The "TAI PRIZE". "Shipped in apparent good order and condition". Who is representing what, and to whom?

Quadrant CHAMBERS

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Cases nearly always turn on their own facts. Particular findings of fact (in particular in arbitration, where there is of course no appeal on the facts), can lead to interesting issues of law, but also leave other questions, which might arise on slightly different facts, unanswered.

The very recent Court of Appeal decision in ***The 'TAI PRIZE"*** is a good illustration [2021] EWCA Civ 87.

It recapitulates well established principles in relation to the representations that are made, or are not made, by the cargo descriptions in bills of lading, but leaves open possible new arguments for the future.

The key findings (or non-findings) of fact made by the arbitrator were as follows:

» The cargo, of Brazilian soya beans, was not in actual good condition prior to and on shipping. Some beans had an excessive moisture content and there was already some heat damage.

» This constituted inherent vice in the cargo.

» The pre-existing damage was reasonably visible to the Shippers of the cargo as they would have had ample opportunity to inspect the cargo prior to loading.

» However, importantly, there was no finding that the Shippers in fact knew that the cargo was not in good condition prior to loading.

» During normal loading, the pre-existing damage was not reasonably visible to the Master and crew. The Master could have identified the poor condition of the cargo if he had regularly interrupted loading to inspect the beans, but this would not have been the usual loading procedure at the loadport.

» The Shippers/Charterers presented a draft Bill of Lading which (in the usual way) said that the cargo was in apparent good order and condition.

» The Master signed the Bill of Lading in those terms.

» The cargo arrived in China in a damaged condition.

The dispute in the English arbitration was between Disponent Owners and Charterers.

Headowners had been held liable to receivers (as the lawful holders of the Bill of Lading) in Chinese proceedings in respect of the damaged cargo. The basis of this decision was not clear (or, at least, there was no finding in the arbitral award, as to the basis of the Chinese decision).

The Headowners sought a contribution from Disponent Owners under the Inter-Club Agreement which was incorporated into the head-charterparty, and the Disponent Owners settled that claim.

Disponent Owners then sought to recover their liability to Headowners from Charterers.

The arbitrator found for Disponent Owners.

This was on the basis of two key findings:

» First, that the cargo was not in apparent good order and condition when shipped. The Court of Appeal noted that the basis of this finding was not clear from the Award. The arbitrator's reasoning might have been that the damage was reasonably visible to the Shippers prior to shipment; or it might have been that the damage would have been reasonably visible to the Master, if he had intermittently stopped loading to inspect the cargo.

» Secondly, that, on the facts, there an implied warranty made by Shippers (and thus Charterers, because they were responsible for the acts of Shippers) that the statements in the draft Bill of Lading presented for signature were true, because the Shippers could reasonably have ascertained the true facts whereas the Master could not. The Charterers were thus in breach of warranty, so that the Disponent Owners could recover.

The Award was overturned by HHJ Pelling in the Commercial Court, and his decision was upheld by the Court of Appeal.

The key holdings in the Court of Appeal were as follows.

First, for the purposes of the Bill of Lading, the cargo was in apparent good order and condition.

This follows from a long line of authorities stemming from ***The "Peter der Grosse"*** in 1875 and drawn together in ***The "David Agmashenebeli"*** [2003] 1 Lloyds' Rep 92 to the effect that:

» A statement in a bill of lading as to the apparent good order and condition of the cargo refers to its external condition, as would be apparent on a reasonable examination, "so far as met the eye";

» What amounts to a reasonable examination depends on the actual circumstances prevailing at the loadport. In particular, since the reasonable examination is that of the Master, the Master's responsibility is to take reasonable steps to examine the cargo, but "reasonable steps" do not require him to disrupt normal loading procedures;

» What matters is what would be apparent to the Master or other servants of the carrier, not what might be apparent to someone else, such as the shipper (who might have more opportunity to examine the cargo- as of course was the case on the instant facts);

» What matters is the apparent condition of the cargo at the time of shipment, not any other time;

» The statement is based upon the reasonable examination that the Master has, or should have, undertaken.

