Shipping E-brief
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The compensatory principle (re)applied by the Court of Appeal

Classic Maritime Inc v. Limbungan Makmur SDN BHD & another [2019] EWCA Civ 1102

The Court of Appeal has upheld a Commercial Court finding that the effect of an exceptions clause in a contract of affreightment ("COA") depended on its proper construction. It further found that the Commercial Court had misapplied the compensatory principle. The principle, properly applied, was to compare the financial position of the Owners following the Charterers' breach of the COA with their financial position had the Charterers actually performed the COA, not their financial position had the Charterers been willing but unable to perform.

The background facts

In brief, Classic Maritime Inc ("Owners") and Limbungan Makmur SDN BHD ("Charteters") entered into a long term COA for the carriage of iron ore pellets from Brazil to Malaysia. The Charterers failed to provide seven intended shipments between July 2015 and June 2016. The Owners commenced proceedings against the Charterers for breach of the COA.

The Charterers accepted that they had no defence for the first two of the seven missed shipments. However, prior to the third shipment, the Fundao Dam burst, stopping production of iron ore at the relevant mine.

In relation to the last five shipments, the Charterers argued that they were relieved of liability under Clause 32 of the COA, which read:

> *"Exceptions*
>
> *Neither the vessel, her master or Owners, nor the Charterers, Shippers or Receivers shall be Responsible for loss of or damage to, or failure to supply, load, discharge or deliver the cargo resulting from: Act of God,… floods… accidents at the mine or Production facility… or any other causes beyond the Owners' Charterers' Shippers' or Receivers' control; always provided that such events directly affect the performance of either party under this Charter Party."*

The Commercial Court decision

The Court found, as a matter of fact, that as a result of the dam burst it was impossible for the Charterers to perform the final five shipments of the COA. However, it also found that had the dam burst not occurred, the Charterers would have failed to provide the shipments in any event.

As to whether the Charterers could rely on Clause 32 to excuse themselves of liability in these circumstances, the Court held that this was a question of construction: *"all must depend upon the wording of the particular clause."*

The Court found that, based on the language of Clause 32 and its context and purpose, to rely on the clause, the Charterers needed to show that *"but for"* the dam burst, they would have been able to perform the COA. As the Charterers had not done so, they could not rely on the clause. Accordingly, the Charterers were liable to the Owners for breach of the COA.

However, the Court awarded the Owners only nominal damages in relation to the final five shipments. This was because, in applying the compensatory principle of damages (i.e. putting the Owners in the same financial position as if the Charterers had performed the COA), it determined that the dam burst could not be ignored. Had the Charterers been willing and able to perform the COA, the final five shipments would not have been provided anyway. In those circumstances, the Charterers could have relied on Clause 32 to excuse themselves of liability. As a result, the Owners suffered no loss as a result of the Charterers' failure to perform the final five shipments.

The Owners appealed the Court's decision on damages, and the Charterers cross-appealed the Court's decision on liability.

The Court of Appeal decision

Liability

The Court of Appeal unanimously dismissed the Charterers' cross-appeal. It agreed with the Commercial Court's decision that the question was one of construction. It also agreed with the Commercial Court's construction of the clause itself: the Charterers could not rely on the clause to excuse themselves of liability.

Damages

The Court of Appeal unanimously allowed the Owners' appeal on damages. It found that the Commercial Court had misapplied the compensatory principle.

While the value of an innocent party's contractual rights for a future period following an anticipatory breach of contract may be affected by subsequent events (see, for example, the House of Lords decision in *The Golden Victory* [2007]), the present case concerned actual breaches of contract. In assessing the level of damages, the Owners' position following the breach of COA should be compared with their position had the Charterers actually performed the COA. The Commercial Court had misapplied the compensatory principle by comparing the Owners' actual position with their position had the Charterers been willing to perform the COA. That was not the correct counter-factual scenario. The Charterers had an absolute obligation to supply cargoes subject only to the exceptions in Clause 32. If the Charterers could not rely on that clause to excuse them from liability, whether or not they were willing to perform the COA was irrelevant to the assessment of damages.

Comment

The effect of these kinds of clauses depends on their construction; of primary relevance is the language of the clause that the parties have chosen to use, having regard to the context and purpose of the clause.

This fact highlights the importance of careful drafting. When drafting force majeure clauses or clauses that exclude or limit liability, it is important to set out as clearly as possible what should and should not be covered and what requirements a party relying on the clause should have to satisfy. Small changes make a big difference – in this case, the US$20 million between nominal and substantive damages.

