Holmes Hardingham

Maritime and Commercial Solicitors

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OUR NEWS

Many of our readers may by now be aware that Glenn Winter and Ken Scott recently left the Firm to set up a new practice under the name of Winter Scott. We wish them well.

The Partners who remain at Holmes Hardingham include four of the Firm's original founding Partners, Adrian Hardingham, Nicholas Walser, David Johnston and Andrew Messent, as well as Tim Knight, Louise Glover, Jane Hobbs and Martin Penny, all of whom have been Partners in the Firm for some years. Together with Associates Ian Ramsay and Niranjan Abeyratne, and a number of experienced Assistants, they will continue to offer the same wide range of services in the maritime and commercial fields in which the Firm has built up a leading reputation during the past 15 years.

David Padovan, Anthony Holmes, Nicholas Garrett and Andrew Goldsworthy remain as Consultants to Holmes Hardingham.

More details about the Firm, and other news and information of interest to our readers (including the full text of this and past issues of the Holmes Hardingham Newsletter) will be found on our new website: www.HHlaw.co.uk

We will also shortly be introducing an electronic mailing list, giving you the option of receiving your copy of the Newsletter by email in future. Details of this and other innovations will be posted on our website as soon as available.

CHARTERPARTY

The impact of the Contracts (Rights of Third Parties) Act 1999 on a charterparty providing for shipowners to pay commission to charter brokers

In Issue 30 p 1, we made brief reference to the Contracts (Rights of Third Parties) Act 1999, which permits enforcement of contractual rights by a third party as provided in the Act. The impact of the Act has recently been demonstrated in the Commercial Court case Nisshin Shipping v Cleaves & ors. These were the facts.

C were charter brokers. As agents for shipowners N, they negotiated and concluded a series of nine charters with various charterers. Each charterparty contained a London arbitration clause and each also provided for the payment of brokerage commission by N to C. However, N maintained that C were in repudiatory breach of the agency relationship (arising from a conflict of commercial interest) and were not therefore entitled to any commission.

The issue of entitlement to commission was referred by C to arbitration even though C were not parties to the arbitration agreements in the charters. They relied on sections 1 and 8 of the Act. The wording of the arbitration clauses was wide enough to cover a claim by the charterers against N for failure to perform the promise to pay commission to C. In those circumstances, the arbitrators concluded that they did indeed have jurisdiction to determine the claim by C against N for commission by virtue of sections 1 and 8 of the Act. N did not agree and applied to the court (under the Arbitration Act 1996) challenging the arbitrators' substantive jurisdiction.

The judge dismissed N's application. The effect of the commission clauses in the charters was in fact to confer a benefit on C within section 1 (1) (b) of the 1999 Act and that sub-section was not "disapplied" by any other sub-section or by any contrary intention in the contract.

The charters did not express an intention contrary to the entitlement of C to enforce the commission provision. They created a trust of N's promise to pay commission in favour of C, enforceable by the charterers as trustees but that did not mean that N and the charterers intended that C should not be entitled to enforce the promise directly under the Act. It followed that C were entitled to enforce the commission clauses in their own right under section 1 of the Act.

The effect of section 8 of the Act was to deem C to be "bound by and entitled to the benefit of the arbitration clauses" for the purpose of enforcing their claim against N. The promise to pay commission was clearly enforceable by the charterers by arbitration. By analogy with the position if there had been an assignment, C stood in the place of charterers by virtue of section 8 of the Act and were "entitled and obliged" to refer the dispute over payment of commission to arbitration, and the arbitrators had jurisdiction to determine the dispute.

Accordingly, C were entitled to pursue their commission claim against N before the arbitrators.

CONTRACT – GENERAL

BIMCO introduces standard form contract for ship repairs

In November 2003, REPAIRCON, the latest addition to the range of standard form contracts from BIMCO was launched. As its name suggests, it is a ship repair contract and as such it is a useful addition to the many BIMCO forms available to the shipping industry.

Repaircon is the result of a long development and consultation process which aimed to produce a concise, balanced and "party neutral" contract which would appeal to both shipyards and shipowners. Its object is to be sufficiently flexible for use worldwide as well as to be suitable for both major long term repair contracts and brief minor repair requirements.

