

# wh Newsletter

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## FORTUITY OR CERTAINTY?

In 2005 the oil rig Cendor MOPU was transported on an unmanned tug-towed barge around the Cape of Good Hope with its three welded steel legs elevated above the deck as part of its voyage from Galveston to the Cendor oilfield some 200m off the coast of East Malaysia. Fatigue cracking caused by repeated bending of its legs as it was being transported, caused first its starboard leg and subsequently its other two legs to break and be lost.

The Court of Appeal considered whether the loss was covered under a cargo insurance policy incorporating the Institute Cargo Clauses (A) 1982, the insured perils being "all risks" subject to specified exclusions, one of which was inherent vice or nature of the subject matter. It was not disputed that the weather prevailing during the rig's transportation was within the range reasonably contemplated.

Before the voyage, a specialist firm of marine transport consultants had been employed to arrange the transit. They recognised that if the rig was transported with its 312ft long legs upwards, a risk of metal fatigue existed due to the actions of the waves. Nevertheless, other specialist experts undertook calculations as to the structural integrity of the legs and, ultimately, after surveys had been undertaken by a reputable firm of surveyors, the rig was loaded with its legs extending into the air subject to a recommendation that the barge roll motions should be kept to below 5 degrees.

In early October the rig arrived at Saldanha Bay, by which time the motion of the waves had caused some cracking and repairs were carried out. Following those repairs, the same firm of surveyors issued a certificate of approval for the tow to complete the voyage. During this further period the legs were lost.

The Claimants argued the loss was accidental and therefore within the terms of the cover. They submitted the proximate cause of the loss was the failure to ensure adequate repairs were carried out at Saldanha Bay. The Defendants argued the cause was inherent vice in the legs themselves or alternatively that the loss was an inevitable consequence of the voyage.

The Court of Appeal considered a statement in *Arnould on Marine Insurance* that "inability to withstand the ordinary incidents of the voyage is clearly an appropriate test of inherent vice".

The Court of Appeal held that where there was an accident at sea such as had occurred, the burden was on the insurer to establish inherent vice as the proximate cause particularly whether there was some other external fortuitous event which caused the loss of the rig's legs. Waller LJ stated; "The inclusion of fortuity within the definition of perils of the sea requires the assured to adduce evidence negating a loss by ordinary wear and tear or inherent vice or nature of the insured vessel. Thus, whereas with most

named perils the burden lies on the insurer to invoke s. 55(2)(c) (of the Marine Insurance Act) and adduce supporting evidence, the definition of perils of the sea reverses that burden." Arguing the loss was simply caused by perils of the sea was insufficient because if it was the action of the sea which had caused the loss, there had to be something beyond the "ordinary" which raised the question of by what yardstick "ordinary" was to be assessed.

With regard to a hull policy and the term "ordinary action of the wind and waves", the word "ordinary" related to "action", not to the wind and waves. The waters sailed in were relevant because the ordinary action of the waves in the Mediterranean would be different from those around the Cape of Good Hope. The definition was intended to exclude ordinary wear and tear.

The position should be no different with cargo insurance. If cargo was damaged by the motion of the vessel in "favourable" or "perfect weather" the obvious inference in most cases would be that any damage was caused by inherent vice or the nature of the cargo.

In considering whether damage to cargo was caused by inherent vice, the answer was not to be found by reference to what might be reasonably foreseeable as the ordinary incidents of that voyage but rather by reference to wind and waves which would be bound to occur as ordinary incidents on any normal voyage of the kind undertaken.

In finding that the accident was not a certainty, the Judge at first instance must have concluded that a wave strong enough to break a rig leg was not an inevitable occurrence on the voyage. The rig had been properly stowed and care had been taken to consult surveyors as to how it should be carried. The rig had been certified fit for the voyage. Metal fatigue was not the sole cause of the loss of the legs. A wave, not bound to be encountered on any normal voyage around the Cape, had caused the starboard leg to break off and that led to the other legs being placed at greater risk and subsequently also breaking off. Prior to the voyage it was not certain that this would happen and while with the benefit of hindsight it was highly probable, that high probability had been unknown to claimants. The motion of the waves so adverse as to cause the legs to break was the fortuity against which the Claimants had insured.

