

---

# wh Newsletter

watson hicks

---

## INTRODUCTION

Since our last issue we have been particularly busy.

We have moved to newer offices, still in Fenchurch Street in the heart of the City. We have been joined by two new recruits, Rupert Talbot-Garman, a solicitor with a number of years experience in the shipping and commodity litigation sector and by Miranda Hearn, an experienced paralegal. Both Rupert and Miranda speak fluent Spanish and French. We welcome them both.

We anticipate further recruitment announcements in the near future. We have also demerged from a number of our former colleagues, whom we wish well in the various new careers they will be pursuing.

---

## THE DEATH (ALMOST) OF RULE B

One of the most refreshing new features of maritime law in recent decades has been the ability to intercept electronic fund transfers in the banking system in New York under the Rule B security procedure. In the Editor's view this procedure did much to clean up the maritime market and remove recalcitrant operators from it. The feature was refreshing unless one's funds had been wrongly attached.

However on 16 October 2009, the United States Court of Appeals Second Circuit, which covers New York, in *Shipping Corporation of India v Jaldhi Overseas Pte. Ltd.* effectively sounded the death knell for the use of Rule B Orders as security devices in this way.

The driving force behind this blatant policy decision was the damage Rule B Orders were perceived to wreak upon the New York banking system and the US currency.

The effects of the judgment have not been worked through but it seems that Rule B EFT cases can be put into three categories. The first category includes cases where the Court has issued an order for the attachment of EFTs held by an intermediary bank prior to the *SCI v Jaldhi* decision but funds have not yet been attached. In these cases, the attachment order is now ineffective. The second category comprises cases where funds are held by an intermediary bank pursuant to a Rule B Order and remain in the bank's possession as garnishee or possibly where the funds have been removed from the garnishee bank and placed into a suspense account at the Registry of the Court. It is considered likely that Defendants may apply for a motion to vacate the Rule B Order in these cases.

The third category concerns funds held by an intermediary bank which were then replaced by substitute security in the form of either a bond or an escrow deposit. It is considered likely that such

security will not be affected by the recent decision in that the EFTs have been converted into another form of security and that by agreeing to provide substitute security any doubt as to the validity of the electronic fund transfer attachment has been displaced.

A possible future exception to the *SCI v. Jaldhi* decision may be where a bank in New York is the originator or recipient of the wire transfer as opposed to an intermediary bank. The decision does not rule out Rule B Orders against other forms of assets, for example tangible property, bonds or insurance proceeds.

It is possible the case may be reviewed by the US Supreme Court and it may be that, to paraphrase Mark Twain, reports of the death of Rule B are premature. We shall revert in a later edition of this newsletter with further developments.

---

## HEATING BUNKERS (AND CALCIUM HYPOCHLORITE)

There was an explosion in a hold of the "Aconcagua" caused by the selfignition of the dangerous chemical calcium hypochlorite stowed in a container. The container had been stowed in a position in the hold where it was surrounded on three sides by a bunker tank which had been heated during the voyage. The vessel Owners commenced arbitration against the Time Charterers CSAV to recover damages. An interim award was made in favour of the Owners and shortly thereafter CSAV agreed to a settlement of US\$27,750,000. CSAV then sought to claim damages against the Defendants in this action, Sinochem Tianjin, for breaches of contract contained in or evidenced by the Bill of Lading in respect of this container.

CSAV claimed that, unknown to them, the calcium hypochlorite had abnormally high thermal instability and was prone to selfheat at ordinary carriage temperatures. As a result it exploded at temperatures which were ordinarily to be expected on board a vessel during such a voyage. Had the cargo not been abnormal it would not have exploded and CSAV therefore claimed therefore damages under Article IV Rule 6 of the Hague Rules.

Sinochem contended that the cargo was not abnormal or at the very least had not been shown to be abnormal. They claimed that in stowing the container in the position they had, CSAV was in breach of the Article III Rule 2 Hague Rules obligation to properly and carefully load, handle, stow, carry, keep and care for the goods carried.