Repaircon is produced in the familiar BIMCO format. It comprises two principal parts with provision for annexes and additional clauses as may be required.

Part I contains a series of boxes for the insertion of certain key information such as the names of the parties and the vessel to be repaired, the contract price, the delivery date and the contract period. In addition to these and other matters of administration, Part I also includes boxes for setting the daily rate of liquidated damages, the interest rate for late payment, termination dates, the length of the post-redelivery guarantee period and overall limits on the contractual liability of both parties.

Part I also makes provision for the parties to choose the governing law of the contract and the place of arbitration proceedings in the event of a dispute. English Law and London arbitration will apply in the absence of other choices. Provision is also made for the attachment of additional clauses and annexes which set out the repair specification, a work variation form and a tariff.

Part II contains the main contractual clauses and includes detailed provisions which address commercial issues such as:

- variations;
- delay, force majeure and extensions to the contract period;
- the right to damages, liquidated or otherwise;
- termination rights; and
- dispute resolution.

As with all standard form contracts, Repaircon provides only a starting point. The parties will need to ensure that the standard terms operate as they expect and they must consider all matters of commercial importance which may be particular to them. Further, as has been pointed out in the shipping press, there are certain omissions from the contract of potential seriousness. For example there is no "fast track" dispute resolution for technical disputes and there are no security provisions for a shiprepairer who extends credit to a shipowner beyond redelivery of the vessel. Such matters can of course be addressed by the parties as and if appropriate. Overall, it is believed that Repaircon will in time become of marked value to the industry.

LITIGATION

Were successful defendants entitled to claim their legal costs from professional claims funders?

Only very rarely do we report on cases involving civil court procedure and we have never previously done so on a matter involving costs. We do so now in the case of Arkin v Borchard Lines & ors because it was a maritime commercial one which also involved the funding of the claimant by a professional claims funding company, something that looks set to become more common.

The award of legal costs to a successful party to litigation in England is always a matter for the discretion of the court. It is a wide discretion, enabling the court to make an order against a person who is not a party to the action. A successful party will normally expect to be awarded his costs but all depends upon the court's discretion.

A, a former director of BL and other shipping companies, started an action in the Commercial Court against the companies claiming damages totalling £80 million. From the outset, A was without funds to pay for the litigation and so he had arranged a "conditional fee agreement" with his lawyers. However as the case progressed, funds had to be found to finance the expert witnesses required to support A's case. A therefore entered into a contingency fee agreement with a professional funding company MPC which agreed to pay the experts' fees in return for 25 % of any damages (however great) that might be awarded to A.

A's case proceeded to trial but his claim was dismissed. BL and the other defendants had incurred costs of some £6 million and sought a recovery from MPC. The issue before the Court was in what circumstances, if any, should an order for costs be made against a professional funder which carried on the business of litigation support in return for substantial contingent fees in the event of a successful claim.

BL argued that MPC's financial interest in the outcome of the litigation made it effectively a party to the proceedings. Therefore MPC should have a costs order made against it, being an unsuccessful party.

The judge disagreed. He identified three public policy principles which were material to the exercise of his discretion:

(a) the discouragement of ill-founded claims or defences, and the compensation of those obliged to protect their rights, underlay the rule that a successful party was generally entitled to recover costs;

(b) facilitating access to justice for impecunious claimants, especially those with large and complex claims, needed to be supported;

(c) the courts must discourage interference by funders in any way adverse to the proper conduct of litigation.

He went on to hold that whether an order should be made depended on whether it was appropriate both to reflect the defendants' success and the risk of prejudice to the objective of "protecting the due administration of justice".

On the facts, MPC did not attempt to interfere in the conduct of the proceedings. All decisions were taken by A and his counsel, and MPC was entitled to rely on the advice that A had a strong claim. In the absence of the funding agreement with MPC, A would have been obliged to abandon his claim. MPC could not commercially undertake responsibility for the defendants' costs as part of the funding agreement.

In those circumstances, the public policy principles in (a) and (c) above must give way to (b). An order for costs against MPC would operate as a strong deterrent to professional funders in cases such as this and should not be made.

SHIPPING – UNSAFE PORT

Were charterers in breach of the safe port warranty in a NYPE charter?

