

SHIPPING – NEGLIGENCE

Was a ferry operator liable in relation to a search and rescue operation?

In the recent case *Davis v Stena Line*, we acted for the widow and children of a passenger D who fell overboard from S's ferry. Mrs D claimed compensation against S in negligence. These were the facts.

D, with Mrs D and their children, was on board S's ferry "KONINGIN BEATRIX" traveling from Rosslare to Fishguard in poor weather conditions. About an hour out, D went on deck and somehow fell overboard. A man overboard alarm was raised by passengers who saw D in the water.

The ferry turned around and, together with a nearby container ship, started to search for D. Some 40-50 minutes later, D was seen alive in the water, waving. Medical evidence established that he would have been in reasonably good physical condition.

The ferry was then manoeuvred in such a way that D came very close to its high, flared bows. D disappeared under the flare and when he reappeared on the opposite side of the ferry he was lifeless and face down in the water. His body was subsequently recovered by a helicopter.

S denied liability in respect of the claim of Mrs D. S believed that D went overboard "deliberately or recklessly" and contended that D had committed suicide. Further, S denied that it or the master and crew of the ferry had been negligent or at fault in any way leading to the death of D, whether under Art 3 of the Athens Convention or otherwise.

The Judge disagreed. There was no evidence from which it could be properly inferred that D jumped overboard. Once overboard, S had no procedure or plan as to how D might be rescued. In the prevailing weather, the ferry could not launch its own rescue boats and the master and crew had no training or guidance as to how to deal with that situation. The plan that was devised to try to get D back on board, by opening the ferry's bow door, was hopeless. It not only risked D's life but could have been catastrophic for the ferry itself. It should never have been attempted. As a result, the ferry came far too close to D and caused him to drown.

The judge held that S (and the master and crew of the ferry) were negligent in numerous respects resulting in D's death. Although those on the bridge of the ferry were faced with an emergency, they had plenty of time between the beginning of the emergency and the time D was located to formulate a course of action to effect a rescue. There should have been coordination with Search and Rescue in Dublin and also with the container ship which would have been able to launch its own small rescue boat. The decisions made by the master were not excusable as being "agony of the moment" decisions.

The court went on to criticise S for its failure to have taken account of lessons that emerged from previous occurrences such as the "Estonia" tragedy. The problem of launching rescue boats from high-sided ferries in poor weather was well known throughout the industry and S should have ensured that procedures were in place to deal with incidents such as this. Even if S's shortcomings were representative of standards at the time (October 2000), that did not excuse them.

S was plainly negligent and Mrs D's claim succeeded.

CONTRACT – SALE OF GOODS

A short and interesting point arose in a case recently before the Commercial Court, *Totsa Total Oil Trading v Bharat Petroleum Corporation*.

The claimant T entered into a contract to supply various quantities of crude oil to the defendant B. The contract was expressly subject to T's standard terms of contract but in addition, certain special and additional terms were negotiated between the parties and incorporated into the contract. One of those special terms provided that B was obliged to pay to T the full amount of any sums included in T's invoices, and expressly excluding any right on the part of B to make any set-off, deduction or counterclaim.

In performance of the contract, a quantity of oil was loaded onto a tanker at T's installation for carriage and delivery to B. In accordance with the standard contract terms, the quantity of oil loaded was measured at the shore tanks and that quantity appeared on the invoice presented by T for payment by B.

However, following an independent inspection of the cargo shipped, a significant amount of water was found in the oil. As a result, B declined to pay the full amount that had been invoiced and paid only a lesser amount which it claimed represented the correct figure for the cost of the oil after a deduction for the quantity of the water.

T brought proceedings against B to recover the short fall and applied for summary judgment. B advanced a number of arguments in its defence, the main one being that the special terms did not in fact preclude it from making a deduction from the invoice figure because it was under no obligation to pay for the water in the first place. The contract was for the supply of crude oil, not water.

The court was unable to accept that argument. It was held that on the true construction of the contract, B was precluded from maintaining that there had been a short shipment and also precluded from refusing to pay the full amount as invoiced. In making a payment of less than the sum invoiced, B was seeking to make a deduction from the invoice and withholding that sum. By the special additional terms, that was precisely what B had contracted not to do.

Accordingly, T was entitled to summary judgment for the sum wrongly deducted by B.

