

wh Newsletter

watson hicks

INTRODUCTION

We welcome to the firm Tom Wild, an Oxford University law graduate who has recently passed Bar exams. He speaks French and some Russian.

ARREST CONVENTION 1999

This has now come into force. It permits the arrest of ships in respect of various new types of claim not scheduled in earlier Conventions including sale and purchase disputes, insurance premium including P&I calls, port dues, environmental damage, wreck removal claims and claims for commission.

Maritime states who have become parties to the Convention where we expect to see these new heads of claim tested include Algeria, Spain and Syria. The Convention also specifically permits the rearrest of vessels.

PIERCING THE VEIL

In *Antonio Gramsci Shipping v Stepanovs* the Claimants were a number of one-ship companies, all in the beneficial ownership of the Latvian Shipping Company ("LSC"). Their case was that the Defendant, who held a decision-taking role with LSC, had chartered their vessels to his own companies at below market rate. These companies had then sub-chartered the vessels onwards at higher rates and the Defendant had profited from those transactions.

The Claimants were held to have a good arguable case that the veil of incorporation between the Defendant and the various companies controlled by him ought to be pierced, allowing the Claimants in principle to enforce their claims against the Defendant personally. The Claimants obtained a freezing injunction against the Defendant and his companies.

Burton J considered whether the corporate veil can only be pierced where it is necessary to do so. He rejected the

argument that it was only possible where necessary to provide the Claimant with an effective remedy. He found that necessity is not a fetter upon such a claim.

The Judge held the Defendant may be jointly and severally liable with the companies under the contracts, remarking that there is 'no good reason of principle or jurisprudence why the victim cannot enforce the agreement against both the puppet company and the puppeteer who, at all times, was pulling the strings'.

It being settled that the Defendant could be personally liable on the charters, it fell to be considered whether the jurisdiction agreements in those contracts were effective. In reliance on *Coreck Maritime GmbH v Handelsveem* [2001] it was held that national law rather than European law must determine the identity of the parties to a jurisdiction agreement. By analogy with the principle of agency, the Defendant was found to be party to the contracts. There was no need for him to be identified in writing as a party. There was a good arguable case that the Defendant had consented to the jurisdictional agreement and had thereby submitted to English jurisdiction.

EARLY REDELIVERY: NO MARKET

It is well established that damages for early redelivery will reflect the difference between the charter rate and the prevailing market rate for an equivalent fixture for the remaining duration of the breached contract. However difficulties arise where, as in late 2008, there is no market at all for equivalent business. This problem was considered in two recent cases – the "KILDARE" and the "WREN".

In the wake of the financial crisis in the Autumn of 2008 the bottom fell out of the market. Charterers found their liquidity drying up and sought to escape fixtures entered into while the market was buoyant. In both the "KILDARE" and the "WREN" Charterers' liability for wrongful early redelivery was established and the Court moved to consider the question of quantum.

The "WREN" concerned redelivery after 5 months of a 36-month time charter. The "KILDARE" was redelivered one

year into a 5-year consecutive voyage charterparty. In both cases the Court found that at the time of redelivery there was no available market for equivalent business. The normal measure of damages was therefore unavailable.

Both vessels had been placed in alternative employment – the “KILDARE” was originally placed on the spot market before eventually being chartered on a separate long-term contract of affreightment while the “WREN” was fixed on a succession of voyage charters. Before the contractual date of redelivery the market for equivalent business revived.

Blair J giving judgment in the “WREN”, followed David Steel J in the “KILDARE” in holding that the revival of the market was irrelevant in calculating loss. The difference between the contract rate of hire and the prevailing rate when the market revives several months after breach is not an accurate measure of what has been lost – to take the revived market rate into account would conflict with the notion that damages should be assessed at the point of breach.

The Charterers of the “WREN” further pointed out that to return to the market rate as the measure of recovery once the market revived would be to assess their liability at its highest: the market rate is likely to be at its lowest when the industry is in the foetal stages of recovery.

Both judgments provide that where a vessel is redelivered early and no market for equivalent fixtures exists, the Owners will recover their gross loss for the remainder of the charter period less the profits of alternative employment, subject to the normal contractual limitations on recovery.

BARRISTERS AS ARBITRATORS – BIAS?

In *A & Others v B & Another* a QC was agreed as sole arbitrator. He had previously been instructed in other matters as Counsel by both firms of solicitors involved in the arbitration.

Shortly before issuing his Award in the arbitration he wrote to both parties pointing out that on one case where he had acted for one of the firms of solicitors the case had recently been revived so that he was working together with that firm on another case shortly before the Award was issued.

