

CHARTERPARTY

Injunction granted to time charterers pending arbitration award

The Court of Appeal, in *Lauritzencool v Lady Navigation* has delivered an important judgment relating to the scope of injunctive relief available to time charterers.

C were the managers of a pool of reefer vessels. Two vessels in the pool were owned by LN and time chartered to C. In early 2003, there was a change in the beneficial ownership and control of LN and therefore of the two vessels. Information was sought by the new owners about the operation of the pool, following which disputes arose between the parties which were referred to London arbitration.

LN alleged that C had breached various duties owed to them. They also informed C that they wished to withdraw their two vessels from the pool notwithstanding that the two time charters were not due to expire until 2010. C objected but LN refused to give an undertaking that they would not withdraw the vessels.

As a result, C went to the court to seek injunctive relief, pending a final award in the arbitration, to prevent LN from taking any step to interfere with the performance of the charters. The court acceded to the application of C and granted them an interim injunction restraining LN from:-

- (i) employing the two vessels in any manner inconsistent with the time charters, and
- (ii) fixing either of the vessels with any third party for employment in respect of any period before 2010.

LN appealed. They contended that it was a principle established by The "SCAPTRADE" (1983) that injunctive relief would not be granted to restrain conduct inconsistent with a time charter if the **practical** effect would be to compel the party enjoined to perform the charter. The relief granted by the court fell foul of that principle. In addition, it was maintained by LN that there was a general principle that injunctive relief would not be given in respect of a "contract for services" (which included a time charter) if the practical effect would be to compel specific performance. That derived from the nature of the relationship of trust and confidence between the parties to such contracts.

The Court of Appeal was unable to accept the contentions of LN. There was nothing to suggest that The "SCAPTRADE" decision altered established principles and there was no general principle that injunctive relief would not be given in respect of a contract for services if the practical effect would be to compel performance.

The court further held that, even in respect of contracts for services which were more easily described as personal in nature than time charters, there was no inflexible principle excluding negative injunctive relief which precluded activity outside the contract contrary to its terms.

Neither the fact that the contracts were for services in the form of a time charter nor the existence of fiduciary

relationships in them represented in law any general objection to the grant of an injunction precluding LN from employing the two vessels outside the pool, pending the outcome of the arbitration. Nor was it an objection that the only realistic commercial course left open to LN was to leave the vessels in the pool and perform the charters.

LN's appeal was accordingly dismissed.

LITIGATION

In Issue 41 p 2 we reported on the case of *Arkin v Borchard Lines*. An appeal against the judgment has now been heard and we briefly summarise the facts.

A, a former director of BL and other shipping companies brought an action against the companies claiming some £80million. A was without means and so arranged a conditional fee agreement with his lawyers. He also needed funds for expert witnesses. He therefore made a contingency fee agreement with a professional funding company MPC which agreed to pay the experts' fees in return for 25% of any damages awarded to A. In the event, MPC paid out over £1.3million to A's experts.

A's case went to trial but his claim failed and was dismissed. BL and the other companies had incurred legal costs of some £6million and they sought a recovery from MPC. At first instance, the Judge declined to make an order against MPC (see our earlier report). BL appealed and contended that it was fair that a funder who, for profit, had supported a claim which had turned out to be worthless, should be required to indemnify a successful defendant against costs reasonably incurred in resisting the claim.

The Court of Appeal agreed to a limited extent. It held that a professional funder, who was financing part of a claimant's costs, should be potentially liable for the costs of the opposing party up to the extent of the funding that had been provided. In that way, a successful opponent would not be denied all his costs. And commercial funders, who provided help to those seeking access to justice, would not be deterred by the fear of "disproportionate" costs consequences if the litigation they were supporting did not succeed.

It might well be that a funder would require, as the price of the funding, a greater share of the recovery if the claim were to succeed and the net recovery of a successful claimant would be diminished. That was a cost that the impecunious claimant could reasonably be expected to bear. Overall justice would be better served, giving successful defendants at least some recompense.

It was a likely consequence that professional funders would cap the funds provided so as to limit their exposure, which could have the effect of keeping costs "proportionate". Funders would also no doubt have to consider with even greater care the prospects of success in the litigation.

