2. ADMIRALTY, SHIPPING AND AVIATION LAW

ADMIRALTY LAW

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Introduction

2.1 2006 was a relatively quiet year in so far as decisions on admiralty law were concerned. There were only four decisions handed down by the courts, in each of which issues of admiralty law were only raised peripherally.

Arrest of vessel as security for arbitration proceedings

2.2 It is now settled law after the Court of Appeal decision of *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629 ("*Swift-Fortune*") that s 12(7) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") does not vest the Singapore courts with any statutory power to grant Mareva injunctions in aid of foreign arbitration. This decision puts to rest the dichotomy of views expressed by Judith Prakash J and Belinda Ang Saw Ean J respectively in the first instance decisions of *Swift-Fortune Ltd v Magnifica Marine SA* [2006] 2 SLR 323 and *Front Carriers Ltd v Atlantic & Orient Shipping Corp* [2006] 3 SLR 854 ("*Front Carriers*") as to whether such a power exists. The significance of these decisions is dealt with elsewhere in this issue of the Annual Review.

2.3 Within the compass of admiralty law, these decisions are unanimous on one point. They confirm that s 7(1)(*a*) of the IAA contemplates that where the mandatory stay of an action is ordered pursuant to s 6 of the IAA, the security furnished to avert an arrest or to procure a release on the arrested vessel itself may be retained in satisfaction of any award that may be made in the arbitration proceedings, *irrespective of whether the arbitration is taking place in Singapore or some other jurisdiction* (see *Swift-Fortune Ltd v Magnifica Marine SA* [2006] 2 SLR 323, on appeal, *Swift-Fortune* (*supra* para 2.2) and *Front Carriers* (*supra* para 2.2)). Thus, such a statutory power can be exercised in aid of a foreign arbitration to ensure that there is security against which the potential award can be enforced. (For completeness, it should be pointed out that s 7(1)(*b*) of the IAA empowers the court to order that alternative security be furnished for the satisfaction of the arbitration award.) The explanation for the apparent inconsistency between the absence

of any power to grant a Mareva injunction in aid of foreign arbitration under s 12(7) of the IAA and the power under s 7(1) is that the latter power stemmed from the legislative implementation of a specific recommendation of the Law Reform Committee's Report titled, *Report of the Sub-Committee on Review of Arbitration Laws* (see paras 46 and 48). The Committee opined that a provision allowing ships to be arrested under the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) would not give rise to extraordinary hardship to shipowners as such arrests were relatively widespread. That may be so but apart from legislative history, it is respectively submitted that there appears not to be any policy justification for this distinction. Although the principles and requirements pertaining to the reliefs of Mareva injunction and arrest are indisputably different, there is, in functional terms, considerable similarity between the two types of relief in so far as they are a means to ensure or enhance the possibility that there are assets belonging to the respondents against which the arbitration award may be satisfied.

2.4 The Court of Appeal in *Swift-Fortune* (at [57]) considered the situation where the power under s 12(7) of the IAA might be exercised to be distinct from those situations under ss 6 and 7. Interestingly, it reasoned that the enactment of s 7 rendered it unlikely that Parliament intended s 12(7) to apply to foreign arbitration for if s 12(7) had such a wide effect, there would not have been the need for s 7 to begin with. With respect, such a reasoning appears to overlook the fact that s 7 of the IAA is traceable to s 26 of the UK Civil Judgment and Jurisdiction Act 1982 (c 27) (see *The Sunwind* [1998] 3 SLR 954 at [7]–[9]). The enactment of s 7 is not owed to or explicable by a restrictive reading of s 12(7). Its legislative and conceptual roots (the latter taking into account the different requirements of arrest and Mareva injunction) are different.