When the Award was made available it emerged that the successful party was the party represented by the same firm of solicitors with whom he had more recently been working. The unsuccessful party applied to challenge the Award for

serious irregularity and have the arbitrator removed because of doubts as to his impartiality. They argued that any objective observer would conclude there was a real possibility of “unconscious bias”.

Flaux J rejected this argument: if predisposition was only unconscious it was difficult to see how there could be any relevant predisposition. He found no suggestion that the QC was seeking to foster his relationship with the firm for whom he was more recently acting and who had been more successful under the Award.

Although it was arguable that the QC might have disclosed his recent instructions at an earlier stage in the arbitration, this did not amount to a serious irregularity causing substantial injustice.

MAJOR APPROVAL

The “ROWAN” concerned the scope of a warranty in a voyage charterparty that the vessel would be approved for the carriage of fuel and/or vacuum gas oil by certain oil majors.

The fixture recap included the words:

“TBOOK WOG VSL IS APPROVED BY:
BP/LITASCO/STATOIL – EXXON VIA SIRE”

The Charterparty also incorporated the Vitol voyage chartering terms, clause 18 of which provided:

“Owner warrants that the vessel is approved by the following companies and will remain so throughout the duration of this Charterparty – TBOOK VSL APPROVED BY: BP/EXXON/LUKOIL/STATOIL/MOH”

“TBOOK” meant “to the best of Owners’ knowledge” and “WOG” meant “without guarantee”.

During the course of the voyage, the vessel was inspected for class annual survey and SIRE inspections by Shell and Conoco. An interim class certificate was issued requiring the low suction sea-chest valve to be repaired at the next port and a condition of class was imposed. Before the Owners reported on the SIRE inspections Shell agreed to buy the cargo subject to vetting. Shell subsequently rejected the vessel as a result of the latest SIRE report.

The Owners brought proceedings claiming demurrage and the Charterers counterclaimed the balance between the

value of the sale contract to Shell and the actual resale value of the cargo as damages.

It was held that the expression "WOG" in the fixture recap did not override the express wording of Vitol clause 18. There was therefore a warranty that, to the best of the Owners' knowledge, the vessel would retain the approval of the oil majors throughout the Charter.

The Court held that "TBOOK" refers to the actual knowledge of the company at the time the warranty was made. Accordingly, the fact that the Owners as an entity knew that the status of the sea-chest valve was such that the warranted approval would likely be revoked was fatal and the counterclaim succeeded.

ASSIGNMENT OF BUILDING CONTRACT DOES NOT NULLIFY GUARANTEE

In *Meritz Fire & Marine Insurance v De Nul* dredgers were to be constructed by a Korean shipyard against the security of advanced payment guarantees issued by the insurers Meritz. Without the knowledge or consent of the Buyers or of Meritz the shipbuilders transferred the shipbuilding contracts to a third party which itself then transferred them to a fourth party. Under Korean law this discharged the shipbuilders from their liabilities to the Buyers under the shipbuilding contract.

The Buyers subsequently sought to claim against Meritz under the guarantees. Meritz claimed that the transfer of the shipbuilding contracts discharged them from liability under the guarantees.

The case came before the Court of Appeal which construed the wording of the particular guarantees literally finding that the Buyers had made advance payments, they had asserted the contracts had been terminated in the circumstances giving rise to claims under the guarantees and unless their claims were disputed by commencement of arbitration they were entitled to collect repayment.

ENFORCEMENT OF LOI

In the "JAG RAVI" claimant Owners sought to enforce a letter of indemnity for delivery of cargo without production of a Bill of Lading against defendant Charterers and Receivers. The vessel was chartered by Far East Chartering Limited (FEC) on behalf of Visa Comtrade AG (Visa), an affiliated

company and a party to a sale of goods contract on FOB terms. Visa subsequently onsold the cargo to second Defendants Binani Cement Limited (Binani).

FEC sent an LOI to Binani in the form required, who returned the executed LOI to FEC. The LOI was addressed to "The Owners / Disponent Owners / Charterers of the M/V "JAG RAVI" and was expressed to indemnify "you, your servants, your agents..." in consideration of the delivery of the cargo without production of the original Bill of Lading. Meanwhile, unknown to Binani and the Owners, a dispute had arisen between the Shippers and Visa, who were refusing to take up the Bills of Lading.

The Owners discharged the whole cargo at the discharge port. Following discharge, Binani initially refused to accept delivery of the cargo, which they alleged to be below contract specification. Relations deteriorated and the shippers gave notice to the Owners of a claim for damages for delivering the cargo without presentation of the original Bills of Lading. The Shippers obtained judgment on liability against Owners and Owners sought to enforce the letter of indemnity.

