

[3] When Cap Preston arrived in Japan the containers were unloaded and stored but they were not cleared customs for eight days due to a delay in health certificates arising. When the container was opened by the buyer much of the meat was found to have deteriorated. It was smelling, and the whole container was rejected.

[4] The four temperature monitors placed inside four separate cartons within the container duly recorded that the temperature of the meat in the container had increased to +1°C before the containers were loaded on board the vessel Cap Preston on 2 June 2009. The temperature also spiked on several occasions before the container was emptied.

[5] The quantum of the appellant's loss as a result of the rejection is NZ\$108,012.27.

[6] GVI does not dispute its liability to Goat NZ for the loss of the cargo. But it says it was liable for the loss under the Carriage of Goods Act 1979 and therefore its liability was limited to \$1,500. This was its only defence. It is agreed that if GVI cannot bring itself within the terms of the Carriage of Goods Act then it will be liable for the full figure of \$108,012.27.

[7] The District Court (Judge M-E Sharp) on 20 June 2011 rejected GVI's argument that the Act applied and so found it liable for the full amount. This is an appeal against that decision.

[8] The Carriage of Goods Act applies only to domestic carriage in New Zealand. It does not extend to GVI's responsibility for the off-shore leg of the transportation of the container from New Zealand to Japan.

[9] Counsel are agreed that the question is whether or not s 9(1) applies. Section 9(1) provides:

9 Liability of contracting carrier

(1) Subject to the other provisions of this Act, a contracting carrier is liable as such to the contracting party for the loss of or damage to any goods occurring while he is responsible for the goods in accordance with the

succeeding provisions of this section, whether or not the loss or damage is caused wholly or partly by him or by any actual carrier.

[10] It may be noticed immediately that s 9(1) draws a clear distinction between the loss or damage of any goods, on the one hand, and whether or not the loss or damage is caused wholly or partly by the contracting carrier, or by any actual carrier on the other.

[11] This distinction is reinforced by the scheme of the Act. The scheme of the Act is to impose absolute liability on the contracting party (GVI) obviating the need for an examination of whether or not GVI is the cause of the damage in whole or in part, but, in return, fixing the liability at \$1,500 for each unit of goods. It is agreed that as the cartons were packed by Goat NZ's agent the unit in this case is the single container. See s 15 of the Act.

[12] It is agreed that the consequence of the change of the input air temperature to the container at the Auckland Metro Port caused a change in the meat as a commodity before it left New Zealand. The question, however, is whether or not this change amounts to loss or damage to the goods occurring while GVI is responsible for the goods, to paraphrase the core of s 9(1). Note s 9(6) provides:

(6) Notwithstanding any of the foregoing provisions of this section, the responsibility of a contracting carrier who contracts for the carriage of goods to a destination outside New Zealand ends for the purposes of this Act at the time when the international carriage of those goods begins.

(Emphasis added)

The District Court decision

[13] The District Court held that although the meat changed by reason of the change in temperature, the change only reduced what would normally be a 60 day shelf life of the product by one and a half days. The Court held that this was *de minimis* and so did not count as damage occurring in terms of s 9(1), therefore, s 9(1) did not apply. Strict liability did not apply. The limit of damage of \$1,500 did not apply. Therefore, the plaintiff was entitled to judgment for the full sum.

[14] The District Court also rejected reliance by GVI on exception clauses in its terms of trade. This was on the basis there was inadequate notice of the terms. There is no appeal against that finding.

The proper approach to interpreting the Act

[15] The Supreme Court has recently given clear guidance as to the correct approach to interpreting this statute. This is the decision of *Ports of Auckland Ltd v Southpac Trucks Ltd* [2010] 1 NZLR at 363. I do not intend to unduly lengthen this judgment by quoting exhaustively from the unanimous reasons of the Court, given by Blanchard J. It is sufficient to summarise the reasoning by saying that the purpose of the Act was to remedy the common law which had imposed an almost absolute liability on common carriers. The common law had allocated the risk of loss on the basis partly as fault and partly as strict liability. But the use of the fault principle was seen by the law reformers as having serious disadvantage: encouraging unnecessary litigation, leading to difficulties of proof and being uncertain in its application. The purpose of the reform was to impose absolute liability but absolute upward limits on the liability. It was intended that a common set of rules be enacted relating to the liability of all domestic carriers. The new rules would apply to all who procure contracts of carriage whether or not they take any part in the carriage itself; that liability to loss or damage of goods during carriage should lie where the balance of convenience places it irrespective of fault.