2.5 One important *dictum* on s 7 emerges from the *Front Carriers* decision (*supra* para 2.2). Ang J observed (at [28]) that s 7 reflects a distinction between the choice of forum for determination of the merits of the dispute and the right to security under the High Court (Admiralty Jurisdiction) Act. The latter can still be invoked notwithstanding the presence of an arbitration agreement. Section 7 "effectively does away with the *Rena K* test" (at [28]). *The Rena K* [1979] QB 377 restricts the court's power to order retention of security or the provision of alternative security to circumstances where it is shown that the eventual arbitration award is unlikely to be satisfied by the shipowner because of its parlous financial condition. In that event, the claimant is entitled to thereafter lift the stay on the action *in rem* and the security so retained or alternative security so furnished can be used

to satisfy the judgment *in rem*. *The Rena K* principle was in its time an innovative way out of the difficulty that bedevilled the English courts which were constrained by the principle that admiralty jurisdiction should not be exercised (by way of an arrest) for the purposes of obtaining of security for an arbitration award. It is not without difficulties, though (see Toh Kian Sing, *Admiralty Law & Practice* (Butterworths, 1998) at pp 498–499). Its usefulness effectively ended when s 26 of the UK Civil Judgment and Jurisdiction Act 1982 was introduced. To the extent that s 7 of the IAA is based on s 26 of the UK Act, it is, with respect, clearly right to rule that the former provision does away with the criterion in *The Rena K*.

Adducing evidence of foreign law in admiralty proceedings

2.6 *The Vasiliy Golovnin* [2006] SGHC 188, a decision of Tan Lee Meng J, arose out of an appeal against the decision of the assistant registrar to refuse leave to admit a further affidavit on the law of Togo.

2.7 The background to this decision may be summarised as follows. The plaintiffs, two banks ("the Banks"), that financed a cargo of rice loaded onto the *Chelyabinsk*, arrested the *Vasiliy Golovnin*, a sister vessel of the *Chelyabinsk*, in Singapore for alleged breach of the contract of carriage contained in or evidenced by the bills of lading, of which the plaintiffs alleged they were the holders. Both the *Vasiliy Golovnin* and the *Chelyabinsk* were at the material time owned by Far Eastern Shipping Company PLC ("FESCO"). The bills of lading named Lome in Togo as the port of discharge.

2.8 FESCO had chartered the *Chelyabinsk* to Sea Transport Contractors Ltd ("Sea Transport"), who in turn sub-chartered the vessel to Rustal SA. The Banks had provided financing to Rustal SA for purchase of the cargo and in consideration thereof, became alleged holders of the bills of lading. The essence of the Banks' claim against FESCO which led to the arrest of the *Chelyabinsk* in Lome and Singapore is that FESCO had failed to comply with their instructions to proceed to another port, Douala in Cameroon, for discharge but instead sailed the *Chelyabinsk* to Lome (the discharge port named in the bills of lading), where the cargo was detained by court orders obtained by Sea Transport in its claim against Rustal SA.

2.9 Prior to the arrest of the *Vasiliy Golovnin* in Singapore, the Banks had arrested the *Chelyabinsk* in Lome, Togo on or about 21 February 2006 in respect of the same claims as the action in Singapore. The earlier arrest was set aside by the Togolese court in Lome on the basis that the Banks did not have any valid claim against FESCO. In setting aside the arrest and ordering the Banks to pay costs, the Lome court made the following findings:

(a) The Banks could not deal directly with FESCO without going through Rustal SA and Sea Transport.

(b) FESCO had not been at fault in proceeding to Lome on Sea Transport's instructions since Sea Transport had control over the commercial management of the *Chelyabinsk* as charterers.

(c) Douala was not listed as a port of discharge on the bills of lading although the Banks claimed that the cargo was bound for Douala.

(d) Sufficient security was given for the claims for loss and damage to the cargo and the Banks could not claim that they had suffered any loss.

2.10 However, despite the determination by the court in Lome on the Banks' lack of any right to arrest the vessel, the Banks proceeded to arrest the *Vasiliy Golovnin* in Singapore in respect of the very same claim.

2.11 In the circumstances, one of the grounds which the FESCO had relied on to set aside the Banks' writ and the warrant of arrest was issue estoppel. It is trite law that a foreign judgment can give rise to issue estoppel, by virtue of which a party is prevented from re-litigating the same issue or matter which has already been decided by a foreign court: *The Sennar No 2* [1985] 1 WLR 490. The assistant registrar set aside the arrest on the basis of issue estoppel (although she also ruled that there was material non-disclosure and that the Banks had no arguable case under ss 3(1)(*g*) and 3(1)(*h*) of the High Court (Admiralty Jurisdiction) Act). This ground for setting aside the arrest is rather novel although there does not appear to be any reason against using it in such a context.

