

OUR NEWS

New Associate We are pleased to announce that **Andrew Large** has been appointed as an Associate of the firm. Andrew worked for shipping law firms in Hong Kong and in the City before joining Holmes Hardingham in 2001. He has practised exclusively as a shipping litigator with experience of cargo claims, charterparty arbitration, cargo salvage, general average disputes as well as hull insurance matters and some re-insurance. He currently specialises in carriage of goods by road and sea and associated insurance disputes.

The Legal 500 The recently published 2006 Edition of "The Legal 500" guide to the UK legal profession reports in the chapter on London firms handling multi-modal transport matters that "Holmes Hardingham retains its position as the pre-eminent firm within the sector, with **Adrian Hardingham** leading an extensive team of experienced practitioners that impresses clients with 'service and professionalism of the highest standard'". Other partners specifically mentioned elsewhere in the guide are **Nicholas Walsler** for 'dry' shipping and commodities work, and **David Johnston** and **Martin Penny** for 'wet' shipping work.

The Editor and the Newsletter Many of our readers will know that **Nicholas Garrett** has been a consultant with Holmes Hardingham since the foundation of the firm in 1989, and his association with some of our partners goes back to the 1970s when he was senior partner of Ingledeu Brown Bennison & Garrett. Some of our readers will also know that for the last twelve years or so he has been the editor of our Newsletter. In truth, he has also compiled or written the majority of the articles. In this task, he has been most ably assisted by another consultant **David Padovan** who has the irksome responsibility of assembling and categorising the source material.

It is with regret that we report that, having recently achieved his three score years and ten, Nicholas Garrett has reluctantly decided to resign his consultancy with us and also to hand in his editor's pen. We are enormously grateful to him for all he has done for us and offer him our very best wishes.

We have been greatly encouraged over the years by the many comments received from readers of the Newsletter, only occasionally critical! As must be apparent, we do not set out to provide comprehensive reports of all current maritime, commercial and transport law but rather to give an eclectic mix of topics that seem to be of some help or interest to our clients and friends. So we intend to continue to produce a Newsletter in the future although we have yet to decide whether changes in style, format or presentation might be adopted.

LITIGATION

Plans for a new commercial court This month, the Lord Chief Justice is due to chair a "summit" meeting of commercial court judges, court users and representatives of banking and other commercial interests. This comes in the wake of wide-spread criticisms of the much publicised and extremely drawn out case brought by BCCI against the Bank of England. The way that such large scale cases are managed by the courts in the future will be considered but it is understood that much more radical matters will also be canvassed.

In particular, the meeting will consider plans for a new commercial or business court, equipped with the most up-to-date IT and modern communications facilities that do

not exist in the courts at present. The proposed new court building would be purpose-built and the space would be flexible. The court rooms would have no fixed furniture other than the judge's bench, with tables and chairs adjustable to fit the case and there would be much more use of computers and electronic production of evidence. All the commercial, chancery and construction and technology judges (together with certain other officials), would be under one roof.

The building and establishment of such a court would inevitably take time. Meanwhile, reforms would be implemented, in particular with the purpose of keeping down litigation costs and improving procedures. The judge recently in charge of the commercial court is still closely concerned with these plans. He himself set up a project for computer case management which involves an e-diary, logging electronically all current cases and the steps to be taken. A pilot scheme is also running, involving several City law firms, to establish if proceedings can be issued online and documents lodged and payments made electronically. Both these initiatives are intended to show the advantages of using new technologies in the handling of cases and to underscore the urgent need for, as well as be prepared for, the smooth operation of a new fully equipped court.

CONTRACT

Sec 4 of the Statute of Frauds, 1677, provides that a person who gives a guarantee for the debt of another person shall not be liable unless "some memorandum or note" of the guarantee shall be in writing and signed by the guarantor or some other person lawfully authorised by him. This well-known statutory requirement came up for consideration in the case *J Pereira Fernandes v Mehta*. These were the facts.

JPF supplied bedding products to B Ltd, a company of which M was a Director. B Ltd failed to pay for the goods and JPF therefore petitioned to wind up the company. M asked a member of his staff to send an e-mail to the solicitors for JPF. In it, he requested an adjournment of the hearing of the petition subject to his giving a personal guarantee for a stipulated sum in favour of JPF.

The e-mail was not signed by M but his e-mail address appeared on the e-mail. JPF's solicitors accepted M's proposals verbally on the telephone and the petition was adjourned. However, M failed to honour his proposal and JPF instituted proceedings.