Accordingly, MPC was ordered to pay £1.3m by way of contribution to the successful defendants' costs.

In our previous report, we referred to the court's wide discretion enabling it to make a costs order against a person who was not a party to the action. That power was

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

Footnote

recently exercised in the clearest terms by the Court of Appeal in *CIBC Mellon Trust v WO Stolzenberg*. A shareholder of a company, who was not a director, was ordered to pay costs incurred by another party to litigation against the company when, to serve his own interests, the share holder had controlled and financed the litigation in the name of the company.

SHIPPING – LIMITATION OF LIABILITY

Should the court grant a limitation decree and an anti-suit injunction?

Two interesting and related issues arose in a recent case before the Court of Appeal, *Seismic Shipping and Anr v Total E&P UK*. These were the facts.

In October 2002, the survey vessel “WESTERN REGENT”, owned by SS and operating under demise charter, collided with a marker buoy causing damage to a well head installation in the North Sea. The only party with a claim resulting from the collision was T, the owner of the installation.

SS (and the demise charterers) accepted responsibility for the damage. In November 2004 they issued proceedings in England pursuant to the Convention for Limitation of Liability for Maritime Claims 1976 and the Merchant Shipping Act 1995, claiming to limit their liability to T to a sum based on the tonnage of the vessel. They sought “all necessary and proper directions” for the ascertainment of the amount payable to T.

In January 2005, T filed a complaint in Texas against SS claiming damages of US\$9.9million. Under Texas law, the sum to which SS would be entitled to limit its liability exceeded T’s claim, so that limitation in Texas would not help SS.

T applied to dismiss the English action, claiming that the court had no jurisdiction. It argued that SS could only start limitation proceedings when underlying legal or arbitration proceedings had been started in England. It was maintained that the 1976 Convention was “jurisdictional” and only conferred jurisdiction to begin a limitation claim where the limitation claimant could constitute a limitation fund under Art 11.1. But that Article only contemplated the setting up of a fund in a state in which legal proceedings had been started in respect of the claim which was the subject of limitation. T had begun no such proceedings in England. Therefore SS could not bring a limitation claim in England.

SS applied for summary judgment of their limitation claim. They also applied for an anti-suit injunction restraining T from pursuing the Texas proceedings.

At first instance, it was held that the English court did have jurisdiction to hear the claim of SS. The Judge granted a restricted limitation decree to SS, rejecting T’s arguments. However, he declined to grant the anti-suit injunction, holding that (i) the Texas court would want to reach its own view as to whether an English court declaration as to limitation was relevant and (ii) the interests of comity must be respected. Both T and SS appealed.

The Court of Appeal upheld the submissions of SS and the Judge’s conclusions. Neither the constitution of a limitation fund nor the ability to constitute a fund was a pre-condition to either the jurisdiction itself or the grant of a limitation decree. The court had jurisdiction to hear the claim of SS and SS was entitled to its limitation decree. T’s appeal failed.

The appeal of SS also failed. It was not entitled to an anti-suit injunction. T was not in breach of contract in starting the Texas proceedings and those proceedings were not vexatious or oppressive.

CONTRACT

In *Bryen & Langley v Boston*, the Court of Appeal recently considered whether standard terms for building works were incorporated into a building contract.

D bought two flats intending to convert them into one. Through his quantity surveyor, he invited building contractors B&L to tender for the works. The tender documents envisaged that any contract entered into would be on the JCT Standard Form of Contract 1998. D’s quantity surveyor sent a letter to B&L confirming D’s intention to engage them for the works and stating that contracts would shortly be drawn up and executed under the JCT Standard Form.

B&L then commenced the building works and issued architects certificates for interim payments in accordance with the provisions of a JCT Form of Contract. A dispute arose with D as to how much B&L were entitled to be paid and B&L therefore referred the dispute to an adjudicator. D contended that the contract had not incorporated the JCT Form and so the adjudicator had no jurisdiction. The adjudicator disagreed and made an award in favour of B&L. D failed to comply with the award and B&L therefore sought enforcement by summary judgment.

