HOLMES HARDINGHAM
MARITIME AND COMMERCIAL SOLICITORS

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CARRIAGE OF GOODS BY SEA

Was the shippers claim time-barred and was the carrier entitled to a declaration of non-liability?

Two interesting points arose in the recent Commercial Court case Bhatia Shipping and Agencies v Alcobex Metals in which we acted for the successful carriers.

B contracted with A to carry a consignment of goods from Mumbai, India to Stafford, England via Avonmouth. The contract was contained in two multimodal transport documents (MTDs) issued by B to A. B's obligation as "operator" was to deliver the goods in exchange for one of the three originals issued in the case of each MTD.

Clause 22 of the conditions on the reverse of each MTD provided:

> Any action relating to multimodal transport…. shall be time-barred if judicial proceedings have not been instituted within a period of nine months after:
>
> (1) the date of delivery of the goods, or
>
> (2) the date when the goods should have been delivered, or
>
> (3) the date on and from which the party entitled to receive has the right to treat the goods as lost.

Clause 23 provided in effect that any action could be brought in either India or England.

On arrival at Avonmouth, the goods were released (though not by B itself) at the receivers' request but without production of original MTDs. The date of release was prior to 17 May 2002. A said the goods had been released without its consent and that the receiver had not paid for them. A therefore alleged misdelivery and conversion of the goods by B. A instructed lawyers in India but no proceedings were issued at that time.

On 4 April 2003, B brought proceedings in England against A and others seeking a declaration that it was not liable to A, the main ground being that any claim by A against B was time-barred (because of clause 22). The claims against the other defendants were for an indemnity in case B was held liable to A for the misdelivery.

On 30 January 2004, A began proceedings in India against B.

B could have entered judgment in default in England but chose to ask the Court to order a full trial because a default judgment would not have been enforceable under Indian law.

The Court held that clause 22 was in "very wide terms" and referred to any action relating to multimodal transport. It encompassed whatever claim A might make in respect of the misdelivery, whether in contract or in tort. A's essential complaint was that the goods were wrongfully delivered and original documents were not produced. The relevant sub-paragraph of clause 22 was either (2) or (3). It followed that A was entitled to treat the goods as lost from the moment the receivers were permitted to collect them at Avonmouth. That occurred, at the latest, on 17 May 2002.

Accordingly, the 9-month period for instituting proceedings expired, at the latest, on 17 February 2003. After that date, any right that A had to bring an action against B was extinguished. It must follow that, as no proceedings anywhere had been started by A before that date, A's claim was extinguished.

The Court went on to hold that it had jurisdiction to grant negative declaratory relief. It was a matter of discretion. Relief would be granted if a useful purpose would be served in doing so and it was otherwise appropriate. In this case, the Court had no doubt that negative declaratory relief would both serve a useful purpose and be entirely appropriate. Any claim by A was now time-barred and A had no answer to that. The declaration should prevent A from continuing the proceedings in India. Further, B would no longer need to pursue its claims against the other defendants as they were all contingent upon B being liable to A.

The transfer of responsibility from shipowners to charterers in respect of loading, stowage and discharge of cargo

The House of Lords, in Jindal Iron and Steel v Islamic Solidarity Co Jordan, has recently refused to depart from its own 1957 decision, Renton v Palmyra Trading, holding that that earlier decision has been frequently followed and its effect is well known and understood by those involved in the sea carriage of goods.

The facts in Jindal were straightforward. J shipped a cargo of steel coils on board S's vessel, "Jordan II", for carriage from India to Spain. On arrival the cargo was found to be damaged as a result of defective loading, stowage or discharge. The cargo was shipped under bills of lading on Congenbill form incorporating the terms of the voyage charterparty. The Hague-Visby Rules were applicable. The charterparty included an agreement that the shippers, charterers and receivers were to put the cargo on board, stow it, lash it, secure it, dunnage it and discharge it free of expense to the vessel. It was accepted that this agreement was designed to transfer responsibility for those functions from S to J.

The issue before the Court was whether the agreement in the charterparty purporting to transfer responsibility for loading, stowage and discharge from the carriers (S) to cargo interests (J), was invalidated by the Hague-Visby Rules, Art III r 2 and 8, which provide in part:

> 2… the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods….
>
> 8. Any clause, covenant or agreement in a contract of carriage relieving the carriers… from liability for loss or damage to… goods arising from negligence, fault or failure in the duties and obligations provided in this Article… shall be null and void and of no effect.