[16] The Supreme Court said:

The Act must be read with those principles firmly in mind and with regard also to its long title, which shows that its purpose was “to restate and reform the law relating to the carriage of goods within New Zealand”. [4]

[17] The facts of that case do not assist here.

[18] In this case GVI is the contracting carrier and under the scheme of the Act is the person to whom the shipper of goods claims.

[19] One can also take into account that the Contracts and Commercial Law Reform Committee, whose work was the foundation for this statute, was composed

of experienced practitioners who would be aware that many domestic contracts of carriage were but the first step in the export of primary perishable commodities being exported to the other side of the world.

[20] Mr Rzepecky noted that it is more common place than not for private contracts of insurance to impose liability on a fault basis rather than in the first instance on damage.

[21] This is a statute intending to do away with any examination of fault. It adopts the proof of loss or damage as the principal precondition for liability, provided that the damage occurs in New Zealand. It goes out of the way to spell out in subs (1) that this liability is imposed without regard to questions of fault:

... whether or not the loss or damage is caused wholly or partly by him or by any actual carrier.

The appellant's argument

[22] Mr Rzepecky's argument was that once the wrong temperature had been entered on the reefer the damage was inevitable. He argued for a meaning of damage which was satisfied when two elements were present:

1. There was a physical change in the goods.
2. In a context which rendered the goods losing some commercial value or usefulness.

[23] He relied upon a decision of the Tasmanian Supreme Court which has been followed widely in the common law world since it was decided in 1986. This is the decision of *Ranicar & Anor v Frigmobile Pty Ltd* (1983) 2 ANZ Insurance cases 60-525, Green CJ. Ranicar were fish exporters who had contracted to sell frozen scallops to a Canadian company. Frigmobile took possession of the scallops and delivered them to a wharf in Melbourne with a view to them being loaded on a ship bound for Canada. At the wharf the scallops were found to be at a temperature between -6°C and -12°C. The Export Fish Regulations of the Commonwealth of

Australia require a temperature to be no higher than -18°C. Thus they were rejected for export. Ranicar were able to sell the scallops on the Australian market but for less than they would have had they completed delivery to the Canadian company. They sought damages. Frigmobile claimed it was relieved of any liability by Condition 3 of its Conditions of Carriage. Condition 3 read as follows:

The Carrier is not a common carrier and will accept no liability as such. The goods are at the risk of the owner and not the Carrier. The Carrier shall not be liable in respect of the loss of or any damage whatsoever to any goods while such goods are in the custody or under the control of the Carrier or its sub contractor. ...

[24] Ranicar brought a second action against Royal Insurance as defendant. Ranicar sought an indemnity under a policy issued by Royal. Royal denied liability on the grounds that the scallops had not been lost or damaged within the meaning of the relevant clause of the contract for insurance. Clause 5 read as follows:

This insurance is against all risks of loss or damage to the subject-matter insured but shall in no case be deemed to extend to cover loss damage or expense proximately caused by delay or inherent vice or nature of the subject-matter insured. ...

[25] Green CJ focussed on the term common to both conditions, that is, damage. He said:

In my view, the ordinary meaning, and therefore the meaning which I should *prima facie* give to the phrase “damage to” when used in relation to goods, is a physical alteration or change, not necessarily permanent or irreparable, which impairs the value or usefulness of the thing said to have been damaged. It follows that not every physical change to goods would amount to damage. What amounts to damage will depend upon the nature of the goods.

[26] Applying that test to the facts he said later in his reasoning:

... The question which remains is whether in the circumstances of this case that change in temperature amounted to damage to the scallops. In my view, it plainly did. An alteration in temperature undeniably involves a physical change to a substance and in this case the change had the effect of removing one of the primary qualities which the scallops had – their exportability. As a result, it is plain that their usefulness was impaired and their value reduced.