The decision also shows the differences in how the Commercial Court and Court of Appeal have applied the compensatory principle. Again, this was a US$20 million point. It could also have an impact on the assessment of damages beyond the shipping industry.

It is understood that the Court of Appeal has refused leave to appeal, but that leave to appeal is being sought directly from the Supreme Court.

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Expiry of class certificate under BARECON 89 did not automatically entitle owners to withdraw vessel

Ark Shipping Company LLC v. Silverburn Shipping (IOM) Ltd (M/V Arctic) [2019] EWCA Civ 1161

The Court of Appeal has overturned a recent Commercial Court decision in relation to the consequences of a vessel falling out of class during the currency of a bareboat charter under the BARECON 89 form.

The background facts

The Owners bareboat chartered the vessel to the Charterers for a period of 15 years, commencing from delivery on or about 18 October 2012, on amended BARECON 89 terms.

A series of disputes arose over the payment of hire and the general state of the vessel's repair. On 31 October 2017, the vessel entered dry dock for repairs. On 6 November 2017, her classification certificate expired. On 7 December 2017, the Owners purported to terminate the charterparty for breach of Clause 9A of the charter, which provided as follows:

> ***9. Maintenance and Operation***
> *(a) The Vessel shall during the charter period be in the full possession and at the absolute disposal for all purposes of the Charterers and under their complete control in every respect. The Charterers shall maintain the Vessel, her machinery, boilers, appurtenances and spare parts in a good state of repair, in efficient operating condition and in accordance with good commercial maintenance practice and, ~~except as provided for in Clause 13 (I),~~ they shall keep the Vessel with unexpired classification of the class indicated in Box 10 and with other required certificates in force at all times. The Charterers to take immediate steps to have the necessary repairs done within a reasonable time failing which the Owners shall have the right of withdrawing the Vessel from service of the Charterers without noting any protest and without prejudice to any claim the Owners may otherwise have against the Charterers under the Charter.*

The Charterers denied that there was any breach and declined to return the vessel, maintaining that the charterparty remained alive. In arbitration, the Owners sought, among other things, an order for delivery up of the vessel.

The Tribunal dismissed the Owners' application and disagreed with the Owners that the Charterers' obligation to maintain the vessel in class was both absolute and a condition of the charterparty. Rather, if the Charterers were in breach of their Clause 9A obligations, they had to immediately take steps to carry out the necessary repairs and reinstate the class certificates within a reasonable time, failing which the Owners would be contractually entitled to withdraw the vessel. On the evidence, the Tribunal found that the Owners had not established that the Charterers should have dry-docked the vessel and completed the necessary repairs and reinstatement of class before 7 December 2017.

The Commercial Court decision

On appeal, the Court reversed the Tribunal's findings. In the Court's view, the contention that the obligation to maintain the vessel's class was only one of due diligence could not be supported by a natural reading of Clause 9A, which explicitly required the Charterers to effect repairs within a reasonable time, but contained no such explicit wording in respect of reinstating lapsed class certificates. The Court, therefore, concluded that the obligation was absolute.

The Court further considered that the obligation to maintain class status had an *"obvious temporal element"*, leading to the conclusion that it was a condition. Among other things, the Court emphasised the possibly serious consequences for the Owners if the vessel was to fall out of class, including potential loss of insurance cover.

The Court of Appeal decision

The appeal was only on the issue of whether the obligation to maintain class was a condition. The Court of Appeal reversed the Commercial Court decision on the point.

The Court of Appeal thought that, given the BARECON 89 was an industry standard form and the clauses had been carefully drafted by BIMCO, had the intention been that the term should be a condition, this would have been stated expressly. Furthermore, although the judge had found that the clause had a *"temporal element"* it was not a *"time clause",* i.e. a clause specifying that a thing had to be done by a certain time. In addition, although consequences could flow from a breach of the term, there was no *"inter-dependence":* performance of the term was not required in order to trigger other obligations required for the *"performance"* of the contract.

The Court of Appeal acknowledged that the vessel was either in class or she was not. There was, therefore, only one type of breach. While this factor pointed in the Owners' favour, it was outweighed by the other factors. Specifically, the wording of Clause 9A as a whole did not suggest that the class obligation was a condition. Clause 9A mainly dealt with maintenance obligations, which were not conditions, and it would be odd to include a condition among them. The Court added that the term did not just apply to the vessel's class certificate, it applied to all *"other required certificates".* As such, if the Owners were right in their interpretation of the term as a *"condition",* then they would be entitled to terminate for the most trivial documentary breach. Where the consequences of the Charterers' breach of the term could be trivial, minor, or indeed very grave, it was more likely that this was an innominate term (where the gravity and consequences of the breach determined whether termination was possible), rather than a condition (where the Owners could automatically terminate and claim damages, irrespective of the consequences of the breach).