2.12 The Banks appealed against the assistant registrar's decision to set aside the arrest. Before the hearing of the substantive appeal, the Banks sought leave to admit a second affidavit by their Togolese lawyer ("the Affidavit"), for the purpose of the hearing of the appeal in relation to the question of issue estoppel.

2.13 In the affidavit filed in support of the application for admission of the Affidavit, it was deposed that further evidence on Togolese law was necessary in connection with three issues, *ie*, (a) whether "provisional enforcement" under Togolese law was similar to provisional injunction ("the first issue"); (b) whether the release order by the Togolese court was a "provisional injunction" ruling within the meaning of Art 160 of the Togo

Code of Civil Procedure ("the second issue"); and (c) whether the judgment of the Togolese court that was considered in *Ascot Commodities NV v Northern Pacific Shipping, The Irini A* [1999] 1 Lloyd's Rep 189 was of the same type and nature as the release order given by the Togolese court in this case ("the third issue").

2.14 Tan J heard the application to admit further evidence. Having carefully considered the three issues above, he held, at [15]–[17], applying the Court of Appeal decision in *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [1999] 2 SLR 233, that whilst a judge hearing an appeal against a decision of an assistant registrar has the discretion whether to admit new evidence for the purpose of hearing the appeal, in this instance, there was no need for a further affidavit on Togolese law to be admitted.

2.15 As the first issue did not arise in the hearing below and would not be an issue in the hearing of the appeal and as FESCO's counsel accepted that "provisional enforcement" was different from "provisional injunction", there was no need for a further affidavit on this point. In respect of the second issue, as it was the Banks' case that the Togolese lawyer had already stated his position in his earlier affidavit (which was considered by the assistant registrar in the first instance), there was similarly no need for any further evidence on the second issue.

2.16 The need for evidence on the third issue did not arise as FESCO (through its counsel) accepted that the two rulings, *ie*, the judgment of the Togolese court considered in *The Irini A* and the release order, were different.

2.17 At the time of writing, this substantive appeal has not yet been disposed of. Any grounds of decision in respect of the substantive appeal should make for interesting reading.

SHIPPING LAW

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2.18 There were two sea carriage cases of note in 2006, both of which are of guidance beyond the particular facts of the case.

The doctrine of election

2.19 In *The Pacific Vigorous* [2006] 3 SLR 374, the plaintiff sold a cargo of coal to Bhatia International Limited ("Bhatia"), which was a sub-charterer of the ship *Pacific Vigorous* from the head charterer, Eitzen. Bhatia took delivery of the cargo from the carrying vessel *Pacific Vigorous* without producing the bills of lading, against letters of indemnity given to Eitzen. Eitzen in turn gave back-to-back letters of indemnity to the shipowner. Bhatia disputed the quality of the goods, but, instead of rejecting them, delivered them to the end users and paid a unilaterally reduced price to the claimant. The plaintiff was the holder of the bills of lading. It accepted the reduced price as part payment, then commenced action against the defendant, owner of the *Pacific Vigorous*, for the misdelivery to Bhatia. The defendant argued that delivery to Bhatia was with the plaintiff's consent, and alternatively that the plaintiff's acceptance of part payment amounted to an election that precluded it from recovering damages from the defendant.

2.20 The plaintiff applied for summary judgment. The assistant registrar granted the defendant leave to defend the action but this was reversed on appeal by the High Court. Belinda Ang Saw Ean J held that there was nothing in the defence that the cargo was released to Bhatia with the consent of the claimant. The release was against letters of indemnity, not on the basis of any prior consent by the claimant.

2.21 In her judgment, Ang J elucidated on the doctrine of election. Election at common law occurs where a person has two inconsistent rights or courses of action and only one of which can be exercised. In such a case, his choice by overt act communicated to the other party that he is relying on one such right precludes him from later claiming the benefit of another. Election in equity means that a party cannot both accept an instrument or judgment and reject it.

2.22 In this case, there was no common law election because the plaintiff was not exercising two inconsistent rights. The plaintiff had separate and independent causes of action against two persons – against the shipowner for conversion and against Bhatia for the price – which were cumulative and not alternative remedies.