BANKING – BREACH OF CONTRACT

In *Jackson and Another v Royal Bank of Scotland*, the House of Lords has reversed a decision of the Court of Appeal in an important judgment dealing with the assessment of the quantum of damages.

The claimants imported dog chews from Thailand and sold them to an English customer. The goods were paid for by transferable letters of credit issued by the defendant bank RBS to the customer, naming the claimants as beneficiaries.

In error, RBS sent documents to the customer which revealed to the customer the amount of the substantial mark-up which the claimants were charging on the price of the goods. The result was that the customer placed no further orders for dog chews with the claimants.

The aggrieved claimants therefore brought an action

Contract for the supply of crude oil incorporating a special term

Assessment of bank's liability in damages flowing from its breach of contract

against RBS in breach of contract. Their claim was for damages for the loss of opportunity to earn profits from their trading relationship with the customer. The judge had no difficulty in finding that RBS was in breach of its obligation of confidence to the claimants. As a result, he awarded damages on the basis that, but for the breach, there had been a “significant chance that the trading relationship would have continued for a further four years”. He held that, after that period, the claimants’ chance of obtaining repeat business from the customer was so speculative as not to give rise to any further claim.

RBS appealed. The Court of Appeal held that the damages award should be limited to one year’s loss of profit after the date of the breach of contact.

The claimants appealed to the House of Lords. They argued that to limit the award to a period of one year was an error of principle and that the liability of RBS was in fact open-ended as it had not limited its liability by the contract to any particular period. RBS cross-appealed, maintaining that there was no foreseeable loss at all because it was not within its reasonable contemplation that the disclosure of the profit that the claimants were making would lead to the termination of the trading relationship.

The House of Lords allowed the claimants appeal, dismissed the cross-appeal of RBS and held, in summary as follows:

- on the date that the contract was made, the parties had the opportunity to limit their liability in damages and at that stage they could draw attention to any special circumstances outside the ordinary which they should have had in contemplation when entering into the contact;
- if no cut-off point was provided by the contract, there was no arbitrary limit which could be set to the amount of the damages which might be awarded, once the usual test of “remoteness” had been satisfied (which it had in this case);
- since RBS had not included any provision in the letter of credit limiting its liability for the loss of repeat business to any particular period, the only limit on the period of its liability was that identified by the trial judge, namely four years, after which any loss was too speculative.

RBS was obliged to pay damages accordingly to the claimants.

CARRIAGE OF GOODS BY SEA

Straight bill of lading is a document of title

In Issue 39 p 4 we reported briefly on the Court of Appeal judgment in the “RAFAELA S” (MacWilliam v Mediterranean Shipping Co) and the case has now been before the House of Lords. It involved a very long running dispute between a carrier and a buyer of goods as to the true effect of a straight bill of lading.

In January 1990, four containers of machinery had been damaged in the course of sea carriage from Felixstowe to USA. The carrier was MSC and M was the buyer of the machinery. The sole issue was whether the contract of carriage had been covered by “a bill of lading or any similar document of title” as per Sec 1(4) of COGSA 1971 and Art 1(b) of the Hague-Visby Rules.

If it had been, then M’s claim was subject to the limit of liability in the Rules. If it had not been, the claim was subject to the limit of liability in the US COGSA 1936. The Rules were significantly more generous to M.

The question of principle was whether a straight bill of lading (meaning a bill providing for delivery to a named consignee and not to order, or assigns, or bearer and so not transferable by endorsement) was in fact a “bill of lading or any similar document of title”.

It was the task of the court to determine the true nature and effect of a legal document and the court was not bound by the label that the parties had applied to it. Where it was considering a bona fide mercantile document, it would be slow to reject the description that it bore, particularly (as in this case) when it had been issued by the party seeking to reject the description.

The document in the case called itself a bill of lading. It was not transferable by endorsement and so was not negotiable. However, if it was a mere receipt or sea waybill, there was no point in having more than one original and also the attestation clause was meaningless.

Further, the conditions contained in the document clearly envisaged that the consignee and bill of lading holder might become a party to the contract of carriage: that had been a distinctive feature of a bill of lading for many years. The conditions made no sense if the consignee, although holding the bill, remained a stranger to the contract of carriage. They were quite unlike the standard terms of non-negotiable sea waybills.