At first instance, the judge held that the JCT Form had not been incorporated into the building contract. It followed that the adjudicator’s award had no validity and that B&L’s claim and application for judgment must be dismissed. It was also held that, if the adjudication provisions of the JCT Form had in fact applied then they were not “unfair” for the purposes of the Unfair Terms in Consumer Contracts Regulations 1999, contrary to D’s contention.

B&L appealed and D cross appealed. The first issue was whether the contract had incorporated the JCT Form. The Court of Appeal was in no doubt that it had. All the terms of a building contract in JCT Form had been agreed. The mere fact that the two parties proposed that their agreement should be contained in a formal contract to be drawn up and signed in the future did not preclude the conclusion that the parties had already informally contractually committed themselves on exactly the same terms. The appeal of B&L must be allowed and subject to D’s cross appeal their claim and application succeeded.

The second issue was whether the adjudication provisions of the JCT Form were “unfair” as being contrary to the 1999 Regulations. The problem faced by D in his argument was that the provisions were not imposed upon him by B&L. They were introduced by his own quantity surveyor. B&L had been invited to tender on the exact terms of which D now complained. There was no lack of openness, fair dealing or good faith in the manner in which the contract was made. It followed that D’s cross appeal must be dismissed.

An important issue arose in the High Court case *Peekay Intermark v Australia and New Zealand Banking Group*.

P, a director and controlling shareholder of PI, sought investment advice from ANZ, who proposed that he should invest in an emerging markets product on behalf of PI. P contended that misrepresentations made by ANZ had induced him to make the investment. If he had been aware of the true nature of the product he would not have done so.

ANZ maintained that the product was correctly described in the final terms which formed part of the investment

Were standard terms incorporated into a building contract?

Was an oral misrepresentation nullified by a later accurate contract?

contract and which P had initialled on each page and signed at the end. It was also argued that PI was not entitled to rely on any alleged pre-contractual representations which might have described the product differently.

On the evidence, the court held that the nature of the investment contract had been misrepresented to P who was induced to enter into the contract on behalf of PI.

It was not incredible that once he had received the investment advice, P did no more than glance through the final terms. He had no reason to expect that the final terms would describe a fundamentally different product from the one he was expecting and which had been described to him. Although the failure to read the final terms was unwise, the fact of P initialling and signing them did not nullify or supersede the prior oral misrepresentation of ANZ as to the very nature of the product being marketed. P was entitled to assume that if there had been a material change to the product, it would have been pointed out to him.

It followed that PI was entitled to damages in the sum which was the difference between the amount realized from the investment and the amount of the investment as made by PI.

JURISDICTION

Parties to a contract of carriage free to choose where to resolve their disputes

The principle that parties should be free to choose the courts in which their disputes were to be resolved was paramount when a contract of carriage conferred exclusive jurisdiction on the English courts but one of the parties sought to exercise a statutory right to bring proceedings in another jurisdiction. The Court of Appeal so held in *OT Africa Line v Magic Sportswear and Others*. The facts were as follows.

OT owned a vessel on which goods were shipped in New York for carriage to Monrovia. OT was an English company which also had offices in Toronto. The bill of lading, issued in Toronto and naming MS as shipper, contained an exclusive English jurisdiction clause. The cargo was insured with Canadian insurers all of whom were based in Toronto.

On the vessel's arrival in Monrovia, complaint was made of short delivery of cargo. MS and the cargo receivers began proceedings against OT in Toronto in August 2003, relying on the Canadian Marine Liability Act 2001 to give the Canadian courts jurisdiction. The cargo insurers were the instigators of those proceedings, acting under rights of subrogation.

OT promptly (September 2003) issued proceedings in England against MS and the cargo receivers. They claimed a declaration that there had been no short delivery and also an injunction restraining the Canadian action. Permission to serve the English proceedings out of the jurisdiction, on MS and the receivers, and an anti-suit injunction were granted. Permission was also granted to join the cargo insurers (as defendants) in the English proceedings.

Despite the anti-suit injunction, the Canadian action continued. And in the English proceedings, MS and the receivers applied to stay the English proceedings and to discharge the anti-suit injunction on the ground that the Canadian court was properly seised of the dispute. At first instance, the applications were refused. MS and the receivers appealed.