2.23 The learned judge added that, even if there were alternative and inconsistent remedies, the common law doctrine of election took effect only where a stage was reached where some choice had finally to be made. In this case, the plaintiff had not commenced proceedings against Bhatia for the price. Acceptance of part payment was not an unequivocal act which

outwardly signified an election under either common law or equity. Furthermore, the plaintiff must have known of his right to elect, and this knowledge was not proved to the judge.

Cargoworthiness under a Vegoilvoy charterparty

2.24 *The Asia Star* [2006] 3 SLR 612 (HC), [2007] 3 SLR 1 (CA) is noteworthy for being a rare reported judgment interpreting the Vegoilvoy charterparty. The plaintiff chartered the *Asia Star* from the defendant, her owner, on a Vegoilvoy form to carry a cargo of refined palm oil from Belawan, Indonesia, and Pasir Gudang, Malaysia, to Turkey. The plaintiff required epoxy-coated tanks to carry the cargo. The answer to "the Standard Tanker Voyage Chartering Questionnaire 1988" stated that the cargo tanks were fully coated with epoxy and the fixture note stated that the vessel was "epoxy coated/coiled". During the pre-loading tank inspection at Belawan, the plaintiff's surveyor found that 40% of the epoxy coating of the cargo tanks had broken down. The plaintiff rejected the vessel.

2.25 The defendant exercised its option under the charterparty to cancel the charterparty, arguing that it could do so without liability under cll 1(b) and 15. Clause 1(b) provided that if the tanks were defective, the shipowner would undertake to effect repairs, provided they could be done within 24 hours and at reasonable expense; otherwise the shipowner had the option to cancel the charterparty without responsibility. Clause 15 provided that if the charterers rejected the tanks as unsuitable for the cargo, prior to loading, the shipowner had the right to cancel the charterparty without responsibility. The plaintiff sued the shipowner for loss and damage for breach of charterparty.

2.26 At first instance, Tan Lee Meng J found that the rationale for epoxy coating was well known, namely, to ensure that certain types of liquid cargo would not be oxidised, discoloured or damaged by exposure to the steel surface of the cargo tanks. The deterioration of the epoxy coating in the cargo tanks of the *Asia Star* by as much as 40% was a breach of the term in the fixture note that the vessel would be epoxy coated. The *Asia Star* was not cargoworthy when she was presented for loading and the plaintiff was entitled to reject the vessel.

2.27 Clause 1(a) of Pt II of the Vegoilvoy charterparty altered the shipowner's absolute obligation at common law to furnish a cargoworthy ship to an obligation to exercise due diligence to "make the tanks, holds and other spaces in which cargo is carried fit and safe for its carriage and preservation". No maintenance or cleaning records were produced by the

defendant. The learned judge found that there had been a failure to monitor the state of deterioration of the cargo tank coating or to ascertain the cause of the coating problem. Consequently, the defendant shipowner had breached its duty of due diligence under cl 1(a).

2.28 Tan J held that the shipowner's right to cancel under cll 1(b) and 15 of the charterparty could not be read to render meaningless its obligation to exercise due diligence to render the ship cargoworthy under cl 1(a). Furthermore, the special provision on tank cleanliness in cl 5 overrode the printed term in cl 15. The defendant could not cancel the charterparty with impunity. Judgment was rendered for the plaintiff with damages to be assessed.

2.29 The shipowner appealed, although it dropped reliance on cl 15 at the appeal. The Court of Appeal dismissed the appeal with costs: see [2007] 3 SLR 1. The court agreed that the express term of the fixture that the vessel's cargo tanks were "epoxy coated" had been breached. The court also agreed that the vessel was uncargoworthy at the time she was presented for loading and that the shipowner had failed to show that it had exercised due diligence as required under cl 1(a).

2.30 The Court of Appeal held that cl 1(b) did not avail the shipowner for several reasons. Firstly, cl 1(b) was aimed at the due diligence obligation under cl 1(a). It did not apply to the express contractual obligation of the shipowner to provide epoxy-coated tanks, which was a separate and independent obligation from the seaworthiness obligation under cl 1(a). Secondly, consistent with Tan J's reasoning, the Court of Appeal held that giving effect to cl 1(b) would deny the term relating to the vessel's description as epoxy-coated of contractual effect. Thirdly, the typewritten clause describing the vessel as epoxy-coated overrode the printed cl 1(b), which could not be read to give the party in default the right to cancel for its breach of the coating description.