Furthermore, while Clauses 12 and 13B of the BARECON form required the Charterers to insure the vessel against P&I and war risks, this obligation was not a condition. As such, it would be strange if the Owners were entitled to terminate the charterparty if the vessel fell out of class because of the risk that this would leave the vessel uninsured, when they would not be able to automatically terminate if the Charterers actually failed to insure the vessel.

Finally, the Court of Appeal commented that while a statement that a vessel is in class at the start of a charterparty is usually seen as being a condition, a continuing warranty that a vessel remains in class is not such a condition. The Court of Appeal added that, in its view, the law should not be developed in that direction.

Comment

Generally, the decision highlights the importance of drafting charterparty (and other contractual) clauses carefully to achieve the outcome intended. More specifically, the Court of Appeal's judgment acknowledges that termination of a charterparty and withdrawal of a vessel is an extremely powerful weapon in the arsenal of an owner and a potentially disproportionate consequence of what might be a trivial breach of the charterparty.

Bareboat charters are often used in loan facilities and financing arrangements in which a bank or other lender will become the registered owner of a vessel, only to then lease it back to the shipping company via the bareboat charter. As such, the first instance decision had potentially far-reaching implications in that a shipping company could have faced action to deliver up a vessel to lenders for seemingly trivial documentary breaches.

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Supreme Court excludes SCOPIC charges from costs of repair when calculating constructive total loss

Sveriges Angfartygs Assurans Forening (The Swedish Club) and others v. Connect Shipping Inc and another (MV Renos) [2019] UKSC 29

Insurers have succeeded before the Supreme Court in overturning the lower courts' decision to include the salvors' SCOPIC remuneration as part of the "cost of repair" for the purpose of the constructive total loss calculation. The Supreme Court held that SCOPIC charges are not aimed at repairing the vessel and are separable from the rest of an LOF salvage award.

The Supreme Court also rejected the other issue on appeal, ruling that costs incurred before the service of a Notice of Abandonment (including traditional salvage charges) can be included in the CTL calculation.

Introduction

The Marine Insurance Act 1906 ("MIA 1906") provides that in the case of damage to a ship, there is a constructive total loss ("CTL") where *"she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired":* (s. 60(2)(ii)).

The Supreme Court has now clarified two questions of how the cost of repairs should be calculated for the purpose of determining whether a vessel is a CTL. Those two questions related to the treatment of: a) costs incurred prior to the service of a Notice of Abandonment ("NOA"); and b) SCOPIC remuneration under the Lloyd's Open Form 2011 ("LOF 2011").

The background facts

The *MV Renos* was insured by her Owners for US$12 million under a hull and machinery policy that incorporated the Institute Time Clauses – Hulls (1/10/83) and for a further US$3 million under an Increased Value policy on the Institute Time Clauses – Hulls Disbursement and Increased Value (Total Loss Only) Clauses (1/10/83). Both sets of clauses had the effect of modifying the provisions of MIA 1906 so that the reference figure for a CTL was the insured value of the vessel, not the vessel's sound market value.

On 23 August 2012, while the vessel was on a laden voyage in the Red Sea, a serious fire broke out in the vessel's engine room. Salvors were appointed under a LOF 2011 and they invoked the Special Compensation Protection and Indemnity Clause ("SCOPIC"). Having dealt with the fire, salvors towed the vessel back to the Egyptian loadport to discharge the cargo, and then on to Suez to be surveyed.

Coverage under the H&M policy was not disputed, but quantum was. In December 2012 and January 2013, Owners and Insurers obtained quotations for repairs from a number of shipyards, ranging from under US$3 million to around US$9 million. It was common ground that in order to constitute a CTL, the shipyard repair costs had to exceed US$8 million.

The Owners contended that the vessel was a CTL because the cost of repairs would exceed her insured value. However, the Insurers viewed the claim as a particular average claim (that is, a partial loss), to be quantified as an unrepaired damage claim, which they said came to approximately US$1.4m. As can be seen, the financial implications of the dispute were thus very significant.

On 1 February 2013, the Owners served a NOA on the Insurers. The High Court and the Court of Appeal dismissed the Insurers' argument that this was given too late and this issue was not pursued before the Supreme Court.