[27] It will be understood immediately that this is a refined concept of the notion of damage. It is an examination as to whether or not the physical alteration of the

goods has impaired their value or usefulness. Impairment of value or usefulness can be the result of Government regulations applicable to the transporting of goods.

[28] Counsel before me, with insurance practices, have informed me that this decision is widely followed in the industry.

Analysis of merit of appellant's case

[29] That being the case I would not be minded to criticise it. What is more, I agree with it. The value of commodities is directly related to the ability to trade them. The trading of perishable commodities, in the modern day world, takes place in regulatory environments. A commodity which does not meet the regulatory standards is usually of a lower value than a commodity which does.

[30] Perishable commodities which do not comply with the regulations are usually because there has been some change in their cellular structure which poses some risk to health.

[31] In this case the Judge found that raising the temperature in the container did produce a physical change. Secondly, she found that that had the consequence of shortening the shelf of the meat by one and a half days, which goes to usefulness and potentially to value.

[32] In this case there were no regulations setting the desirable temperature of the containers. However, it is obvious, and the Court accordingly takes judicial notice of the fact, that the goat meat was a consumable and its shelf life was necessarily a quality which would affect its value. The evidence before the Court was that the goat meat properly chilled would have a shelf life of 60 days.

[33] The meat was slaughtered between 13 and 19 May. The consignment was not completed until 19 May. It was placed in the hands of GVI on 21 May. A week elapsed before the goods were transported to Auckland Metro Port, the Auckland cargo station for the Port of Tauranga. The goods were loaded on the Cape Preston on 2 June. The vessel arrived in Japan on 7 July. At that point in time (there being

no suggestion there was any particular delay) the meat first slaughtered on 13 May was nearing the end of its shelf life.

[34] The Judge reasoned:

[20] It is accepted that, in the four days prior to loading onto the vessel, the meat cargo suffered temperature abuse so that between 1.5 to 2.5 days of shelf life in the product was lost, irrespective of what occurred after loading. In fact, during the cross-examination of Mr Sorenson (who was the expert called by GVI) he accepted that the evidence of the expert called for Goat NZ was more accurate. Thus I believe I am able to find that between 1.5 and 1.8 days of shelf life were lost over that four day period during which the meat cargo was in the possession of GVI under its contract with Goat NZ.

[21] Whilst GVI says that the loss of even 1.5 days of shelf life may not seem significant in a 60 day shelf life, when you take into account the four days within which the meat was in GVI's possession prior to being loaded onto the ship, the 14 days of the voyage, and look at how many days out of the accepted shelf life for this produce (60 days) were left, then the 14 days to sell product in Japan at the end of the voyage was little enough, but to subtract 1.5 from those days, leaving only 12.5 days to sell the product, shows that the actual damage was much more than de minimis. Having said this, I have to acknowledge that GVI's counsel did not accept that the de minimis qualification applied.

[35] There was no challenge to these findings on appeal except as to whether or not it was appropriate to find that damage was more than de minimis. Having considered the expert evidence on shelf life the Judge relevantly reasoned:

[29] From this point, I take it that the loss of 1.5 to 1.8 days of shelf life in the scheme of things is but a small matter, particularly when one accepts the evidence from both experts to the effect that the 60 day shelf life guarantee (if I can call it that) is conservative and that in many, if not most cases, meat will be good to eat for longer periods than that. More importantly, however, in respect to GVI's argument as to the reduction of the usefulness of the meat, there was no evidence about this; since this was an affirmative defence raised by GVI, the burden of proof was upon it. There was no evidence called from any source to indicate what was to have happened to the meat on landing in Japan. In the statement of agreed facts, though, I note that the cargo was delivered to Maruichi Meat, the cold storage facility nominated by the buyer of the cargo. That says to me that the cargo was being – or had already been – sold to a Japanese buyer. Unless there was some particular term of the contract between the Japanese buyer and Goat NZ as to the length of the shelf life that the mat had to have, it seems to me that any argument by GVI about the reduced shelf life meaning that the usefulness of the product was diminished is not one that can be upheld by me.