The Court of Appeal had no hesitation in dismissing the

appeal from the refusal of the court to stay the English proceedings. Where the parties to a contract of carriage had bargained for English law, the court should give effect to that bargain and the freely negotiated choice of law and jurisdiction. The court should not, as a matter of comity, override that bargain and choice. The English proceedings should not be stayed.

The more difficult question concerned the anti-suit injunction. The refusal of a stay (of the English proceedings) did not of itself justify an anti-suit injunction, which could be perceived as an interference with a foreign court. But where there was an exclusive jurisdiction agreement, as in this case, the situation changed. Proceedings brought in a jurisdiction other than the agreed one were proceedings in breach of contract. Whilst there was no doubt that the Canadian courts had jurisdiction (under their Marine Liability Act), there was no "impropriety" in restraining a party from invoking that jurisdiction when he had agreed not to do so. An injunction was the only way to avoid duplicity of proceedings. Accordingly the anti-suit injunction would not be discharged and the appeal would be dismissed.

ARBITRATION

A case of "great importance for the effective functioning" of the Arbitration Act 1996 has recently been before the House of Lords – *Lesotho Highlands Development Authority v Impregilo and Others*.

The case was primarily concerned with sec 68 of the Act which so far as material provides:

"(1) A party to arbitral proceedings may... apply to the court challenging an award... on the ground of serious irregularity affecting the tribunal, the proceedings or the award...."

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant –

- (a) failure by the tribunal to comply with section 33 (general duty of tribunal);
- (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67)...."

In 1991, LHDA engaged a consortium of seven companies (the contractors) to construct a dam in Lesotho. The arbitration clause in the contract provided for arbitration in London under ICC Rules. Those Rules exclude any right of appeal on a point of law. The law of the contract was that of Lesotho and the currency of account was the Lesotho maloti.

In due course, the contractors made a number of claims against LHDA for reimbursement of increased costs. These were referred to arbitration. The tribunal issued a partial award finding that certain sums were due to the contractors and holding that the sums, which were stated in maloti, should be converted into European currencies. In doing so, the tribunal relied on sec 48(4) of the Act which provided that it might order the payment of a sum of money "in any currency".

LHDA challenged that decision on the basis that the tribunal had exceeded its powers under sec 68(2)(b) of the Act. The Commercial Court ruled that the tribunal had exceeded its powers by expressing the award in currencies other than those provided for in the contract. The Court of Appeal

Did a tribunal exceed its powers under sec 68 of Arbitration Act 1996?

upheld that decision. The contractors appealed to the House of Lords.

The central issue was whether an alleged error of the tribunal in interpreting the contract was in fact an excess of power under sec 68(2)(b) so as to give the court the power to intervene. To determine whether the tribunal had exceeded its powers, it was necessary to ask whether the tribunal was purporting to exercise a power which it did not have or whether it was erroneously exercising a power that it did have. If it was the latter, then no excess of power under sec 68(2)(b) was involved. The erroneous exercise of an available power could not by itself amount to an excess of power and neither would a mere error of law.

By its very terms, sec 68(2)(b) assumed that the tribunal acted within its substantive jurisdiction. It was aimed at the tribunal **exceeding** its powers. There was no hint in sec 68 that a failure to arrive at a correct decision could afford a ground for challenge under that section. In the present case, assuming the tribunal had erred in the interpretation of the contract or as to its powers under sec 48(4), the highest that the case could be put was that the tribunal had committed an error of law. And that was no more than an erroneous exercise of the power available to it.

It followed that the Court of Appeal was wrong in its conclusion that the tribunal had exceeded its powers. If the tribunal had erred, it was an error within its powers. The contractors appeal was allowed and the tribunal's award re-instated.

IN BRIEF

False claim not necessarily a fraudulent claim

An interesting point was decided in *Horne v Norwich Union Insurance*. H held home insurance with NU. A serious fire occurred at his house. A policy condition headed "fraud" provided, in line with general principles, that NU would not pay out if any part of the claim was false or exaggerated. H included in his substantial claim alleged damage to some items of garden equipment. It subsequently emerged that these items had not been damaged in the fire. H explained that, during the long period after the fire when his home was abandoned, the items had been stolen or vandalised. NU declined the claim. No, said the court. Some element of "wilfulness" was required for a false claim to be fraudulent. Further, the courts had in the past recognised circumstances where the falsity was "not so serious" as to give rise to a breach of the Insured's duty. That was the position in this case and NU must pay.