The Supreme Court decision

Issue 1: Costs incurred before the NOA

In assessing whether the CTL threshold is met, the costs of repairing a damaged vessel include the costs of recovering the vessel so that she may be repaired. These will include, for example, the costs of salvage.

Section 60(2) MIA 1906 provides that:

> *"In estimating the cost of repairs… account is to be taken of the expense of future salvage operations …"*

It was submitted by the Insurers that the inclusion of the expense of *future* salvage operations implied the exclusion of the costs of *past* salvage operations. In this construction, the Insurers also relied on two old cases in which costs incurred before NOA were not counted towards the CTL calculation.

Further, the Insurers argued that, as a matter of principle, whether there had been a CTL fell to be decided at the point in time when NOA was given, as the parties' rights crystallised at that point, and because it was at that point that the Owners made their choice between incurring further costs of repairing the vessel or abandoning it to the Insurers. In making that decision, costs incurred to date were "sunk costs" and, therefore, not relevant to the choice faced.

Lord Sumption, giving the judgment in the Supreme Court, was mindful that the effect of this would be to exclude salvage remuneration from the cost of repairs for CTL purposes in many cases, as in practice it is often necessary to professionally assess damage, having first salved the vessel and brought her to a place of safety.

The Supreme Court found little assistance in the wording of the MIA 1906, agreeing with the Court of Appeal that the MIA 1906 did not indicate the point in time from which the costs must be "future" and did not make any reference to tendering NOA in this regard. The Court also found that the two authorities to which the Insurers referred were not particularly helpful. Rather, the question should be resolved according to the following two fundamental principles of insurance law:

1. A claim on an insurance policy is a claim for unliquidated damages, where the obligation of the insurer is to hold the assured harmless against an insured loss. Therefore where, as in an H&M policy, the insurance is against physical damage to property, the insurer is in breach of its obligation to hold harmless as soon as physical damage occurs. The assured's cause of action against the insurer is thus complete at the time of the casualty, not only once the loss caused by the casualty has fully developed and the measure of indemnity can be ascertained.

2. A CTL is not a special type of loss, but simply a partial loss which is financially equivalent to a total loss. Whether or not the cost of repairs exceeds the insured value of the ship is a fact that has to be determined objectively, and is not determined by the subjective opinion or prediction of the owner at the time that the CTL election is made.

Therefore, for the purpose of determining whether the vessel is a CTL, the damage to the vessel is the entire damage ultimately arising from the casualty, from the moment of the casualty. The measure of indemnity is the ordinary measure, being the depreciation of the vessel caused by the damage, represented by the entire cost of recovering and repairing it. As Lord Sumption reasoned: *"It cannot make any difference when the cost was incurred."*

Finally, the Supreme Court held that the fact that an assured may not recover for a CTL where the loss suffered had been 'adeemed' or reversed at the time that NOA is given (such as where a captured vessel is later released) did not affect the question of whether an assured's post-casualty expenses should count towards the "cost of repairs". That orthodoxy is based on the indemnity principle, which precludes an assured from making a recovery where it has not ultimately suffered a loss. However, the indemnity principle is not contravened by an assured recovering their actual loss in the form of expenditure from the time of a casualty.

Affirming the decision of the Court of Appeal, the Supreme Court held that costs incurred before the NOA should be included in the cost of repairs for the purpose of determining whether a vessel is a CTL.

Issue 2: SCOPIC remuneration

The SCOPIC clause, which supplements the LOF, gives salvors the right to additional remuneration in respect of steps taken by them to minimise environmental damage following a casualty. This can have the effect of entitling salvors to payment for their services where they would not otherwise be so entitled, owing to the 'no cure, no pay' rule, and it was introduced with a view to creating an incentive for salvors actively to protect the marine environment following a casualty.

The SCOPIC clause clearly states that SCOPIC charges are payable solely by the shipowner and will not be shared with other parties with an interest in the marine adventure. In practice, SCOPIC remuneration is paid by the vessel's P&I insurers, as it reduces owners' exposure to liability in relation to environmental damage.

In the Supreme Court, the Insurers relied on a single, simple argument on this issue: that whether a cost could be considered a cost of repair counting towards a CTL should depend on the nature of that expenditure. Only expenditure in the nature of repair (including the cost of recovering the vessel in order to carry out repairs) should be included. Even if the costs of salvage generally are properly considered costs of repair, SCOPIC charges specifically cannot be treated in the same way.

In response, the Owners maintained their principal argument from the courts below, on which they had succeeded, namely that SCOPIC costs formed an integral part of the salvage costs. The ship first had to be salved to be repaired, and the SCOPIC charges had to be paid in order for the ship to be salved. Therefore, the SCOPIC charges were properly part of the cost of repair.

