Shipping

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SHIPPING BULLETIN

Welcome to the June edition of our Shipping Bulletin.

We start this bulletin with an HFW case relating to a close quarters situation involving four vessels that gave rise to a collision, and the sinking of an Indian naval vessel. The judge had to decide whether the court could find fault with the two vessels which were not party to the proceedings and, if so, whether it could apportion the liability as between those vessels.

We then consider a French case in which the buyers of two newbuildings sought substantial damages from a Classification Society which they accused of wrongly certifying the vessels.

Our third article considers two important cases which look at the potentially significant consequences for a party to a dispute who refuses a request by the other to mediate.

Finally, our fourth article concerns a charterparty damages case in which the long-held legal position (since 1858) was revisited. As a result of this review, initially by arbitrators and subsequently confirmed by the High Court, the owners were awarded almost three times the amount that they would have received based on previous case law.

Should you require any further information or assistance with any of the issues dealt with here, please do not hesitate to contact any of the contributors to this bulletin, or your usual contact at HFW.

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Can a court find causative fault against vessels not party to the proceedings?

It is rare nowadays for collision cases to be argued before the English courts, but in *NORDLAKE v SEAEAGLE*[1], the judge had to address whether the court could find fault with a vessel which was not before the court, a question that had been left open previously in the *BOVENKERK*[2].

NORDLAKE v SEAEAGLE involved two actions arising out of a collision between the container vessel *NORDLAKE* and the Indian warship *INS VINDHYAGIRI* in the "narrow channel" approaches to Mumbai on 30 January 2011. *NORDLAKE* was outbound from Mumbai and agreed by VHF with the "lead warship" of a group of Indian warships, inbound to Mumbai, to pass all other inbound warships green to green, namely starboard to starboard. In breach of Rule 9 of the Regulations for Preventing Collisions at Sea (COLREGS), which requires vessels to navigate on the starboard side of the narrow channel. *NORDLAKE* then proceeded along the port side of the narrow channel which brought her into a close quarters situation with *SEAEAGLE, INS VINDHYAGIRI* and *INS GODAVARI*, ultimately resulting in the collision with the *INS VINDHYAGIRI* which caught fire and sank.

The owners of *NORDLAKE* brought a claim against the owners of *SEAEAGLE* on the ground that the collision was caused by the negligence of *SEAEAGLE* and the Indian warships *INS VINDHYAGIRI*, *INS GODAVARI* and the "lead warship". The owners of *SEAEAGLE* counterclaimed on the basis that the collision was caused by the negligence of *NORDLAKE* and the same three Indian warships.

The case was unprecedented for a number of reasons:

1. Four vessels were found to be involved in the circumstances giving rise to the collision between the two vessels.

2. The judge had to decide whether the court could find fault with a vessel which was not party to the proceedings. None of the Indian warships were before the English court, although the Indian government on behalf of the *INS VINDHYAGIRI* had commenced proceedings against *NORDLAKE* in the Mumbai High Court.

3. Pursuant to section 187 of the Merchant Shipping Act 1995, the judge had to consider and weigh the faults of each ship individually and then to arrive at an apportionment of liability that justly reflected the relative degree of fault as between all four.

4. Finally, *NORDLAKE*'s interests sought a general decree of limitation to limit their liability pursuant to the Merchant Shipping Act 1995.

In arriving at his decision, the judge noted that he was unable to give a binding judgment against the Indian warships as they were not party to the actions.

The judge found that, whilst *SEAEAGLE*'s and *INS GODAVARI*'s faults were not causative of the collision, they had "causative potency" in that they distracted *NORDLAKE*; but for those faults *NORDLAKE* might have seen *INS VINDHYAGIRI* earlier and might have avoided a collision.

The judge also held that VHF should not be used to agree on a course of navigation that conflicts with the COLREGS. The fact that *NORDLAKE* had informed the "lead warship" of her intention to pass all other warships green to green did not justify a departure from Rule 9.