The issues for the court were first whether the e-mail constituted a sufficient "memorandum or note" of the alleged guarantee agreement to comply with sec 4 and secondly, assuming that it was a sufficient memorandum or note, whether it was sufficiently signed by or on behalf of M.

The court had no difficulty over the first point. It found that the e-mail was capable of being a sufficient memorandum or note of the agreement because it contained an offer in writing which had been accepted. The fact that the e-mail predated the actual agreement was irrelevant.

On the second point, JPF argued that the e-mail was effectively signed because at the beginning of it, the e-mail address "nelmehta@aol.com" was included. This contention was rejected by the Judge. Having reviewed the authorities, he held that, for the purposes of sec 4, a person could use his full name or his last name with or without initials and possibly even a pseudonym or code, but it was essential that the person intended this as a signature, giving authenticity to the document. The e-mail address upon

Did a guarantee incorporated in an e-mail meet the requirements of the Statute of Frauds 1677, sec 4?

which JPF relied was automatically included when the e-mail was sent. There was therefore no intention to include it at all and neither was it intended to be used as a signature.

The claim of JPF against M therefore failed. In conclusion, the Judge also referred to the Electronic Communications Act 2000 which is authority for the proposition that where a principal's name is typed in the body of an e-mail, this could be sufficient to amount to a signature. Whether it did would depend on intention.

INSURANCE

Claims co-operation clauses, whether or not they are expressed to be or amount to conditions precedent to the liability of insurers, are frequent sources of dispute in many types of indemnity policy – see for example Issue 42 p2. Two further interesting cases have recently been decided on this topic, the first in the Court of Appeal and the second in the Privy Council (on appeal from the Court of Appeal of Belize).

In *Shinedean v Alldown Demolition & Another*, AD was engaged by S to carry out certain demolition and excavation works in the course of development of premises owned by S. The excavation works caused the flank wall of an adjoining property to begin to collapse and the design of the whole development had to be altered. AD notified its insurer, Axa, of the partial collapse of the wall in September 2002.

AD's policy with Axa obliged AD to provide, in the event of a possible claim, "all necessary information and assistance" to Axa, but no express time limit was stipulated within which that must be done. By June 2003, AD had provided a certain amount of documentation to Axa. However, Axa took the view that AD was in breach of its obligations as above and gave notice that it declined to meet any claim.

The Owners of the adjoining property brought an action for damages against S. That action was settled by S which then brought these proceedings against AD for an indemnity and also a claim for its own losses. Documentation in support of the claims was eventually, some two and a half years after the damage occurred, supplied to Axa but by that time AD had gone into liquidation and so Axa was joined as second defendant in the proceedings.

In the action, a preliminary issue arose as to whether AD was in breach of the co-operation obligations of the policy and therefore whether Axa was liable to indemnify it. It was common ground that the obligations were a condition precedent to Axa's liability, but had they been breached? The court held that there had to be a term, implied so as to give business efficacy to the policy, that AD would do what was required of it by way of notification and claims co-operation within a "reasonable time".

The judge at first instance considered that a "reasonable time" was to be interpreted generously, insofar as it was reasonable to do so, in favour of AD, having regard to the facts of the case. One of the tests for judging reasonableness was whether Axa had suffered any prejudice by the delay. The judge took the view that Axa had not suffered prejudice and held that Axa must indemnify AD.

No, said the Court of Appeal. It was not correct to assess what was a "reasonable time" on the basis that Axa had not been prejudiced by the delay. Axa were entitled to receive claims information in good time to take appropriate action, which might include deciding to take control of the case.

Much of the information was in existence and providing it two and a half years later was obviously unreasonably late. Whilst each case depended on its own facts, there was no rule that a co-operation condition was not broken if it turned out that the insurers were not prejudiced by the failure to co-operate. In this case, Axa were entitled to receive the information relating to the problem in good time, whether

they were prejudiced or not.

Accordingly, AD was in breach of the condition precedent and Axa was not obliged to indemnify it.

In *Nasser Diab v Regent Insurance*, N owned commercial premises in Belize which were insured against fire damage with R. The policy provided that, as a condition precedent to the payment of any claim, a claim in writing must be submitted within 15 days after the occurrence of any loss or damage and be accompanied by "as particular an account as may be reasonably practicable of all the... items of property damaged or destroyed and of the amount of the loss or damage thereto..."

The premises and their contents were destroyed by fire. N met with F, the managing director of R. F told N that he knew who had started the fire, how and when it had been done and what had been used. He indicated that a claim in respect of it would be fraudulent.