## PURE ECONOMIC LOSS RECOVERABLE – COURT OF APPEAL

In a decision which surprises us, this is the line of argument now available following the Court of Appeal judgment in *Shell UK v Total UK*.

Shell had a part beneficial interest in an oil storage terminal which was damaged by explosions and fire and suffered loss as a result

of being unable to distribute aviation and ground fuel. The legal title to the premises was vested in service companies.

The Court of Appeal held that equitable owners may bring claims in negligence for pure economic loss provided the legal owner is joined in the proceedings.

We believe the Court of Appeal may have intentionally opened up this area for review by the Supreme Court.

Further proceedings are expected and this is unlikely to be the last word.

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### BEWARE INFLATING CLAIMS

The "ARIELA" collided with a barge on 30 April 2004 at Goa, the barge itself alliding with a dredger alongside. Kamal, the Owners of the dredger and barge brought a substantial damages claim against the "ARIELA" Owners both for alleged damage to the barge and dredger, as well as for consequential losses. The total claim was for approximately US\$1.3 million consisting of US\$681,000 for repair costs, US\$485,000 for loss of use in respect of the dredger, US\$65,000 repair costs and US\$63,000 for loss of use in respect of the barge, plus a claim for business disruption and agency.

The High Court ordered separate trials of liability and quantum. At the liability trial it was held "ARIELA" was 100% to blame for the collision. An order was agreed and sealed in October 2007 as to the costs of the liability hearing pursuant to which the "ARIELA" Owners were to pay Kamal's costs of the action up to that date and make an interim payment of GBP65,000. This was duly paid. After the quantum hearing held in January 2009, the Judge gave judgment to Kamal in the sum of only US\$6,245 which represented a recovery for Kamal of less than 0.05% of their alleged claims. As one might expect, the Judge ordered Kamal to pay the "ARIELA" Owners' costs of the quantum hearing on an indemnity basis. The "ARIELA" Owners claimed that the liability costs order agreed in October 2007 had been obtained by fraud on the part of Kamal. The "ARIELA" Owners issued proceedings to set aside the liability costs order.

The "ARIELA" Owners argued that the so called "collision" in April 2004 was not in fact a collision at all but merely a very slight allision of the "ARIELA" with the barge which then in turn was gently pushed into the side of the dredger. The "ARIELA" Owners alleged the fraud perpetrated by Kamal was that the latter knew that almost no damage had been caused by the allision to either barge or dredger. Even so Kamal continued to assert that both the dredger and barge had sustained huge damage and as a result sustained enormous economic losses, when they knew neither assertion was true. The "ARIELA" Owners applied to set aside the liability costs order and sought an order that Kamal instead pay "ARIELA"'s costs for the entirety of the original liability action on the indemnity basis. In the alternative, they argued they were entitled to damages under the well known English case of *Derry v Peek* [1889] being the costs they incurred in defending Kamal's fraudulent claim and the sum they were required to pay on an interim payment basis in relation to the liability hearing.

Mr Justice Burton held there had been very little if any damage caused to either barge or dredger and, consequently, the enormous claims put forward by Kamal in respect of costs of

repairs and loss of use in relation to both of those vessels were entirely fraudulent. He had no compunction in setting aside the liability costs order by exercising the Court's discretion to do so since the Court and the "ARIELA" Owners had been entirely misled as to the extent of the actual damage sustained. The Court would not have made the order had the true position been properly presented by Kamal. He went further and substituted the liability costs order with an order against Kamal that they pay "ARIELA"'s costs of the original liability hearing on the indemnity basis and ordered that Kamal make an interim payment of US\$170,000 and return the GBP65,000 already paid by the "ARIELA"'s Owners, plus interest accrued.