The House of Lords held as follows. The common law duty to load, stow and discharge the cargo *prima facie* rested with carriers but it could be transferred by agreement to cargo interests. The effect of Art III r 2 was not to override freedom of contract to reallocate responsibility for the functions described in that rule. The basic principle enunciated by the House of Lords in the Renton case was that an agreement transferring responsibility for loading, stowage and discharge of the cargo from shipowners to shippers, charterers and consignees was not invalidated by Art III r 8, despite the apparent clarity of the wording of that rule. The principle had been consistently applied in subsequent cases for almost fifty years without criticism in later legislation or in academic comment. Certainty was paramount in mercantile transactions.

The House might be persuaded to depart from an earlier decision where that decision had been shown to work unsatisfactorily in the market place and to produce unjust results. But in a case such as this, it would not be proper to reverse the earlier decision. The case against departing

from Renton was overwhelming and the House declined to do so.

Footnote

The United Nations Commission on International Trade Law (UNCITRAL) is currently undertaking a review of carriage of goods by sea rules. That will involve a close examination of the workings of the Hague-Visby Rules including Art III. Representations will be made by all interested groups and the principle in Renton will no doubt be considered.

CONTRACT SALE OF GOODS

The effect of delivery of goods to a named individual at a given address

In the Court of Appeal case ICM Computer Solutions v Computer 2000 Distribution, the Court held as follows. Where, under a contract for the sale and delivery of goods, the buyer's purchase order specified a particular address and person to whom the goods were to be delivered, and the sellers' goods were in fact delivered there to a person who claimed to be the one authorised, then the sellers had performed their contract and were entitled to payment.

These were the facts. A fraudster, purportedly acting on behalf of a reputable company, placed three substantial orders with ICM for electrical goods. ICM acted on those orders and in turn placed purchase orders with the suppliers of the goods, CD. In compliance with the fraudster's instructions, ICM requested that CD must deliver the goods to a named individual at a given business address. A security guard at that business address signed for the goods, as was his job. His records showed that the goods were later collected by the named individual.

Naturally, ICM did not receive payment for the orders placed by the fraudster. ICM contended that CD had not carried out their contractual obligations and so were not entitled to be paid. The Court at first instance disagreed. ICM appealed. The sole question to be decided was – who had ICM held out to CD as the person authorised to receive the goods (supplied by CD) at the given business address?

The Court of Appeal held that the terms of the purchase orders showed clearly that the goods were to be delivered to the named individual. On the evidence, the goods had indeed been collected by that named individual. It must follow that the suppliers CD had delivered the goods in accordance with the terms of the orders placed by ICM. The fact that the goods had been signed for by the security guard did not affect that conclusion. It was clear that the guard had authority to receive goods on behalf of persons who carried on business at the given business address. In addition, there was no reason for the courier engaged by CD to suspect that the named individual and the reputable company were not in fact carrying on business at the given business address. Accordingly, the delivery was made in apparent compliance with the requirements imposed by ICM in their purchase orders.

It followed that ICM was liable to CD for the price of the goods delivered.

CHARTERPARTY – CANCELLATION AND DEMURRAGE

Was owners claim time-barred and were they entitled to demurrage?

A novel argument was raised by charterers in a case recently before the Commercial Court, Odfjell Seachem v Continental des Petroles et D'Investissements. But the argument failed and Owners were granted their application for summary judgment.

OS chartered their tanker "Bow Cedar" to CP for the carriage of a cargo of jet fuel, gasoline and gas oil from Bahrain to Benin for a lump sum freight of US$825,000. Notice of Readiness was tendered by Owners at Bahrain on 27 August 2002 and laytime ran from then until 30 August after which date demurrage was incurred.

Charterers, in early September 2002, informed Owners that they had failed to solve problems relating to their purchase of the cargo. They therefore asked for the charter to be cancelled and requested Owners to find alternative employment for "Bow Cedar" in order to mitigate damages. Owners accepted this repudiation by charterers and claimed a "cancellation fee" in the amount of the lost freight and also the demurrage earned, giving credit for any saved costs. "Bow Cedar" was chartered on 5 September to another charterer by way of mitigation.

OS and CP entered into negotiations but were unable to agree upon the sums to be paid to OS. As a result OS started Court proceedings in October 2003 for summary judgment, claiming damages flowing from the breach by CP of its implied obligation to provide a cargo and from its repudiation of the charterparty.