In the Admiralty Court case Maintop Shipping v Bulkindo Lines (The "MARINICKI") the shipowners MS chartered their vessel to BL on an amended NYPE form. The charter was for "one Timecharter trip via safe port(s) … intention Bulk Wheat from Vancouver to Indonesia". The charter also provided:

> 8. …The Captain (although appointed by the Owners) shall be under the orders and directions of the Charterers as regards employment and agency.
>
> 11. …the Charterers shall furnish the Captain from time to time with all requisite instructions and sailing directions, in writing…

On 9th February 2000, BL ordered the vessel to proceed to Jakarta to discharge. Prior to arrival at her discharge berth, the vessel sustained serious bottom damage. MS said the damage was caused by an underwater obstruction within the dredged channel which was the designated route into Jakarta. BL denied that there was such an obstruction and said the bottom damage was caused when the vessel ran over her own anchor some time prior to arrival at Jakarta.

MS claimed damages against BL, alleging that Jakarta was unsafe when the vessel was ordered to go there. MS also maintained that the presence of an underwater obstruction in the designated route was sufficient evidence of the unsafety of the port. In the alternative, MS maintained that there was no proper system at Jakarta to check the safety of the approaches to the berth or to warn traffic of any dangers that might exist.

On the evidence, the Deputy Judge held that MS had discharged the burden of proving, on a balance of probabilities, that the vessel was damaged by an underwater obstacle in the dredged channel. What MS were unable to establish was the date that the obstacle came to rest in the channel. They were therefore unable to establish that, on 9th February 2000 when the vessel was ordered to Jakarta, the port was unsafe because of the presence of the obstacle.

However, that was not fatal to the case of MS. The court went on to hold that Jakarta was in fact unsafe on 9th

February 2000 because there was no proper system in place to investigate reports of obstacles in the channel or to find and remove them or to warn vessels of their presence by means of notices to mariners or by buoying the obstruction.

Accordingly, BL were in breach of the safe port warranty and the claim of MS succeeded.

Footnote

This judgment is the most recent in a long line of cases which have illustrated and defined the seriousness of the safe port warranty in charters and the considerable burden arising from it that lies with charterers.

CONTRACT – SALE OF GOODS

Was the seller entitled to rely on a contractual exclusion clause and if so was the buyer entitled to rely on the Unfair Contract Terms Act 1977?

In the case of Amiri Flight Authority v BAE Systems, the Court of Appeal recently considered two interesting and related points arising from a sale of goods contract.

A brought a claim as the successor to the Private Department (PD) of the ruler of the United Arab Emirates. In 1987, PD bought an aircraft from BAE. The contract was made in Abu Dhabi and the aircraft was delivered in England. The contract also provided for the supply of a maintenance programme as well as ongoing services connected with it. In 1999, serious corrosion was found in the aircraft's fuel tanks caused by fungal contamination, a known risk.

A's claim against BAE was that the corrosion arose because of the negligence of BAE in relation to the maintenance programme and associated obligations to provide technical assistance. The claim was brought for breach of an implied term of the contract and in tort.

At first instance, the judge held that the claim had no real prospect of success because of the effect of the wide exclusion of liability (cl. A.10 in App. C) in the contract. That clause was not subject to the test of reasonableness under the Unfair Contract Terms Act 1977 because the contract was an international supply contract (within section 26) since it provided for the goods to be delivered to the territory of a state (England) other than that in which the contractual offer and acceptance were made (UA Emirates).

A appealed. It was maintained that the operation of cl. A.10 was confined in scope to a certain part of the contract and also that the exclusion in cl. A.10 did not apply to the claim in tort. Further it was contended that the exclusion was not fair and reasonable under the 1977 Act and also that the Act was indeed applicable to the contract.

The Court of Appeal analysed the contract in detail and concluded as a matter of construction that cl. A.10 did exclude the liability of BAE for the defects in the aircraft that arose from its own breaches. Further the clause expressly covered BAE's liability in tort.

However, the court held that the judge was wrong to find that the contract was an international supply contract within section 26 because it provided for the goods to be delivered to a state (England) other than the one in which the contractual offer and acceptance were made (UA Emirates). The words "delivered to" in section 26 required the goods to be moved from one state to another and did not cover the case of goods simply delivered "in" England, as in this case. Section 26 required international movement of goods to a state other than that of the contract. That was not what happened. It followed that the 1977 Act was applicable to the contract. As a result, the case was remitted to the judge to determine the issues (the fairness and reasonableness of cl. A.10) that arose under the Act.

