Issue 2 2023

wh Newsletter

waterson hicks

ETERNAL BLISS

Much to our disappointment and that of many in the market this case has settled before coming before the Supreme Court for review. It therefore remains the case that Owners' claims for loss by delay under voyage charters will ordinarily be limited to demurrage.

REASONABLE DILIGENCE TO REINSPECT HOLDS

In the recent case of Panocean Co Ltd v Daelim Corporation the vessel was required to have clean holds upon delivery or upon arrival at the first load port.

The vessel was delivered into Charterers' service at Abu Dhabi on 12 February 2017. She berthed on 15 February and her holds were inspected on 16 February. The holds failed. At 1530 on 19 February the Master of the vessel notified the agents that the vessel had been cleaned and a reinspection was requested. The vessel did not re-berth until 3 March when the holds were reinspected and passed. The Charterers treated the vessel as off hire after 1530 on 19 February although at this time the vessel's holds were as a matter of fact clean. An amount of USD 110,765.63 in hire and USD 16,308.93 in bunkers was deducted by the charterers.

Owners commenced arbitration proceedings in which they argued that it was an implied term of the Charterparty that Charterers were required to carry out any reinspection with reasonable diligence and without any undue delay. They said that on the facts Charterers were in breach of this implied term because the reinspection took so long to arrange. Charterers argued the implied term relied upon by Owners was inconsistent with the express terms of the Charterparty and the term should not be implied.

The Tribunal ruled in Owners' favour stating that once a vessel advised cleaning had been completed and the Master called for a reinspection it was reasonable for the Charterers to be under an implied obligation to have the vessel reinspected without delay. They found the vessel to be on hire from the time cleaning was completed.

Charterers appealed for an error of law under Section 69 of the Arbitration Act 1996, arguing the Tribunal had applied the wrong test for the implication of a term and that the only term that should have been implied was a duty to exercise reasonable diligence to cooperate with the reinspection of the cargo holds.

It was common ground between the parties that the position as to implication of an implied term was governed by Marks & Spencer Plc v BNP Paribas [2016].

In that case the Supreme Court ruled the test was whether the implied term gave business efficacy to the contract or was so obvious that it went without saying. Five conditions have to be satisfied.

(1) It must be reasonable and equitable;
(2) It must be necessary to give business efficacy to the contract, so that no term would be implied if the contract is effective without it;
(3) It must be so obvious that it went without saying;
(4) It must be capable of clear expression and
(5) It must not contradict any express term of the contract.

The Tribunal's language in the Award referred to whether it was "reasonable" for a term to be implied and in the finding of the Court that was plainly the wrong test. The Tribunal found that Charterers were under an implied obligation to have the vessel reinspected without delay. Sir Ross Cranston agreed with Charterers' contention that the Tribunal had erred in law by implying a term that was unilateral in its effects, given that the appointment of an inspector required cooperation by both sides. The correct term to be applied was one that obliged both parties to take reasonable steps to cooperate to organise a reinspection without undue delay.

Applying these principles to the facts the Charterers were required to have exercised reasonable diligence in having the vessel reinspected without undue delay. It was common ground the Tribunal had erred in law in deciding that the vessel was immediately back on hire on 19 February when the vessel's holds were clean given that Clause 69 of the Charterparty provided that hire recommenced at the time of successful reinspection of the holds.

The Court therefore concluded the Tribunal had not determined the key question, namely the point at which reinspection should have been undertaken if the Charterers had exercised reasonable diligence to have the vessel reinspected without undue delay. As there was no finding on that point in the Award the appropriate remedy was to remit the Award to the Tribunal for consideration of what should have been done by the parties regarding reinspection, whether either party was in breach in this regard, the relevant timescale for reinspection and the financial consequences of any breach.

NO DEDUCTION FROM HIRE WITHOUT OWNERS' EXPRESS AGREEMENT

Owners Bulk Trident chartered their Vessel to Charterers Fastfreight under a heavily amended NYPE charterparty for

WATERSON HICKS • SOLICITORS • 11 BOLT COURT • LONDON EC4A 3DQ
Telephone: +44 (0)20 7929 6060 Fax: +44 (0)20 3004 0997 E-Mail: law@watersonhicks.com www.watersonhicks.com
AND 43 Tsamadou Street, Piraeus 185 32, Greece. Telephone (30) 210 429 4300

a trip from India to China carrying a cargo of iron ore pellets.

Standard NYPE offhire provisions (usually to be found under clause 15) were contained in Clause 17.