Christopher Clarke J found that

- (1) This calcium hypochlorite was dangerous in nature and CSAV did not have nor ought they to have had knowledge of this

and therefore they had not consented to the shipment of a cargo of such dangerous nature.

- (2) The burden of proof was on Sinochem to show that stowage of the container in the position where it was stowed had a causative effect if Sinochem were to avoid liability.
- (3) On the evidence, Sinochem was unable to establish that heating of the bunker tank was the cause of the explosion. Even if that was wrong, it would be necessary to consider what would have happened if the container had been stowed in some other position on the vessel. The IMDG Code required that calcium hypochlorite must be stowed "away from" sources of heat. The Court accepted CSAV's submission that so long as there was a space of at least one container between the container and the source of heat, the container should be regarded as "away from" the source of heat. If the stowage planner was acting competently, the likelihood was that it would have been stowed in the forward part of the hold, where it was in fact stowed, but higher in the stow. However, on the evidence the cargo would still have exploded.
- (4) If wrong on this the Court had to consider whether the stowage position of the calcium hypochlorite amounted to a breach of the obligation to exercise due diligence to make the vessel seaworthy at the commencement of the voyage which could not be cured on the voyage. Heating the container while underway was not unseaworthiness per se, but negligence. The vessel was only potentially in danger if the bunker tank was heated. If no such heating had taken place the container would be safe. In such circumstances the vessel could not be considered as unseaworthy at the commencement of the voyage unless heating was bound to occur because that particular bunker tank had to be used during the voyage. On the facts the vessel did not have to use the relevant bunker tank on the voyage and fault lay not with the stowage position but with the decision to use and heat the relevant bunker tank, which was a failure by the Chief Officer and Chief Engineer. Heating the bunker tank was negligence but it did not amount to unseaworthiness.
- (5) It was admitted by CSAV that indirectly heating the container was a failure to handle cargo properly and carefully but they relied on the defence in Article IV, Rule 2(a) of "act, neglect or default in the management of the vessel". The Court held that the risk of loss thus arising was an excepted peril.
- (6) As regards CSAV's claim they were entitled to rely upon an indemnity under Article IV, Rule 6, the Court followed the FIONA [1993] from which it was implicit that Article IV Rule 6 could be relied upon where the casualty was caused by a combination of a dangerous cargo and an excepted peril.

Judgment was given in favour of CSAV in the sum paid to the shipowners in the London arbitration.

If the carriage had been subject to the new Rotterdam Rules instead of the Hague Rules, the carrier's duty of seaworthiness would not have been restricted to the start of the voyage but would have been a continuing obligation. The exclusion of liability under Article IV Rule 2(a) has been omitted from the Rotterdam Rules. Therefore, the result would have been different.

## SHIPOWNERS' RIGHTS TO RECOVER EXPENSES AFTER WITHDRAWAL

The vlcc "Kos" was chartered on the Shelltime 3 form for a period of 36 months +/- 15 days at Charterers' option. Under clause 13 the Master was under the orders and directions of the Charterers and the Charterers were obliged to indemnify Owners against all liabilities and consequences arising from orders given by the Master to the vessel. Clause 14 provided that Charterers were to accept and pay for all bunkers on board the vessel at the time of delivery and Owners were obliged to accept and pay at the actual purchase price all bunkers remaining on board at the time of redelivery.

The Charterers failed to pay hire as a result of which the Owners withdrew the vessel. At the time of withdrawal the vessel was loading cargo. Charterers argued the withdrawal was wrongful and threatened to arrest the vessel unless the Owners put up security in the amount of US\$ 18,000,000. The Owners complied with Charterers' demand, but maintained the demand was unjustified. The Charterers did not immediately upon withdrawal arrange for the loaded cargo to be discharged as they were seeking a revocation of the withdrawal from Owners. Discharge was commenced only after it transpired that Owners would not do so. The Owners claimed damages from the Charterers for detention and/or loss of use for the time between the notice of withdrawal and eventual disconnection of hoses. The market rate was said to be US\$ 155,407 per day and the Owners' claim for delay was for US\$ 410,274 plus the value of bunkers consumed. Additionally, Owners claimed the costs arising from providing a bank guarantee.

