Autumn 2007

wh Newsletter

waterson hicks

As the firm continues to expand we are delighted to welcome Domenica Lucibello as our latest recruit. Domenica is a Barrister who has been working for the last six years for Shell dealing with claims and transactional business. She hopes to requalify as a solicitor within the next few months.

NAMED PORTS AND EXPRESS WARRANTIES OF SAFETY

If a charter specifies the loading port or place then, absent any express warranty in the charter, there is no implied warranty as to the safety of the specified port or place. Thus in The HOUSTON CITY [1954] Dixon C.J. stated in a judgment of the High Court of Australia which has been widely followed in England:

> "When the charterer is prepared at the time of taking the charter to specify the place where the cargo will be available or the place at which he desires it delivered, the shipowner must take the responsibility of ascertaining whether he can safely berth his ship there or will take the risk of doing so. If he agrees upon the place, then, subject to excepted perils, his liability to have his ship there is definite"

In January 2003 the hull of the "LIVANITA" was damaged by ice on an outbound voyage from St Petersburg.

The NYPE charterparty on which the vessel was fixed was for "one time charter trip via St. Petersburg/Baltic/Conti to the Far East". Additional clauses provided the vessel was not to be required to enter any icebound port or a port where the vessel would not be able to safety enter or leave because of ice and that trading was to be between safe ports, berths, anchorages and places.

Arbitrators found the Charterers liable for breach of the express safe port warranty in the later additional clause.

The Charterers appealed. They relied on The HOUSTON CITY and argued that any express warranty of safety in a charter was nullified by naming the relevant port in the charter.

The same question coincidentally arose in the decision a month earlier in the "ARCHIMIDIS" where the charter referred to "one safe port Ventspils". Charterers argued this was a mutual agreement by the parties that the port of Ventspils was safe.

In both cases the Judges in the Commercial Court dealing with the appeals found in favour of Owners as a matter of charterparty construction. There was no inconsistency between a safe port warranty and a named loading or discharging port. Effect should be given to both of the terms. The safe port warranty therefore applied to the named loading ports.

RISK OF MARPOL CHANGES

The "ELLI" and "FRIXOS" were both time chartered on the Shelltime 4 form for a number of years. Each of the charters provided that the vessel should be in every way fit to carry crude and/or dirty petroleum products, in every way fit for the service, should have on board all certificates, documents and equipment required to enable them to perform the service, that Owners would exercise due diligence to maintain or restore these requirements and that the vessels had segregated ballast tanks and were doublesided. A further additional clause provided that Owners warranted the vessels were eligible under all conventions, law and regulations to trade to and from the ports and places set out in the charter, would have on board all certificates, records, compliance letters and other documents required for such services and that Owners warranted the vessels did and would fully comply with all applicable conventions, law, regulations and other international, national, state or local requirements including those of Marpol 1973/1978 as amended and extended.

After the charterparty of the "ELLI" had been agreed but before the Charterparty of the

“FRIXOS” had been agreed new Marpol Regulations were introduced setting out requirements for the carriage of fuel oil from a date 16 months in the future. One of those new regulations provided that fuel oil could only be carried in double-hulled vessels from the relevant date although there was an exemption provided for tankers which were constructed with double-bottoms or double-sides which were not used for the carriage of oil and extended along the entire cargo tank length. Both of the vessels have been considered to be double-sided by the market previously but the introduction of this regulation meant that they no longer strictly complied with this requirement since some 2.6 meters of the cargo tanks in the total length of each vessel (around 230 metres) was not surrounded by spaces which were not used for the carriage of oil since the offending 2.6 meters length in each case consisted of doublebottom bunker tanks. Because of this Lloyd’s Register determined that the vessels should be classed as single hulled tankers which were not permitted to carry heavy grade oil. The flag state, Liberia, took the same view.

Mr. Justice Cooke held that the vessels had to be fit for the service required at the time of delivery which included compliance with the applicable laws and regulations such as Marpol. There was an ongoing obligation to comply with these laws and regulations irrespective of cost. In the present cases the physical cost of remedy was estimated at US$600,000 per vessel plus offhire. The Judge observed Owners’ obligation to exercise due diligence to ensure compliance with the legal and regulatory requirements gave rise to an obligation to exercise reasonable skill and care to remedy any deficiency once it arose. Reasonable steps had to be taken within a reasonable time using reasonable skill and care to put right any deficiency. While there might be some latitude about when, where and how remedial work was carried out, cost was not a material factor.

