

# CV SCHEEPVAARTONDERNEMING ANKERGRACHT V STEMCOR (A/SIA) PTY LTD (2007) 160 FCR 342

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## Facts

In late 2001 and early 2002 two consignments of steel coils were shipped from Japan to Australia by CV Scheepvaartonderneming Ankergracht ('carriers') on board the *MV Ankergracht* ('Ankergracht') and *MV Archangelgracht* ('Archangelgracht') at the request of Stemcor (A/sia) Pty Ltd ('shippers').

The consignments were manufactured in Japan for the shippers and each coil was enclosed in an individual steel casing. The coils were loaded onto the vessels at Yokohama and steamed to Sydney, although the *Archangelgracht* also took on additional cargo in Kobe. After the consignments were unloaded and transported to their final destination, it was discovered that the coils had suffered from corrosion damage.

## First Instance Decision

Emmett J of the Federal Court accepted evidence that the *Ankergracht* consignment had been loaded wet, and that timber dunnage (used to separate cargo in the hold) had also possibly been loaded wet. With respect to the *Archangelgracht* consignment, it was accepted that some cargo was loaded when wet and dunnage used could also have been wet. However, there was no evidence that the coils themselves were loaded whilst wet in that case. His Honour concluded that there was clearly water in the hold of each vessel when they left Yokohama and some additional water probably entered the *Archangelgracht*'s hold when it docked at Kobe. His Honour further found that additional water entered the hold of each vessel, in the form of water vapour, as a result of ventilation during the voyage to Australia.

It was argued whether the corrosion damage to the *Ankergracht* consignment was caused by water in liquid form present at the time of loading, or whether the corrosion was caused by water vapour. Based on expert evidence (which was not challenged on cross-examination) Emmett J found that the corrosion was caused by water vapour and not water in liquid form. On these facts, Emmett J found in favour of the shippers that the carriers were responsible for the damage to the consignments. His Honour's reasons follow.

## Application of the Amended Hague Rules

It was agreed that the contract of carriage between the carriers and the shippers was subject to the Amended Hague Rules (the Rules) as set out in Schedule 1A to the *Carriage of Goods by Sea Act 1991* (Cth) ('COGSA'). The legal consequence is that the Rules take effect as terms of the bill of lading between the carrier and the Shippers (ie, they have contractual rather than statutory force).

Article 3 rule 1 of the Rules provides that the carrier is 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; and
- (c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

Given the susceptibility of steel coils to corrosion if exposed to water, the Court found that the vessels were unseaworthy, as neither vessel employed dehumidifiers capable of removing water that entered the holds during loading or on cargo and dunnage. By failing to fit dehumidifiers, the carriers failed to exercise due diligence to make their vessels seaworthy and breached Article 3 rule 1 of the Rules.

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Article 3 rule 2 of the Rules provides that the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge goods carried. The Court combined the knowledge of sensitivity of steel coils to moisture and the absence of a dehumidification system and found that the carriers failed to carry, keep and care for the coils properly and carefully, constituting a breach of Article 3 rule 2 of the Rules.

The carriers sought to rely on a number of the exemptions provided for in Article 4 rule 2 of the Rules. In particular:

- Article 4 rule 2(i): act or omission of the shipper or owner of the goods, his agent or representative;
- Article 4 rule 2(m): inherent defect, quality or vice of the goods;
- Article 4 rule 2(n): insufficiency of packing;
- Article 4 rule 2(q): any other cause arising without the actual fault or privity of the carrier, or fault or neglect of the agents of servants of the carrier.

In reliance upon the above exclusions the carriers argued that: the packaging of the coils was insufficient to adequately protect the steel coils; the steel coils were already wet when loaded; and that ventilation only occurred when it was appropriate. Emmett J did not accept that any of those exceptions applied.

## **Appeal to the Full Court of the Federal Court of Australia**

On appeal, the Full Court of the Federal Court was comprised of Ryan, Dowsett and Rares JJ, who delivered judgment on 31 May 2007. The majority judgement was delivered by Ryan and Dowsett JJ. This judgment rejected the finding of Emmett J that the carriers had breached Article 3 rule 1, but agreed with many of the remaining findings made at first instance. Ultimately the appeal was dismissed, as the Court found that the carriers had breached Article 3 rule 2. Rares J delivered a dissenting opinion, supporting the finding of Emmett J that the carriers had breached their obligation under Article 3 rule 1 by not fitting the dehumidifiers. Rares J also dismissed the appeal.