The Owners submitted that they were entitled to those damages firstly under the indemnity in clause 13, secondly as damages for Charterers' breach of charter in failing to pay hire, thirdly under an implied term that following withdrawal Charterers would pay Owners at market price until completion of discharge and the costs of any consumed bunkers until discharge, fourthly under a contractual obligation arising from exchanges between the parties after the withdrawal of the vessel and finally as a right correlative to the Owners' duties as bailees.

The Court rejected the first four grounds submitted by Owners. Andrew Smith J held that an indemnity under clause 13 would be too remote as the parties could not have intended it to cover the present claims. The Owners' withdrawal was out of the control of the Charterers. The claims were not recoverable as damages for the failure to pay hire. Charterers' breach was not repudiatory and, effectively, the Owners' withdrawal broke the chain of causation. Similarly, the Court refused to infer an implied term as suggested by the Owners and did not accept that the Owners had, apparently, acted upon the request of the Charterers. The Owners had not held the vessel at the load port in response to an implicit request by Charterers, but because there was no practical alternative. However, Smith J did accept the Owners' last submission. When the vessel was withdrawn the Owners remained bailees of the cargo. The bailment for valuable consideration became a gratuitous bailment. Unless there is a contract in place to the contrary effect, the bailees were not obliged to take a chattel to its owner. On those grounds, the Owners were entitled to rely upon their duty as bailees to bring a claim for the expenses they incurred in fulfilling those duties. The

expenses in relation to the provision of a bank guarantee were deemed to be incidental to the proceedings and therefore recoverable as costs.

---

### REWRITING THE AGREEMENT

The House of Lords recently reviewed the law of contractual construction and rectification in *Chartbrook Limited v Persimmon Limited*. The Defendant had contracted to develop a plot of land owned by the Claimant and to make payments based on a formula. The Claimant commenced proceedings against the Defendant for £3,590,000.

The Defendant contended the Claimant had wrongly interpreted the formula. Alternatively, they argued the agreement should be rectified to reflect the underlying commercial agreement.

The House of Lords, with Lord Hoffman (who is known to have distinct and original views on contractual construction) giving the leading judgment, considered the extent to which courts could take into account precontractual negotiations, if at all, when the language of a written agreement has clearly failed.

As to construction, their Lordships agreed with the Defendant stating the current law to be that a mistake had to be on the face of an agreement and the corrective action obvious. Lord Hoffman considered:

*“there is [no] limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant.”*

It is well established law that evidence in relation to pre-contractual negotiations is inadmissible. However, Lord Hoffman appeared to open up the possibility for consideration of such evidence for one purpose, albeit not for another. With regard to the current rule he stated that it:

*“excludes evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant. It does not exclude the use of such evidence for other purposes: for example, to establish that a fact which may be relevant as background known to parties, or to support a claim for rectification or estoppel. These are not exceptions to the rule. They operate outside it.”*

The House of Lords has encouraged Courts to intervene and correct mistakes made in drafting an agreement in cases when the mistake is clear and it is obvious what the parties had meant, even more so where the literal construction does not make commercial sense. The Court may not take into account precontractual negotiations for the purpose of drawing inferences as to the meaning of a term but they may do so for the purposes of informing itself as to the background of the agreement.

Their Lordships held that for rectification to be available there had to be a prior consensus as to the meaning of the written

agreement. That consensus was dictated by what a reasonable observer would interpret the meaning of the agreement to be, not what the parties to the agreement subjectively believed it to be.

Expect litigation based on this decision.

---

### ADMITTING THE INADMISSIBLE

In *Oceanbulk Shipping v TMJ Asia* the Claimants and Defendants concluded a settlement agreement in relation to disputes arising out of FFAs. A dispute then arose with regard to the meaning of provisions of the settlement agreement. An issue arose as to whether the Defendants were entitled to adduce and rely on without prejudice exchanges between the parties. The Defendants argued the exchanges were relevant to the proper interpretation of the settlement agreement and their contention that the damages were too remote to be recoverable gave rise to an estoppel against the Claimants. It was the Claimants' case that the exchanges were inadmissible as they were conducted on a without prejudice basis.