The judge apportioned liability as follows: 60% to *NORDLAKE*, 20% to *INS VINDHYAGIRI*, 10% to *INS GODAVARI* and 10% to *SEAEAGLE*. The judge also found that the owners of *NORDLAKE* were entitled to limit their liability.

Notwithstanding the unprecedented decision that the court can apportion liability pursuant to section 187 of the Merchant Shipping Act 1995 against parties not appearing before the court, the case serves as a useful reminder for owners and their crews of not using VHF to agree a course of navigation contrary to the COLREGS.

Dimitri Vassos, Partner, Toby Stephens, Partner and Jonathan Goulding, Associate & Mariner acted for the Defendants (*SEAEAGLE*).

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1 Owners and/or demise charterers of the vessel *NORDLAKE* v owners of the vessel *SEAEAGLE* (now named *MV ELBELLA*) [2015] EWHC 3605 (Admlty)

2 [1973] 1 Lloyd's Rep. 63



Extra-contractual liability of classification societies

The decision rendered by the Court of Appeal of Versailles on 15 December 2015[1] shows how the French Courts consider claims made on an extra-contractual basis against classification societies. The court found that the classification society was liable for the loss and damage suffered by the buyers of two previously certified vessels.

Facts

In October 2005, Unicorn Tankers International (UTI) concluded two shipbuilding contracts with a Chinese shipyard, Taizhou Sanfu Ship Engineering. The French classification society, Bureau Veritas, issued class certificates for both vessels, the *BERG* and the *BREEDE*. The *BERG* was delivered to Petrochemical Shipping Ltd in November 2008 and the *BREEDE* was delivered to UTI who then resold it to Unicorn Baltic Ltd, in March 2009.

A few months after the deliveries, leaks were detected in the cargo collectors and both vessels were subsequently obliged to undertake repairs which took several months.

UTI claimed their losses from the yard but under the terms of the shipbuilding contracts, only the costs of the necessary repairs were recoverable. Ultimately a settlement was reached for both vessels. In order to recover the additional damages suffered during the period of repair (e.g. loss of hire), UTI, Unicorn Baltic and Petrochemical Shipping brought a claim against Bureau Veritas on the basis of tort law.

The decision

Before dealing with the substantive claim, the French Court had to decide what was the applicable law. Bureau Veritas argued in favour of English law whereas the claimants argued that Chinese law was applicable.

The court found that in this case Regulation 864/2007 (Rome II)[2] was not applicable because the events giving rise to damages (the delivery of the classification certificates) occurred before the entry into force of this regulation. As a result China was identified as being the country which was the most closely connected with the tort (being the place of construction, delivery of the vessels, inspections and delivery of certificates).

The French Court thus applied Chinese tort law, whose requirements are very similar to French law. To succeed, the claimants needed to demonstrate: (i) a wrong committed by the classification society, (ii) losses suffered by the buyer, and (iii) a causal link. The classification society was found liable because the shortcomings of its testing and verification operations (in particular, its failure to detect defective welds) constituted a wrong which had caused the claimants to suffer losses.

The court therefore awarded damages to the claimants but on different grounds. In the case of Petrochemical, whose charterers terminated the charterparty with them as a result of the problems with the cargo collectors, damages were awarded by reference to the loss of hire during the periods of repair and the loss of the opportunity to obtain a replacement charter at an equivalent hire rate. UBL, whose vessel was not under charter at the time of repairs, were awarded damages for loss of the chance to charter the vessel out.

While both claimants were successful, neither was awarded the full amount of damages claimed from Bureau Veritas as the court took into account a number of other factors.

Comments

This ruling appears to be in line with existing French law with regard to extra-contractual liability of classification societies.

In 1996, the French Court of Appeal of Versailles[3] held a classification society liable for the damages suffered by a third party (purchaser of a vessel). The court stated that its repeated and significant failures, which went to the heart of its duty, constituted gross negligence.

