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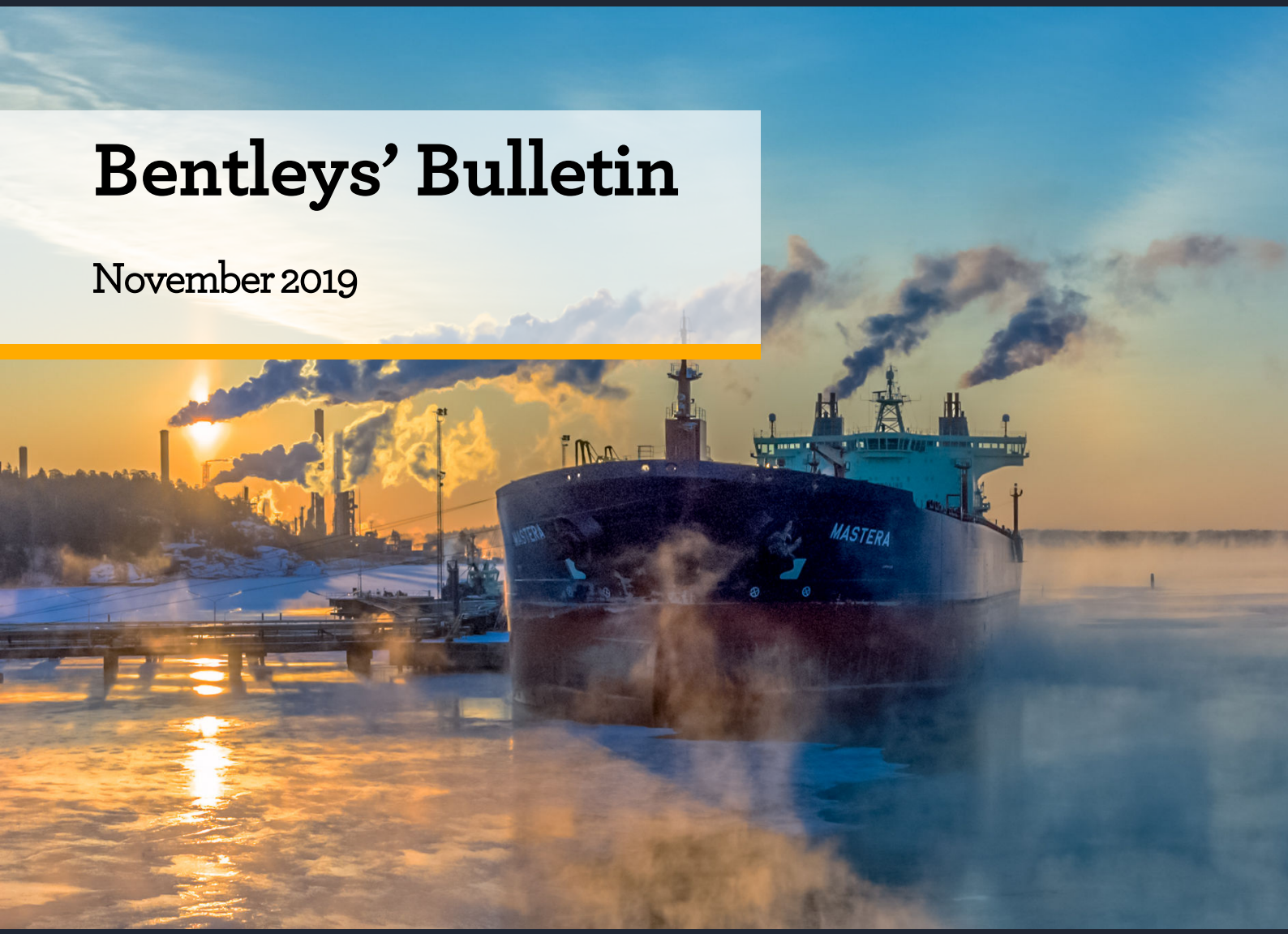
Bentleys' Bulletin

November 2019



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Cancellation clauses, the danger of unexpected consequences when charterparties are not on back-to-back terms: The "ALPHA HARMONY"

In voyage charterparties, a notice of readiness ("NOR") is most obviously associated with laytime and demurrage. It does, though, have other roles which can be overlooked, and in particular in relation to a right to cancel the charterparty. English law has long been reluctant to find that an NOR could be valid for one of those purposes but not for another.