[30] In particular, GVI said that, when looking at a total shelf life of 60 days, 12.5 days left after the 14 day voyage and the time before loading, and

then subtracting the 1.5 days loss of shelf life means that 12.5 days as a proportion of 60 is very clearly much more than just de minimis damage. Put another way, the usefulness of the product, represented by there being only 12.5 days of the 60 day life to sell the meat once in Japan, indicates that the usefulness of it was seriously diminished. As I say, there was no evidence from the defendant, on whom the burden was as to this particular matter, and since it is an agreed fact that there was a Japanese buyer who presumably was going to on-sell the meat within Japan, I believe that I am able to reject that particular argument as to usefulness.

[31] The same must go for value. As Goat NZ said, notwithstanding the loss of shelf life of 1.5 to 1.8 days, as of June 2009, the meat was still able to be exported. Its external characteristics were unchanged. It was saleable for the same price.

[32] De minimis, of course, means 'of little consequence', 'of a tiny amount'. Does that apply here? I consider that it does. Prior to 2 June 2009, I do not consider that this cargo of meat suffered physical change that was more than de minimis, such physical change causing the value or usefulness of the meat to be impaired.

[36] In the argument before me these findings were not seriously challenged. Rather, Mr Rzepecky argued that the trial Judge should not have applied the de minimis test. It was submitted she incorrectly drew that from the decision of *Arrow International Ltd v QBE Insurance (International) Ltd* [2009] 3 NZLR 650, a case which should have been distinguished. Mr Rzepecky argued that the test in *Ranigar* required some actual quantifiable loss whereas the test in the relevant policy in *Arrow* required an examination of whether or not there was physical damage.

[37] By some actual quantifiable loss I understood Mr Rzepecky to say that the test in *Ranigar* required some loss of value or utility. I agree that is what the *Ranigar* test requires and indeed value or usefulness is in my view the same test because any loss which goes to the utility of a product will, in the normal circumstances, also go to value.

[38] On appeal Mr Rzepecky argued that once the temperature of the meat in the container had risen to +1°C the container was rendered unfit for carriage of the cargo to Japan. This meant that the meat was never going to arrive in Japan in a fit state for consumption and inevitably would be a total loss. It could not be successfully exported from that point on:

This mean that for the purposes of the Act the goat meat was damaged when it was subject to the incorrect cargo temperature days before it was loaded on board the ship. This is the approach that the trial Judge should have taken.

[39] For the respondent, Ms Barratt's competing argument was to support the reasoning of the Judge. She argued that while the meat was in New Zealand it had not lost its value or functionality. The change to the container temperature setting did not prevent the meat from being exported. None of its material qualities were lost. There was no evidence that the minimal loss of shelf life that occurred in New Zealand affected either the value or the saleability of the meat.

[40] Both of these points of view have a solid foundation in the evidence. It was virtually inevitable that once the temperature had been adjusted to +1°C it would not be further adjusted during transportation. Therefore, its shelf life would continue to deteriorate at a more rapid pace than would otherwise have been the case if it had been shipped at a lower temperature.

[41] It seems to me that the correct way to resolve the competing merits of these two valid points of view is to examine carefully the test set by Parliament in s 9(1).

[42] I start first with the carrier's objection to the adoption of the de minimis test.

[43] The insurance policy in *Arrow* was a general liability policy that Arrow, a construction company, had taken with QBE. The insurer indemnified the insured in respect of all sums that the assured became legally liable to pay by way of compensation consequent upon accidental physical loss of or damage to any tangible property; happening within the Territorial Limit specified in the Schedule during the Period of Insurance and resulting from Occurrences in connection with the business. "Occurrence" was defined as meaning:

... an occurrence resulting in damage or injury and includes any one occurrence or a series of occurrences (including continuous or repeated exposure to injurious conditions) consequent upon or attributable to one source or original cause.

[44] Arrow had built an apartment complex which became a leaky building. It had been sued by a number of parties. The proceedings were settled. QBE had been

joined as a third party by Arrow. The remaining issue in the proceedings was whether or not QBE were obliged to indemnify Arrow. The policy of insurance was taken out in the first instance on 30 May 2002. The building itself had been completed in 2000. The damage to the building consisted of rotting and water damage to timber. The crucial question was: did the damage fall within the expression “*physical damage to tangible property happening during the period of insurance*”, that is, after 30 May 2002? (See [24].) It was common ground between the experts that the process of microbiological decay of the timber due to leaks had commenced prior to 30 May 2002 and continued progressively over the period that extended before, during and after the relevant period of insurance.