CP's main argument in its defence was that the claim of OS was time-barred by clause 20 of the charter which provided:

> "The charterers shall be discharged and released from all liability in respect of any claim for demurrage, deviation or detention under this charter unless a claim in writing has been presented to charterers within 90 days of the completion of discharge of the cargo carried hereunder. Any other claim against charterers shall be extinguished unless such claim is presented to charterers within 180 days of the completion of discharge of the cargo…"

CP maintained that, where, as in this case, no cargo was discharged, there should be implied into clause 20 a term that charterers would be discharged from liability unless any claim was presented within 90 or 180 days of the date on which the cargo **should have been delivered**. CP said that OS had failed to comply with that implied term. CP went on to argue that demurrage could not be claimed after OS had accepted repudiation of the charter.

The Court was unimpressed. Granting the application of OS for summary judgment, the Judge held that CP had no real prospect of successfully defending the claim on the basis of the time-bar which it said should be implied into clause 20. On the true construction of the charterparty, the claim of OS for damages did not fall within clause 20 at all and so there was no time limit imposed by the charter. In addition, OS was entitled to claim the demurrage which had accrued before the repudiation. Further, it was held that, if the charter had been performed, OS would have been entitled to further demurrage in respect of the time which would have been taken to load and discharge. Therefore OS could also include that sum in its claim for damages.

LITIGATION

We seldom report upon cases that are concerned with civil procedure in litigation but there have been two in recent months which we think will be of interest concerning, as they do, circumstances that frequently arise in practice.

Did the Court have power to order the disclosure of a preliminary or draft report made by an expert in preparation of his final report?

In the first case, Jackson v Marley Davenport, the question arose as to whether an expert's preliminary report and other documents were disclosable or were privileged.

J had been employed by MD. Following a fall from a ladder whilst working, J sustained injury and began proceedings against MD. An expert was instructed by J and he prepared a report for the purposes of a conference with J's lawyers. Subsequently, a final report was served on MD which made reference to letters of instruction and other documents and gave the appearance that the expert may have changed his view from that expressed in his preliminary or draft report. MD thought it advantageous to their case to see the first report and applied for its disclosure.

order was made for disclosure. J appealed and the appeal was allowed. MD continued to believe they should see the first report and in turn appealed to the Court of Appeal.

The Court dismissed MD's appeal. The common law rule that litigation privilege attached to expert reports and drafts which came into existence for the purpose of giving legal advice was not affected by the limited exception contained in Part 35 of the Civil Procedure Rules. Rule 35.10 provided that an "expert's report" had to state the substance of all material on the basis of which the report was written. But the reference to "expert's report" had to be a reference to the expert's intended evidence, not to earlier and privileged drafts of what might or might not become the expert's evidence. Expert's earlier and draft reports remained privileged.

Was a letter marked "without prejudice" a privileged communication?

Correspondence marked "without prejudice" is commonplace but whether a letter so headed must be treated as privileged depends upon whether or not it was genuinely intended to be a "negotiating document". That was what the Court held in Schering v Cipla. The facts can be shortly summarised.

The managing director of C wrote a letter to the chief executive of S headed "without prejudice". He stated that a patent owned by S was invalid and that it would avoid "revocation" if an alternative commercial solution could be found acceptable to both parties. S did not reply to the letter but instead began proceedings for infringement of its patent. The contents of the letter were the sole basis for S's allegations and accordingly, if the contents of the letter were to be treated as privileged, S would have no material on which to rely and the claim must be struck out.

The Court held that it must look at the intention of the author of the "without prejudice" letter to establish if it was a *bona fide* negotiating document and it must also consider how the document would be viewed by a reasonable recipient. Although the words "without prejudice" did not conclusively make a letter privileged, it was an indication that the author intended it to be so treated. In this case, it was apparent from the letter that C wished to negotiate. The letter was an invitation to S to negotiate and the heading "without prejudice" reinforced that.

It followed that the letter was covered by privilege and S could not rely on it or refer to it in its action. Accordingly the action must be struck out.

CMR

Judicial consideration of the words "unavoidable circumstances" in Article 17.2 of CMR

The Central London Mercantile Court, in Netstal Maschinen v Dons Transport, has recently considered the ambit of the words "unavoidable circumstances" as they appear in Article 17.2 of CMR.

