

# THE PERENNIAL QUESTION — THE BURDEN OF PROOF IN CARGO CLAIMS UNDER THE HAGUE RULES: *Volcafe Ltd v Cia Sud Americana de Vapores SA* [2019] AC 358

Joshua McKersey\*

## 1 Introduction

Lord Sumption JSC's judgment in *Volcafe Ltd v Cia Sud Americana de Vapores SA* began by observing that it was 'strange that a species of litigation which has generated reported decisions over four centuries should not yet have returned a definitive answer' to the question of the burden of proof in cargo claims.<sup>1</sup> His Lordship proffered that this was likely due to the fact that the burden of proof is 'very rarely' determinative per se in cases before the courts: '[t]he trial judge is usually able to find some persuasive evidence, however exiguous, to break the impasse'.<sup>2</sup> In the present case, however, there was no such evidence, and his Lordship turned to the law of bailment to surmount the impasse. Indeed, so far as English law is concerned, the judgment that followed is said to have 'restored bailment to a central position in [the] carriage of goods by sea'.<sup>3</sup> While *Volcafe* does not settle the law in Australia, the judgment does provide a 'persuasive authority in the rich vein of authorities to mine in the search for the right answer'.<sup>4</sup>

## 2 Facts

The six claimants were the owners and holders of bills of lading of a cargo of Colombian green coffee beans shipped on nine separate consignments from Buenaventura, Colombia, to Bremen, Germany, from 14 January 2012 to 6 April 2012 on vessels owned by the defendant carrier.<sup>5</sup> The coffee was bagged in 70kg hessian bags and stowed in 20 dry, unventilated 20-foot containers, with 275 bags to each container.<sup>6</sup> Each consignment was covered by a bill of lading on LCL/FCL (less than full container load/full container load) terms, which rendered the carrier contractually responsible for preparing the containers for the voyage and filling or 'stuffing' the bags into each.<sup>7</sup> The bills of lading were subject to English law and, by a clause paramount in Condition 2,<sup>8</sup> incorporated the Hague Rules<sup>9</sup> into the contract of carriage.<sup>10</sup>

When the containers were unpacked in Bremen, 18 containers were found to contain bags that had been damaged by water.<sup>11</sup> The number of damaged bags in each container varied, but the damage was relatively minor as a proportion of the total shipment and in financial terms.<sup>12</sup> It was agreed between the parties that the total loss caused by the water damage was US\$62,500, which was only 2.6% of the overall value of the consignments.<sup>13</sup> At trial, the deputy judge found that the bags had been wet as a consequence of moisture in warm air rising from the bags and, on contact with the cool roof of the container, condensing and falling onto the bags on top of the stow and running down the sides of the container.<sup>14</sup>

In the Supreme Court, Lord Sumption JSC summarised the background facts that were essentially common ground at trial:<sup>15</sup>

---

\* BBusMan, LLB (Hons) (University of Queensland), Student Editor of the *Australian and New Zealand Maritime Law Journal*, and Research Clerk, MinterEllison. All views expressed in this work are my own, as are all errors.

<sup>1</sup> *Volcafe Ltd v Cia Sud Americana de Vapores SA* [2019] AC 358, 368 [1] ('*Volcafe*').

<sup>2</sup> *Ibid.*

<sup>3</sup> Paul Todd, 'The Hague Rules and the Burden of Proof' [2019] *Lloyd's Maritime and Commercial Law Quarterly* 183, 183.

<sup>4</sup> Justice Angus Stewart, 'The Fluctuating Incidence of the Burden of Proof under the Hague-Visby Rules: The Implications of *Volcafe v CSAV* [2019] AC 358 for the Position in Australia' (Richard Cooper Memorial Lecture, Federal Court of Australia, Brisbane, 24 October 2019) 18–20.

<sup>5</sup> *Volcafe* (n 1) 368 [2] (Lord Sumption JSC).

<sup>6</sup> *Volcafe Ltd v Cia Sud Americana de Vapores SA* [2017] QB 915, 923 [2] (Flaux J) ('*Volcafe*').