The Owners were forced to concede that they could have contracted with salvors on terms that excluded the SCOPIC clause. However, relying on the test of the 'prudent uninsured owner', they argued that while *in theory* SCOPIC charges were separate from the costs of recovery of the vessel, in practice a prudent uninsured owner would contract with salvors on terms that would minimise their liability for environmental damage.

The Supreme Court found in favour of the Insurers, holding that it was necessary to identify the objective purpose of an item of expenditure to determine whether it was incurred to permit the ship to be repaired. Accordingly, expenses such as temporary repairs, salvage, and towage were to be considered necessary preliminaries to repair, the costs of which were *"relevant to the question of whether the vessel was financially worth saving".* SCOPIC costs, on the other hand, protected an entirely different interest of the shipowner; its potential liability for environmental pollution. The objective purpose of that expenditure was therefore not repair, and indeed had nothing to do with the subject matter insured.

The Supreme Court noted the 'prudent uninsured owner' test, but limited its application. The purpose of that test is as an aide to determining whether there is a CTL when the relevant facts are hypothetical or unknown. It consists of asking the question whether the prudent uninsured owner would have repaired the vessel, and how. In answering that question, the settled case law predating the MIA 1906 is clear: the prudent uninsured owner is assumed only to be interested in the cost of repair. Other factors, such as the value of the wreck, are excluded. Therefore, liability for environmental pollution was also not a factor that could be taken into account in the prudent uninsured owner test.

Having allowed the appeal on this point, the Supreme Court remitted the claim to the Commercial Court judge to decide whether, with the SCOPIC charges excluded from the calculation, the vessel was in fact a CTL.

Comment

It remains to be seen whether the Supreme Court's decision to exclude SCOPIC charges from the "cost of repair" will mean the difference between an unrepaired damage claim for US$1.4 million or a CTL claim for the full insured value of the vessel. The numbers are close either way in this case but, in other cases, this judgment could be of more obvious significance.

In the Supreme Court, the Insurers dropped their argument that by including SCOPIC charges as a cost of repair, the Owners were making an indirect claim for SCOPIC charges against their H&M insurers, contrary to Paragraph 15 of the SCOPIC clause which prohibits this directly or indirectly. Nevertheless, a concern to preserve the proper division of liability between P&I and H&M insurers provides an obvious backdrop to Lord Sumption's typically principled judgment.

The decision will be welcomed both by hull insurers and those commentators who were troubled by the impact that the lower courts' decision might have had on the future support for the LOF and salvors' obligations under it (even in the absence of the SCOPIC provision) to endeavour to preserve the environment.

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Bunker supply contracts: incorporation, variation and assignment

Cockett Marine Oil v. ING Bank and another (Ziemia Cieszynska and Manifesto) [2019] EWHC 1533 (Comm)

In an unsuccessful appeal from two arbitration awards, on the grounds that the Tribunal had no jurisdiction, the Court has considered the incorporation and variation of standard terms in the context of bunker supply contracts.

The background facts

The claim was for amounts due in connection with the supply of bunkers. In relation to: (a) the *Ziemia Cieszynska*, Cockett Marine purchased bunkers from OW Bunker Malta, who in turn purchased the bunkers from Eko Marine Fuels ("Eko"); and (b) the *Manifesto*, Cockett Marine purchased bunkers from OW Bunker Middle East, who in turn purchased the bunkers from GS Caltex.

In the arbitration, the Tribunal had held that it had jurisdiction over the dispute because the relevant bunker supply contracts incorporated a London arbitration clause.

The Court was asked to consider the following issues:

1. In respect of both sales, whether the OW Bunker Group's ("OWBG") 2013 set of standard terms and conditions ("2013 STCs") were expressly incorporated into the contracts of sale, thereby incorporating the London arbitration clause;

2. In respect of the *Manifesto* sale only, whether the 2013 STCs were incorporated by way of course of dealing; and

3. In respect of both sales, if the 2013 STCs were incorporated:

    a. Whether any of the 2013 STCs were varied so as to exclude the London arbitration clause because the actual or physical supplier of the bunkers insisted that its terms (which did not include a London arbitration clause) governed the contracts between the relevant OWBG entity and the relevant Cockett entity; and

    b. Whether Cockett Marine could challenge the finding that there was a valid assignment of OWBG's claim to ING Bank.

The Commercial Court decision

The first issue – express incorporation of the 2013 STCs

In 2013, OWBG altered their terms and conditions so as to provide for English law and London arbitration. The Court accepted, as a finding of fact, that the 2013 STCs had been brought to the attention of Cockett Marine.