A similar decision was reached in the Wellborn case, in 2004[4]. The classification society was held liable having committed a gross negligence by the delivery of certificates which enabled a dangerous vessel (dubbed a 'wreck' by the court) to sail for years in international waters.

This latest case therefore reinforces the view that the French Courts are prepared to award damages where they consider that a classification society has breached its extra-contractual duties. It also underlines that France is a more favourable jurisdiction than England in which to bring claims in tort against classification societies.

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1 Cour d'appel de Versailles, 12e ch., 15 décembre 2015

2 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

3 Cour d'appel de Versailles, 12e ch. 1re section, 21 mars 1996 – Elodie II case.

4 Cour d'appel de Versailles, 12e ch. 1re section, 9 décembre 2004.

Mediation – an offer you cannot refuse?

Two recent cases: *Reid v Buckinghamshire Healthcare NHS Trust*[1] and *Bristow v The Princess Alexander Hospital NHS Trust & Ors*[2] suggest that an offer to mediate should not be declined without good reason. However neither case provides guidance as to what would be considered a "good reason". Both cases were costs proceedings in cases involving clinical negligence. In both cases, the court decided that the defendants' refusal to agree to mediate should be penalised by an order requiring the defendant to pay the claimants' costs on an indemnity basis.

In the Reid case, where a defendant refused an offer to mediate, the court decided to award costs on an indemnity basis from the date *"the defendants are likely to have received the claimant's offer"* (i.e. three days after the offer to mediate was sent.) The Reid case does not make clear the grounds on which the court found the refusal to mediate to be unreasonable, which could suggest that the threshold which would prompt the court to impose costs sanctions is low. What is however clear from the judgement is the court's sense of exasperation at the defendant's six week delay in responding to the offer to mediate.

In the Bristow case, the court provided a more detailed explanation as to when it would be appropriate to make an order for indemnity costs. In this case, as with Reid, the claimant made the offer to mediate. It was not until three months after the offer was made that the defendants rejected it on the grounds that the parties were too far apart, and that the case had already been set down for a detailed assessment. The court emphasised first that parties should be encouraged to mediate. Secondly, it considered that the defendants had given *"no good reason* [not to do so] *other than the fact that the case had already been set down for a detailed assessment"* and went on to state in conclusion that the defendants had *"not given any reasonable reason why they refused to engage in mediation"*. As a result, it was ordered that the defendants pay the claimants' costs on an indemnity basis.

In both these cases it was the defendants who refused to mediate and both lost in the underlying proceedings. It should however be noted that the successful party can also be penalised as a result of not participating in mediation.

Some might argue that these cases are not applicable to those engaged in general commercial litigation. It is possible that the fact that the defendants were public bodies apparently wasting the time and expense of both sides weighed on the courts' mind, and this was a factor in the imposition of costs sanctions. Inevitably, however, where one area of law moves others will follow. It is suggested that these cases therefore contain important lessons regarding mediation offers made not only in the course of costs proceedings, but also in the course of commercial litigation generally.

Decisions such as these render offers to mediate a means of applying pressure on opponents as well as an end in themselves. In that connection, one as yet unanswered question is what would happen if a defendant, having accepted an offer of mediation, attended a mediation but in reality declined to engage meaningfully in the process.

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MICHAEL HARAKIS, ASSOCIATE

What is clear from these two cases is that if a party does not want to accept an offer of mediation, it should respond promptly, and set out detailed reasons as to why mediation would not be appropriate. To do otherwise would expose that party to the risk of costs sanctions. We will have to wait to discover what the court would accept as a sufficiently good reason to refuse mediation.

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1 [2015] EWHC B21

2 [2015] EWHC B22



hfw MTM HONG KONG

The question considered by the English court in the *MTM HONG KONG*[1] was: if a voyage charter is repudiated by charterers, is an owner's claim for lost profits limited to either:

1. The duration of the repudiated charter period.
2. The duration of the repudiated charter period plus other losses, such as positional losses, which may be incurred beyond the repudiated charter period?