The "ALPHA HARMONY" is a stark illustration of why it is important to be aware of all the roles of an NOR. This concerned a short voyage charterparty chain. The owner, Oldendorff, voyage chartered out to ADM, who in turn sub-chartered to Bilgent.

The head-charter, between Oldendorff and ADM was on a Norgrain form. The sub-charter, between ADM and Bilgent, on the Baltimore Form C. The laycan period in both charterparties was on similar terms. It narrowed to a requirement that notice must be given no later than 10th May which was a Sunday. The ship tendered NOR at 0704 on that day.

"The question is whether the cancellations were lawful in circumstances where, although notice of readiness has been tendered before the relevant time on the cancelling date, it had not been tendered during the permitted hours."

MR JUSTICE TEARE

Both charterparties were silent as to delivery of an NOR on a Sunday. The express requirements were that it be served between 0800 and 1700 on weekdays and between 0800 and 1100 on a Saturday. Both the head-charterer and the sub-charterer cancelled. As the judge, Mr Justice Teare frames it:

"The question is whether the cancellations were lawful in circumstances where, although notice of readiness has been tendered before the relevant time on the cancelling date, it had not been tendered during the permitted hours."

The cancellation provisions in the charterparties were on different terms. Under the sub-charter the right to cancel arose if the NOR was not delivered "as per clause 14". Clause 14 contained the office hours requirements set out above. The judge, contrary to the earlier views of an arbitration tribunal, ruled that the cancellation under this charterparty was valid. He found that the provisions were consistent with each other such that, when read together, they produced one simple and clear meaning. NOR had to be delivered within office hours by a certain date. Failing that the right to cancel arose. It had, of course been argued that this produced an uncommercial result. For the judge, though, he felt that *"a failure to give …(the)…words their ordinary and natural meaning risks causing uncertainty where the parties had endeavoured to create certainty."*

The cancellation provisions in the head-charterparty read:

"Should the vessel's notice of readiness not be tendered and accepted as per Clause 17 before…the Charterers…shall…have the option of cancelling the charterparty."

Clause 17 itself dealt with the mechanics of delivering the NOR but it did not, in its own wording, restrict this to office hours. Instead it contained the words *"see also Clause 70"*. Clause 70 did contain the office hours requirements and was silent as to the position on a Sunday. The head-charterer argued that

this must mean that the office hours requirements were incorporated into the cancellation provisions by reason of the "see also" wording thus allowing them, just as the sub-charterer had done, to cancel.

Teare J felt not. For the purposes of cancellation, he again felt the position clear. The parties had not intended to go any further than reading the cancellation clause 4 together with the notice requirements in clause 17. It was not necessary, as a matter of construction, to bring in the clause 70 office hour provisions which, he said, dealt with laytime and not cancellation.

Notice under the head-charter had, therefore, been given in time. The head-charterer had no right to cancel.

This may seem a very uncommercial result. It is, however, extremely difficult to fault the judge's objective analysis of the different contractual regimes. It is, therefore, a warning as to how important it is to achieve back-to-back terms where the rights to cancel are of such key importance in a charterparty chain.