If it were appropriate to decide whether the document was a “bill of lading or any similar document of title” by reference to the document alone, then the conclusion must be that it was. However that was a wrong approach. The Hague Rules represented “an agreed international response to common problems” and recognition of that must govern the court’s interpretation.

Having considered the *travaux préparatoires* to the Hague Rules, the court could find no intention to exclude straight bills from their scope. The Hague and Hague-Visby Rules had been intended (with the exception of charterparties) to govern the great majority of commercial shipments. Those negotiating the Rules were more concerned with preventing their circumvention than restricting their scope.

Accordingly, the court would give an expansive interpretation to the words “bill of lading or any similar document of title”. Those words were apt to cover the present document, particularly given that on its express terms, it had to be presented to obtain delivery of the goods.

It followed that M’s claim was subject to the limit of liability in the Rules and not that in US COGSA 1936.

This judgment has given rise to much comment in the maritime press, especially as to its likely effect on the use of sea waybills. In addition, the provisions of UK COGSA 1992, which were not considered because of the 1990 date of the bill, will now need to be taken into account.

Footnote

CHARTERPARTY

The Commercial Court, on appeal from arbitrators, has recently considered, in the case *Action Navigation v Bottiglieri di Navigazione* (The “KITSA”), the scope of an implied indemnity in a Charterparty.

The bulk carrier “KITSA” was chartered by her owners AN to B on an amended NYPE form for a period of about seven to nine months. The trading limits under the Charterparty were “always within Institute Warranty Limits” subject to certain exclusions. In addition to the printed off-hire clause (clause 15), there was a typed clause 54 which provided:

“Clause 54

Deviation/Put Back

Should the vessel put back whilst on voyage by reason of breakdown of machinery, collision, stranding, fire or other accident or damage to the vessel, ... or by reason of the refusal of the master, officers or crew to do their

Were charterers liable for cost of hull cleaning and was the vessel off-hire during cleaning time?

duties, or any owners' matters, the payment of hire shall be suspended from the time of inefficiency in port or at sea until the vessel is again efficient in the same position or regain(s) a point of progress equivalent to that when the hire ceased hereunder...."

The vessel was sub-time-chartered, also on an amended NYPE form, for a trip for the carriage of coal from South Korea to a warm water port in India, Visakhapatnam (Visak). When the vessel arrived there, discharge of the cargo was delayed and she remained at the port for over three weeks. As a direct result, her hull became seriously fouled by barnacles.

AN subsequently arranged for the vessel to be de-fouled. The cost was some US\$180,000 and AN claimed that cost from B on the basis of an "implied indemnity" under the charterparty. In addition, AN claimed that B had wrongfully put the vessel off-hire for the period during which the de-fouling work was being carried out. B resisted the claims of AN and argued that, given the circumstances of the fouling at Visak, the costs of de-fouling were not within the scope of any "implied indemnity". B also maintained that the vessel was off-hire during the de-fouling work and was entitled to withhold hire accordingly.

The dispute came before arbitrators in London who rejected the contentions of AN and accepted the arguments of B.

AN appealed. First they argued that the fact that the parties had agreed that the vessel could trade within a very wide range of ports (within IWL) and also carry a variety of cargoes, meant that B had a very wide freedom of choice in how to employ the vessel. That freedom of choice gave rise to the implication of a right to indemnity for losses resulting from B making that choice. Secondly, AN maintained that arbitrators decision that the vessel was off-hire was wrong and was contrary to clear case precedent.

The court rejected both arguments. B's order for the vessel to go to Visak was lawful. The risk of hull fouling there was foreseeable. The cost of cleaning the hull was an ordinary expense of trading under the charter and the cleaning had to be carried out by AN because of their obligation to keep the vessel in a thoroughly efficient state. The loss sustained by AN arose from a risk that they had agreed to run and consequently they had no right to the claimed indemnity.

AN's appeal also failed on the off-hire point because leave to appeal had only been given on a point of law which did not in fact arise on a true construction of the arbitrators' reasons.

JURISDICTION

In Issue 42 p 1 we reported upon the operation of European Community Regulation 44/2001 (successor to the Brussels Convention 1968) in relation to anti-suit injunctions and we referred in particular to the European Court's ruling in *Turner v Grovit*. Two recent cases, both involving questions of the exercise of the English courts' jurisdiction in relation to the Regulation, have recently been heard. We refer to each in turn.