O, a driver employed by DT, was driving a lorry laden with a 15 tonne machine owned by NM along a motorway in Belgium. Shortly after midnight, on an unlit section of the road, he saw what he thought was a human body lying in the carriage-way full ahead. He swerved to the left and avoided the hazard but immediately saw that the left lane was also blocked, by an unlit car whose four passengers were trying to attract his attention. O braked and swerved back to the right causing his vehicle to jack-knife. It crashed into the central barrier, dislodging and irreparably damaging its load.

It emerged that the hazard was not a human body but that of a wild boar. It had been hit and killed by the car, the collision having been so severe that it had disabled the car and extinguished its lights.

NM sought recovery for the loss of the machine from DT and O, who both claimed the benefit of Article 17.2 of CMR. That article exonerates carriers from liability in circumstances which they cannot avoid and the consequences of which they are unable to prevent. NM argued that O could have avoided the accident by driving more slowly, by driving only during the day or by some other way of planning the journey.

The Court approached the matter on the basis that the carrier would be exempt from liability if he proved that either he had exercised a high degree of care or that the accident would have happened even if he had exercised a high degree of care. It was accepted that the journey could have been differently planned but to say that it should have been, was not realistic.

On the evidence, the Judge concluded that O's conduct had been perfectly reasonable. It was normal and economic for long-distance lorries to travel at night when traffic was lighter. O was very experienced, had not exceeded his permitted hours and was fully alert as his quick reactions demonstrated. Neither was speed an issue. The lorry was being driven well within its speed limit and even if O had been driving more slowly it was doubtful if there would have been any other outcome. O exercised a "high degree of skill" in avoiding the boar, the car and the passengers in the roadway.

Whilst the burden of proof lay with DT and O, the standard of proof was that of the balance of probabilities. The Court concluded that the lorry and load would have suffered a serious accident whatever its speed. The machine had not been secured in such a way that it could have withstood the outcome of any collision, however low the speed. Serious damage would have arisen in any event as a result of the accident. DT and O had discharged the burden upon them and were exonerated from liability by virtue of Article 17.2. The claim of NM therefore failed.

INSURANCE

The meaning of a declaration relating to bankruptcy in a proposal form

An interesting point arose in the Court of Appeal case Doheny v New India Assurance concerning the phraseology of a declaration in a proposal form for property insurance.

The Claimants in the case were a husband and wife and also a company of which they were both directors. They had taken out two insurance policies with Insurers NI against the risk of material damage to their property. In order to obtain cover, they had filled in proposal forms. At the end of the proposal forms there was a box which was headed "Declaration". There followed a sequence of five specific declarations, all of which were to be made by the Claimants "to the best of my/our knowledge and belief", and which were stated to be the basis of the contract. The fifth and last of the declarations read:

> "No director/partner in the business, or any Company in which any director/partner have had an interest, has been declared bankrupt, been the subject of bankruptcy proceedings or made any arrangement with creditors."

The Claimants duly made the declarations by signing the proposal forms.

A fire occurred at the property and a claim was made. However, NI declined liability. They produced evidence that the husband and wife had been directors of companies which had become insolvent and gone into liquidation. NI maintained that those were material matters which should have been disclosed and further that there had been a breach by the Claimants of the fifth declaration.

The primary issue before the Court of Appeal was whether the fifth declaration applied to the insolvency of

companies and the Court disposed of the matter shortly. The meaning of the fifth declaration was clear. The words "bankrupt" and "bankruptcy" were intended to apply equally to the husband and wife **and** to any company in which they had an interest. Commercial men spoke, in common parlance, of persons or companies being or becoming bankrupt and did not draw the distinction drawn by lawyers between bankruptcy (persons) and liquidation (companies). Both were simply insolvencies. To construe the words "bankrupt" and "bankruptcy" as applying only to persons and to exclude a company was to interpret the clause contrary to the plain and apparent intention of the parties. Reasonable persons filling in the proposal form would conclude that Insurers were interested in the solvency not only of themselves but also of any corporate vehicle they were using.

The Claimants appeal was therefore dismissed and the secondary issue relating to non-disclosure did not need to be decided.