<sup>7</sup> *Volcafe* (n 1) 368 [3] (Lord Sumption JSC). See also *Volcafe Ltd v Cia Sud Americana de Vapores SA* [2015] 1 Lloyd's Rep 639, 641 [5] (David Donaldson QC) ('*Volcafe*').

<sup>8</sup> *Volcafe* (n 7) 642 [7] (David Donaldson QC).

<sup>9</sup> *International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, and Protocol of Signature*, opened for signature 25 August 1924, 120 LNTS 187 (entered into force 2 June 1931) ('Hague Rules').

<sup>10</sup> *Volcafe* (n 1) 368 [3] (Lord Sumption JSC).

<sup>11</sup> *Ibid.* 369 [3] (Lord Sumption JSC).

<sup>12</sup> *Volcafe* (n 6) 923 [4] (Flaux J).

<sup>13</sup> *Ibid.*

<sup>14</sup> *Volcafe* (n 7) 646–8 [26]–[39] (David Donaldson QC).

<sup>15</sup> *Volcafe* (n 1) 368–9 [3].

Coffee is a hygroscopic cargo. It absorbs, stores and emits moisture. It can be carried in ventilated or unventilated containers. In 2012 both types of container were in widespread use for the carriage of bagged coffee, and the shippers had specified unventilated containers for these consignments. The use of unventilated containers is cheaper, but if they are used to carry coffee beans from a warm climate to a cooler climate, as they were in this case, the beans will inevitably emit moisture which will cause condensation to form on the walls and roof of the container. This makes it necessary to protect the coffee from water damage by dressing the containers, ie lining the roof and walls with an absorbent material such as cardboard, corrugated paper or 'kraft' paper. The use of kraft paper was a common commercial practice in 2012, and it was employed in this case.

### 3 Litigation History

The claimants commenced proceedings in the London Mercantile Court in the 'standard'<sup>16</sup> or 'traditional'<sup>17</sup> form of a cargo claim. The claimants pleaded that the carrier breached its duties as bailee by failing to deliver the cargoes in the same good order and condition as that in which they were deposited for shipment.<sup>18</sup> In the alternative, the claimants pleaded that the carriers had failed to properly and carefully load, handle, stow, carry, keep, care for, and discharge the cargoes in breach of art III r 2 of the Hague Rules.<sup>19</sup> The claimants particularised the carrier's negligence as, inter alia, the carrier's failure to use adequate or sufficient kraft paper to protect the coffee bags from condensation.<sup>20</sup> The carrier joined issue on these points, and pleaded that the damage had been caused by an excepted peril — the inherent vice of the cargoes — under art IV r 2(m) of the Hague Rules.<sup>21</sup> The gist of the inherent vice argument was that the beans were unable to withstand the ordinary amount of condensation that formed in containers during voyages from warm to cool climates.<sup>22</sup> In reply, the claimants pleaded that any inherent qualities of the cargo only engendered damage because of the carrier's negligence in failing to take proper measures to protect the cargo.<sup>23</sup>

While there were various legal and factual issues at first instance and before the Court of Appeal, for the purpose of discussing the judgment in the Supreme Court, the essential point to note in respect of the judgments below is the disagreement between the London Mercantile Court and the Court of Appeal on critical findings of fact. At trial, the deputy judge found that the evidence did not establish the thickness of the kraft paper that was employed by the carrier, nor the number of layers that were employed.<sup>24</sup> The deputy judge also found that the evidence did not establish what thickness of paper ought to have been used, nor a general practice as to the appropriate method of lining an unventilated container to avoid condensation damage.<sup>25</sup> While the Court of Appeal set aside the findings of the deputy judge and made positive findings of its own,<sup>26</sup> the Supreme Court, in turn, set aside the findings of the Court of Appeal and reinstated the facts as found at trial.<sup>27</sup>

In these circumstances — viz, a dearth of evidence relevant to the amount of kraft paper the carrier ought to have used, and did in fact use — the incidence of the burden of proof under the relevant articles of the Hague Rules was critical to the outcome of the appeal.