Anti-deduction Clause 11 provided:

Notwithstanding of the terms and provisions hereof no deductions from hire may be made for any reason under Clause 17 or otherwise (whether/ or alleged off-hire underperformance, overconsumption or any other cause whatsoever) without the express written agreement of Owners at Owners' discretion. Charterers are entitled to deduct value of estimated Bunker on redelivery. Deduction from the hire are never allowed except for estimated bunker on redeliver.

The Vessel left Visakhaptnam on 19 April 2021 and arrived at Lanqiao, China on 4 May. It was unable to obtain a berth and remained at anchor at the discharge port until 25 August before berthing to discharge. The Vessel was redelivered on 28 August.

Charterers contended the Vessel was offhire from arrival at the discharge port on 4 May due to alleged positive Covid tests of 3 crew members on 1 May. Except for a period of five days between 22 and 26 May 2021, Charterers did not pay any hire for the vessel between 4 May and 28 August 2021.

Owners commenced arbitration to recover the unpaid hire. Owners disputed there was any infection but, in any case, tests had shown that the 3 crew members had recovered by 13 May. Owners contended that Clause 11 meant Charterers could not deduct periods of alleged offhire if offhire had not been agreed by Owners.

The Tribunal agreed with Owners and rejected Charterers' contention that Clause 11 only prevented deductions from hire 'that is due', that the Vessel was actually offhire and hire had not accrued, so a deduction was not prevented. The Tribunal considered that if Charterers' contention were accepted, this would allow Charterers to simply allege offhire to justify non-payment. That was expressly overridden by the words "*Deduction from the hire are never allowed except for estimated bunker on redeliver.*" The Tribunal held that for Charterers to validly withhold hire, they needed to show the Vessel was in fact offhire and that Owners had agreed to this in writing. The Tribunal also rejected Charterers' argument that Clause 11 only covered set-offs and cross-claims because offhire does not operate by way of set-off or cross claim.

Charterers appealed on the following question:
"Where a charterparty clause provides that no deductions from hire (including for off-hire or alleged off-hire) may be made without the shipowner's consent: Is non-payment of hire a 'deduction' if the Vessel is off hire at the instalment date?"

Henshaw J stated the settled principles of hire payment under a time charter:

1. The risk of delay rests with the Charterer who is liable to pay hire unless relieved of the obligation by an offhire provision
2. An offhire provision is an exclusion clause meaning that the burden rests with the Charterer to prove the offhire provision applied
3. The obligation to pay hire is absolute and the Owner may withdraw the vessel in the absence of payment of hire
4. The Owner is entitled to the full amount of an advance instalment of hire on the day it falls due
5. The Charterer may make deductions from hire in the event of a dispute over offhire
6. In making those deductions, the Charterer needs to establish those deductions are made in good faith and are reasonable

The Judge then considered the meaning of Clause 11 and held that this clause was an important part of the contract reinforced by the words "Notwithstanding of the terms and provisions hereof".

The restriction on deductions limited Charterers' right to deduct under Clause 17 for offhire (whether alleged or actual offhire) and this was not limited to set-off for overpaid hire.

There was good commercial reason for the provision which was to protect Owners from mere (sometimes baseless) allegations of offhire to justify non-payment.

However, Owners do not have an unfettered discretion to decide whether or not to agree to an alleged offhire: there has to be a genuine dispute about the deduction and the discretion has to be exercised for a contractual purpose.

PURCHASE OF VESSELS FROM SANCTIONED SELLERS

In Gravelor Shipping Limited v GTLK Asia M5 Limited the bulk carriers "WL TOTMA" and "WL KIRILLOV" were operating under materially identical bareboat charterparties which were in essence finance leases which contemplated that at their expiry ownership of the vessels would be transferred to the Charterers, Gravelor.

The Owners of the vessels were direct subsidiaries of GTLK Asia Maritime Ltd owned by GTLK Asia Ltd. The ultimate parent company of the GTLK group was JSC State Transportation Leasing Company (JSC GTLK) which is owned and controlled by the Russian Ministry of Transportation.

The amounts payable by Gravelor depended upon how the charterparties were terminated.

a) In the event of breach of the charterparties Clause 18.1 provided that after an Event of Default had occurred, Owners had the option of giving notice terminating the charter and requiring redelivery of the vessels. Under Clause 18.3 the sum payable would include default interest and other costs, expenses and losses incurred by the Owners. Payment of the Clause 18.3 sum would lead to the transfer of title to the charterers.
b) If there was no Event of Default, Gravelor had early purchase options and a purchase obligation at the end of the charterparties' term, in which eventuality certain

of the items making up the Clause 18.3 sum were not payable.

Payments were to be in USD to the Owners' account at Gazprombank.

