Bentleys

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Piracy, off-hire clauses and principles of construction (again):

The "ELENI P"

Back in 2010 the ship was under time charter when, having sailed through the Gulf of Aden into the Arabian Sea, it was captured by pirates. Months and $4.5 million in accrued hire later it was released.

The case revolves around two clauses in the time charterparty. Did either serve to place the ship off-hire? The first, as written, reads:

"*Should the vessel be captures [sic] or seized or detained or arrested by any authority or by any legal process during the currency of this Charter Party, the payment of hire shall be suspended for the actual time lost…..*"

On the face of it, the ship was captured, and actual time was lost. At commercial arbitration that was the approach of the majority of the tribunal and they held that the vessel was off-hire. Owners appealed to the Commercial Court, arguing that *"captured"* did not refer to a free standing event. It was governed by the later words *"…by any authority or any legal process."*

Mr Justice Popplewell disagreed with that and found in favour of charterers. He was able to point to a First World War case, some judicial comment from Cooke J in another case, and a warning in a Panama Maritime Authority bulletin about what they might do to ships trading to North Korea in support of that conclusion. In fairness though, this was only to support his meticulous syntactical approach to the construction of the clause which left him in no doubt as to his conclusions.

One of several points the judge made was that unless one treats the words "…*by any authority or any legal process*" as applying to all the events listed in the clause, then they would be superfluous in that an *"…arrest…"* would not occur other than by these two methods. In his view:

"*Whilst the presumption against superfluity is not always of significant weight in charterparties, in this instance it would involve surprisingly inept drafting if it had been added immediately after the word arrested to provide a meaningless qualification to it.*"

This could be seen more clearly in the context of the word *"detained"*. If that was not qualified by the requirement for a legal detention it could be said that it would include all sorts of events, including for instance detention at berth through weather, port conditions or congestion.

Having found in favour of owners under that provision, the judge considered the other provision, which, again as written, read:

"…Charterers are allowed to transit Gulf of Aden any time … In case vessel should be threatened/kidnapped by reason of piracy, payment of hire shall be suspended…"

Owners argued that this clause put the vessel off-hire only if the vessel was kidnapped within the geographical confines of the Gulf of Aden (whatever they may be). The charterers' argument was that the clause should be understood to include "*...the immediate consequence of the Vessel being required to transit the Gulf of Aden...*".

Popplewell J found in charterers' favour on this point - the ship was off-hire. In doing so, the major reasoning was that the clause's "*principal and critical purpose in a term time charter of this nature is to enable the Charterers to trade the Vessel through the Suez Canal.*" In doing so, the ship would emerge from what were the undefined geographical limitations of the Gulf of Aden into an area where it was well known that there were piracy risks. The structure of the clause overall was that charterers would pay certain additional costs of that (extra war risk insurance, crew war bonuses and the usual additional items). Owners, however, accepted the risk of the ship going off-hire if it was detained by pirates. There was no strict geographical limit on that, the question to be considered was whether the piracy was an immediate consequence of trading in that area.

It might be said this case provides a good example of how precise English law rules relating to the interpretation of contract terms can be on the one hand and how commercially orientated they can be on the other.

Eleni Shipping Ltd v Transgrain Shipping BV (The "ELENI P") [2019] EWHC 910 (Comm)

"It might be said this case provides a good example of how precise English law rules relating to the interpretation of contract terms can be on the one hand and how commercially orientated they can be on the other."

Constructive total loss, what costs should be included in the calculations: The "RENOS"

In giving the sole judgment of the Supreme Court on this case involving an assured's claim for a total loss under a hull and machinery policy, the now retired Lord Sumption has given a definitive answer to a question on which there was no direct authority and clarified a second question on which there was doubt.

> **"Early in Lord Sumption's judgment he makes two fundamental points that shape the reasoning. The first is that the use of the word *"would"* in the MIA *"reflects the hypothetical character of the whole exercise and not the chronology of expenditure."* There is, therefore, nothing in the wording of the MIA to suggest it is necessary to divide expenditure up along time lines depending on when a formal notice was given."**

The first point was whether costs incurred before a notice of abandonment (the "notice") is served count toward ascertaining whether the ship is a constructive total loss ("CTL"). Frequently it is clear from early on that the ship will be a CTL, and if not, the hull insurer may well reject the notice and hold back for future negotiations and a compromise on the claim. This may explain why this point has never had a direct judicial answer.

The starting point is the Marine Insurance Act 1996 (the "MIA"), Section 60(2)(ii) which provides that a ship is a CTL where:

"*…she is so damaged by a peril insured against that the costs of repairing the damage would exceed the value of the ship when repaired".*

The costs of repair include salvage charges under clause 19.2 of the Institute Time Clauses and, in fact, were always treated as such in practice. The reason to make the point is that in this case all the salvage charges were incurred prior to the notice. So, do these "charges" count in the calculations for a CTL?