In respect of the *Ziemia*, a dispute arose as to when the contract was concluded and whether the 2013 STCs were incorporated. Cockett Marine argued that the contract was concluded by an email stating *"we confirm our order"*. While the Court agreed that these words were capable of amounting to acceptance, it noted that Cockett Marine had subsequently added additional terms and requested a copy of OWBG's terms and conditions. This strongly suggested that Cockett Marine did not consider that the parties had already concluded a binding agreement. The Court referred to the situation whereby parties continue to negotiate after they appear to have reached agreement and where, in these circumstances, the Court may look at the entire course of the negotiation to decide whether an apparently unqualified acceptance does in fact amount to a binding agreement.

The Court also held that OW Malta's response confirming the order *"as per the attached Sales Order Confirmation"* ("SOC") was not an unqualified acceptance of the nomination. While it was expressed as a confirmation of an order, the SOC added additional terms and was, therefore, strictly speaking a counter-offer. The counter-offer (which referred to the 2013 STCs incorporating the London arbitration clause) was subsequently accepted by Cockett Marine's conduct of accepting the bunkers.

In respect of the *Manifesto*, the Court found that while the parties' exchanges relating to the agreement of the quotation did not mention the 2013 STCs, the subsequent exchange of nominations and SOC requesting a copy of the 2013 STCs did. The Court held that the exchanges must be considered together and objectively, and ruled that the standard terms were incorporated.

Accordingly, the Court found in both instances that the London jurisdiction and arbitration clause was incorporated and that the Tribunal had jurisdiction to hear the dispute.

The second issue – incorporation of the 2013 STCs by course of dealing

Although it did not strictly need to deal with the point, the Court considered whether the 2013 STCs could have been incorporated by way of course of dealing. In respect of the *Manifesto*, there had been nine previous trades and, in each SOC, the SOC provided that the sale and delivery were subject to the 2013 STCs, providing a hyperlink to the terms themselves. The Court held that a reasonable person viewing those trades would conclude that the 2013 STCs were to govern the parties' relationship. Furthermore the Court ruled that the reference without objection to the 2013 STCs in each of the previous nine trades was sufficient to indicate acceptance of those terms.

The third issue – whether any of the 2013 STCs had been varied

Clause L4 of the 2013 STCs provided that *"where the physical supply of the Bunkers is being undertaken by a third party which insists that the Buyer is also bound by its own terms and conditions",* the 2013 STCs shall be varied accordingly. The question was therefore whether any of the terms had been varied.

The Court held that the purpose of Clause L4 was that, where bunkers are supplied by a third party and the third party insists that the buyer is also bound by the third party's terms, OWBG's terms and conditions would be varied accordingly. The Court rejected the argument that clause L4 was intended to enable OWBG's position to be back-to-back with the third party's terms and conditions. Rather, the commercial objective of Clause L4 was to provide a mechanism by which OWBG could give effect to something that its third party supplier might insist on. In respect of the *Ziemia*, Eko's terms did not insist that OW Malta must also be bound by Eko's terms and there was no variation. Similarly in respect of the *Manifesto*, GS Caltex's terms did not amount to an insistence that their terms should apply not only to the buyer from it, i.e. OW Middle East, but also to OWB's buyer and again there was no variation.

The final issue – whether there was a valid assignment of OWBG's rights to ING Bank

Finally, the Court found that there was a valid assignment to ING of OWBG's rights under the bunker supply contract. The Supreme Court ruling in *Res Cogitans* [2016] had been relied on to argue that OWBG's supply contracts were not contracts for the sale of goods within the meaning of the Sale of Goods Act 1979 and that, therefore, the assignment could not have been effective because it applied only to *"Supply Contracts" "relating to the sale of oil products traded by the [OW] Group".* The Court disagreed and held that the parties to the agreement had assumed that OWBG's supply contracts were contracts of sale and that they had intended that the security provisions of the contract applied to them. There being a valid assignment in favour of ING, there was a valid arbitration agreement between ING and Cockett Marine and as such, the arbitrators had jurisdiction to make an award in favour of ING.

Comment

This case is a helpful reminder that when considering the conclusion of a contract, the Court will look at the entire course of the negotiations objectively and a seemingly unqualified acceptance, upon closer examination, may just be another step in the negotiations. Given this, best practice for commercial entities seeking to trade on the basis of their standard terms and conditions may be to refer expressly to those terms and conditions and to attach a copy to all relevant correspondence.