The Court held without prejudice exchanges between parties to a dispute were not generally admissible. It was however established that this rule was not absolute and Andrew Smith J considered three instances where such evidence would be admissible: (i) where the issue was whether the without prejudice communications resulted in a concluded compromise agreement, (ii) if the evidence showed the agreement was concluded on the basis of misrepresentation, fraud or undue influence or (iii) if a statement made by one party on which the other party was intended to act gave rise to an estoppel.

The Judge found there would be no sense in admitting evidence as to whether a settlement agreement was concluded without admitting evidence of the terms of the agreement. Evidence could be admitted to determine whether a written agreement should be rectified and to inform as to the interpretation of the agreement. The without prejudice exchanges were admissible where the interests of justice required the meaning of the settlement agreement to be ascertained by reference to them. The Defendants were entitled to rely on without prejudice exchanges in relation to the remoteness of damages claimed by the Claimants.

---

### UNSAFETY – LIABILITY OF THE BERTH OWNER

In the “BON AMI” the Owners of the vessel, which sustained damage because of the unsafety of a berth where it had been represented the vessel could lie safely aground, pursued the relatively unusual route of making a claim against the berth owner under the Occupier's Liability Act 1957.

Gloster J held it was an implied term of the mooring contract that the owners of the berth should have taken reasonable care to ensure that the layerage of it was safe and to the extent that it might not be, they had an obligation to warn their customers that

such was the case. She continued to hold that the berth owners were occupiers for the purposes of the Occupiers Liability Act 1957 and subject to a duty to ensure the berth was in proper condition or to give a warning if it was not.

However on the facts that the Judge found that the berth owner had given sufficient warning of the dangers inherent in using the berth.

---

### SOLICITORS GET OFF THE HOOK

On 17 October 2005 the “Pearl of Jebel Ali” collided with the “Pride of Al Salaam” in the Suez Canal. The “Pride of Al Salaam” sank and her Owners brought a claim for US\$ 10,600,000 against the “Pearl of Jebel Ali” which counterclaimed for US\$ 1,500,000. A subsequent Collision Agreement provided for English law and jurisdiction so that a two year limitation period applied for commencing proceedings. The parties’ solicitors exchanged correspondence in relation to the necessity to commence prior proceedings in Egypt for the purposes of obtaining VHF and VTS evidence before commencing proceedings in London. For this purpose, Jebel Ali’s solicitors wrote to Al Salaam’s solicitors on 2 October 2007 asking for a “mutual unlimited extension of time from 16 October 2007 within which to commence proceedings in England subject to one month’s notice of termination of intention to proceed by either side....”. Al Salaam’s solicitors agreed this on behalf of their clients.

On 19 September 2008 Al Salaam gave notice to Jebel Ali they wished to commence proceedings and issued a Claim Form on 14 October 2008, although it was not served until 26 January 2009. On the day of service, Jebel Ali gave notice to commence proceedings themselves within one month followed by the issue and service of their client’s Claim Form on 29 January 2009. On 12 February 2009 Al Salaam informed Jebel Ali that the claim of Jebel Ali was time-barred. Jebel Ali applied for a declaration that their claim was not timebarred or alternatively for an extension of time.

Jebel Ali argued the agreed extension was unlimited but if either party wished to proceed it had to give one month’s notice to the other party whereas Al Salaam submitted the extension ended upon one month’s notice. Teare J held that the parties could not have intended the extension to last for an unlimited period of time without it being capable of termination. A reasonable person would expect the extension could be brought to an end upon receipt of evidence from Egypt or when enough time had passed to seek that evidence. Accordingly, the effect of Al Salaam’s notice on 19 September 2008 was that the parties had to commence proceedings within one month. Jebel Ali was therefore timebarred from bringing any counterclaim.

The next question was whether a counterclaim was subject to the two year limitation period of S.190 Merchant Shipping Act 1995: the Court confirmed it was. Teare J however saw fit to grant an extension to allow the counterclaim as the email of 2 October 2007 was poorly drafted.

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

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