2.31 The Court of Appeal held, however, that cl 1(a) would not be rendered meaningless if effect were given to cl 1(b). The shipowner was given an opportunity to either repair the defect or cancel the charterparty. This discretion of the shipowner was to be exercised honestly and in good faith. However, as the court found that the shipowner was in breach of the express term on epoxy-coating, which was not excused by cl 1(b), Tan J's decision was upheld.

AVIATION LAW

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Introduction

2.32 In *Smart Modular Technologies Sdn Bhd v Federal Express Services (M) Sdn Bhd* [2006] 2 SLR 797, the Singapore courts had to consider the issue of whether in a contract for the carriage of goods by air, the carrier's duty of care could be modified by an exemption clause in the airway bill such that the carrier would not be liable for loss caused by an event beyond the carrier's control.

2.33 There were originally two plaintiffs in this action. The first was Smart Modular Technologies Sdn Bhd ("Smart"), a Malaysian company which manufactured memory chips in its factory in Penang. The second plaintiff, Sun Technosystems Pte Ltd ("Sun Tech") was a company incorporated in Singapore which purchased memory chips from Smart. In July 2000, Sun Tech ordered 1,000 memory chips worth some US$860,000 from Smart. On 28 August 2000, when the goods were ready for shipment, Smart contacted the defendant courier company and one of the defendants' employees picked up the goods from Smart's premises. While he was transporting the goods to the air cargo terminal in one of the defendant's vehicles, he was forced by robbers to stop his van. The van was hijacked, the goods were stolen and they were never recovered.

2.34 The first plaintiff discontinued its action at a relatively early stage of the proceedings. It had no real interest in the claim as the goods had already been sold to the second plaintiff. It was not disputed between the parties that the second plaintiff had title to the goods and could sue on the contract of carriage as it was the owner of the goods. It was also common ground that the contract of carriage was with the defendant as carrier.

The bailee's duty of care

2.35 Sun Tech submitted that as the goods were lost while they were in the defendant's possession and as the defendant was transporting them for reward, the defendant was in the position of a bailee. A bailee of goods had

certain well-established duties in relation to their care. Sun Tech submitted that as the bailee, the defendant owed Sun Tech a duty to take and use reasonable care to carry the goods safely and to refrain from acting in any way which was inconsistent with the bailment of the goods. Further, the burden of proof was on the defendant to show that the loss of the goods occurred without negligence or misconduct on its part or on the part of its employees. This well-known proposition had been established in *Port Swettenham Authority v T W Wu and Co (M) Sdn Bhd* [1979] AC 580.

2.36 The defendant, while not challenging the general proposition that, as bailee, it did owe Sun Tech a duty of care, argued that, in this case, its duty had been modified by contractual agreement. It cited a clause on the back of the airway bill that provided:

> We [*ie*, the defendant] will not be liable for loss, damage, delay, shortage, misdelivery, nondelivery, misinformation, or failure to provide information in connection with your shipment caused by events we cannot control, including but not limited to acts of God, perils of the air, weather conditions, mechanical delays, acts of public enemies, war, strikes, civil commotions, or acts or omissions of public authorities (including customs and health officials) with actual or apparent authority.

2.37 The defendant contended, therefore, that as long as the loss had been caused by an event it could not control, it would not be responsible to Sun Tech. In this case, the loss was caused by the hijack of its truck by person or persons unknown. This hijacking was an event beyond the defendant's control as it could not do anything to prevent its truck from being hijacked. Sun Tech disputed that assertion and said that if the defendant had taken reasonable security precautions, the hijacking could have been averted.

2.38 Judith Prakash J reviewed the duties that a bailee was under *vis-à-vis* the goods in his care. Under the general law, a bailee's duty was a heavy one. A bailee must deliver the goods in the same condition and quantity as he received them. If the goods were lost or damaged while in his care, he must discharge the heavy burden of showing that such loss or damage took place without any breach of duty on his part or that of his employees or agents. By relying on the cited clause from the airway bill, the defendant's argument, in essence, was that its common law duty had been modified by the clause such that as long as it was able to show that the hijacking caused the loss and that it could not have done anything to prevent the hijacking, it would not be liable for the loss.