In the first case, *Owusu v Jackson and Others*, the facts were simple. O, domiciled and resident in England, was seriously injured while on holiday in Jamaica. O sued J, also domiciled and resident in England, in the English court, J having rented his villa to O. O also joined various Jamaican companies as defendants. J and the Jamaican companies all applied for orders that the court should not

exercise its jurisdiction over them because England was not the *forum conveniens*. They maintained that the action should be heard in Jamaica.

At first instance, a stay of the action was refused. It was held that the action between O and J was subject to Art 2 of the Convention (now Art 2 of the Regulation) which provides that "... persons domiciled in a contracting state shall, whatever their nationality, be sued in the courts of that state...". Both O and J were domiciled in a contracting state (England) and it was not therefore permissible to apply any doctrine of *forum non conveniens*. J and his co-defendants appealed and the Court of Appeal referred the question to the European Court of Justice.

The ECJ held that the case did indeed fall within Art 2. The Article did not simply apply where claimant and defendant were domiciled in different contracting states but also to any case with an international element which fell within its express terms. That included a case (such as the present one) where a defendant was domiciled in a contracting state, even if that was the same contracting state as the claimant's and the state where the proceedings were brought.

The ECJ went on to hold that it was not open to the English court to apply a *forum non conveniens* doctrine. It emphasised that "legal certainty" was a central value for the EC jurisdiction regime. *Forum non conveniens*, which balances a variety of different factors in a relatively unconstrained way, tended to undermine certainty. It was not expressly countenanced by the Convention and was, therefore, impermissible.

It followed that J's argument failed and O's case would proceed in the English court.

As we suggested at the end of our article in Issue 42, a question remained as to whether the English court could, after *Turner v Grovit*, continue to grant anti-suit injunctions in support of jurisdiction agreements in arbitration clauses. That question has now been dealt with squarely by the Commercial Court in *West Tankers Inc v RAS Riunione Adriatica and Generali*. The facts were as follows.

WT's vessel struck an oil refinery jetty in Sicily belonging to Italian voyage charterers ERG. Substantial losses arose. The charterparty contained a London arbitration clause and ERG brought their claim in London arbitration proceedings which had been going on for some years. Later, Italian Insurers, who had indemnified ERG for certain of their losses, began proceedings in Sicily against WT to recover their outlay to ERG. WT thus faced a claim in Italy which duplicated the claim already made against them in London, giving rise to the risk of duplicate costs and of conflicting judgments.

WT therefore applied to the English court for an anti-suit injunction. They sought to uphold the arbitration agreement and to restrain the Insurers from proceeding further in Italy.

The Insurers argued that under Italian law (which applied to their policy) they were not bound by an arbitration clause in a contract to which they were not a party. Anyway, there should be no injunction (following the ruling in *Turner v Grovit*) as that would be incompatible with the system of the Regulation.

The court held that the question whether the Insurers were bound by the arbitration clause was one for English law. The Insurers had demonstrated an intent to ignore WT's right to insist that claims were determined by London

Anti-suit injunction granted in support of arbitration agreement

Is the English court entitled to apply rules of *forum non conveniens* to its own proceedings?

arbitration. The judge said in terms that there was no doubt that the Insurers position was inconsistent with the terms of the arbitration agreement, so entitling WT to injunctive relief. And he declined to exercise his discretion in favour of the Insurers. He therefore granted a permanent anti-suit injunction in WT's favour, so restraining the Insurers from going on with their proceedings in Italy.

If the Insurers appeal, we shall report further on this important and controversial topic.

CHARTERPARTY – DEMURRAGE

Was the interruption of discharge beyond the control of the consignee?

A case of some significance for both owners and charterers has recently been before the Commercial Court, *Frontier International Shipping v Swissmarine*, the "CAPE EQUINOX".

The vessel was chartered on an Americanised Welsh Coal Charter Form to carry coal from Australia to Mexico. In Mexico, discharge was interrupted for some 23 days because of a strike by employees of the consignees of the cargo. Clause 9 of the charter provided that the cargo was to be:

"...discharged by the consignee at port of discharge, free of expense and risk to the vessel... In case of strikes, lockouts, civil commotions, or any other causes or accidents beyond the control of the consignee which prevent or delay the discharging, such time is not to count..."

Clause 26 contained a cesser clause which was amended so as to make the charterers liable for demurrage at the discharge port and which gave owners a lien on cargo for demurrage.