As regards the alternative claim for *Derry v Peek* damages, it was clear Kamal had fraudulently misstated the quantum of their claim and as such, all of the "ARIELA"'s losses resulted directly from the said fraudulent misstatement. The "ARIELA" Owners had consistently sought disclosure of documents which Kamal had fraudulently concealed from them and furthermore had even made a Part 36 offer of settlement of a figure almost 50 times the genuine value of the claim, which had been rejected out of hand without any counter offer by Kamal. The Judge suggested that if a judgment were to be given under this alternative claim, then he may have offset some US\$30,000 from the total costs inclusive of the bill, because had Kamal put forward a genuine claim at the outset the claim most probably would have been settled and paid without any legal costs or interest having accrued since no lawyers would have been involved although he accepted that there may have been some minor costs related to experts' evidence. However, he found that it was not necessary to make any order under this alternative head of claim.

Rather unsurprisingly, Kamal did not appear at the quantum hearing in the High Court nor were they represented by any solicitors or barrister.

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### BAR RAISED HIGH FOR ANTI-SUIT

In a recent case in the Commercial Court, Transfield Shipping purported to have entered into a charterparty with Chiping Xinfu Huayu Alumina but the recap of the charterparty which was signed and stamped and returned to Transfield contained the words "subject details". Transfield had in correspondence suggested that London arbitration be agreed, to which Chiping responded that they would like Hong Kong arbitration. Despite Transfield sending an email to Chiping saying that the charterparty was clean, Chiping did not respond. After this, due to movements in the freight market, Chiping decided it would not nominate a vessel and failed to perform in repudiatory breach of the charterparty.

Transfield commenced arbitration in London in December 2008. Chiping appointed an arbitrator but disputed there was a concluded charterparty and arbitration agreement and commenced proceedings in China later in December 2008 asking the Court there to decide whether there was a binding charterparty between the parties and seeking a declaration that no arbitration agreement had been agreed. Almost a year later Transfield amended its claim in the arbitration proceedings and included a claim for damages for breach of the arbitration agreement and applied to the Court and for an anti-suit injunction against the proceedings brought by Chiping in China. The

Chinese Court had however, in the meantime, set a hearing date.

The Commercial Court held that where a party applied for an anti-suit injunction based upon an argument that there was or probably was or arguably was an agreement to have disputes decided in London arbitration, the test was whether the applicant party had shown on the evidence put forward at the interlocutory hearing a high degree of probability that there was an agreement to have disputes decided in London arbitration. The judge accepted Transfield had a good arguable case that there was a binding charterparty and that London arbitration applied but did not accept that there was a high probability that Transfield would establish this. It is clear from the judgment that the use of the words "subject details" in the document which Transfield signed indicated the agreement was not yet intended to be binding even though main terms had been agreed. Furthermore any application for an anti-suit injunction had to be made in good time. In this case, Transfield should have made the application as soon as it became apparent that Chiping was pursuing proceedings in breach of the arbitration agreement in China at the end of January 2009. However, it only made the application in November 2009.

Some deference will be given to a court in another country in deciding whether or not to prevent a party litigating in that country where the legal position as to whether or not there was a valid arbitration agreement was less clear than in England.

Application denied.

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### **NYPE – UNDER THE DIRECTION OF THE CAPTAIN**

The meaning of the terms "supervision" and "responsibility" in Clause 8 of the NYPE charterparty have been well litigated. London Arbitration 5/10 reviewed a fairly novel amendment to the Clause. The case concerned over carriage of steel pipes which should have been discharged at Jebel Ali but were instead kept onboard mistakenly and carried to Damman, where the vessel was redelivered. A dispute arose between Owners and Charterers over who was responsible for the error.

Clause 8 of the NYPE charterparty provided:

"... the Captain ... shall be under the orders and directions of the Charterers as regards employment and agencies; and Charterers shall perform all cargo handling, including but not limited to loading, stowage and trimming, **lashing, securing, dunnaging, unlashng, discharging, and tallyng** the cargo at their risk and expense under the supervision **and direction** of the Captain who is to sign Bills of Lading..."