Early in Lord Sumption's judgment he makes two fundamental points that shape the reasoning. The first is that the use of the word *"would"* in the MIA "*reflects the hypothetical character of the whole exercise and not the chronology of expenditure."* There is, therefore, nothing in the wording of the MIA to suggest it is necessary to divide expenditure up along time lines depending on when a formal notice was given.

Secondly, he points out a general rule that loss under a H&M policy occurs at the time of the casualty. It may be that this loss has yet to be quantified but the moment it arose was the time of the casualty. Moreover,

"The rule that the loss is suffered at the time of the casualty applies notwithstanding that the loss developed thereafter, unless it developed as a result of something that can be regarded as a second casualty, breaking the chain of causation..".

Although several more points are then made in the judgment, the conclusion is that the timing of the notice is irrelevant. Salvage costs incurred beforehand count in the calculations towards a constructive total loss.

The second question was whether SCOPIC costs should also be included in the calculation. These are the costs a salvor incurs in protecting damage to the environment and for which they are subsequently entitled to charge the shipowner by way of "special compensation". Lord Sumption noted that these charges are designed to protect the shipowner for liability to the environment.

They are very different in nature to the costs of actual repair of the ship together with the costs of, for instance, towage to a repair facility preliminary to those repairs. This difference is also reflected in the difference in insurers. Environmental damage is a P&I and not an H&M risk.

In consequence, the Supreme Court has held that SCOPIC remuneration is excluded from a CTL calculation.

Sveriges Angfartygs Assurans Forening (The Swedish Club) & Ors v Connect Shipping Inc & Anor (The "RENOS") [2019] UKSC 29

"In consequence, the Supreme Court has held that SCOPIC remuneration is excluded from a CTL calculation."

On deck cargo and exclusion clauses: The "ELIN"

Whilst this case originated as a routine claim for cargo loss and damage involving cargo on deck and under deck, it gave rise to a number of disputed issues. In a bid to streamline the ensuing High Court proceedings, the court ordered that a preliminary issue be heard which dealt with liability for deck cargo.

This reads:

"Whether, on a true construction of [the Bill of Lading]*, the Defendant is not liable for the loss or damage to any cargo carried on deck howsoever arising, including loss or damage caused by unseaworthiness and/or the Defendant's negligence".*

On its reverse, the bill of lading contained a standard provision:

"The Carrier shall in no case be responsible for loss of or damage to the cargo, howsoever arising … in respect of deck cargo."

On its face there was additional wording:

"…loaded on deck at shipper's and/or consignee's and/or receiver's risk; the Carrier and/or Owners and/or Vessel being not responsible for loss or damage howsoever arising."

The parties agreed the following points of law:

- The Hague/Hague Visby Rules did not apply because Article I(c) excludes deck cargo identified as such on the bill of lading and carried on deck.
- At common law there is an implied term, which is absolute and not qualified by due diligence, that the ship will be seaworthy before and at the commencement of the voyage to undertake the contractual voyage.

Cargo interests argued that the provisions of the bill of lading were not effective to exclude the carrier's liability for negligence or unseaworthiness in respect of deck cargo. Although a spoiler alert should, perhaps, have been issued, in short, their arguments failed.

By way of background, twenty years ago, Bentleys acted for the owners of the "IMVROS" in a case where we successfully argued that a term in a bill of lading excluding liability for damage to deck cargo *"however caused"* was effective to include damage caused by unseaworthiness. (The *"IMVROS"* [1999] 1 Lloyd's Report 848). However, in that case the underlying dispute concerned parties to a time charterparty, and the judge's decision on that point was obiter – i.e. not necessary for his decision. This case has been the subject of judicial and academic criticism over the years but until now the point had not arisen directly for fresh consideration.

English law is thought to be out of step on the point with some other important jurisdictions, notably Singapore and Canada and this may have been the start of a campaign on cargo interests' part to get the points of principle up to the higher courts for a reconsideration.

The cargo interests' arguments focused on two principal strands.

Firstly, the argument went that the common law obligations of seaworthiness and of not acting negligently in carrying the cargo were such fundamental ones that if a wording was to be sufficiently clear to exclude them then it should say so in express terms. The judge was urged to review a long line of authorities starting *with Canada Steamship Lines Limited v R* [1952] AC 192 which discuss the approach to the interpretation of exclusion clauses. Cargo interests argued that the correct approach was to consider whether an exclusion clause would have meaning if liability for negligence or unseaworthiness was not excluded – if it would, then that was how it should be understood. After a detailed review of the authorities, however, the judge concluded that case law obliged him to construe the clauses *"to see what they plainly mean to any ordinarily literate and sensible person having all the relevant background knowledge which would reasonably have been available to the parties ...at the time the contract was concluded."*

As a result, he decided:

"The words of exclusion are clear. The Owner has no responsibility for cargo carried on deck whatever the cause. …The exclusion covers any and every cause and there is no justification for excluding either negligence or unseaworthiness as a cause."