### **Article 3 Rule 1**

When defining the obligation owed by the carrier under Article 3 rule 1, the Court referred to the judgment delivered by Gaudron, Gummow and Hayne JJ in the High Court in the case of *The Bunga Seroja*.<sup>1</sup> That judgment referred to three factors which are involved in establishing a breach under Article 3 rule 1:

- 1 The time of the obligation operates ‘before and at the beginning of the voyage’ (meaning that the carrier’s obligations cover the period from the start of loading, until a vessel leaves the dock, but not beyond that time).
- 2 The obligation to make a vessel seaworthy is not an absolute obligation, as it was previously under the common law. Under COGSA<sup>2</sup> and the Rules the obligation is to exercise due diligence to make the vessel seaworthy.
- 3 Seaworthiness is not a fixed standard. Instead, the level of seaworthiness required will depend on a range of factors, including the conditions the vessel will encounter and the cargo to be carried. In addition, this standard of fitness is not unchanging and the standard will rise with improved knowledge of shipbuilding and navigation.

The Court held that, to find either vessel unseaworthy at the beginning of the voyage, the shippers would have to show that it was not equipped to reach its destination safely, or that it was unable to carry its cargo safely to that destination. There was no allegation that the vessels could not reach their destination safely. Therefore, the only consideration was whether they were fit to transport the cargo of steel in question. In the judgment by Emmett J at first instance his Honour found that, given the likelihood of water entering the holds during loading, to

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<sup>1</sup> *Great China Metal Industries Company Ltd v Malaysian International Shipping Corporation Berhad (The Bunga Seroja)* (1998) 196 CLR 161 at [27]-[31].

<sup>2</sup> *Carriage of Goods by Sea Act 1991* (Cth), s17.

exercise due diligence the carriers would have been required to install dehumidifiers to make the vessel seaworthy.

Ryan and Dowsett JJ rejected the conclusions of Emmett J, finding at paragraph 85 that the chance that moisture might enter the hold during loading was insufficient to show that the vessel was unseaworthy. Their Honours stated:

In our view, given the absence of evidence of any practice of installing and using dehumidifiers, the duty of due diligence could only have required such a step if the vessel and its crew might not otherwise be able to deal with the problem.

There was a mechanism for removing moisture from the hold, namely the wiping and mopping of water by the crew. Whilst their Honours agreed that this method might not have been effective for removing all the water, they considered it might have been sufficient to bring moisture below the critical level where condensation would form. Their Honours found at paragraph 87 that there was insufficient evidence to make a finding of unseaworthiness, and that a discussion of whether due diligence was exercised was therefore unnecessary.

In his dissenting opinion, Rares J concurred with Emmett J that a lack of dehumidifiers rendered the vessel unseaworthy for the carriage of the steel coils, and that the carriers had therefore breached their duty under Article 3 rule 1. In making this finding, Rares J discussed at paragraph 222 the fact that this cargo required special treatment to protect it from corrosion, and that the carriers knew, or ought to have known, this fact. Rares J found that the carriers failed to exercise their duty of due diligence, because the amount of water in the holds at the time the vessels were loaded was sufficiently significant that condensation occurring during the voyage was virtually inevitable; and that the risk of this occurring could have been avoided through the use of dehumidifiers.

## Article 3 Rule 2

The Court highlighted at paragraph 84 the difference between rules 1 and 2 of Article 3. As mentioned above, Article 3 rule 1 requires that the carrier provide a seaworthy vessel, which includes that the vessel be cargoworthy, before and at the start of the voyage. In contrast, Article 3 rule 2 requires that the carrier properly and carefully handle the cargo *throughout* the voyage.

The Court cited *Albacora Srl v Westcott & Laurance Line Ltd*<sup>3</sup> when considering the effect of the word ‘properly’ on this obligation, and the judgment of Lord Pearson was quoted as reflecting the current position: ‘The word “properly” adds something to “carefully, if “carefully” has a narrow meaning of merely taking care. The element of skill or sound system is required in addition to taking care.’<sup>4</sup>

The shippers argued that the carriers had breached their duty under Article 3 rule 2, by failing to ventilate in accordance with accepted proper practice.

Ventilation is a normal incident during a voyage. However, before ventilating, it is important to determine temperature and moisture levels both inside and outside the hold. This data needs to be monitored as the conditions inside and outside the holds are often different and the admission into the hold of air that is warmer or contains more moisture tends to cause condensation to form. Emmett J concluded ventilation should generally only occur when the air dew point temperature outside the hold is lower than that inside the hold. This is a simplification, as it is often difficult to determine the temperature accurately inside the hold, because the temperature can vary in different areas of the hold. Based on the available facts and the damage to the steel coils caused by corrosion, Emmett J determined that ventilation should not have occurred on either vessel, and that such ventilation as occurred was capable of causing condensation. On appeal the carriers did not pursue any challenge to that finding, and Ryan and Dowsett JJ saw no reason to disturb the judgment of Emmett J on this point.