Charterers sought to distinguish the present case from Court Line Ltd v Canadian Transport Co Ltd (1940) in which it was held that discharge of cargo under a NYPE charterparty is the Charterers' responsibility. Charterers in the present case argued that the words "and direction" had the same effect as the words "and responsibility", which are commonly inserted with the effect of transferring responsibility for discharging to Owners. Charterers submitted it was not for stevedores to tell the Master which cargo is to be discharged.

Owners relied on The Labrador in which it was held that the

words "and direction" did not transfer responsibility for stowage away from charterers. They argued that the insertion of these words merely emphasised the Master's right to intervene in cargo operations. Owners further relied on the Clause 8 words "and risk", arguing that these underlined Charterers' responsibility for cargo operations.

The Tribunal decided in Owners' favour. It held that the meaning of "and direction" is not equivalent to the meaning of "and responsibility" which, as established in Court Line, has the effect of transferring responsibility to Owners and which the parties in the present case had chosen not to insert into Clause 8. The words "and direction" did not by themselves have the effect of transferring responsibility away from Charterers. Owners were awarded their claim for the balance of hire plus interest and costs.

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### **ARE DAMAGES FOR LOSS OF A SUB-FIXTURE TOO REMOTE?**

The "SYLVIA" was chartered on an amended NYPE form, dated 22 February 2000, for 2-4 months +/- 15 days subsequently extended, lastly by an addendum dated 13 June 2003 for a further period of min/max 11/13 months in Charterers' option at US\$5,900 per day.

On 11 March 2004 she loaded a cargo of green petcoke at Anacortes, USA, for discharge at Port Alfred, Canada.

On 30 March, her Charterers entered into a voyage subcharter with Conagra for the carriage of wheat from Baie Comeau, Canada, to Casablanca, Morocco, with a laycan of 14-22 April 2004.

Discharge commenced at Port Alfred on 15 April. That day a Port State Control (PSC) inspection determined three structures in the holds were wasted.

On 16 April, discharge and cleaning of her holds was completed but the Canadian Food Inspection Agency rejected four of the five holds for loading grain and grain products. Owners appointed contractors to undertake descaling work.

The vessel arrived at Baie Comeau on 19 April where her holds were again inspected by PSC who issued a detention order recording "Main Structure wasted in cargo holds ... 1, 3 and 4". Repairs commenced on 22 April. The same day Conagra cancelled the subcharter.

The Time Charterers claimed damages, including loss of profits in respect of the cancelled subcharter.

On appeal from Arbitrators, Mr Justice Hamblen held that whether a loss was too remote was a question of mixed fact and law and the Court would only interfere if it were shown that the Tribunal had erred in law or had reached a conclusion on the facts which no reasonable Tribunal could have reached.

Having applied the test in Hadley v Baxendale, the Tribunal had not obviously erred in law. The Owners had a heavy burden to discharge as to whether the Tribunal's conclusion was one which

no reasonable Tribunal could have reached. The Tribunal had applied the orthodox approach and asked itself whether the loss claimed was of a kind or type which would have been within the reasonable contemplation of the parties at the time the contract was made as being not unlikely to result. They had concluded it was, finding that the loss of a fixture during the course of a charterparty due to delay in meeting laycan caused by Owners' breach of charterparty was both foreseeable and within the first limb of Hadley v Baxendale.

The Tribunal had not found, in distinction to the judgment in the "ACHILLEAS", a general market understanding or expectation that damages for delay during the currency of a time charterparty were limited to the difference between charter and market rates during the period of delay. Instead, the Tribunal had found the general understanding was that damages could be recovered for loss of a fixture where there was delay during the currency of a time charterparty. The measure of damages recoverable for a lost voyage fixture was recognised in charterparty cases.

This was not a case in which the resulting liability was unquantifiable or disproportionate. Where a follow on fixture was made at the end of a charter, it could be for any period. Loss of a subcharter during a time charter, by contrast, could never be for a longer period than the time charter itself. Whilst it was possible that market movements might mean the loss suffered was large, it would be a loss based upon a trading voyage.