[45] There was an obvious issue as to whether the fact that the building leaked was a continuous trigger or continuous cause of the damage. MacKenzie J considered international authorities on this issue and concluded that in this policy

[68] ... it is the damage, rather than the occurrence from which that damage results, that must happen within the policy period. The damage, rather than the occurrence, triggers the cover.

[46] MacKenzie J then moved on to examine when the damage happened and that brought him to *Ranicar* and to other New Zealand decisions following *Ranicar*. He found on the facts that the damage had occurred before the policy was taken out. It followed that Arrow’s claim must fail. In the course of making the decision as to whether damage had occurred MacKenzie J formulated a test as follows:

[82] ... I consider that each case must be examined on its own facts to determine when an alteration to the physical state has occurred to an extent which is more than de minimis so that the point has been reached where physical damage has happened.

[47] It must be noted immediately that the question of damage in the context of the *Arrow* case did not turn on whether or not the wet timber had lost its value. In terms of *Ranicar* it was whether or not it had lost some of its usefulness. The second point to note is that MacKenzie J, a Judge very experienced in insurance matters, was making his decision in the context of the particular policy between Arrow and QBE. He found it natural to use the de minimis test.

[48] But it is essential that I test whether the de minimis standard is appropriate, not by simply asking the question whether to follow Arrow or not but by bringing the question back to the context here, being the intention of Parliament in s 9(1) of this Act and in the context of the facts of this case.

[49] When applying statutory provisions it is a sound policy not to gloss a statutory standard. Where Parliament has considered it appropriate it will define terms in a statutory standard. MacKenzie J was not applying a statute. I also note that MacKenzie J did not have to make a finding that the damage was only de minimis.

[50] Section 9(1) has to be read in the light of the purpose of the Act. The Act's long title is:

An Act to restate and reform the law relating to the carriage of goods within
New Zealand

[51] Keeping in mind that New Zealand is a trading country it is abundantly plain that the Act is not intended to interfere in any way with the insurance against risks associated with international trade.

[52] Section 5(1) provides:

5 Application of Act

(1) Subject to subsections (4) and (4A) of this section and to section 4 of this Act, this Act applies to every carriage of goods, not being international carriage, performed or to be performed by a carrier pursuant to a contract entered into after the commencement of this Act, whether the carriage is by land, water, or air, or by more than one of those modes.

Subsections (4) and (4A) are of no relevance to this case.

[53] It follows that the Act leaves undisturbed the usual insurance policies taken out by exporters and shippers for offshore risk. Both the District Court and this Court were informed that the litigation was being conducted by the parties' respective insurers.

[54] The Act provides for different contracts of carriage in s 8, one of which is a contract for carriage “*at limited carrier’s risk*”. This was such a contract.

[55] The limitation of liability in s 15 is a cap on liability, not a standard sum. Section 15(1) provides:

15 Limitation of amount of carrier's liability

- (1) For the purposes of this Act, -
- (a) The liability of the contracting carrier to the contracting party; and
 - (b) The separate liability of any actual carrier to the contracting carrier; and
 - (c) The joint liability of any actual carriers (where there are more than 1) to the contracting carrier; and
 - (d) The joint and several liability of every successive carrier under a contract to which section 13 of this Act applies, -

is limited in amount in each case to the sum of \$1,500 for each unit of goods lost or damaged or, in the case of a contract “*at declared value risk*”, the amount specified in the contract.

[56] There is separate provision for other consequential losses in subs (2):

- (2) The limitation of amount for the time being specified in subsection (1) of this section does not apply to -
- (a) Any liability for the loss of or damage to any goods intentionally caused by the carrier; or
 - (b) Any liability arising out of the terms of the contract for damages other than for the loss of or damage to the goods; or
 - (c) Any liability arising out of the terms of the contract for damages consequential upon the loss of or damage to the goods.