CONTRACT – SUPPLY OF SERVICES

Was there breach of an implied term in a contract to provide road haulage services?

The Court of Appeal in CEL Group v Nedlloyd Lines UK, has also recently considered an important point involving a contract alleged to incorporate an implied term.

A road haulage company, CEL, entered into a contract in 1996 to provide road haulage services to NL, a shipping line, for three years with effect from the beginning of 1996. The contract gave CEL the exclusive right to provide all such services. At the end of 1996, NL merged with the P&O group which had its own haulage business. As a result, by May 1997 there ceased to be any separate identifiable NL transportation requirement for CEL to carry out. CEL brought a claim against NL maintaining a breach of an implied term of the contract.

The judge at first instance held that it was a breach of contract for NL, having granted CEL the exclusive right to supply road haulage services for a 3 year period, to merge its business with another group so that its road transport requirements could no longer be separately identified. The merger and subsequent loss of identifiable business was a breach of an implied term of the contract.

NL was unhappy and appealed. It argued that the judge was wrong to imply the term which he did, because it had the effect of converting a promise not to supply work to other hauliers into a promise to continue to supply work to CEL.

The Court of Appeal held that, as so often, the case turned on the true interpretation of the contract. If it was agreed that CEL would have the exclusive right for 3 years to provide all the defined road haulage requirements for NL's business, then there was no difficulty in implying a term (or applying a rule of law) that NL must do nothing of its own motion to make it impossible for CEL to supply those requirements. If on the other hand, it was simply agreed that NL would not go elsewhere for its haulage requirements then there was nothing at all to prevent NL disposing of its business. The former was the correct interpretation. If matters outside NL's control had led to a lack of demand, then there would have been no breach. But that was not the case: the business was still there, but differently organised and not made available to CEL.

It was correct to imply a contract term that NL would itself do nothing to bring an end to its own road haulage requirements and correct that there had been a breach of that implied term. NL by its own act had made it impossible for CEL to exercise the right which NL had granted by the contract. Accordingly, CEL was entitled to damages flowing from the breach.

LITIGATION

The effect of an admission made during a without-prejudice meeting in the course of litigation

A case involving the admissibility in evidence (in court) of admissions made during a without-prejudice meeting was reported in Issue 40 p 4. A further similar case, Savings and Investment Bank v Fincken has been decided by the Court of Appeal. Without-prejudice discussions are very common both before and during litigation and the present case again demonstrates the very limited circumstances in which evidence of such discussions is admissible.

F owed SIB a large sum of money giving rise to litigation over a long period. Various agreements were made as well as settlement attempts and a without-prejudice meeting

was held in December 2002. F was said to have made an admission in the course of that meeting which was contrary to his pleaded case. Consequently, SIB applied to the court for leave to amend its claim based on that admission. The judge allowed the application, holding that F's admission fell within a recognised exception to the doctrine of without-prejudice privilege, known as the "unambiguous impropriety" exception. Thus the protection of the without-prejudice rule had been lost.

No, said the Court of Appeal. There was no unambiguous impropriety. The mere inconsistency between an admission and a pleaded case, with the mere possibility that such might lead to perjury, did not lose the admitting party the protection of privilege. It was only if the privilege itself was abused that protection was lost.

Most importantly, the court said that it was not abuse of the without-prejudice privilege to tell the truth "even where the truth was contrary to one's case". That was what the without-prejudice rule was all about, to encourage parties to speak frankly in aid of reaching a settlement. The public interest in that rule was very great "and not to be sacrificed save in truly exceptional and needy circumstances".

The court accepted that it was distasteful to avert its eyes from any admission which appeared to incriminate a party of lying in a sworn document. However, in the tension between two powerful public interests, it seemed to the court that the one in favour of the protection of the privilege of without-prejudice discussions held sway over the public interest in the discouragement of perjury, unless the privilege was in itself abused when exercised.

It followed that SIB was not permitted to amend its claim.