The Tribunal's finding was that the parties would reasonably have contemplated that a delay in providing the vessel's services during the course of the charterparty would in the ordinary course of things cause Charterers the kind of loss they claimed as damages. The Tribunal had not found this was a case involving extraordinarily volatile market conditions or that the loss arose due to market conditions rather than the need to fix quickly.

Appeal dismissed.

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### AGREEMENT CONCLUDED?

Midgulf International entered into two contracts in June and July 2008 to sell sulphur to Groupe Chimiche Tunisien (GCT) a Tunisian state-owned company. A dispute arose as to the quality of the sulphur and Midgulf applied to the High Court for the appointment of an arbitrator in October 2008 under the July contract (no dispute arose as to whether London arbitration was the correct forum for disputes under the June contract). Shortly thereafter GCT commenced proceedings in Tunisia in which they sought a declaration that there was no arbitration agreement between the parties and a second action was commenced seeking damages. In February 2009, Midgulf applied for an interim anti-suit injunction in the High Court in London. In May 2009 the anti-suit injunction was granted and the Judge ordered that an expedited trial be held to decide the question of whether the July contract between the parties contained an arbitration clause.

At trial Midgulf submitted it had made an offer for the sale of sulphur and of particular note the offer stated that all other terms and conditions including those relating to jurisdiction and arbitration were to be the same as those in the June contract which contained English law and London arbitration provisions. Midgulf

argued the offer was accepted during a telephone conversation between the parties in early July 2008 or in the alternative, it was accepted by fax a few days later. GCT argued the fax was a counteroffer, not an acceptance of Midgulf's original offer as it stated that it confirmed purchase but "at the following conditions" which did not contain any jurisdiction or arbitration terms. Nor did it include any reference to Midgulf's initial offer; only to those terms set out in GCT's fax of 7 July. Mr Justice Teare found for GCT and held the contract was concluded per GCT's fax of 7 July and did not include a London arbitration clause. He found that the telephone conversation between representatives of the two parties in early July 2008 did not constitute a concluded contract intended to include all the terms and conditions of the June contract including the jurisdiction and arbitration clause. Midgulf appealed.

The Court of Appeal took a close look at GCT's actions during the course of negotiations. Applying an objective test, it noted GCT had argued that its representative, during the telephone conversation in early July 2008, did not accept Midgulf's offer of a few days earlier but did agree that a contract for the sale of sulphur had been concluded on "main terms" but those terms did not include an arbitration clause. The Court held that while a contract could be entered into on main terms with other terms remaining to be negotiated, for a contract to be concluded the parties had to have come to an agreement on all essential matters or terms. The Court of Appeal could not accept GCT's arguments that the parties had entered into such an important contract without agreeing such important matters as the grade/quality of sulphur to be provided, when it was to be provided and how payment was to be effected by GCT. It seemed clear to the Court of Appeal that during the telephone conversation in early July, GCT's representative would have been considered by a reasonable objective observer to have been concluding a contract for the July purchase on the basis of Midgulf's offer of a few days earlier as set out in its email which referred to the terms in the June contracts, including the London arbitration clause.

The wording used in GCT's fax contained phrases such as "we are pleased to confirm the purchase" and "we congratulate ourselves for this conclusion and look forward to its smooth execution". Had this fax been intended to be a counter offer and/or a rejection of Midgulf's email offer, then it would be strange for GCT to have used such wording. The Court of Appeal held that a contract had been concluded at the very latest upon receipt by Midgulf of GCT's fax and that contract included the terms of the June contract, including the London arbitration clause.

GCT argued the English court should not grant an anti-suit injunction if the foreign jurisdiction concerned, in this case Tunisia, was a party to the New York Convention as Tunisia was. The Court rejected this argument since the English court had historically granted anti-suit injunctions on the basis that they were compatible with the New York Convention. Midgulf's appeal was allowed and the anti-suit injunction upheld.

*The above are only intended to be short summaries.*

*If you require any further information please feel free to contact us.*