[57] Section 9(1) uses different language from that used in the policy in *Arrow*. The common element with these other two policies is the phrase “*loss of or damage*”.

[58] In my view it is very important to read the whole of s 9(1) as one test. Subsection (1) provides:

9 Liability of contracting carrier

(1) Subject to the other provisions of this Act, a contracting carrier is liable as such to the contracting party for the loss of or damage to any goods occurring while he is responsible for the goods in accordance with the succeeding provisions of this section, whether or not the loss or damage is caused wholly or partly by him or by any actual carrier.

[59] It might be noted that the word here is occurring in the context of the phrase “*while he is responsible for the goods [in New Zealand]*” as distinct from “*occurrence*” in *Arrow*. It is also an absolute liability whether the loss or damages is caused wholly or partly by him or by any actual carrier.

[60] This could have ramifications in cases similar to this. There could be cases of loss or damage of the same goods where there are two causes - fault in New Zealand and fault during overseas carriage. For example, there might be conditions of carriage which obligate the shipper on the sea voyage to recalibrate the temperatures of the reefers upon a set of instructions different from those given by GVI to Metro Port. In that case a situation might be that although the wrong temperature was imported at Metro Port in Auckland it ought to have been recalibrated during the voyage by the crew of Cap Preston in which case there would be a clear delineation of fault in New Zealand from fault during overseas carriage.

[61] I favour giving primacy to the normal meaning of the words used in s 9(1) to limit its application to loss or damage occurring [in New Zealand]. Literal interpretation can be challenged by showing it produces absurd results. Mr Rzepecky has argued that were this interpretation taken it would impose on the parties difficult exercises in distinguishing between the value or loss of utility of a good depending on when the cargo left New Zealand, or in the case of shipping, was swung across the side of the ship.

[62] The common law of damages takes a robust approach to setting damages with often a difficult set of facts. The New Zealand legislature in common with similar jurisdictions does not normally endeavour to impose authority outside the territory of the jurisdiction.

[63] Gradual deterioration in value is a frequent problem illustrated in this case by both *Arrow*, *Ranicar* and these facts. Insurance companies regularly settle between themselves contributions to loss.

[64] I am not persuaded that there are insuperable practical problems to following a literal interpretation of s 9(1). To the extent that there are problems they are inevitable in a country where a significant amount of domestic carriage is the first step on an international journey, and where the goods are refrigerated commodities in reefer containers. If I am wrong it is always open to the New Zealand Parliament to amend this Act. In the meantime, I think it is preferable to follow as closely as possible the statutory test without glossing or qualifying it because of some perceived practical difficulty, once it is assessed that the practical difficulty is a relatively common place one.

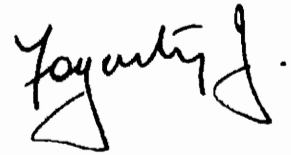
[65] I am left with the conclusion that s 9(1) was intended to identify and confine liability to loss or damage *occurring* in New Zealand. *Ranicar* is a useful authority consistent with this interpretation. There was damage to the product within the meaning of s 9(1) as the temperature setting changed the physical composition of the meat causing it to age faster than the rate set for commercial reasons thereby diminishing its commercial utility.

[66] The second question is: what loss if any was incurred by the plaintiff, Goat NZ Limited, for the purposes of applying s 15? However, no loss of value was proved. Therefore there could be no order under s 15.

[67] This finding does not insulate GVI from the consequences of loss or damage during the export journey. The Carriage of Goods Act 1979 did not allow GVI to limit its liability, outside New Zealand, for the consequences of the incorrect setting of the container in New Zealand.

[68] The respondent has not advanced in its pleadings any other reason why it should not meet the appellant's claim in full. The quantum of the total loss is agreed as noted, and that was the judgment entered in the District Court.

[69] Accordingly, for slightly different reasons the appeal is dismissed leaving the judgment in the District Court in place. The respondent is entitled to costs in this Court calculated on a 2B basis. If the parties cannot agree costs, leave is reserved to apply for them to be fixed.

A handwritten signature in black ink, appearing to read "Joynting J.", is located in the upper right quadrant of the page. The signature is written in a cursive, somewhat stylized font.

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