Bilgent Shipping Pte Ltd and ADM International SARL v Oldendorff Carriers (The "ALPHA HARMONY") [2019] EWHC 2522 (Comm)

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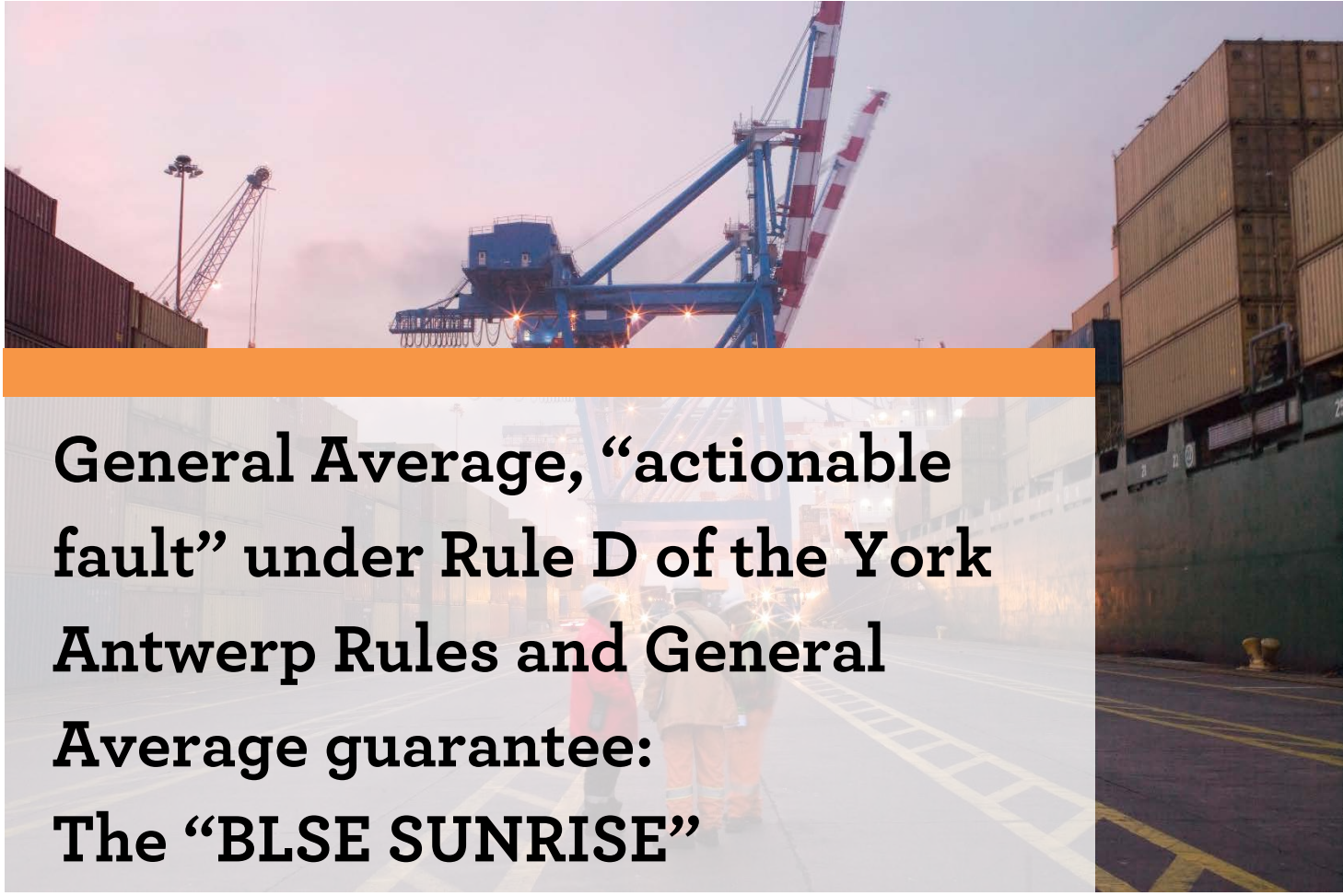


General Average, "actionable fault" under Rule D of the York Antwerp Rules and General Average guarantee: The "BLSE SUNRISE"

In this case, a ship ran aground, the owner declared GA and cargo interests issued GA Bonds in standard terms. They maintained, however, that they had a defence to any claim for GA in that, they alleged, the loss arose out of the owner's failure to exercise due diligence to make the vessel seaworthy, together with the associated obligations, under Article III.I of the Hague-Visby Rules. This, in turn, would activate the "actionable fault" defence under Rule D of the York Antwerp Rules.