Subsequently, and after the expiry of the 15-day period in the policy, N's solicitors wrote to R seeking to recover N's losses. R denied liability on the basis that the condition precedent had not been complied with.

N began proceedings in Belize, seeking recovery under the policy and contending that, as a result of the meeting between N and F, R had waived its rights under the condition precedent or alternatively was estopped from relying on it. The court rejected N's arguments, as did the Court of Appeal of Belize. N appealed to the Privy Council.

N submitted that he had been relieved of his obligation to comply with the requirements of the condition precedent for these reasons:

1. At the meeting, F had repudiated R's liability to meet a claim for the fire damage.
2. F's remarks at the meeting constituted a waiver by R of the requirements of the condition precedent, alternatively an estoppel by representation.
3. R was in breach of its duty of good faith in not warning N that he had only 15 days within which to comply with the condition.
4. The requirements of the condition precedent operated as a forfeiture provision, depriving N of the benefit of the policy for which he had paid and therefore in equity he should be granted relief from forfeiture.

The Privy Council was unable to accept any of N's submissions and his appeal was dismissed. In the first place, there was no rule of law that a repudiation of liability by an insurer on a ground unconnected with the insured's compliance with provisions for the delivery of a formal claim and details of loss in writing, relieved the insured from the obligation to comply with those provisions. It was possible for repudiatory words to justify the inference of a waiver or to amount to an estoppel but F's remarks did not do so. Nothing said by him constituted a representation, let alone an unequivocal one, that R would not hold N to the conditions of the policy and its procedural requirements.

Second, whatever post-claim duty of good faith might have been owed by R to N, it did not extend to an obligation to warn N that time for delivering the written notice and particulars was running out.

Third, the provision in the policy was not a forfeiture clause. It was a condition precedent to R becoming liable to meet a claim. Equity might or might not have a role to play in relation to the flexibility or inflexibility of the 15-day period, but it had no role to play in relieving N of the need to have performed the condition precedent before requiring payment of a claim under the policy.

Were insurers entitled to rely upon a condition precedent in their policy?

Had the Insured provided its claim documents in reasonable time?

ARREST OF SHIPS

Did a P&I Club Letter of Undertaking contain implied terms?

The Commercial Court has recently given consideration to the terms of a routine letter of undertaking (LOU) issued by a well-known P&I Club in respect of a cargo claim (*Almatrans v The Steamship Mutual Underwriting Association*).

In March 1993, A petitioned the Court in Ravenna, Italy for the arrest of a vessel to secure claims arising from delay in the delivery of cargo. A LOU was issued also in March 1993 on behalf of the Club's Member T, a Cyprus company who were bareboat charterers of the arrested vessel. The vessel was released.

Thereafter, matters progressed slowly. A finally presented its claim to the Club's Italian lawyers in September 1995. In July 1997, A again wrote to the Club's lawyers making it clear that it was seeking to interrupt the time bar, as permitted under Italian law. In the same month, it commenced proceedings in Ravenna against T. Thereafter, problems arose over service of the proceedings on T in Cyprus.

In May 1998, the Club's lawyers asked for the return of the LOU on the ground that the limitation period had expired. This was disputed by A although it failed to mention that it had started proceedings in Italy.

The Italian proceedings continued and eventually the Italian Court issued a judgment against T. In February 2001, the judgment was filed in Ravenna and steps were taken to serve T in Cyprus. Demand was made of the Club to settle the claim. This was refused on advice it had received on the law of Cyprus and Italy.

In May 2005, A started proceedings in London for settlement of the claim under the LOU. In its defence, the Club maintained that progress of the claim had been slow, desultory and accompanied by sharp practice. Amongst other matters, it submitted that:

- (a) there were implied terms within the LOU that adequate notice (of the proceedings started in Ravenna) would be given;
- (b) that the judgment was a nullity as against T because of improper service and lack of notice to the Club; and
- (c) that it would be contrary to public policy to allow A to enforce the LOU because it had deliberately chosen not to inform the Club of the Ravenna proceedings.

The court rejected these arguments. There was no justification for implying the suggested terms into the LOU. The LOU was in conventional form and explicit. It was negotiated by lawyers to the parties. If the Club had required notice of the start of proceedings as well as of any judgment it could have asked for that to be included. It would not have been obvious to A that it was intended that notice should be given to the Club of proceedings taken against T. The Club's remedy was to alter the terms of its LOU.