### 4 Judgment of the Supreme Court

Lord Sumption JSC, with whom the rest of the Court agreed, gave judgment in the case. His Lordship stated the two issues on appeal to be concerned, respectively, with the burden of proof under art III r 2 and art IV r 2(m) of the Hague Rules. In relation to art III r 2, his Lordship phrased the issue as follows: 'Does the cargo owner bear the legal burden of proving [a] breach of that article, or is it for the carrier, once loss or damage to the cargo has been ascertained, to prove compliance?'<sup>28</sup> In relation to art IV r 2(m), the issue was whether, once the carrier had proved the facts that brought the case within the exception, it was 'for the cargo owner to prove that it was the negligence of the carrier which caused the excepted peril ... to operate on the cargo'.<sup>29</sup> Lord Sumption JSC resolved the appeal in favour of the claimant cargo owners in four distinct steps, which are detailed below.

<sup>16</sup> Ibid 369 [4] (Lord Sumption JSC).

<sup>17</sup> *Volcafe* (n 6) 923 [5] (Flaux J).

<sup>18</sup> *Volcafe* (n 1) 369 [4] (Lord Sumption JSC).

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid 369 [5] (Lord Sumption JSC).

<sup>25</sup> Ibid. See also *Volcafe* (n 7) 649 [49] (David Donaldson QC).

<sup>26</sup> The Court of Appeal found that there was a practice of lining container surfaces with a particular amount of kraft paper, and that the carrier had lined the containers in accordance with that practice: *Volcafe* (n 6) 950 [78], 952 [88]–[89] (Flaux J).

<sup>27</sup> See Section 4.4 *infra*.

<sup>28</sup> *Volcafe* (n 1) 373 [13].

<sup>29</sup> Ibid.

## 4.1 The Carriage of Goods by Sea at Common Law

Lord Sumption JSC first examined the nature of the carrier's obligations at common law. According to his Lordship, this exercise was necessary because, first, the common law forms an 'essential part of the legal background' against which the Hague Rules were drafted and, secondly, the common law position was considered in a number of 'influential' authorities.<sup>30</sup>

Lord Sumption JSC considered that, at common law, the carrier generally stands in the same position as a bailee for reward, although the carrier's liability may be modified by the terms of the bill of lading.<sup>31</sup> In his Lordship's analysis, two principles of the common law of bailment were 'fundamental'.<sup>32</sup> First, a bailee's duty is to take reasonable care of the goods; 'a bailee of goods is not an insurer'.<sup>33</sup> In stating this principle, his Lordship observed that the notion of 'common carriers', whose liability for loss or damage to goods was strict, was effectively 'extinct' as a category of liability of shipowners.<sup>34</sup> Secondly, the bailee bears the legal burden of proving the absence of negligence.<sup>35</sup> The bailee 'need not show exactly how the injury occurred, but he must show either that he took reasonable care of the goods or that any want of reasonable care did not cause the loss or damage sustained'.<sup>36</sup> His Lordship cited a string of English cases (*Dollar v Greenfield*,<sup>37</sup> *Morison, Pollexfen & Blair v Watson*,<sup>38</sup> and *The Ruapehu*)<sup>39</sup> for the proposition that this principle applied equally to the carriage of goods by sea.<sup>40</sup>

In concluding this analysis, his Lordship stated that there was no significant dispute about these principles on appeal, the 'real issue' being whether the burden of proof was 'different in a modern contract for carriage by sea incorporating the Hague Rules'.<sup>41</sup>

## 4.2 The Burden of Proof under Article III Rule 2 of the Hague Rules

Lord Sumption JSC then turned to consider the issue of the burden of proof under art III r 2 of the Hague Rules. The carrier argued that the burden of proving a breach of art III r 2 lay upon the cargo owner.<sup>42</sup> This argument, as recounted by his Lordship, rested on three central propositions:<sup>43</sup>

- (i) the Hague Rules constitute a complete code governing the care of the cargo; (ii) an international Convention such as the Hague Rules should not be construed in the light of particular features of English law or any other domestic system of law; and (iii) article III, rule 2 of the Hague Rules, by imposing an obligation to take reasonable care of the cargo, displaces the English law rule about the burden of proof, because as a general rule he who asserts must prove.