To back up the GA Bonds the insurers of the cargo interests issued GA guarantees. Again, these were in very standard industry terms approved both by the London insurance market and the average adjusters' professional association.

The relevant part of the guarantee is that the insurers undertook to pay any GA contributions "on behalf" the cargo interests.

"…which may hereafter be ascertained to be properly due in respect of the said goods."

In due course, the GA adjusters got to work on their calculations and issued their adjustments (under which two separate liabilities of around USD 500,000 each would be payable).

The owner claimed for cargo interests' contributions to GA not against the cargo interests under the GA bonds but directly against the insurers. They did so in the hope of short circuiting the process in that, so they argued, even if cargo interests had a potential defence arising out of the "due diligence"

"The judge found that the word "properly" served to *"put the matter beyond doubt."* This had to mean that the GA contributions only became due, or not due, once the merits of a legal defence to them had been decided by the court."

provisions, that defence did not extend in any shape or form to the insurers and their guarantees. The owner said, therefore, they were entitled to immediate payment.

This point was considered as a preliminary issue by the High Court. (Under this process the parties agree a set of facts without prejudicing their future rights beyond the issue, or issues, that the court has been asked to decide.)

The owner did have some authority in their favour. In *The "MAERSK NEUCHATEL"* [2014] EWHC 1643 (Comm), a charterer issued a LOU undertaking to pay anything that was due "…under an Adjustment". Here it was found that they did indeed have to pay simply against an adjustment because they had "contracted out" of any rights to challenge this once issued.

The judge in the present case contrasted that with what had been agreed here. He concentrated on three areas of the wordings. Firstly, he was satisfied that "due" when applied to a monetary obligation means that it is legally payable.

Secondly, the guarantees were given "on behalf" of the cargo interests. He pointed out that this must suggest that "due" must mean a sum which the cargo interests would be obliged to pay. No such obligation to contribute in GA would arise if the cargo interests could establish a defence to this.

The judge could see *"no commercial or other reason"* why the insurer would, in this case, agree to provide security excluding such defences.

Thirdly, he found that the word "properly" served to *"put the matter beyond doubt."* This had to mean that the GA contributions only became due, or not due, once the merits of a legal defence to them had been decided by the court. Remember again in this, that this was a hearing purely on a preliminary issue.

As the judge himself said:

"Not merely does the language used when considered in its correct factual and commercial context lead to the conclusion I have reached but the settled practice I have referred to is such that only very clear wording could justify a departure of the sort contended for by the owner in this case."

This is a very strong and clear judgment. It does though concern standard industry wordings in an area where doubt certainly exists.

Navalmar UK Ltd v Ergo Versicherung AG & Anor (The "BSLE SUNRISE") [2019] EWHC 2860 (Comm)

Ship sales on terms that the vessel is for demolition and not further trading, remedies in the event of breaches of that provision: The "CSK GLORY"

This case arises out of, in the judge's words, *"a bad bargain"*. The buyer purchased the vessel (a Capesize bulker) initially intending to demolish it in a then very buoyant scrap market. This collapsed, and the buyer would have made a solid loss on the deal. To avoid this, they chose instead to trade the vessel. The problem with this was that the under the express terms of the MOA they had guaranteed they would not do so - it was firmly agreed that the sole purpose of the sale was a scrap venture. The MOA was subject to English law and jurisdiction.

An interesting feature of the case is that the seller did not, once aware of the buyer's intentions, immediately apply to the English High Court for an interim injunction seeking to prevent the trading. Instead, they arrested the vessel in India seeking security and, eventually, damages there.

It was the buyer who took the initiative in England, applying to halt the Indian proceedings (which was, in any event, agreed in due course) and seeking a declaration that the seller would only be entitled to nominal damages. In this, it would be acknowledged that a breach had taken place but one which led to only very minimal and/or legally unrecoverable loss.

Only at that stage, albeit that the judge found that this had not prejudiced their position, did the seller counterclaim for an injunction. In addition, they sought a declaration that they were entitled to substantial damages on the basis of what has become called "negotiating damages".