The Court was also asked to decide on damages. A point of note arising in relation to the Charterers’ claim for damages related to the Owners’ allegation that the Charterers failed to mitigate their loss in respect of the “ELLI” by their decision to have the vessel’s tanks cleaned so she could carry clean petroleum cargoes. In support of this, the Owners pointed to the time involved in cleaning, the limited number of clean cargoes carried by the vessel, and the Charterers’ subsequent decision to revert to the dirty trade. The Judge concluded there was no basis for finding the Charterers’ decision was unreasonable. The facts fell short of showing that Charterers’ conduct was so unreasonable as to break the chain of causation between the breach of charter and the losses suffered.

ANTI-SUIT PENDING JURISDICTION PROCEEDINGS

The vessel “ALEXANDROS T” was lost on a voyage from Brazil to China while carrying a cargo of iron ore. The Bill of Lading for this cargo expressly incorporated the English law and London arbitration clause of the Head Charter.

The Chinese cargo insurers obtained an Award from the Chinese Courts against the Owners and their Time Charterers freezing amounts due from the Cargo Owners to the Voyage Charterers under the voyage subcharter and from the Time Charterers to the Owners under the Head Charter. The Owners were also ordered to provide security to the Cargo Interests. The Cargo Owners and their insurers then commenced substantive proceedings in China against the Owners, Managers and Time Charterers. They later also commenced London arbitration proceedings. The Owners opposed the jurisdiction of the Chinese Courts and applied for an interim anti-suit injunction restraining the Cargo Owners and their insurers from taking any steps in the Chinese proceedings.

Mr. Justice Cooke held that the English Courts would normally restrain proceedings overseas commenced in breach of a London arbitration clause Insurers are bound equally by a London arbitration clause: he rejected the insurers’ argument that they were not bound by it as a matter of Chinese law. Against the background of at least one of the arbitrators being unable to hear an application to deal with the issue of jurisdiction in London before the Court in China was likely to reach a decision on jurisdiction, it was appropriate for the Court in London to issue an interim injunction restraining the Chinese proceedings pending the result of the jurisdiction determination by the London arbitrators. The Chinese proceedings had also been commenced against the vessel’s Managers but it was not within the jurisdiction of the Court to extend the anti-suit injunction to include the vessel’s Managers.

As an indication of the pragmatic approach which the Commercial Court may be expected to take in dealing with cases of this type, it granted the interim anti-suit injunction against the Cargo Owners and their insurers on condition that the injunction would continue only if security was arranged by the vessel Owners comparable to that which had been arranged in China and this was to be put in place as soon as the security in China was released.

CHARTERERS' ACHILLEAS HEEL

We previously reported the Commercial Court decision in this case where Time Charterers redelivered the vessel "ACHILLEAS" late. The Owners had committed the vessel to new employment with new Charterers with a cancelling date 6 days after the latest date for redelivery. When it became obvious to Owners that the vessel would not be redelivered before the cancelling date under the new employment they renegotiated that business at a lower rate and claimed their losses against the present Time Charterers. The Charterers argued before the Court of Appeal that their liability was limited to damages for late redelivery at the difference between the market rate and the Time Charter rate for the overrun period. The Court of Appeal rejected this argument and supported the rationale of the Commercial Court decision that it is entirely foreseeable that Owners will look to reemploy vessels following redelivery and the losses that may arise by reason of that future employment being lost or renegotiated as a result of late redelivery are themselves foreseeable.

NO NDC FROM KPT; NO FRUSTRATION

After the tanker "TASMAN SPIRIT" ran aground near the approaches to Karachi on 27 July 2003 a salvage agreement was concluded with Tsavliris by the vessel's Owners on the LOF 2000 Form which incorporated the SCOPIC clause.

To lighten the vessel and tranship the cargo into another tanker, Tsavliris time chartered in a number of shuttle tankers. One, the "SEA ANGEL", was time chartered in for a period of "up to 20… days". The "SEA ANGEL" was due to be redelivered at Fujairah and, on 9 September 2003, with her task completed, Tsavliris tendered the requisite three-day notice of redelivery.

However, the Karachi Port Trust ("KPT") refused to issue a document known as a No Demand Certificate ("NDC"), without which port clearance could not be obtained. The "SEA ANGEL" could not therefore be redelivered within the charter period, did not leave Karachi until 26 December 2003 and was not redelivered until 1 January 2004. The vessel was detained by KPT as security for its pollution claims against third parties. The vessel was held until KPT and the Owners' P&I Club reached an agreement.