IN BRIEF

Remuneration of professionals in the absence of express agreement

In Dinkha Latchin v General Mediterranean Holdings, the Court of Appeal upheld a first instance decision that a professional person (in this case an architect) had an implied right to be paid fees in circumstances where there was no express agreement. In the absence of other facts, the giving to and carrying out of instructions by a professional "normally" gave rise to an implied promise to pay. "Necessity" compelled that conclusion because no other explanation made commercial sense. A test of necessity was applied in respect of the parties' conduct and the commercial and human realities of the position were considered. It was well within the function of the court to decide at what point in the relationship between the parties the implied duty to pay would arise.

Liability insurance – exposure to dangerous substances

In the recent case Phillips v Syndicate 992 Gunner, P was employed by K for two periods 1955 to 1957 and 1959 to 1970. At some point in those periods, P was exposed to asbestos dust. He contracted mesothelioma and later died. His widow obtained judgment against K, by then in liquidation. So the claim was pursued against K's insurers G under the Third Parties Act 1930. G had been K's employer's liability insurers between October 1959 and September 1968. G did not contest their liability to Mrs P. However they maintained that because they had not been on risk throughout the full period during which P had been exposed to the asbestos, they should only be liable for the appropriate proportion of the damages (some 72.5 %). No, said the court. Applying the reasoning of the House of Lords in the Fairchild decision (see Issue 37 p 4), a claim arises on exposure and each exposure to a dangerous substance gives rise to a claim. Therefore G must pay Mrs P's judgment in full.

Where losses arise from any one event or occurrence

The Court of Appeal case (Scott v Copenhagen) which we reported briefly in Issue 37 p 4 has recently been followed in Midland Mainline v Commercial Union. The decision includes a useful summary of the criteria for assessing the existence of one event or occurrence for the purpose of aggregation of claims in an insurance policy, a problem that arises quite frequently. For there to be an occurrence, (a) there must be a sufficient degree of "unity" to justify the label of an event; (b) the assessment of unity was by reference to time, locality, cause and motive; (c) the matter was to be scrutinised from the perspective of an informed observer in the position of the assured; and (d) the assessment was to be made both analytically and as a matter of intuition and common sense.

Judicial observation on the LMAA Rules

The judge, in the Commercial Court case Ocean Major Navigation v Koch Carbon made a pertinent observation relating to the LMAA Rules. The case was an appeal from an arbitration award made following a dispute under a time charter. In his award, the arbitrator said that the case would have benefited from a short oral hearing. The judge agreed. The legal issues were not straightforward, written submissions were elaborate and the arguments had changed as the case progressed. Under the Rules, once the parties had agreed that the arbitration was to be on written submissions alone, the arbitrator had no power to call for an oral hearing. That inflexibility was undesirable. The parties should be alert to the convenience of a short oral hearing and if necessary the arbitrator should be empowered to order such a hearing.

Court of Appeal decision on the duties of a ship mortgagee

In Issue 39 p 3, we reported on Den Norske Bank v Acemex Management and set out the facts briefly. DNB, mortgagees of the "TROPICAL REEFER" were in dispute with AM who were the mortgagor's surety. AM contended that DNB had caused them loss by wrongly exercising their rights under the mortgage. On appeal, it was held that DNB did not owe any duty of care to AM when deciding to exercise their right to arrest the vessel. DNB must merely exercise their powers in good faith. AM further argued that a mortgagee was not entitled (by arresting the vessel) to interfere with a shipowner's contracts. To succeed in that argument, AM would have to show that DNB were in breach of the terms of the mortgage. By the simple exercise of the clear right in the mortgage to arrest, there could be no such breach. AM's argument must therefore fail.

Late application to amend claim refused by court

In the Commercial Court case Portolana Compania Naviera v Vitol (The "AFRAPEARL"), shipowners PCN claimed substantial demurrage and agency fees from time charterers V following the vessel's call at Dakar. The judge rejected all V's defence arguments and found in favour of PCN. In addition the court held that it had not been "appropriate" to give V permission to amend its defence (on the first day of the trial) so as to plead reliance on a clause in the charter which provided for a 90-day time bar for claims. V had been aware of the time bar but had chosen not to plead it for tactical reasons related to the possible negotiation of a settlement. That was not an acceptable way to conduct legal proceedings. Under the Civil Procedure Rules, the parties are encouraged to put all their cards on the table at the outset. Therefore V's application to amend was refused.

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.