Commodities

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# COMMODITIES BULLETIN

## Fire at sugar loading terminals – a decision

In a decision eagerly awaited by the sugar trade, the English Court of Appeal recently ruled on the scope of the laytime exceptions clause in the Sugar Charter Party 1999 Form (the 1999 Form). The decision in *E.D. & F. Man Sugar Ltd v Unicargo Transportgesellschaft (The Ladytramp)* (19 November 2013) concerned a fire at a sugar loading terminal at Paranagua, Brazil in 2010.

The fire at Paranagua happened in June 2010, a week before *The Ladytramp's* arrival at the port. It destroyed the conveyor belt linking the terminal to the sugar warehouse. The vessel had to wait for about a month before loading. Owners claimed for demurrage. Charterers sought to rely on clause 28 of the 1999 Form which provides that delays in loading caused by (among other things) "mechanical breakdowns at mechanical loading plants" would not count as laytime. Importantly, clause 28 does not include an express reference to fire.

The issue before the Court was simple: was this a case of "mechanical breakdown"?

Upholding the arbitrators' award, the Commercial Court decided that the destruction of the conveyor belt by fire was not a case of mechanical breakdown. It was not enough for the relevant piece of machinery no longer to function, as the Charterers had argued. Rather, the nature of the breakdown or malfunction was relevant – it had to be "mechanical", relating to the mechanism of the loading plant. Charterers appealed to the Court of Appeal.

One key aspect of the case was that the original arbitration tribunal made few findings of fact about the fire, holding simply that it had led to the destruction of the conveyor belt. There was no finding as to any mechanical breakdown. As such, the factual background on which the Court could base its decision was limited.

The Charterers sought support for their case from the Court of Appeal's decision in *"The Afrapearl"*, in which it had been held that the breakdown of a piece of equipment occurs when it no longer performs its function. However, in its judgment in *The Ladytramp*, the Court of Appeal was quick to distinguish between the two cases: *The Ladytramp* specifically concerned mechanical breakdown, not just breakdown. Minimal support was to be found for Charterers in the existing authorities.

The Court of Appeal therefore concluded that the first instance judge's reasoning was sound. Clause 28 is concerned with the nature of the breakdown and the destruction of machinery by fire cannot, on its own, amount to a mechanical breakdown. The Court disagreed with Charterers' argument that if machinery does not work, there has been a mechanical breakdown. Charterers' appeal was therefore dismissed.

As a result of the recent fire in Santos, this appeal has attracted much attention and no doubt many in the sugar trade have already been scrutinising the Court's decision with interest. It remains to be seen how far *The Ladytramp* decision will assist in resolving claims in relation to the incident at Santos.

HFW acted for the interveners in *The Ladytramp* Court of Appeal hearing.

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The Court disagreed with Charterers' argument that if machinery does not work, there has been a mechanical breakdown. Charterers' appeal was therefore dismissed.

LUKE ZADKOVICH

## ROT clauses: proceed with caution

Sellers use retention of title (ROT) clauses to protect themselves against non-payment by preventing title in the goods passing until payment has been received. ROT clauses give the seller priority over secured and unsecured creditors of the buyer if the buyer fails to pay for the goods. However, a recent English Court of Appeal decision, *FG Wilson (Engineering) Limited v John Holt & Company (Liverpool) Limited* (17 October 2013), has given rise to a potentially significant problem for sellers using ROT clauses.

The claimant seller, FG Wilson, had entered into a distributorship agreement on its own standard terms with the buyer, Holt Liverpool. The agreement related to the supply of generators, spare parts and other services and contained both a ROT clause and a "no set-off" clause.

FG Wilson brought an 'action for the price' against Holt Liverpool for failure to pay over US$12 million owed under a number of invoices. In a separate action, Holt Liverpool sued FG Wilson for alleged losses in excess of US$53 million arising out of alleged breaches of the distributorship agreement.

At first instance, FG Wilson obtained summary judgment for the price and Holt Liverpool's reliance on its cross-claims by way of defence was rejected because of the no set-off clause.

Holt Liverpool appealed and the Court of Appeal was required to consider three issues:

1. Can a claim for the price only be brought pursuant to section 49 of the Sale of Goods Act 1979 (SOGA)? ("the Statutory Issue")
2. Does FG Wilson have a claim for the price? ("The Action for the Price Issue")
3. Does the no set-off clause apply so as to prevent Holt Liverpool from relying on its cross-claims as a matter of construction of the clause? ("The Construction Issue")

The Court of Appeal held as follows:

1. A claim for the price could only be brought under section 49 SOGA.
2. In order to bring a claim under this section, FG Wilson had to show that property in the goods had passed to Holt Liverpool. Disagreeing with the first instance judge, a majority of the Court of Appeal found that FG Wilson could not show that property in the goods

had passed because on a true construction of the ROT clause the seller retained title in the goods until paid. The ROT clause allowed the buyer to onward sell the goods before they had paid for them and thus before title passed but in these circumstances they sold them as the seller's fiduciary agent, not as a principal, and were required to account to the seller for the proceeds of sale. A separate clause excluding the creation of an agency relationship between the parties was held to be overridden by the terms of the ROT clause.

3. The Court of Appeal agreed with the first instance decision in relation to set-off, stating that the terms of the clause, which provided that the buyer *"shall not apply any set-off"* to the price of seller's products without prior written agreement by the seller, were perfectly clear enough to provide that payment could not be withheld or reduced by Holt Liverpool.

The result of the decision is that FG Wilson was prevented by the terms of the ROT clause from maintaining an action for the price against Holt Liverpool, although other remedies may be available, for example a claim for an account of the proceeds of the re-sale. Permission has been granted for FG Wilson to appeal to the Supreme Court.

Until then, sellers using ROT clauses in their contracts should consider the potential consequences, particularly in circumstances where the goods are likely to be onsold.

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CLARE CHYB

## Conferences and Events

**Cargo Insurance in Practice**
HFW Geneva
16 January 2014
Presenting: Paul Wordley and Ciara Jackson

**Commodities Breakfast Seminar**
Dubai
16 January 2014
Presenting: Simon Cartwright, Sarah Hunt, Jemma Hill and Hari Krishna

**Offshore Wind Power Seminar**
HFW London
29 January 2014
Presenting: Max Wieliczko, Simon Blows, Robert Blundell and Emilie Bokor-Ingram. External speakers will include DONG Energy, Per Aarsleff, Visser & Smit Marine Contracting, AON and London Offshore Consultants

**Investing in African Mining Indaba**
Cape Town, South Africa
3–6 February 2014

**EU commodity derivatives regulation and how it affects traders in Switzerland**
HFW Geneva
13 February 2014
Presenting: Robert Finney and William Hold

For more information about any of these events, please contact events@hfw.com

**HFW extends Season's Greetings to all of our readers with our best wishes for 2014.**

Lawyers for international commerce

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