Owners claimed demurrage. Arbitrators upheld the claim, finding that although charterers could not have avoided the strike, it was not outside the control of the consignee.

Charterers appealed to the court. They contended that the natural meaning of cl. 9 was that:

- (1) in the event of a strike preventing or delaying discharge, the laytime clock would stop, and
- (2) in the event of some different cause (other than the named causes) preventing or delaying discharge, the laytime clock would stop, but only if that other cause was beyond the consignee's control.

The court disagreed. The natural meaning of cl. 9 was that the words "beyond the control of the consignee" applied not only to "any other causes or accidents" but also to the specified events of strikes, lockouts and civil commotions. There was nothing unusual in a charterer having to investigate events (such as the reasons for or background to a strike) of which he had no direct knowledge in order to determine whether he could rely upon an exception from the running of laytime. It was up to the charterer to prove that the strike **was** beyond the consignee's control. On the facts found by the arbitrators, it was clear that the consignee was very much responsible for the incidence of the strike and its duration.

Charterers appeal therefore failed and owners recovered their demurrage.

IN BRIEF

European Commission plans curtailment of many exemptions enjoyed by maritime transport

In present day maritime transport, pools, conferences and ship sharing arrangements are commonplace. Such arrangements in other sectors of the economy are likely to be investigated and prosecuted for cartel-like behaviour. Price fixing agreements are tolerated in the shipping market but would be roundly condemned in other commercial activities. Change is however now in the wind. The EC has announced its intention to remove

many of the exemptions and exclusions enjoyed by maritime transport and expose the industry to the free market. In this event, current arrangements between competitor ship owners and operators will have to be radically restructured or abandoned. We shall report further as and when regulations are made.

An interesting and important general observation was made by the Court of Appeal in the case *Royal and Sun Alliance v Dornoch*. The case, amongst other matters, was concerned with the true meaning of a condition precedent in a policy of reinsurance which read in part: "...The reinsured shall upon knowledge of any loss... which may give rise to a claim..." advise the underwriters within a specified time. On the evidence, great difficulties arose in determining precisely when the reinsured gained "knowledge" of a loss and therefore whether it had complied with the condition precedent. This led the court to observe that "knowledge" is an "elusive concept" because a party to a contract may have difficulty in showing what another party "knows" at any given moment. It is therefore better if "knowledge" is not used as the trigger for any requirement of notification to the underwriters of a policy.

In the recent Court of Appeal case, *Hajigeorgiou v Vasiliou*, the question arose whether one of the parties, having decided that he did not like the content of his first expert's report, was entitled to rely on a second expert's report. After reviewing the Civil Procedure Rules and the authorities, the court held that a party who was granted an order to adduce evidence from an **unnamed** expert was entitled to reject his first expert's report (which would not be disclosable) and to instruct a second expert without seeking permission from the court. However, where the circumstances did require permission (for example where an expert had been expressly named in the original court order), the imposition by the court of a condition for the disclosure of the first expert's report was appropriate and would not breach legal professional privilege. The practice of "expert shopping" would be likely to be discouraged as a result.

In *Borgship Tankers v Product Transport*, charterers of the tanker "CASCO" claimed damages against owners for breach of a charterparty. They maintained that the vessel's tanks were not ready and suitable to receive its cargo, as a result of the deteriorated state of their epoxy coating. They claimed they were unable to obtain employment for the vessel and suffered substantial loss and damage. However, owners argued that the claim was brought outside the one year time limit under the Hague-Visby Rules which were incorporated into the charter. The court rejected that argument. The one year time limit was concerned with what would be regarded in the marine market as "cargo claims". The claim must be connected with cargo. Charterers claim was not for lost or damaged cargo or in connection with cargo: it was essentially for loss of use of the vessel. The claim was not subject to the one year time limit.

The Court of Appeal, in *Axa General Insurance v Gottlieb*, has recently considered the effect of fraud arising in respect of insurance claims. The rule, to the effect that the **whole** of the claim to which the fraud related must be forfeited, was upheld. Further, any interim payments made on that claim were recoverable by insurers. The rule was deliberately designed to operate in "a draconian and deterrent fashion". The rule did not however apply to separate claims which had already been settled under the same policy before any fraud occurred.

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.

Use of the word "knowledge" in an insurance policy condition precedent

Was second expert's report admissible?

Was charterers claim time-barred?

The effect of fraud on an insurance claim