The charterparties were performed without difficulty until the Russian invasion of Ukraine in February 2022. On 3 March 2022 Gravelor exercised purchase options under the charterparties. On 8 April GTLK and its subsidiaries were made subject to EU sanctions which Gravelor contended prevented it from paying hire under the charterparties. The vessels' P&I, H&M and FDD insurers withdrew cover with effect from 22 April.

GTLK asserted an Event of Default relying on the non-payment of hire, calling for accelerated payment of the sums under Clause 18.3 and nominating an account with JSC Gazprombank in Moscow for payment in HKD, CNY or RUB.

OFAC sanctions were then imposed upon GTLK.

Gravelor commenced proceedings and applied for summary judgment for declarations and a claim for specific performance on the basis it had validly exercised its purchase options for both vessels on 3 March 2022. GTLK disputed this arguing that from late April 2022 Gravelor was in default under the charterparties and that the options had not been validly exercised on 3 March 2022.

Foxton J ordered specific performance. Gravelor was entitled to summary judgment on its specific performance claim and associated declarations to enable the transfer of the vessels upon payment of approximately US$15million per vessel into Court.

In so concluding the Court held:

1. GTLK was under an implied obligation to make a demand for payment; title to the vessels would be transferred following such payment
2. Clause 18.10, i.e. the mechanism for payment if Owners had become the target of sanctions, was intended to apply to incapability at both the paying and receiving ends. The phrase "relevant banking institution" in that clause meant that more than one banking institution might be incapable of processing a payment. A provision for "all necessary steps" extended to requiring GTLK to (i) nominate an alternative bank account into which the required payment could be made (ii) nominate a frozen account into which payment could be received and (iii) accept payment in Euros instead of USD.
3. Payment into a frozen account is good discharge
4. While payments made into a frozen account would cause Owners to suffer prejudice, such prejudice would flow from the legal and practical constraints that those who are obliged to comply with the EU and US sanctions regimes will experience in any dealings and not from anything inherent in the payment as such.
5. Specific performance was granted.

INSURABLE INTEREST IN UNASCERTAINED CARGO

The Court of Appeal recently had to decide whether Quadra Commodities S.A. ("Quadra") could recover from its insurers the losses that it suffered as a result of a fraud perpetrated upon it by sellers Agri Finance SA. ("Agri") and other companies in the same group. Between 2014 and 2018 Quadra had purchased Ukrainian grain cargoes from Agri. Agri provided warehouse receipts to Quadra stating that Quadra owned specific quantities of grain of specific qualities held at specific warehouses. Quadra paid Agri for the goods described in each warehouse receipt and declared each purchase to its insurers. Quadra instructed inspectors to carry out monthly stock monitoring inspections at each warehouse. The inspectors obtained official certificates from each warehouse of the stock that it was holding for Quadra. The stock held at each warehouse formed part of a large bulk that was not segregated according to its respective owner.

Subsequently Quadra was unable to obtain its goods and it came to light that Agri had perpetrated a fraud. Agri would obtain grain, corn and sunflower seeds from local farmers which were stored in a number of warehouses that Agri owned throughout the Odessa region of Southern Ukraine. Agri then sold the same parcels of agricultural products to multiple traders via the issuance of fraudulent warehouse receipts. The same parcel of grain or seeds may have been pledged or sold many times over to different traders. When it came to the point of executing physical deliveries against those warehouse receipts, there was not enough grain to go around. In January 2020 the total losses were estimated at about US$80-120 million of which Quadra's losses amounted to US$5.7 million.

Quadra claimed under its insurance. The issue for the Court was whether Quadra had an insurable interest because the goods were never separated out of bulk quantities held at the warehouses and so were never ascertained. The Court upheld the decision of the trial judge that Quadra did have an insurable interest because Quadra, by virtue of the contracts and the payments under them, stood in a 'legal or equitable relation' to the property, Quadra might benefit from the safety of that property or be prejudiced by its loss and that benefit or prejudice arose in consequence of the contracts Quadra had entered into and paid under. The Court decided the trial judge's conclusion that the inspection reports evidenced the physical presence in the warehouse of the relevant type of grain, corn, wheat or barley, corresponding to the cargoes was irresistible and was sufficient to establish that Quadra had an insurable interest. The Court rejected an argument by insurers that goods must be ascertained in the same sense as required for determining whether or not a buyer has a proprietary interest in goods for the purposes of the sale of goods and decided that an insured can have an insurable interest in goods even though it has no proprietary interest.