"Negotiating damages" is one example where the usual type of recoverable damages has been extended in limited circumstances, and it involves seeking to treat the infringement of a contractual right in terms of an economic value and to consider it as an asset which the innocent party possesses. It is only, though, if the breach removes that asset that a right to damages arises. As the judge summarises the position:

"The rationale….is that the claimant has been deprived of an asset– the defendant has taken something for nothing, for which the claimant was entitled to require payment."

The problem for the seller in this case was that once the vessel was sold, they no longer had any rights of ownership or any financial interest in the ship. These had gone. As the judge went on to say:

"The Buyer's use of the Vessel for trading, though in breach of clause 19, did not involve the Buyer taking or using something in which the Seller had an interest, a valuable asset, for which the Seller was entitled to require payment."

It might appear that English law left the seller without redress in circumstances where there had been a clear, undisputed breach of contract. This leads on to consideration of an injunction as a remedy.

The starting position is that where there has been a breach of a negative covenant, that is to say a contractual term by which one party undertakes not to undertake a course of action, the innocent party is normally entitled to an injunction. That "ordinary position" remains a matter of discretion and can be displaced. It is, though for the party committing the breach to persuade the court that it should be.

So, what factors will be taken into account? The existing authorities look at the question from both sides. A judge will consider whether the application is "vexatious". In this, it is not enough to show that the applicant will suffer little prejudice if the injunction is not granted. Rather, it needs to be established that the applicant really has no particular need, or interest, in obtaining an injunction. In common parlance one might think of asking whether the applicant is being difficult just for the sake of being difficult.

On the other hand, it has to be considered whether the injunction would be "unconscionable" (a clear example is where it would result in something contrary to general public policy) or if it would be "oppressive". That latter term does not mean that the injunction is simply going to be burdensome, rather a sense that it is unduly harsh, tinged, sometimes, with the suggestion that it is not really necessary.

It is here that the question of damages often arises. If an award of damages would be an adequate remedy, it is one factor which may mitigate against an injunction being granted. It may, depending on the circumstances, be a very persuasive factor.

The judge, David Edwards QC, sitting as a High Court judge, reviewed these principles at length. He was clearly unimpressed with the buyer's arguments that an injunction should not be granted:

"In my judgment, on the basis of the evidence I have read the Buyer comes nowhere near surmounting this hurdle"

"The value of this case is twofold. Firstly, it looks at a very difficult area of the law of damages and provides a detailed and clear analysis of this. Secondly, the review of the circumstances in which an injunction will and will not be granted should prove an invaluable addition to case law on the subject."

The judge started by examining the buyer's conduct. They had even entered into a further fixture on the eve of the hearing. Picking up on existing precedent he pointed out that they had acted in deliberate breach throughout. Further, the entering into of the final fixture could *"properly be regarded as cynical".*

This contrasts with the situation where a breach has occurred innocently or inadvertently and bears directly on the question of whether the granting of an injunction can be opposed. It is also relevant to the effect it might have on the party in breach. Would it be "unconscionable" or "oppressive"? Undoubtedly the buyer would lose money on the deal, but the granting of an injunction was not going to give rise to consequences which were so extraordinary that it should not be granted. Indeed, in respect of the final fixture they *"only had themselves to blame".*