The Club failed, on the facts, to make out a case of sharp practice. Further, any defects as to service would have been, on the facts, cured by the Italian Court. An additional time bar defence advanced by the Club by way of counterclaim also failed.

Accordingly there was judgment for A. Although A's behaviour towards the Club had been unsatisfactory, the Club's safeguard against such conduct lay in how it worded its LOU and not in the defences advanced in this case.

CHARTERPARTY – DEMURRAGE

In Issue 47 p 3 we reported on the Commercial Court case *Tidebrook Marine v Vitrol*. In that case, the court had held that, notwithstanding that a vessel had berthed and begun loading prior to the stipulated laycan at charterers' express request, Owners were nevertheless not entitled to calculate their demurrage claim over any period prior to the first day. Owners appealed.

The facts were simple. T let its vessel "FRONT COMMANDER" on Asbatankvoy form, as amended, to V for the carriage of crude oil from Escravos, Nigeria to Europe. The laydays agreed in the charterparty were January 9 and 10, 2004. On January 7, V e-mailed to T requiring the vessel to tender notice of readiness on arrival at Escravos and to berth and commence loading on January 8. The vessel duly tendered NOR on arrival at 00.01 hours on January 8, berthed at 12.00 hours and commenced loading at 16.48 hours.

Clause 6 of the Charterparty appeared to the court to say that, irrespective of loading, laytime would commence upon the expiration of six hours after receipt of NOR, or when the vessel was all fast in berth, whichever was the earlier. Clause 5, however, provided that laytime should not commence before the earliest layday "except with charterers' sanction".

The court was of the opinion that the combination of those two provisions meant that the start of laytime under Clause 6 was postponed to the beginning of the earliest layday, unless the charterer sanctioned otherwise.

The question was this. Was the order by V on January 7 to load the vessel before the beginning of the earliest layday such a sanction? The court was inclined to think so. V was not obliged to begin loading before the earliest layday if he did not want to do so, but if he did, he was entitled to, once the vessel was presented as ready to load. The court considered that once V had decided to ask the vessel to load earlier than he, V, was obliged to load, then he had effectively sanctioned the earlier commencement of laytime: the provision in Clause 5 was spent and Clause 6 ruled as the clause otherwise governing the commencement of laytime.

Additional Clause 31 of the Charterparty provided as follows:

"The vessel shall not tender notice of readiness prior to the earliest layday date specified... and laytime shall not commence before 06.00 hours... on the earliest layday unless charterer consents in writing".

The court rejected V's contention that Clause 31 required a further express written consent from him to the commencement of laytime before 06.00 hours on January 9. The commencement of laytime was intimately connected with the service of a NOR. The sole or dominant purpose of a NOR was to tender the vessel for loading (or discharging) and thus to act as a trigger for the commencement of laytime. Clause 31 could not be read as requiring two separate consents.

The appeal was allowed. T's demurrage calculation was correct and time started to count when the vessel was berthed on January 8 at 12.00 hours.

STATUTE

The Compensation Act 2006 became law in July. A large part of the Act (Part 2) is concerned with the regulation of Claims Management Services and we shall not comment on it in this Issue.

Sec 3 of the Act makes very important provisions for the assessment of damages for those who suffer from the fatal

Did an order to load before the earliest layday amount to consent to earlier commencement of laytime?

The Compensation Act 2006 and claims arising from mesothelioma

illness, mesothelioma. The provisions were included by way of a very late amendment following a landmark judgment of the House of Lords in the case *Barker v Corus* which severely disadvantaged mesothelioma claimants.

The background in very brief terms is this. Mesothelioma is a form of cancer which arises from exposure to asbestos. It can be triggered by a single asbestos fibre and can take many years to manifest itself. When it does, the victim's health rapidly deteriorates and death follows.

Many sufferers of the disease worked for more than one employer, each of whom could have been responsible for the incidence of the disease. The difficulty faced by a claimant victim is that the state of scientific knowledge did not, and still does not, allow a medical expert to deduce whether one particular employer or more than one was responsible. As, in general terms, a claimant is obliged to prove the responsibility of the defendant, the mesothelioma victim was left in an impossible position.

However, the House of Lords in the *Fairchild* case of 2002 (see Issue 37 p4) made a crucial change in the law. It held that where a claimant had developed mesothelioma, it was sufficient to show that an employer had contributed to the risk that the claimant might develop the disease in order for a claimant to recover his full damages from that employer. In short, a victim who had had multiple employers (exposing him to the risk of asbestos) during his working life, need only sue one.