This meant that the arbitrator's finding that the cargo was not in apparent good order and condition was wrong in law. If she had been relying on the fact that the shippers could have discovered the damages, she was in error in law, because the test is what is reasonably apparent to the Master. If she had been relying on the fact that the Master could have discovered the damage if he had interrupted loading, she was in error in law, because the test does not require normal loading procedures to be disturbed.

Secondly, the presentation, by shippers, of a draft Bill of Lading for signature, does not, generally speaking, constitute a warranty or representation by shippers to the carrier that the facts stated in the draft Bill are true.

Rather, it is merely an invitation by the shippers to the carrier to make a representation to that effect, by signing the Bill in the terms presented.

If the carrier does not want to make that representation the Master should clause the Bill (having made his own reasonable examination, as discussed above).

(It is worth remembering that whether the cargo is in apparent good order and condition is judged against how it is described in the shippers' description in the Bill. For example, if the Master wishes to clause Bills, but the shippers require "clean" or unclaused Bills, it is possible for the shippers to amend the shippers' description of the goods in the Bills, to include the damage or other matters that the Master is concerned about. So, for example, a cargo described as "steel pipes" will not be in apparent good order and condition if the pipes are visibly rusty, but if they are described as "rusty steel pipes" they will be in good order and condition given that description, and the Master cannot clause the Bills thus presented: see ***The "Sea Success"*** [2005] 2 Lloyd's Rep 692.)

The decision of the Court of Appeal is relatively uncontroversial. Indeed, it might be thought perhaps slightly surprising that HHJ Pelling gave permission to appeal in the first place (as this was a s69 appeal, permission could not have been sought from the Court of Appeal, if HHJ Pelling had not granted permission himself).

However, some of the obiter observations raise interesting questions as to whether the outcome might have been different if there had been different findings of fact in the Award by the arbitrator.

Of particular note is the following passage in the judgment of Males LJ (paragraph 57):

"It is, perhaps, not impossible that the particular circumstances in which a draft bill of lading is tendered may amount to a representation of some kind by the shippers as to the condition of the cargo. In particular, I would wish to leave open the possibility that, by tendering a draft bill containing a statement that the cargo is in apparent good order

and condition, the shippers make an implied representation that they are not actually aware of any hidden defects or damage which, if known to the master, would mean that he could not properly sign the bill as tendered."

Males LJ pointed out that the Charterers had not put their case in that way, and the factual findings did not support the argument, because there was no finding that the Shippers were in fact aware that the cargo was actually in poor condition.

A number of interesting questions arise. For example:

» The ratio of the Court of Appeal decision (summarised at paragraph 77 of the decision) is that the words, *""CLEAN ON BOARD" and "SHIPPED in apparent good order and condition" in the draft bill of lading presented to the master did not amount to a representation or warranty by the shippers and/or Charterers as to the apparent condition of the cargo observable prior to loading; they were merely an invitation to the master to make a representation of fact in accordance with his own assessment of the apparent condition of the cargo on shipment"* (emphasis added). Given this ratio finding, that the stock words are merely an invitation to the Master to make a representation, it is hard to see how the implied representation suggested at paragraph 57 could get off the ground. Are unusual factual circumstances needed? If so, what might they be?

» If the argument does get off the ground, then what is the test for deciding whether there is an implied representation?

» Further, would the implied representation be limited to a representation that the Shippers actually believed the truth of the shippers' description, or could it extend to a representation that they had reasonable grounds for believing the truth of the description? (See cases such as ***Brown v Raphael*** [1958] Ch 636.)

There is also an interesting parallel with the question whether a party giving a contractual warranty impliedly represents that they believe that they will be able to comply with the warranty (an issue discussed in the recent decision of Foxton J in ***The 'C Challenger"*** [2020] EWHC 3448 (Comm)).

However, these, for now, remain questions for another day, in a different case, on different facts.

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John is an experienced and determined commercial advocate and has acted as lead Counsel in numerous Commercial Court trials, international and marine arbitrations and appellate cases, including two successful appearances in the Supreme Court, including the landmark shipping decision in ***Volcafe v CSAV***. He has also appeared as counsel in inquests and public enquiries.

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