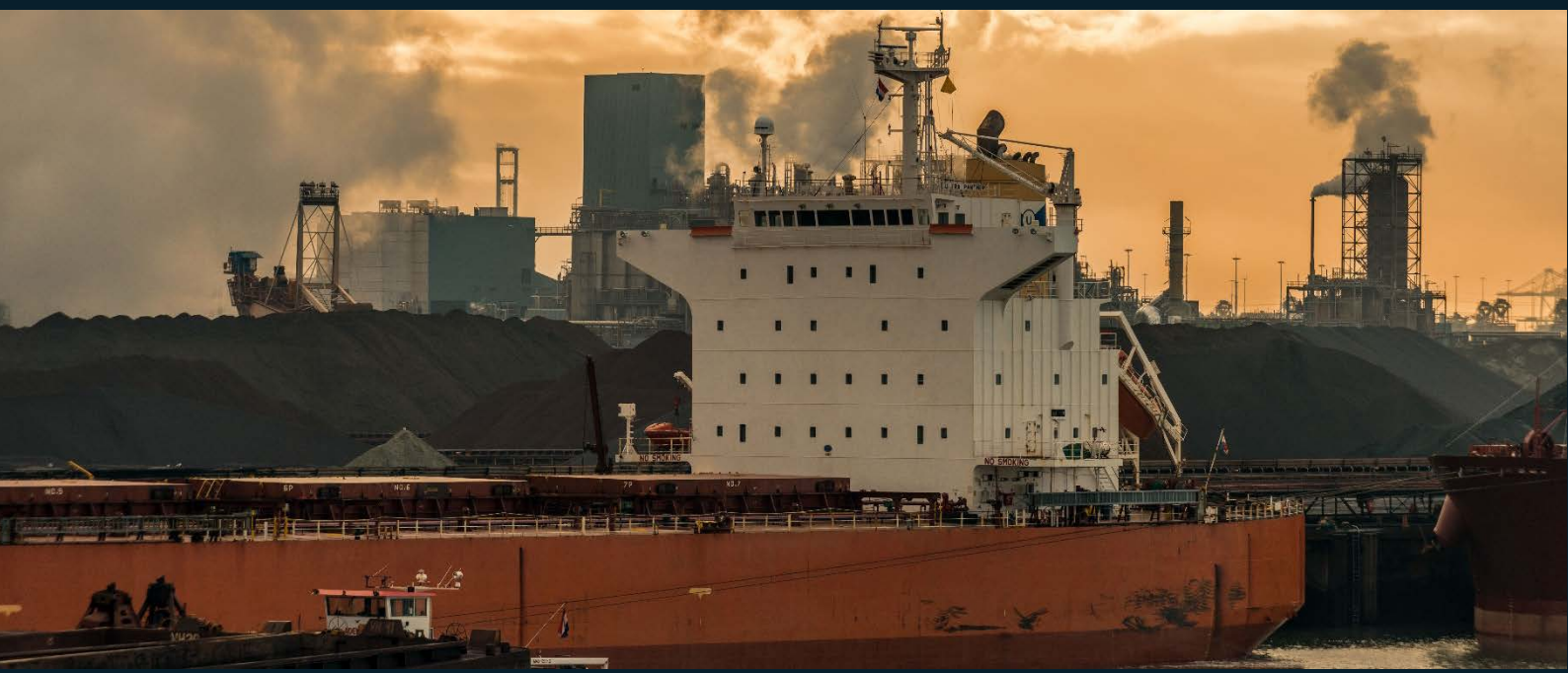
The judge also pointed out that the buyer had other options to mitigate their losses. They could lay the vessel up and wait for the market to improve. Instead he drew the inference that they were simply intending, by their breaches, to take advantage of rising Capesize freight rates.

Looking at the seller's position, it could be said that the seller's interest was not a purely financial one. The trading of one extra capesize in a diverse worldwide fleet of over 1,000 might have very little impact on their own profit margins and it might be concluded that the seller was simply being awkward for the sake of being awkward in circumstances where they had little or nothing to lose or gain. The judge showed the weaknesses in this argument. He pointed out that the seller had a legitimate commercial interest in reducing, if only by one vessel, an oversupplied capesize market. It helped their cause that the seller could demonstrate they had a clear policy of scrapping their own older vessels. As such, there was *"no reason why a term included in the Seller's contract with the Buyer to achieve that end should not be enforced."*

Neither, of course, would an inherently difficult to quantify, but likely to be minimal, award of damages be a sufficient and appropriate remedy.

The value of this case is twofold. Firstly, it looks at a very difficult area of the law of damages and provides a detailed and clear analysis of this. Secondly, the review of the circumstances in which an injunction will and will not be granted should prove an invaluable addition to case law on the subject.

Priyanka Shipping Ltd v Glory Bulk Carriers PTE Limited (The "CSK GLORY") [2019] EWHC 2804 (Comm)



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