BIMCO revises its ISPS clause for time and voyage charters

We reported on the International Ship and Port Facility Security Code in Issue 42 p1 and 2, including a reference to new BIMCO charterparty clauses. Practical experience and feed-back from the industry over the year since their introduction has now led BIMCO to make certain revisions to the clauses. The clauses have been widely used and the amendments to both the time and voyage charterparty clauses reflect the experiences and concerns of both owners and charterers.

The meaning and effect of the word "clausing"

The Commercial Court, in *Sea Success Maritime v African Maritime Carriers*, has recently considered the definition of the word "clausing" as it appeared in a charterparty and in respect of the issue of a bill of lading. Space does not allow a review of the facts in the case but the judgment usefully summarises many of the matters that arise when a master is faced with a decision whether or not to clause a bill of lading, as well as the rights and obligations of owners and charterers in this context. The court did hold that "clausing" has no ordinary settled meaning or commercial usage in the industry. In this case it simply meant a notation on the bill of lading by the Master which qualified existing statements in the bill as to the description and apparent condition of the goods.

Lloyd's has recently introduced a Fixed Cost Salvage Arbitration Procedure to the services that it provides under LOF. The Procedure is a response to requests from certain users of LOF for a system to limit the costs of obtaining a salvage award, especially in cases where a salvaged fund is small or where no point of law arises and/or the facts are uncomplicated. Guidelines have been produced for the conduct of arbitrations on a fixed-cost, documents-only basis, with limitations on the amount of documents in a joint bundle, a fixed timetable and strictly limited written submissions. The Procedure has been widely welcomed and is likely to be used in particular by those involved in the small and leisure craft sectors of the industry.

Lloyd's new Fixed Cost Salvage Arbitration Procedure

A timely reminder of the practical effect of "All Risks" cover in a UK insurance policy has recently come from the Court of Appeal in *Tektrol v International Insurance Co of Hanover*. T took out an "All Risks" business loss policy with H. There were many express exclusions. Two major losses occurred. H said they were excluded and the court agreed. No, said the Court of Appeal. On the facts, the policy provisions were not sufficiently wide to exclude the claims. With an "All Risks" policy, the court held that "one should start from the presumption that the parties intended... to cover all risks, except when they are clearly and unambiguously excluded". Insurers must use very clear wording if they wish to exclude liability for specific perils in such policies.

All Risks means All Risks in a UK policy

A protocol on expert evidence in civil claims was launched in September 2005. It was drafted by the Civil Justice Council for both experts and those instructing them. The main points in briefest summary are: (1) Courts may take into account failure to comply with the protocol when making orders in relation to costs, time limits and stay of proceedings; (2) Experts must be aware of the overriding objective that courts deal with cases justly; (3) Experts should confirm without delay whether or not they will accept instructions and say if those instructions are unacceptable because they require work that falls outside their expertise, impose unrealistic deadlines or are insufficiently clear; (4) Payments must not be contingent upon the nature of the expert evidence or on the outcome of a case.

Protocol for the Instruction of Experts to give Evidence in Civil Claims

In *Lafarge v Newham London Borough Council*, it became necessary to determine (for the purposes of a time limitation in a contract) whether Saturdays constituted "working days". The court held that they did not. The fact that work might regularly be done on a Saturday was irrelevant: that argument would equally apply to a Sunday. In ordinary parlance in the UK, "working days" were Mondays to Fridays, excluding Christmas, Easter and Bank Holidays.

Is Saturday a "working day"?

The Commercial Court, in *Western Bulk Carriers v Li Hai Maritime (The "LI HAI")*, considered the validity of an anti-technicality notice given by owners to charterers for the purpose of withdrawing their ship from time charter. The notice was held to be invalid and charterers were entitled to damages of over US\$2million. Such a notice must be properly drawn and unambiguous and comply with the contractual requirement for an ultimatum. The consequences of owners' failure in these respects, which could easily have been avoided by careful drafting, were all too significant.

The importance of clarity in an anti-technicality notice

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.