According to his Lordship, each of these propositions were 'fallacious'.<sup>44</sup> As to the first proposition, his Lordship considered that the Hague Rules, only having effect in this case by reason of their incorporation into the contract of carriage, were not a codification of the matters relevant to the carrier's legal obligations toward the cargo.<sup>45</sup> Save for some articles that deal specifically with the burden of proof, the Hague Rules are concerned 'almost exclusively' with the standard of performance required by the carrier's obligations.<sup>46</sup> The law of evidence and the rules of procedure are matters that, under orthodox principles of private international law, fall within the exclusive purview of the *lex fori*.<sup>47</sup>

As for the second proposition, Lord Sumption JSC stated that the 'well established' principle that contractual provisions derived from international conventions should be construed in the light of the need for international

---

<sup>30</sup> Ibid 370 [7] (Lord Sumption JSC).

<sup>31</sup> Ibid 370–1 [8]–[9].

<sup>32</sup> Ibid 370 [8].

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid 370 [9] (Lord Sumption JSC).

<sup>36</sup> Ibid.

<sup>37</sup> The Times, 19 May 1905 (House of Lords).

<sup>38</sup> (House of Lords, 10 May 1909).

<sup>39</sup> (1925) 21 Ll L Rep 310.

<sup>40</sup> *Volcafe* (n 1) 370–1 [9].

<sup>41</sup> Ibid 372 [11].

<sup>42</sup> Ibid 373 [14] (Lord Sumption JSC).

<sup>43</sup> Ibid 373–4 [14] (Lord Sumption JSC).

<sup>44</sup> Ibid 374 [14].

<sup>45</sup> Ibid 374 [15].

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

uniformity, and not by reference to entirely domestic legal principles, was of no moment in this case.<sup>48</sup> This followed from his Lordship's earlier conclusions that the Hague Rules do not deal with the burden of proof, except in specific instances, and that, in any event, the common law principles concerning the burden of proof in the context of bailment find analogous principles in Scots law and in the law of many civil law jurisdictions.<sup>49</sup>

As for the third proposition, Lord Sumption JSC considered that the carrier's argument was based on the 'misconception' that bailees at common law were under a strict obligation to redeliver undamaged goods, while art III r 2 only imposed on carriers an obligation to take reasonable care.<sup>50</sup> His Lordship stated that, in the light of his earlier conclusion that a bailee is obligated to take reasonable care of the bailed goods, the analogous duty imposed by art III r 2 is consistent with the carrier also bearing the legal burden of disproving negligence.<sup>51</sup>

Lord Sumption JSC thus rejected the carrier's argument and considered that, 'in principle', where cargo is shipped in apparent good order and condition, the carrier bears the burden of proving that damage to the cargo was not caused by a breach of its obligation under art III r 2.<sup>52</sup> His Lordship then proceeded to consider whether the authorities pertaining to the Hague Rules illuminated a different rule to this 'in principle' position.<sup>53</sup> The answer, in short, was 'no'. After considering the relevant case law (*Gosse Millard Ltd v Canadian Government Merchant Marine Ltd*,<sup>54</sup> *Silver v Ocean Steamship Co Ltd*,<sup>55</sup> *The Torenia*,<sup>56</sup> and *Homburg Houtimport BV v Agrosin Private Ltd*)<sup>57</sup> his Lordship expressed the 'true rule' as follows:<sup>58</sup>

the carrier must show *either* that the damage occurred without fault in the various respects covered by article III, rule 2, *or* that it was caused by an excepted peril. If the carrier can show that the loss or damage to the cargo occurred without a breach of the carrier's duty of care under article III, rule 2, he will not need to rely on an exception.