Then, on 3 May 2006, the House of Lords in *Barker v Corus* effectively reversed the decision in *Fairchild*. It was not fair that an employer (and his insurers) should be made liable for damage even though he may not have caused it at all, simply because he contributed to the **risk** of causing that damage.

The effect of the *Barker* decision was devastating for mesothelioma victims. It meant that a victim who has had multiple exposures to asbestos by different employers would have his damages apportioned amongst those potentially responsible but it would be up to the victim to trace and to proceed against each and every possible defendant, creating a huge burden for the victim as well as the possibility of failure to recover in the event of an employer's insolvency.

At this point, the government stepped in. Sec 3 of the Act was rapidly drafted and the Act is now law. It reverses the House of Lords decision in *Barker*. A victim may now claim his full compensation damages from any one (negligent) past employer and it will be up to this employer to recover contributions from any other (negligent) past employers of the victim. Moreover, this provision is retrospective: it shall be treated "as having always had effect" although it will not affect claims settled or concluded before 3 May 2006.

Finally, it should perhaps be emphasised that sec 3 of the Act does not have general application but applies only to mesothelioma victims because of the special nature of the disease.

Footnote On a completely different topic, sec 2 of the Act provides quite simply and clearly (in the context of a compensation claim) that an "apology, an offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty". So, if a driver says "Sorry" after an accident, that is not of itself an admission of liability.

IN BRIEF

The meaning of "any dispute" in a charterparty In *Exfin Shipping v Tolani Shipping* there was one simple issue for decision. E chartered T's vessel. The charter provided that "any dispute" arising should be referred to London arbitration. During the charter, demurrage became due to T. E failed to pay so T appointed an arbitrator who made an award in T's favour. E applied to

the court to set aside the award. Its only argument was that there was no "dispute" because it had admitted liability, the amount of the claim, date for payment and the fact of non-payment. The court dismissed E's case as "wholly unmeritorious". The parties were clearly in dispute. If one party said you have to pay now and the other party refused to do so then they were in dispute. The construction of "any dispute" did not require any deeper analysis than that. E must pay the demurrage plus interest and indemnity costs.

A question concerning the nature of a compromise agreement arose in the case *Kyle Bay v (Lloyds) Underwriters*. In that case K had compromised an insurance claim under its policy with L. Subsequently, K attempted to reopen the claim, maintaining that L had made misrepresentations during the settlement negotiations. The court held that a compromise agreement was a type of contract "subject to all the usual incidents of contract including the possibility that it might be rescinded for misrepresentation". Care was needed in examining what was said in negotiations to determine if there had been a misrepresentation as opposed to an argument or contention. The court must guard against misrepresentation being used as an improper means of reopening a compromise agreement. In the present case, there had been no misrepresentation and K's claim failed. A valid compromise agreement could not be reopened just because a party perceived that it had made a bad deal.

The recent House of Lords case *Bradford & Bingley v Rashid* dealt with an important point on the subject of without prejudice correspondence. Space does not permit a review of the facts but the point at issue can be reported in general terms. It is well known that without prejudice correspondence is not admissible in evidence if coming into existence in the course of negotiations and for the purpose of settling a dispute. What this case decided was that the without prejudice rule could not apply to correspondence (marked without prejudice) which was written solely to discuss the repayment of an **admitted** liability rather than to negotiate and compromise a **disputed** liability. There was no dispute to be compromised in this case and therefore the correspondence was held to be open and admissible. [The importance of the decision to the claimants was that the correspondence amounted to an admission of a debt due to them, so preventing their claim from being time-barred.]

In another recent House of Lords case, *Harding v Wealands*, the decision has been hailed as a major landmark in private international law. Again we have no space for the full facts. Suffice to say that the case concerned a road accident in Australia in which an Englishman was very seriously injured. He brought his claim in London against the Australian tortfeasor, as he was entitled to do. The question was whether damages should be assessed according to English law or Australian law (in which case they would have been substantially lower). The House decided unanimously, reversing the Court of Appeal, that in the quantification of damages English law must be applied as the law of the forum. Differing levels of damages under any foreign law that might apply to the actionability of the tort under the Private International Law Act 1995 are irrelevant. A person injured in Lesotho or in the USA will receive no more, and no less, than a person injured in London.

The nature of a compromise agreement

Is without prejudice correspondence always inadmissible in evidence?

Private International Law – damages in international torts

For further information on any of the summarised cases and other articles in this newsletter or for initial advice on any marine legal matter, please contact in the first instance David Padovan at our office.