3. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this Article.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

   (a) Act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship.
   (b) Fire, unless caused by the actual fault or privity of the carrier
   (c) Perils, dangers, and accidents of the sea or other navigable waters.
   (d) Act of God."

Article 3 Obligations

[11] Counsel for the defendant states, in his submissions, that the ship was sea worthy within the meaning of the Act; that the owner had discharged his obligation to ensure the preservation of the ship and cargo and that the cargo holds were properly sealed and made fast. These conclusions however, are not supported by facts. The agreed statement of facts and the Minute of Protest are both devoid of any reference to sea worthiness of the ship, or to what efforts, if any, were undertaken to ensure the preservation of the cargo. The minute merely recites that the ship left Claxton Bay Trinidad about 10:30pm on the date in question, with a crew of five men and a cargo of cement. Nothing is said of the sea worthiness of the vessel or as to the method used in securing the cargo.

[12] In **Steel v State Lines S.S. Co.** (1877) App. Cas. 72, 77, Lord Caims expressed the test in these words:

> "The ship should be in a condition to encounter whatever perils of the sea a ship of that kind, laden in that way, may be fairly expected to encounter."

[13] In the text Bills of Lading by Richard Aikens, Richard Lord and Michael Bools page 236, the authors note that while it is wrong to use the language of a "presumption" of unseaworthiness arising in certain factual circumstances, the court will draw inferences of fact and conclusions based on those inferences where appropriate.

[14] Lord Pearson in **Albacora v Westcott & Laurance Line** [1966] 2 Lloyd's Rep. 53 in considering the nature of the prima facie obligations under Article 3 stated:

> "It is not an obligation to achieve the desired result, i.e. the arrival of the goods in an undamaged condition at their destination. It is an obligation to carry out certain operations properly and carefully. The fact that goods acknowledged in the bill of lading to have been received on board in apparent good order and condition arrived at the destination in a damaged condition does not in itself constitute a breach of the obligation, though it may well be in many cases sufficient to raise an inference of a breach of the obligation. The cargo owner is not expected to know what happened on the voyage, and, if he shows that goods arrived in a damaged condition and there is no evidence from the ship owner showing that the goods were duly cared for on the voyage, the court may well infer that the goods were not properly cared for on the voyage."

[15 Under Article 3, the burden of proving due diligence is on the party claiming the exception. The facts stated in the Minute of Protest fail to demonstrate that the holds were fit and safe for the carriage of the goods in question or that the hatches were properly sealed during the voyage. All that is stated is that water ran over the hatches during heavy seas. The Carrier having failed to show that the goods were properly cared for, the Court can draw an inference that they were not. In addition, the carrier has failed to present an evidentiary basis to rebut such an inference.

<u>The Exceptions under Article 4</u>

[16] The defendant submits that he is exempted from liability since the conditions presented during the voyage amount to a peril at sea and that safe delivery of the cargo was made impossible by an act of God.

<u>Peril of the Sea</u>

[17] This exception cannot be invoked in cases where the reason that the peril of the sea operated was due to the carrier's negligence or breach of its Article 3 obligations. In terms of weather, only such weather which was unpredictable and unforeseeable would qualify. In **The Tilia Gorthon** [1985] 1 Lloyd's Rep. 552 Sheen J. stated:

"It seems highly probable that none of the deck cargo would have been lost but for the violence of the storm. But the evidence as to the weather has not satisfied me that the conditions encountered were such as could not and should not have been contemplated by the ship owners. Fortunately for mariners, winds of 48-55 knots (Beaufort force 10) are encountered infrequently. But they are by no means so exceptional in the North Atlantic in the autumn and winter that the possibility of encountering them can be ignored. A ship embarking on a voyage across the Atlantic Ocean at that time of year ought to be in a condition to weather such a storm."

[18] The authors of the text Bills of Lading at page 274 note that the approach taken by Sheen J is consistent with English law approach of restricting perils of the sea to something which could not be foreseen as one of the necessary incidents of the adventure and which are not attributable to the fault of anybody.

[19] On the facts presented here, the court is not satisfied that the conditions encountered by the ship M.V. Markab could not and should not have been contemplated by the ship owners. High seas between Trinidad and Grenada are hardly exceptional. Therefore the possibility of encountering them should have been anticipated. Therefore the facts as presented in the Minute of Protest and the agreed statement of facts do not fall under the exception of peril of the sea.

Act of God

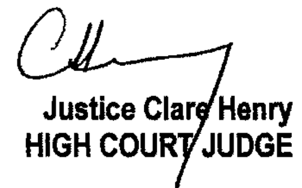
[20] This is one of the exceptions available at common law to a common carrier. The classic definition is found in the U.K. Court of Appeal decision of **Nugent v Smith** (1876) 1 C.P.D. 421, 444:

"The 'Act of God' is a mere short way of expressing this proposition. A common carrier is not liable for any accident as to which he can shew that it is due to natural causes directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected from him."

[22] Clearly, the defendant cannot succeed under this exception. Not only must it be shown that the incident was due directly and exclusively to natural causes but also that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected from him. This has not been shown by the carrier.

[23] The burden was on defendant to show that the damage occurred without want of due diligence on the part of the owner/carrier; that it was as a result of a peril of the sea or an Act of God. The defendant has failed to discharge that burden. Accordingly, the defendant is liable for the damage.

[24] Accordingly, judgment is granted for the claimant in the sum of $22,907.77 plus cost of $6,873.00.



Justice Clare Henry
HIGH COURT JUDGE