In conclusion on art III r 2, Lord Sumption JSC opined that the dicta of the House of Lords and the High Court of Australia in *Albacora SRL v Westcott & Laurance Line Ltd*<sup>59</sup> and *Great China Metal Industries Co Ltd v Malaysian International Shipping Corp Bhd*<sup>60</sup> respectively were, 'so far as they suggest that the cargo owner has the legal burden of proving a breach of article III, rule 2 ... mistaken'.<sup>61</sup>

### 4.3 The Burden of Proof under Article IV Rule 2 of the Hague Rules

Lord Sumption JSC subsequently turned to the issue of the burden of proof under art IV r 2(m) of the Hague Rules. The carrier argued that once the carrier had proven the facts that established an exception, the cargo owner bears the burden of proving that it was only the carrier's negligence that had caused those facts to eventuate.<sup>62</sup> His Lordship noted first that it was well-established, and indeed common ground between the parties, that the carrier bears the burden of establishing any exceptions,<sup>63</sup> before proceeding to analyse the 'sheet-anchor' of the carrier's case:<sup>64</sup> the decision of the English Court of Appeal in *The Glendaroch*.<sup>65</sup>

In Lord Sumption JSC's analysis, the carrier's reliance on *The Glendaroch* was misplaced. Lord Sumption JSC disagreed with the Court of Appeal's distinction, for the purpose of allocating the burden of proof, between the existence of facts giving rise to an excepted peril and the causative effect of the peril.<sup>66</sup> His Lordship considered that the basis of the Court of Appeal's decision was 'technical, confusing, immaterial to the commercial purpose of the exception and out of place in the context of the Hague Rules'.<sup>67</sup> While it may have been justifiable in relation to the bill of lading before the Court of Appeal in that case, 'as the source of a general rule governing the

<sup>48</sup> Ibid 374 [16].

<sup>49</sup> Ibid 374–5 [16].

<sup>50</sup> Ibid 375 [17].

<sup>51</sup> Ibid.

<sup>52</sup> Ibid 375 [20].

<sup>53</sup> Ibid 375–6 [20].

<sup>54</sup> [1927] 2 KB 432.

<sup>55</sup> [1930] 1 KB 416.

<sup>56</sup> [1983] 2 Lloyd's Rep 210.

<sup>57</sup> [2004] 1 AC 715.

<sup>58</sup> *Volcafe* (n 1) 377 [25] (emphasis in original).

<sup>59</sup> [1966] 2 Lloyd's Rep 53 ('*Albacora*').

<sup>60</sup> (1998) 196 CLR 161.

<sup>61</sup> *Volcafe* (n 1) 378 [27].

<sup>62</sup> Ibid 378–9 [28] (Lord Sumption JSC).

<sup>63</sup> Ibid 378 [28].

<sup>64</sup> Ibid 380 [31].

<sup>65</sup> [1894] P 226.

<sup>66</sup> *Volcafe* (n 1) 380–1 [31]–[32]. In *The Glendaroch* (n 65), the Court of Appeal was concerned with, relevantly, a contractual exception in analogous terms to the exception for perils of the sea under art IV r 2(c) of the Hague Rules.

<sup>67</sup> *Volcafe* (n 1) 381 [33].

burden of proof, it should no longer ... be regarded as good law'.<sup>68</sup> Consequently, his Lordship considered that the carrier bears the legal burden of disproving negligence for the purpose of engaging an exception under art IV r 2.<sup>69</sup>

