

Welcome to TT Talk, No. 76 in the series.

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1. Datec v UPS : an update

In TT Talk No. 67 we reported on the first instance decision of the English High Court in Datec v UPS. This decision has now been reviewed by the Court of Appeal.

Datec had entrusted UPS with the transport of several packages of computer parts from its UK premises to a customer in Amsterdam, Holland. The packages were flown to a UPS facility at Cologne airport in Germany, from where they were trucked to its hub in Amsterdam, prior to being delivered to the consignee. Up to that point the packages had been tracked through the UPS system, using barcodes on the labels, but they then disappeared. A claim was made by Datec for the value of the packages, UKP 241,241 (USD 418,070) .

UPS denied liability on the basis of clause 3 of its standard trading conditions under which it stated it would not accept any package worth more than USD 50,000. The lower court rejected that argument, stating that, because the cargo had moved by road between Germany and Holland at the time of the loss, the convention on the contract for the international carriage of goods by road (CMR) applied and that clause 3 was unenforceable as it was incompatible with the CMR regime. However, while there were serious suspicions that an employee of UPS had been complicit in the theft the lower court decided that theft was only one of a number of possible explanations. It held that the claimants had not proved that the cargo had been stolen. UPS was held liable but, in the absence of proof that the loss was due to wilful misconduct, compensation was fixed at the CMR limit of UKP 657.73 (USD 1139.00).

Both sides appealed and, at the end of November, the appeal court delivered its judgment. The three judges agreed unanimously with the lower court that part of clause 3 contravened article 41CMR and was therefore unenforceable. The other part of clause 3 merely set out the scope of the services offered by UPS (and the type of cargo it would not accept) and was valid as it did not derogate from the principles of the convention. However, these provisions had neither been policed nor enforced by UPS, who, having accepted the packages for transport, was a bailee and duty bound to look after them and deliver them intact.

However, the judges disagreed with the lower court when it came to the issue of causation and the standard of proof required to uphold a claim of unlawful activity on the part of the carrier or its servants. While the claimants had the burden of proof, the required standard of proof was not particularly high. The lower court had decided that the claimants' allegations of theft were "speculative" but the appeal court held that this was not so: the claimants had cogently demonstrated that theft by an employee was a plausible cause of loss. Having examined all the possible explanations, the appeal judges agreed with the claimants that the loss had most probably been the result of theft by an employee of UPS. As a result UPS lost the protection of clause 23 CMR (which limited its liability) and was ordered to compensate Datec for the full amount of its claim.

A full transcript of the judgment is on
<http://www.bailii.org/ew/cases/EWCA/Civ/2005/1418.html>

The court gave some guidelines as to how any restrictions on the carriage of certain types of goods might legally be enforced within the CMR regime. We will return to this issue early next year.

2. New Year resolutions

The New Year - the traditional time for making resolutions to break bad habits - is just two weeks away. Top among those promises must be the one about giving up smoking. This year end, more than previous ones, people who want to quit their nicotine addiction may have further incentives as legislatures around the world introduce new laws on smoking at work.

On January 1, Spain will be the latest country to join the increasing list of countries that prohibit smoking in enclosed public spaces. Canada, Norway and New Zealand as well as certain states of the USA such as California, Florida, New York and Washington have already enacted legislation, while in the UK parliament will be deciding the issue next year. In fact legislators are often lagging behind employers themselves, many of whom have already banned smoking in their offices and other enclosed workspaces.

These workplace bans have driven in part by fears of the consequences of claims from non-smoking employees who contract respiratory illness or cancer from passive or second-hand smoke, and in part by employee pressure for a smoke-free working environment. Public opinion surveys in many countries regularly show that over 90 percent of employees favour a complete ban on smoking in their workplaces.

The Club does not cover employers' liability in any of its insurance products and therefore takes no public stance on this issue; our concerns are not so much with passive smoking but with the fire hazard in warehouses and handling areas associated with carelessly discarded matches or cigarette ends. In some facilities smoking is only prohibited in areas where flammable products are being stored or handled, but in the Club's view the ban should encompass all areas where cargo is being stored or handled. There is a substantial fire risk in all warehouses and cargo-handling areas, not just those dealing with flammable materials: one of the Club's largest-ever fire claims arose because a consignment of cotton was ignited by a carelessly-discarded cigarette end. In this respect, therefore, we welcome the legislation. However we have one concern about smoking in operational areas.

The laws generally prohibit smoking in enclosed areas at work. In some countries (and, as the wording is different in each jurisdiction, the precise text must be checked) this means that employers may not even provide a "smoking room" to which employees may go when in need of a cigarette. The nicotine-starved must go outside (and in California, at least 6 metres (20 feet) from the front door) if they wish to light up. This is understandable in terms of removing this risk of passive smoking, but what if the atmosphere outside is too dangerous for people to walk around with a glowing source of ignition jammed between their lips? To reduce the fire risk in operational areas, it has generally been regarded as safer to provide workers with enclosed areas in which they can smoke. But, as an "enclosed working space" such areas may themselves be prohibited, even though smokers enter them voluntarily during rest breaks. Workers are therefore caught between two contradictory elements of workplace safety law: they may not smoke outside because of the fire risk, but they may not smoke inside either because of the dangers associated with passive smoking.

We would welcome comments from members in places where workplace smoking is banned by law as to whether open-air smoking does pose a threat in some operational areas, and if so whether they are legally able to provide smokers with a safe area to indulge their habit

Wherever they apply, smoking bans must be policed and enforced. Perhaps employers should encourage staff to give up smoking at the new year. How about giving nicotine patches to all concerned as a New Year present?

3. New IMDG update

Members are reminded that amendment 32-04 of the IMDG code becomes mandatory from 1 January 2006.

The International Maritime Organisation has published a correction to this amendment. Users of the printed code should update their copies by hand, while users of the electronic version can download an update from the IMO website link:

www.imo.org/Publications/mainframe.asp?topic_id=1006

4. Oasis wins an award

The TT Club's Oasis claims management system has won the prestigious Legal Week award for Best Use of IT, sponsored by LexisNexis Butterworths, the UK's leading provider of legislation, commentary and analysis. The citation noted that Oasis had been developed "in a rare collaboration between lawyers and IT staff" (not that rare in TT!) and that it had revolutionised the company's work. It also said that after three years of fine-tuning, Oasis is more sophisticated and arguably more successful than anything developed by a legal software supplier.

We congratulate the members of the Oasis team on their achievement.

<http://www.legalweekevents.com/eventhome.asp?evid=23>

5. And finally - is your computer psychic?

This is nothing at all to do with the previous item, but disturbing evidence has reached us that your computer screen is now able to read your mind. Proof of this alarming state of affairs can be found on <http://www.gujaratplus.com/cball/middle.html>

The Club believes that this system might usefully be adapted to discover what staff are thinking and thus help to reduce the incidence of errors and omissions claims, but it warns that the full implementation of such a development may still be several years away.

Readers are also warned not to use this website as a means of communication with the Club. We are reliably informed that there have been a number of technical problems in implementing the thought-transmission part of the program.

6. Conclusion: farewell 2005

We do not wish to burden readers over the festive period with gloomy tales of insurance matters and litigation and therefore this is the last edition of TT Talk in 2005. We will be back early next year with more of our usual mix of stories from the underworld of underwriting and the terrors of transport.

As usual, if you would like to have further information about any of these items, or have any comments you would like to make, please email the editor at tt.talk@ttclub.com. We look forward to hearing from you.

In the meantime the editorial team joins with the Club's staff in wishing you all a happy holiday season and every success in the year to come.

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