On 5 December 2003 the Court in Karachi ruled that KPT's refusal to issue the NDC was unjustified and ordered that it be issued. Tsavliris did not pay hire beyond 18 September 2003 arguing that due to the length of delay the charter had been frustrated by KPT's refusal to issue the NDC. The Owners of the "SEA ANGEL" ("Owners") sought hire from 18 September 2003 to 1 January 2004.

At first instance Mr. Justice Gross upheld the Owners' claim finding that the charter had not been frustrated, that the possibility of unreasonable detention was part of the matrix of the time charter of "SEA ANGEL" including the SCOPIC clause and that unreasonable detention was a foreseeable risk of the salvage industry. Tsavliris appealed.

In dismissing the appeal, the Court of Appeal stated it was not merely a case of comparing the length of the delay with the length the time charter was expected to run. The Court also had to consider the parties' knowledge, expectations, assumptions and contemplations (particularly with regard to the risk of delay) at the time they entered into the contract, the nature of the allegedly frustrating event and the parties' reasonable and objectively ascertainable calculations concerning the possibility of performing the charter in the new circumstances. The Court accepted this was not easy to do. There had to be a difference between what the parties had initially bargained for and the way the contract would be performed in light of the new circumstances. The question was whether it would be just for Tsavliris to be bound by the charter. The Court of Appeal found they should be bound by it and followed the reasoning of Mr Justice Gross. The failure of the port to issue the NDC did not render performance impossible: a solution was possible, albeit one which required the cooperation of the parties and the

assistance of the Court in Karachi. The charter was not frustrated.

CREDIT FOR UNDERCONSUMPTION OF BUNKERS

The current flurry of speed and consumption disputes continues.

In a recent London Arbitration the question whether Owners were entitled to a credit for underconsumed bunkers and how the application of a margin for the word "about" should be made were considered.

The Charterparty was concluded upon an amended NYPE Form and the vessel's speed and consumption was described as:

"ABT 14.5KN BALL on ABT 41 MTS IFO (380 CST) + 1 MTS DO
ABT 13.5KN LADEN on ABT 46 MTS IFO (380 CST) + 1 MTS DO"

It was common ground between the parties that in order to calculate time lost and any overconsumption of bunkers reference should be made to the minimum warranted speed allowing 0.5 knots for the word "about" and the maximum warranted consumption allowing a second tolerance for the word "about".

There was a dispute however as to how the word "about" should be applied in relation to assessing underconsumption of bunkers.

The Owners submitted that they were entitled to the benefit of a margin in their favour so that the calculation of underconsumption should be made by reference to the maximum permitted consumption with a 5% allowance having been made for the word "about".

The Charterers contended that a negative allowance of 3% was to be applied in calculating whether the vessel had saved bunkers.

With regard to the extent of the allowance the Tribunal held that the current practice was almost invariably to apply an allowance of 5% to reflect the use of the word "about" unless there were special circumstances. On the facts of this case there was no reason to depart from that practice.

As to the application of an allowance when calculating bunker saving the Tribunal held that no tolerance should be applied and the question of underconsumption should be measured against the stated consumption in the warranty.

Accordingly, in considering whether the vessel had overconsumed bunkers reference was to be made to the warranted consumption plus 5% whilst in determining if bunkers had been saved reference was to be made to the warranted consumption without any tolerance.

Applying these principles the Tribunal concluded that the vessel's bunker consumption neither exceeded the maximum permissible consumption nor did if fall below the level at which savings were made.

RECOVERY OF WASTED STAFF TIME

We have previously drawn attention to decisions which permit the recovery of diverted management time incurred in dealing with a breach of contract or a negligent act. Proof of the extent to which management time is lost has consistently given rise to difficulties.

In a recent judgment in Bridge UK COM Ltd v Abbey Pynford Plc the Court allowed lost management time even though no record had been kept of the time lost. It seems therefore that losses do not need to be evidenced by detailed contemporaneous time records although in the absence of them, as occurred in Bridge v. Abbey Pynford, a Claimant may find that a discount is applied by the Court to the time sought to be recovered.

The above are only intended to be short summaries.

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

WATERSON HICKS • SOLICITORS • 130 FENCHURCH STREET • LONDON EC3M 5LY
Telephone: 020 7929 6060 Fax: 020 7929 3748 E-Mail: law@watersonhicks.com www.watersonhicks.com