The cargo interests' second strand of argument was either that there was no authority on the point or that anything in support of owners' argument was wrong. This led to an analysis of the judgment in the "IMVROS" case and a consideration of the academic and judicial criticism to which the decision has been subject in Canada and Singapore.

His conclusion was that very similar words had been held to exclude liability for negligence causing loss of cargo in the cases of *Travers v Cooper* [1915] 1 K.B. 73 and the *"DANAH"* [1993] 1 Lloyd's Report 351, neither of which had been criticised. Further, that the decision in the "IMVROS" was consistent with other previous authorities. He could see nothing of significance that distinguished them from the present case or which could give rise to academic criticism:

"Words of exemption which are wider in effect than "howsoever caused" are difficult to imagine and, over the last 100 years, they have become "the classic phrase" whereby to exclude liability for negligence and unseaworthiness."

Aprile SpA and Others v Elin Maritime Ltd (The "ELIN") [2019] EWHC 1001 (Comm)

"twenty years ago, Bentleys acted for the owners of the "IMVROS" in a case where we successfully argued that a term in a bill of lading excluding liability for damage to deck cargo *"however caused"* was effective to include damage caused by unseaworthiness."

Class requirements in the BARECON 89 - condition or intermediate term?

The "ARCTIC"

The BARECON 89 form is thought to be the most commonly used bareboat charterparty form worldwide. This case considers the provisions in this form in relation to a vessel's class status.

Clause 9A reads, in part,

[to] *"....keep the Vessel with unexpired classification of the class indicated in Box 10 and with other required certificates in force at all times..."*

Owners chartered the ship out to the charterers for 15 years in October 2012. It is clear things had not gone well over the years. Owners had concerns about payment of hire and maintenance. They had, in fact, attempted to withdraw the ship from the charter previously albeit that this is not of direct relevance to the present case.

At the relevant time, the vessel's Class certification had expired, so plainly charterers had not complied with their obligation in that respects "at all times". They had steps in hand to dry dock, however, to complete the necessary maintenance and repair and restore class. Nevertheless, owners issued a notice alleging breach of clause 9A by the bareboat charterers and accepting the breach as terminating the charterparty. Whether or not they were entitled to do so made swift progress through arbitration to an appeal before the High Court and, now, to the Court of Appeal. The question for the Court of Appeal was whether clause 9A amounts to a condition in the full legal sense of that term or whether it is what is variously called an innominate or intermediate term.

The significance of the distinction is that if the charterers were in breach of a condition, the owners were entitled to terminate the contract. On the other hand, if the term was innominate the owners' immediate remedy depends on the seriousness of the breach.

The arbitrators found that the term was not a condition. That finding was overturned by Carr J on appeal to the High Court. Her reasoning is best summed up in this very short extract from a detailed, carefully considered judgment:

"Only one kind of breach of the classification obligation is possible…Either the Vessel is in class or it is not. The language of the obligation is in no way inconsistent with the concept of its being a condition, and if anything suggests that it is. It is clear and absolute with a fixed time limit, redolent of a condition"

So, did the Court of Appeal agree? In the most general sense, judicial opinion was succinctly summed up by Hamblen LJ in the earlier Court of Appeal decision of *Spar Shipping* [2016] EWCA Civ 982 – on which also see the October 2016 edition of Bentleys' Bulletin -

"…the modern approach is that a term is innominate unless a contrary intention is made clear."

Gross LJ, also a judge in the Spar Shipping case, gave the sole judgment of the Court of Appeal in this case. For a wide variety of reasons he found the term was not a condition. Most important amongst these were that:

- It was not stated to be a condition. This was against a background where the BARECON 89 was carefully drafted by an industry committee who, although the judge does not expressly say so, would have been aware of the vital difference between a term and a condition.
- It could not be regarded as a *"time clause"*. That is to say a moment in time at which something must be done and failing which consequences ensued. It was simply a general requirement to keep the ship in class over 15 years. Beyond that there was no reference to time at all.
- The term is in the middle of a much wider clause relating to the maintenance and operation of the ship. Read as a whole there was no reason to pick this one element out in isolation as a condition.
- Although the consequences of the breach might be *"very grave"* they could also be merely be *"trivial"* or *"minor"*. For example, it could be that class was lost for a very short time. Again, quoting from Spar Shipping the judge found this *"suggested the term is innominate rather than a condition."*

In reaching that overall finding he went on to say:

"…this conclusion best accords with the language, structure and scheme of the charterparty, together with business common sense. While the categories of conditions are not closed, the term simply lacks the hallmarks of a condition. The alternative…is to risk trivial breaches having disproportionate consequences destructive of a long-term contractual relationship."

In this respect, it would seem that in the light of progressive legal developments in this area, it could be necessary to consider revisions to many industry standard forms. If the intention is truly that a term should amount to a condition, that will have to be stated in the contract in clear, unequivocal language.

Ark Shipping Company LLC v Silverburn Shipping (IOM) Ltd (The "ARCTIC") [2019] EWCA Civ 1161

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