Facts

The *MTM HONG KONG* was voyage chartered to carry vegoil from a range of loadports in South America to a range of ports in the Gibraltar-Rotterdam range. Immediately prior to the contractual voyage the vessel grounded at Boma, central Africa. This caused delays and eventually resulted in the termination of the charter.

When the vessel eventually left Boma, the owners ordered her to proceed in ballast to South America, which they considered to be the most promising area for substitute business. After some time, the owners fixed the vessel for a voyage from San Lorenzo to Rotterdam. This substitute fixture was completed on 12 April 2011.

It was impliedly accepted that if the contractual voyage had been performed, it would have been completed on 17 March 2011. The vessel would then have performed a voyage from the Baltic to the United States and one back to Europe. It was also accepted that all three voyages would have been completed about the same time as the substitute fixture – 12 April 2011.

In dismissing the appeal, the judge found that the performance of the contract voyage would not only have enabled the owners to earn the freight payable under the contract charter, it would also have positioned the vessel in Europe to take advantage of higher freight rates in the North Atlantic.

JEAN KOH, PARTNER

In arbitration, the owners succeeded in recovering from the charterers damages totalling just over US$1.2 million, equivalent to the difference between the profit actually earned on the substitute fixture, and the profit which would have been earned had the contract voyage plus the two following transatlantic voyages been performed.

Appeal to the High Court

The charterers appealed to the High Court arguing that owners' recovery should be limited to US$478,386 on the ground that damages should be calculated by reference to the vessel's actual and hypothetical earnings only up to the date when the contract voyage would have ended. They argued that this followed from the long established measure of loss set down in *Smith v M'Guire*[2] - that damages were to be assessed by deducting from the net freight and demurrage any earnings from a substitute voyage. Therefore the correct approach was to apportion the owner's earnings under the substitute charter to reflect the amount earned up to the date the contract voyage would have completed, namely 17 March 2011.

In dismissing the appeal, the judge found that the performance of the contract voyage would not only have enabled the owners to earn the freight payable under the contract charter, it would also have positioned the vessel in Europe to take advantage of higher freight rates in the North Atlantic. Thus, in addition to loss of profit on the repudiated charter, the owners were also entitled to recover their loss as a result of delay in repositioning the vessel in Europe, namely positional loss - the two follow-on transatlantic voyages. It was important, however,

1 [2015] EWHC 2505 (Comm)

2 (1858) 3 H & N 554

that loss of the two follow-on voyages could be calculated with a reasonable degree of confidence.

Comments

At first blush, this decision appears to be at odds with a line of authorities beginning with *Smith v M'Guire* which established that damages for a repudiated charter are limited to those incurred up to the final date of the charter period. However, the judge emphasized this was only on the face of it the measure of damages, and it may be necessary to depart from it in order to give effect to the compensatory principle. The reasoning in this judgment demonstrates a holistic outworking of the compensatory principle, which takes into account all the circumstances of the case and the commercial realities.

The upshot of this judgment is that an owner is not limited to a claim for lost profits calculated by reference to the duration of the repudiated charter alone, but may also be entitled to claim other losses incurred beyond the repudiated charter period, for example positional losses – provided these can be proven. It is submitted that this outcome accords with fairness and is to be welcomed.

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hfw Conferences and events

Wreck Removal Contracts & Operations Seminar
20-21 June 2016
London, UK
Presenting: Toby Stephens

Cruise Lines International Association Conference
21 June 2016
Paris, France
Attending and hosting: Stéphanie Schweitzer

Multimodal
23 June 2016
HFW London, UK
Presenting: Craig Neame and Matthew Wilmshurst

Conference on Resolving Shipping Disputes
2 September 2016
Kolkata, India
Presenting: David Morriss

IBA Annual Conference
13–17 September 2016
Washington
Presenting: Elinor Dautlich, Alex Kyriakoulis, George Eddings