Owners relied first on the Contracts (Rights of Third Parties) Act 1999, claiming they acted as agents for the Charterers in delivering the cargo. Since the LOI was expressed as being executed for the benefit of "[the Charterers'] agents" it followed from the decision in the *Laemthong Glory* [2005] that the Owners were entitled to take the benefit of the LOI. Owners delivered the cargo within the terms of the LOI and accordingly that they could enforce it against Binani.

A further submission was raised on the ground that the LOI was also addressed to the Owners themselves. The difficulty with this submission was that Owners were unaware of the existence of the LOI at the point when they delivered the cargo. Counsel for the Defendants submitted that "Conduct in ignorance of an offer is incapable in law of constituting acceptance". This appears to be the correct approach. However, the Court having ruled in favour of enforcing the LOI under the 1999 Act did not express a view on the second ground.

The Court emphasised the importance of avoiding the temptation to apply too elaborate a construction of letters of indemnity in the commercial context. Judge Mackie QC stated the agreement should be "seen in context written by someone whose first language was probably not English". The words in an LOI will be given their ordinary meaning and an overly technical interpretation of them is to be avoided.

FOLLOW AXA

In the “BUANA DUA” the vessel, a tug, had hull insurance with three lead Underwriters. The tug became a CTL and the first leader AXA agreed to pay its share of the claim. The second leader declined the claim on the basis of their breach of warranty.

The policy contained a follow clause:-

“It is agreed to follow AXA HK in respect of all decisions, surveys and settlements regarding claims under the terms of the policy, unless the settlements are to be made on an ex gratia or without prejudice basis”.

The second leader argued it was not obliged to follow AXA's settlement where there had been a breach of warranty since the claim was not “within the terms of the policy”.

Teare J applied the “follow AXA” clause. It referred to all settlements which suggested there were to be no exceptions to settlement which had to be followed unless expressly stated. The process of claim investigation and settlement by AXA was to be followed including issues of liability on quantum.

The second leader argued that a breach of warranty discharged the insurer from the date of breach so that there was no extant insurance in place when the loss occurred. The Judge rejected this argument: if accepted, this contention would greatly reduce the efficacy of the follow clause and its commercial purpose.

REPUDIATION OF CHARTER

In a recent London arbitration Owners claimed damages for the anticipatory repudiatory breach of a time charter. The Tribunal had to consider whether communications from the Charterers amounted to anticipatory repudiatory breach and whether the Owners subsequently affirmed the contract.

The parties entered into a time charter agreement on 12 April 2005 for a period of 24 months +/- 30 days in the Charterers' option. The vessel was delivered on 26 July 2005, giving an earliest contractual redelivery date of 26

June 2007. However, the Charterers sought to renegotiate the rate of hire in September 2005. Their attempts being unsuccessful they sent a message on 6 September providing:

“charterers hereby give 7 day redelivery notice under the head charterparty of the vessel DLOSP Shanghai on the 12 Sept 2005”

Owners replied the same day, stating they considered Charterers to be in breach of the Charterparty and accepting early redelivery in order to minimise their losses.

Charterers contested Owners' claim on the grounds firstly that their message of 6 September was not an anticipatory breach, rather an indication that they may breach the charter in an attempt to negotiate a better rate of hire. Unsurprisingly, the Tribunal considered the message to be an unequivocal notice of the Charterers' intention to redeliver the vessel and accordingly to be an anticipatory breach.

The second ground of defence was that by continuing to accept the payment of hire up to the date of actual redelivery Owners had rejected the anticipatory breach and affirmed the contract. This argument also received short shrift from the Tribunal. Quoting from the judgment of Moore-Bick J in *Yukong Line v Rendsburg Investments Corporation*, it was held that a contract will not be held to have been affirmed “without very clear evidence that the injured party has indeed chosen to go on with the contract. The law does not require an injured party to snatch at a repudiation and he does not automatically lose his right to treat the contract as discharged merely by calling on the other to reconsider his position and recognise his obligations”.

That the vessel continued on charter until the completion of final discharge and redelivery was the consequence of the normal progress of the voyage, not an election to affirm the contract.

The liability of Charterers being established, it was held that the Owners were entitled to damages reflecting the difference between the charter rate and the market rate for the remaining period of the charter. The Tribunal held that 3.75% in commissions ought to be taken into account when assessing the Owners' loss to reflect the fact that the market rate would probably be subject to commissions at a similar rate.

The above are only intended to be short summaries.

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