Rares J gave additional consideration to the matter of ventilation. His Honour found that the carriers did not necessarily fail to follow proper practice. However, the cargo was ventilated when it should not have been necessary, but for the moisture already in the hold. At paragraph 268 Rares J found that the imprecision of the

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<sup>3</sup> *Albacora Srl v Westcott & Laurance Line Ltd* [1966] 2 Lloyd’s Rep 53.

<sup>4</sup> *Ibid*, 64.

procedure for determining when to ventilate meant that ventilation was not ‘in accordance with a sound system’, and, as such, the carriers did not ‘properly care’ for the cargo, citing the definition in *Albacora*.

## Article 4 Rule 2 Exemptions

The carriers argued that the fact that water vapour was able to penetrate the packaging of the steel coils demonstrated that the packaging was insufficient. The carriers further stated in submissions that this should be assessed without reference to established practice or the general state of knowledge in the industry. The Court rejected that viewpoint, stating the submission was ‘impossible to accept’. Such an assertion would indicate that packing would only be sufficient if it was capable of protecting the goods from all conceivable damage. The Court held that was not the intention of the drafters of Article 4.

The judgment of Ryan and Dowsett JJ recognised that there is little direct authority in the case law on this issue, but pointed to the judgments in *Silver v Ocean Steamship Company*<sup>5</sup> and *The Bunga Seroja* (at first instance).<sup>6</sup> These cases indicate that sufficiency of packaging can be assessed by reference to usual methods of conveyance for world-wide voyages. The Court found that, using this standard as a baseline for comparison, it was open to the carriers to argue a failure by the shippers to sufficiently package the goods. Alternatively, the shippers could argue that it had sufficiently packaged the goods, by reference to the same standard. However, their Honours found at paragraph 117 that the onus of proof ultimately lay with the carriers to prove insufficiency of packaging, as it was the carriers who sought to rely upon that exemption. Ryan and Dowsett JJ were unwilling to accept that there was a basis for attributing corrosion to any insufficiency of packaging. They held that packaging was only required to be reasonable and sufficient and was not expected to be able to protect the goods from every conceivable danger.

Rares J went further in his consideration of the insufficiency of packaging argument. In particular, the carriers had issued a clean bill of lading and accepted that the goods were in apparent good order and condition for carriage by sea. At paragraph 284 his Honour noted that the carriers were not entitled to rely on the packaging being completely waterproof, because there was no representation that the packaging was waterproof. In contrast, the packaging expressed a warning that the goods were to be kept dry. In addition to this, the carriers knew, or should have known, that the steel coils were susceptible to damage if exposed to water. On this basis, the carriers could not rely on an exemption for insufficient packaging.

## Outcome of the Court of Appeal Decision

In response to this decision the carriers sought special leave to appeal to the High Court. This application was dismissed with costs on 8 November 2007.

The outcome at first instance and the dissenting opinion of Rares J in the Court of Appeal would have caused carriers some concern, as those judgments sought significantly to increase the obligations of a carrier to ensure that a vessel is seaworthy and in particular cargoworthy. The conclusions reached by Emmett J regarding seaworthiness represented a swing back towards the absolute obligation of seaworthiness under the common law. The requirement that the vessels had to fit dehumidifiers to be seaworthy represented a costly exercise, and one which was not necessarily common practice.

The majority of the Court of Appeal did not require the same level of obligation from the carriers in respect of seaworthiness. However, Ryan and Dowsett JJ found that the carriers had breached their obligation to the shippers to carefully carry the goods by allowing moisture to enter the holds, resulting in corrosion damage to the goods. This, when combined with the finding that the packaging did not have to protect the goods from all conceivable dangers, is significant, because it gives greater protection to shippers.

Despite the fact that Australia is largely a nation of shippers, cargo disputes are often resolved in favour of carrier interests. This judgment tips the balance back towards shipper interests, as they may now rely to a greater extent on the carrier’s obligation to care for goods whilst they are in transit.

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<sup>5</sup> [1930] KB 416, 421 per Scrutton LJ.

<sup>6</sup> *Great China Metal Industries Company Ltd v Malaysian International Shipping Corporation Berhad (The Bunga Seroja)* [1994] 1 Lloyd’s Rep 455.