IN BRIEF

The Merchant Shipping (Vessel Monitoring and Reporting Requirements) Regulations 2004

The Merchant Shipping (Vessel Monitoring and Reporting Requirements) Regulations 2004 came into force in September 2004, following a European Parliament directive which applied to vessels of 300 tons gross and over. However, the UK Regulations are expressly extended to include all ships used in navigation not propelled by oars, so covering, inter alia, fishing vessels and recreational craft of whatever size. The most onerous of the Regulations is 12, which requires the master or skipper to report to HM Coastguard "by the quickest means possible any accident or incident involving the ship". Both "accident" and "incident" are defined in very wide terms and appear to include even the most trivial occurrence of the type encountered on hundreds of occasions daily. The penalty for failure to comply is a heavy fine and possible imprisonment. The yachting fraternity is extremely concerned and we understand that the Royal Yachting Association may be applying to the Court for a judicial review. We shall report further and meanwhile, more detail can be found in the Yacht Law section of our website.

Successive losses under a marine insurance policy

The law relating to successive losses in a policy of marine insurance is codified in Sec 77 of the Marine Insurance Act 1906. The recent case The "KASTOR TOO" raised the question left unanswered by Sec 77, namely whether a constructive total loss (whether or not notice of abandonment was served) was "merged" into a subsequent actual total loss. Now the Court of Appeal has decided the point. It has ruled that, if the assured suffers a constructive total loss caused by an <u>insured</u> peril, and this is followed almost immediately by an actual total loss caused by an <u>uninsured</u> peril, then there is no merger of the losses and the assured is entitled to recover for the constructive total loss. Further, it was irrelevant that it proved impossible for the assured, on the facts of the case, to serve a notice of abandonment as required by Section 62 of the Act.

House of Lords rejects literalistic approach to the interpretation of commercial documents

Following the general trend, commercial contractual documents should be interpreted, when disputes as to meaning arise, in a way which is commercially realistic rather than literalistic. The House of Lords so held in Sirius International Insurance v FAI General Insurance. The facts of the case are not of particular interest but the guidance given by the House on interpretation is important. The aim should be to ascertain the contextual meaning of the language used rather than to probe the intentions of the parties and the approach should be objective and that of the reasonable person. There had been a shift from literal methods of interpretation towards a more commercial approach. The tendency, generally, should be against literalism. What is literalism? A graphic example was given. The tyrant Temures promised the garrison of Sebastia that no blood would be shed if they surrendered to him. They surrendered. He shed no blood. He buried them all alive. That was literalism and if possible it should be resisted in the process of interpretation.

The measure of indemnity for late payment of an insurance claim

In Normanhurst v Dornoch, the assured suffered serious damage to his business premises and submitted a claim against his insurers. The insurers wrongfully refused to indemnify the assured. Ultimately, they admitted liability, by which time the assured's business had failed because, without the insurance monies, he did not have funds to reinstate his property. The question for the Court was whether the assured was entitled to recover, as damages for breach of contract, the consequential losses flowing from the insurers' failure to pay a valid claim under an indemnity policy. No, said the Court, following a long line of authorities. The insurers' liability in damages arose the moment that the insured peril occurred. The insurers could not be liable in damages for their default because, in English law, "there is no action in damages for failure to pay damages: the only remedy is interest on the unpaid sum". Only an express provision of the policy could have altered this rule.

The proximate cause of a loss and excluded perils

The Court of Appeal in Midland Mainline v Eagle Star considered the question of the proximate cause of a loss in relation to a peril excluded from a policy coverage. The Court held that a peril excluded from a policy (in this instance "wear and tear") will be operative in two situations. First, it may be the sole proximate cause of the loss in which case the claim will fail. Second, the excluded peril may be a joint or concurrent proximate cause alongside an insured peril. In those circumstances also the claim will fail because an express exclusion always takes priority over express words of coverage. [Whether an immediate cause of a loss or a contributory cause of a loss is also the proximate cause or a concurrent proximate cause is a matter for the Court on the facts of the case.]

The York-Antwerp Rules 2004

As from 1 January 2005 the York-Antwerp Rules 2004 may be incorporated into contracts of carriage, insurance policies, adjustments and other documents. Readers will know that the purpose of the Rules, which have been updated at intervals since their introduction in 1924, is to reapportion expenses and sacrifices made by parties to a common maritime adventure when faced with a common peril. In this way, such liabilities are borne in proportion to the value of ship and cargo at the end of the voyage. We do not have space to go into detail but some of the main changes in the new Rules deal with:- the removal of salvage from General Average – port of refuge expenses – temporary repairs – interest on GA expenditure, sacrifices and allowances – commission on GA disbursements – time-bar in respect of contributions to GA – amendments to the text of the Rules. The changes, some of which are quite radical, seem to have been given a cautious welcome by the industry.

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.