The exemption clause

2.39 Prakash J upheld the cited clause from the airway bill and agreed that the defendant would not be held responsible for a loss that was caused solely by an event beyond its control. Her Honour also held that it would be for the defendant to show that the hijacking was an external event over which it had no control and which it could not have prevented by the exercise of reasonable care. An event would only be considered to be beyond the control of a party if reasonable steps taken by that party could not have prevented that event from occurring.

2.40 Her Honour then considered Sun Tech's submission that the defendant's breaches of the measures listed in the International Air Transport Association's Airport Handling Manual ("AHM") was evidence of its lack of exercise of reasonable care. Sun Tech called an expert witness, Mr Phipps, to substantiate its submission. Mr Phipps was a partner at an independent consultancy service specialising in security management. According to Mr Phipps, the AHM was applicable from the point and time at which the carrier issuing the airway bill accepted the goods listed in the airway bill and the defendant did not meet the security measures in AHM 350 (the section dealing with handling and protection of valuable cargo) which specifically states the security measures that have to be adopted during, *inter alia*, ground transportation. Mr Phipps confirmed that this included ground transportation outside the airport. Sun Tech also submitted that whilst certain measures in the AHM were applicable when goods were inside the airport, the risks faced by goods outside of the airport were of a different nature due to public access to public roads and therefore the security measures to be implemented in respect of cargo on public roads should be of a higher standard than those implemented in respect of cargo within the airport compound.

2.41 Prakash J disagreed with the submission of Sun Tech and its expert witness. She held that, while Mr Phipps had more than adequate qualifications as an expert on security measures in relation to the transportation of goods, his reliance on the AHM was misplaced as the loss took place while the goods were on a public highway *en route* to the airport and the AHM was aimed at indicating the appropriate security measures to be taken to protect goods that were within the airport premises. It did not deal with the measures required to protect goods travelling on a public highway and was not the right standard against which the security measures adopted by the defendant were to be measured.

2.42 The security procedures practised by the defendant were suitable for the type of business that it undertook and the crime situation that existed in Penang at the material time. The defendant was a general courier and not a specialist company providing high security transport services for valuable goods. The defendant's customers were aware of the type of services that it offered and the defendant had made clear that it would not offer armed escorts and that it was up to its customers to provide these should they think that the security situation required such measures. Furthermore, the local situation in Penang at the time was such that whilst the defendant's Penang office should have been and was aware that hijacking of vehicles on the road could occur, there was no reason to think that there was an imminent danger of such an incident happening in Penang to the extent that enhanced security measures had to be adopted or that the defendant should have refused to carry valuable cargo.

2.43 The defendant had implemented a reasonable security system in relation to the goods that it carried and to the level of risk that it could reasonably anticipate it would be facing. One of the governing rules of the security procedures adopted was that the vehicle driver's safety was paramount. This was a wholly reasonable rule. There was also no rule or standard in the industry that required courier companies like the defendant to only employ trained security personnel as its vehicle drivers.

2.44 As the loss of the goods was caused by an event beyond the control of the defendant, to wit, the hijacking of its van by person or persons unknown, her Honour held that the defendant was not liable to Sun Tech.

2.45 Sun Tech appealed to the Court of Appeal. In its judgment delivered on 8 November 2006 (*Sun Technosystems Pte Ltd v Federal Express Services (M) Sdn Bhd* [2007] 1 SLR 411), the Court of Appeal upheld her Honour's judgment and dismissed the appeal. The Court of Appeal was satisfied that the defendant/respondent had implemented a reasonable security system in relation to the goods that it carried and the level of risk that it could reasonably anticipate facing. The defendant's couriers were trained to follow specific routes and to handle the vehicles and goods in a certain manner.

2.46 More importantly, the actual terms of the contract between the parties provided that the defendant would not be liable for any circumstances that were beyond its control, to wit, the hijack. It had the burden of proving that the hijack took place and it was clear to the Court of Appeal that, on the facts, the defendant had discharged this requisite burden of proof.