Lord Sumption JSC went on to consider that, even if *The Glendarroch* was correct vis-à-vis the perils of the sea exception, it was inapplicable to the exception for inherent vice. This was because, in the context of the inherent vice exception, no distinction can be made between the existence of an inherent vice and the standard of care required of the carrier.<sup>70</sup> Citing *Albacora*, his Lordship opined that the existence of an inherent vice depended on the standard of care contracted for:<sup>71</sup> by way of amplification, 'the mere fact that coffee beans are hygroscopic and emit moisture as the ambient temperature falls may constitute inherent vice if the effects cannot be countered by reasonable care in the provision of the service contracted for, but not if they can and should be'.<sup>72</sup> Therefore, so far as the exception for inherent vice under art IV r 2(m) is concerned, 'the carrier must show either that he took reasonable care of the cargo but the damage occurred none the less; or else that whatever reasonable steps might have been taken to protect the cargo from damage would have failed in the face of its inherent propensities'.<sup>73</sup>

#### 4.4 The Judgment of the Court of Appeal

In the final stage, Lord Sumption JSC turned to consider the judgment of the Court of Appeal. It followed from his Lordship's earlier exposition of the law that the Court of Appeal's analysis of the burden of proof under art III r 2 — viz, that the cargo owner bears the legal burden of proving a breach of art III r 2 — was wrong.<sup>74</sup> The same can be said in relation to the Court of Appeal's conclusions in relation to art IV r 2(m), that the carrier bears the burden of proving that there is an inherent vice of the cargo and the cargo owner bears the burden of proving that the carrier failed to take reasonable care with the cargo.<sup>75</sup> As noted above, his Lordship also reinstated the findings of fact made by the deputy judge at trial, on the basis that the Court of Appeal had not satisfied itself that the findings were 'wrong'.<sup>76</sup>

In disposing of the appeal, Lord Sumption JSC held that '[i]n the absence of evidence about the weight of the paper employed, it must follow that the carrier has failed to prove that the containers were properly dressed'.<sup>77</sup> Therefore, in the light of his Lordship's analysis, the carrier was in breach of art III r 2 and could not invoke the exception under art IV r 2(m). His Lordship consequently allowed the appeal and restored the orders of the deputy judge in favour of the claimant cargo owners.<sup>78</sup>

### 5 Conclusion

Lord Sumption JSC's lucid pronouncements on the burden of proof under art III r 2 and art IV r 2(m) of the Hague Rules bring welcome clarity to a tempestuous area of maritime law.<sup>79</sup> His Lordship's judgment has, however, attracted criticism. Speaking extra-curially, Justice Stewart of the Federal Court of Australia criticised Lord Sumption JSC's analysis on the basis that bailment was inapt as a tool of analysis vis-à-vis the Hague Rules, since not every carrier bound by art III r 2 is a bailee, and that Lord Sumption JSC's aversion to interpreting the Hague Rules with regard to international uniformity was dubious.<sup>80</sup> In practical terms, while the judgment may be welcomed by cargo interests, it has been said that carriers and shipowners will have much greater difficulty defending cargo claims, and may need to revise the way defences to cargo claims are pleaded in English courts.<sup>81</sup> Criticisms aside, English law now has a definitive authority on an issue that has vexed the Hague Rules since their inception.

---

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid* 381–2 [34] (Lord Sumption JSC).

<sup>71</sup> *Ibid* 381–3 [34]–[36].

<sup>72</sup> *Ibid* 382 [34].

<sup>73</sup> *Ibid* 383 [37].

<sup>74</sup> *Ibid* 383 [39].

<sup>75</sup> *Ibid* 383–4 [39] (Lord Sumption JSC).

<sup>76</sup> *Ibid* 384–5 [40]–[42].

<sup>77</sup> *Ibid* 386 [43].

<sup>78</sup> *Ibid* 386 [44].

<sup>79</sup> See Todd (n 3) 188–9.

<sup>80</sup> Justice Angus Stewart, 'The Fluctuating Incidence of the Burden of Proof under the Hague-Visby Rules: The Implications of *Volcafe v CSAV* [2019] AC 358 for the Position in Australia' (Richard Cooper Memorial Lecture, Federal Court of Australia, Brisbane, 24 October 2019) 18–20.

<sup>81</sup> See Stephen Girvin, 'English Shipping Law' [2019] *International Maritime and Commercial Law Quarterly* 64, 106–7.