DIRECTORS' DUTIES TRIGGERED BY LIKELIHOOD OF INSOLVENCY

In BTI 2014 v Sequana the Supreme Court handed down judgment dealing with the effect of a company's anticipated insolvency on the directors' duties towards the company, its shareholders and creditors.

That fundamental duty is enshrined in s.172 of the Companies Act 2006 which provides, in subsection 1, that:

A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, [the provision then lists a number of considerations that directors should take into account.
Subsection 3 qualifies that duty by making it:
...subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.

The 'certain circumstances' that cause a directors' duty to shift (in part or in whole) from acting in the interests of its shareholders to its creditors, as established in common law, are the expectation that the company may or will become insolvent.

The appellant, BTI, was an assignee of a company's claim against its former directors who, 10 years previously, had caused it to distribute a dividend at a time when the company, though solvent, faced a long term risk of significant liabilities for pollution which would cause the company to become insolvent.

That distribution would have been unlawful had the duty to the company's creditors in s.172(3) been triggered and the question before the Supreme Court was whether it had been notwithstanding that, though there was a real risk the pollution liabilities would be realised, it was not probable that they would be realised.

The Supreme Court dismissed the appellant's appeal on the basis that a real risk of insolvency was not sufficient to trigger the directors' duty towards creditors. Further obiter comments explained that what was required was actual insolvency or imminent or probable insolvent liquidation or administration.

Exactly how that duty requires directors to act, and how the duty is to be balanced against the duty that may continue to be owed to the company's shareholders when s.172(3) is triggered, is a fact sensitive question. However, directors of companies incorporated in the United Kingdom will welcome the Supreme Court's confirmation that a duty is not owed to creditors when there is anything less than a likelihood the company will go insolvent.

MARKET RATE, ACTUAL LOSS AND OBLIGATION TO NEGOTIATE IN GOOD FAITH

Glencore agreed to sell to NIS 1,100,000 mt of crude oil (+/- 20 per cent in NIS's option). The sale contract included the requirement that Glencore procure a Performance Bond which would entitle NIS, on their written confirmation that Glencore had not performed its obligations under the sale contract, to recover an amount from the bond issuer.

It was discovered following delivery that the crude oil was contaminated. The Croatian receiving terminal, Janaf, complained it had suffered a loss of about USD 9,500,000. Glencore and NIS entered into a settlement agreement in which Glencore agreed to refund the entire price of the contaminated cargo and NIS agreed to purchase part of the cargo at a discounted price.

The settlement agreement included an outstanding claim by NIS against Glencore for liability the former incurred to Janaf for storage of the contaminated crude oil. It was agreed that Glencore would:
...reimburse NIS for such liability to the extent that such liability accurately reflects (i) the actual loss suffered by Janaf and (ii) prevailing market rates for storage
and that the parties would:
discuss in good faith with a view to agreeing the level of reimbursement.

The parties were unable to agree the level of reimbursement for storage costs paid to Janaf and NIS claimed about USD 2,000,000 on the Performance Bond. Glencore sought to recover this amount from NIS.

Glencore argued that the entitlement of NIS to reimbursement was limited to both the 'prevailing market rate' and 'actual loss'. Sean O'Sullivan KC, sitting as a Deputy High Court Judge, disagreed and gave judgment for Glencore but only in the amount of USD 1,000,000, holding that while the 'market rate' was the spot market rate for the volume used for the period in question and was not affected by the specific circumstances at the time, NIS were entitled to recover an amount exceeding the market rate as the 'actual loss' suffered by Janaf, which would include any uplift charged by Janaf due to the cargo being contaminated and due to the emergency circumstances.

Though this was decided on the wording of the settlement agreement, the decision provides guidance on what might be considered in determining the market rate and that such considerations will not ordinarily include unusual or specific circumstances.

NIS had further argued that the requirement for the parties to negotiate in good faith had been breached by Glencore on account of an alleged slowness to respond to NIS. The Judge held that it was not commercially unacceptable, and therefore not a breach of the requirement to negotiate in good faith, to be slow to respond particularly given that there was no evidence that it was done intentionally.

Furthermore, it was held that Glencore could, in good faith, require that NIS demonstrate the losses suffered by Janaf by demanding documents evidencing that loss even though Glencore knew they could not be obtained from Janaf.

The above are only intended to be short summaries.
If you require any further information please feel free to contact us.

WATERSON HICKS • SOLICITORS • 11 BOLT COURT • LONDON EC4A 3DQ
Telephone: +44 (0)20 7929 6060 Fax: +44 (0)20 3004 0997 E-Mail: law@watersonhicks.com www.watersonhicks.com
AND 43 Tsamadou Street, Piraeus 185 32, Greece. Telephone (30) 210 429 4300