Banks seeking to enforce their rights by way of assignment should be comforted by this decision, as the Court has confirmed it that will look at the intentions of the security provisions when considering their application.

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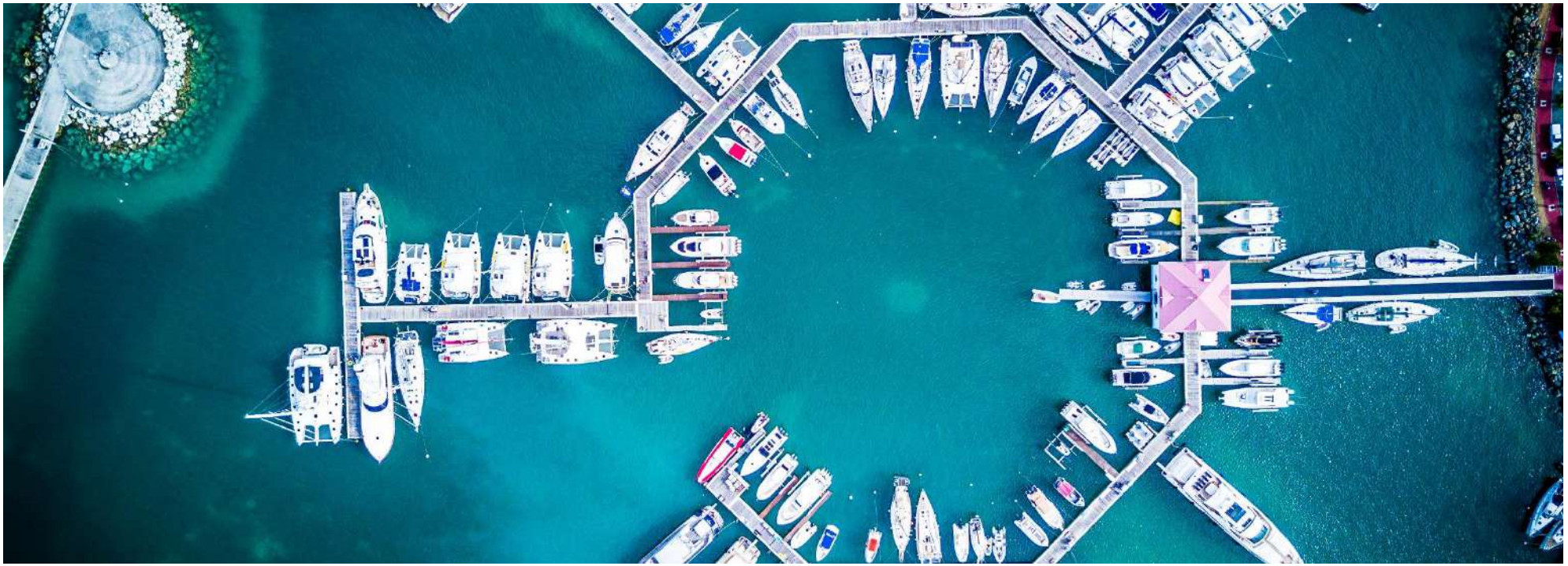
Malicious acts, piracy and perils of the sea examined

Linda McKeever v. Northernreef Insurance Co S.A (Creola) [2019] (unreported)



A yacht owner has recovered from her insurer for loss and damage flowing from the grounding and subsequent looting of her yacht. The Court held that in deliberately smashing the windows of the yacht so as to gain entry for the purposes of looting, the thieves were not acting with the requisite spite or ill-will for the malicious acts peril to be made out. Instead, the Claimant was entitled to an indemnity for damage caused by water ingress following the forced entry, based on the perils of the seas named peril.

The background facts

The Claimant was the owner of the 15-metre sailing yacht *CREOLA*, which ran aground in the Sulu Sea in the Philippines in March 2014. After failing to refloat the yacht, the Claimant was forced to abandon her, securing and padlocking the hatches before being picked up by a fishing vessel.

The Claimant returned to the yacht the following day to find that she had been looted: several windows were broken, and many items stolen (including navigation systems, machinery, and personal effects). By the time that a surveyor inspected the yacht on 30 March 2014, she had flooded to a depth of six inches in some sections. The yacht was then refloated and taken to the Penuwasa boat yard.

The Claimant attempted to claim from the Defendant insurer, Northernreef Insurance Co S.A., for the losses resulting from the grounding and subsequent looting. The yacht was insured on the Northernreef Yacht Clauses, which incorporated the usual range of marine risks. After considering the issue of jurisdiction and other procedural matters arising from the Defendant's lack of participation in the hearing, the Court went on to address the substantive dispute.

The Commercial Court decision

Grounding damage

The first issue was whether the damage caused by the grounding was caused by perils of the seas. This requires that the grounding itself was fortuitous rather than caused *by "the ordinary action of the winds and waves".* Given that the grounding was not alleged to be deliberate or caused by wilful misconduct, and given that it could not be said to be the natural and inevitable result of the winds and waves, the Court held that the grounding was fortuitous.

The Defendant yacht insurer contended that there was a breach of the maintenance warranty, that the yacht was unseaworthy owing to outdated charts, and that the grounding was caused by the Claimant Assured's negligence (coverage for which was expressly excluded). All these defences were rejected on the evidence. Arguably consistent with the 2019 Admiralty Court decision in *CMA CGM Libra*, the Court remarked that it saw the vessel's charts and navigational equipment as going to seaworthiness, rather than to the promissory warranty to maintain the condition of the vessel.

Water ingress

The second issue was whether there was coverage for the losses attributable not to the grounding but to water ingress caused by the looters breaking windows and leaving hatches open. The Court considered this with reference to four insured perils: piracy, malicious acts, theft, and perils of the seas.

Piracy

The Claimant's argument that the water ingress was caused by piracy was dismissed. Piracy is defined within English law *as "forcible robbery at sea",* and therefore a key element of robbery is the threat of or use of force directed at a person. Given that the yacht was unmanned at the time that it was looted, this element was not fulfilled. However, the Court's statement that it was only the *"strong implication"* of the case law that piracy requires the threat or use of force against persons, not simply property, arguably leaves the door open to the contrary argument being made before a higher court in future. Such an argument would be consistent with the UNCLOS definition of piracy that applies to English law by virtue of the Merchant Shipping and Maritime Security Act 1997.

Malicious Acts

The leading case on the meaning of malicious acts is the 2018 Supreme Court decision in the *B Atlantic*, in which the Supreme Court determined that malicious acts must involve an element of *"spite or ill-will".* It is not necessary for this ill-will to be directed at the specific property of the claimant, so long as the act causing the damage was motivated by ill-will at some property or person. Reference was made by the Supreme Court to the 1982 decision in the *Salem*, where the thieves had stolen the majority of the cargo and destroyed the remainder. In that case, the destruction of the remainder was not considered a malicious act as it was a component part of the larger conspiracy carried out for personal gain rather than malice. It was held not to be possible to separate out the specific actions taken by the wrongdoers, but rather that their scheme must be considered as a whole.

In the looting of the *CREOLA*, the looters were not motivated by malice but rather by self-interest. While smashing the windows of the yacht might have been considered malicious if viewed in isolation, when considered as part of the larger scheme those acts were clearly carried out for gain. Accordingly, the Court held that the damage had not been caused by malicious acts, albeit not without expressing its slight reluctance to draw this conclusion.

Theft

As with piracy, the argument that the water ingress damage was caused by theft was quickly rejected. The wording of the policy provision covered the theft of machinery caused by forcible entry. The proximate cause of the water ingress was the forcible entry – admittedly for the purposes of theft – but not the theft itself, and was therefore not covered.

Perils of the seas

The Court relied on the first instance decision in *DC Merwestone* in 2013 to conclude that water ingress is *prima facie* to be regarded as caused by the perils of the seas where the cause of the ingress is fortuitous (including, in that case, where the fortuity was crew negligence). The looters smashing the windows and forcing the hatches was, from the Claimant's point of view, entirely fortuitous. Therefore, the Claimant's claim for water ingress related damages succeeded.

Conclusion

After considering issues of quantum (including sue and labour expenses), the Court awarded the Claimant the diminution in the market value of the yacht owing to the totality of the damage suffered, the value of the stolen items, and her sue and labour expenses.

Comment

This decision examines the implications of the Supreme Court's definition of the *"malicious acts"* named peril in the *B Atlantic*. It is interesting that while the Court applied the test formulated by the Supreme Court, in doing so the judge expressed reluctance to interpret the peril as not providing cover for deliberate damage to property as part of a wider scheme for personal gain. The judgment also provides a useful practical application of the perils of the seas named peril where there is damage caused by water ingress (following the first instance decision in *DC Merwestone*) and highlights the difference between the definition of piracy in the English jurisprudence as compared to the position under international law. Had cover based on perils of the sea not been applicable here, one wonders whether the judge may have been persuaded to consider the piracy definition more closely or whether her decision might have been challenged on appeal.

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