January 2013 to June 2013

MARINE INSURANCE CASE UPDATES

High Court, Court of Appeal and Supreme Court Cases

January 2013 to June 2013

Update 3

Toby Stephens and Alex Kemp

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HFW Marine Insurance Case Update No 3

Welcome to the third of our HFW Marine Insurance Case Updates which are produced on a six monthly basis. The Marine Insurance Case Update aims to provide you with regular summaries of English Court cases relevant to the law of marine insurance including hull, war and cargo risks. We will also seek to include other cases which may be of interest in terms of procedural decisions, for example service out of the jurisdiction or anti-suit injunctions.

This Marine Insurance Case Update forms the basis of a presentation and we have already been to many of you to discuss these cases.

This third update includes three reported cases arising from the "DC MERWESTONE" litigation, an interesting discussion on the Court's powers of sale in respect of arrested vessels and a reinsurance case which has been included due to its commentary on when settlement has been entered into by one underwriter which binds the followers.

We hope you find the update useful and should you have any questions, then please do not hesitate to contact us.

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UPDATE 3 INDEX

Metall Market OOO v Vitorio Shipping Ltd (The "LEHMANN TIMBER") [2013] EWCA Civ 650

Court of Appeal: Lady Justice Arden, Lord Justice Patten and Sir Bernard Rix

Mr Chirag Karia QC (instructed by Clyde & Co) for the Appellant

Miss Claire Blanchard QC (instructed by Stephenson Harwood) for the Respondent

In update 1 we reported on the "LEHMANN TIMBER" case in which the High Court held that the Owners' costs of exercising a lien over cargo to obtain general average security were not recoverable. That decision has now been overturned by the Court of Appeal in a decision which is beneficial to Owners in a GA situation.

Facts

The "LEHMANN TIMBER" was captured by Somali pirates in May 2008 on her maiden voyage. The Owners paid a ransom to secure the release of the Vessel and she sailed for Oman as a port of refuge. En route the Vessel suffered an engine breakdown which resulted in her having to be towed into port.

Owners declared general average and appointed average adjusters who attempted to collect general average security from the cargo interests including the claimant Metal Market OOO ("MMO"). However MMO refused to provide a general average bond, general average guarantee or a cash deposit for all of the cargo and did not pay Owners their proportion of the general average. Only some of the cargo belonging to MMO was insured and an insurer's general average guarantee was provided for part cargo only. However no bond was provided and Owners exercised their general average lien over all cargo onboard.

Owners therefore discharged the cargo into a warehouse which resulted in them incurring costs for storage and insurance of the cargo which accrued substantially over time to the extent they were likely in excess of the sum due from MMO as their GA contribution.

In London arbitration Owners sought to recover a contribution from MMO to both the general average adjustment and the costs incurred in the protection and storage of the cargo (the lien). MMO denied that it had any liability to contribute in general average and counterclaimed for conversion of the cargo.

The arbitration tribunal found in favour of the Owners and found MMO liable for their proportion of general average and the storage costs. All MMO's counterclaims were dismissed.

MMO appealed to the Commercial Court on the grounds that the Owners should have to deliver the cargo for which the General Average Guarantee had been provided. Further, MMO stated that they should not be liable for the storage costs of the cargo.

Held at First Instance

Mr Justice Popplewell held.

1. That is was possible for Owners to insist on provision of both a general average bond and general average guarantee.

2. In relation to the costs of exercising that lien, that following the common law position, it is possible to recover expenses incurred in the preservation of goods from the owner of goods providing that the owner is not denied possession purely because there is a lien being exercised over the goods. Applying this to the facts of the case MMO were denied possession purely because of the lien. Following *Moller v Jecks (1865) 19 C.B.N.S. 332*, a person cannot recover damages which have been caused by their own acts. Owners had, through the exercise of a lien, had the choice to store the cargo either on board or in a warehouse. They should not receive the costs of storage in a warehouse. This is because this could not be construed as being reasonable mitigation for the greater cost of storing the goods on board the vessel.

The decision was appealed.

Held in the Court of Appeal

Sir Bernard Rix gave the leading judgment. He overturned the High Court's decision and held as follows.

Requirement by Owners for a GA Bond in addition to the GA Guarantee

The average bond and average guarantee requested did not in terms promise delivery by the owner. Rather, unlike the position in *Castle Insurance Co v Hong Kong Islands Shipping Co (The Potoi Chau) [1984] A.C. 226*, the consideration was the delivery of the cargo.

MMO could not cite any authority for its contention that Owners' acceptance of the insurer's guarantee (for part cargo) discharged their lien. On the contrary, the authorities illustrated how the average bond supported by additional security, either in the form of a guarantee from insurers or in the form of a cash deposit, was the typical and long standing means by which a shipowner was entitled to stipulate for the terms on which he would be willing to forego his lien. Sir Bernard Rix found, whereas the long standing practice illustrated that the bond may not necessarily be accomplished by a guarantee, there was nothing in the authorities to suggest that a guarantee without a bond was sufficient, or that to require both was unreasonable. He stated as follows (para. 37):

"Where a shipowner requests both bond and insurers guarantee, it seems hard to imagine that the law will insist that the provision of the guarantee but the refusal of a bond will nevertheless amount to a waiver or automatic discharge of the lien".

In the light of the authorities, the long standing practice and the arbitrators' findings, Sir Bernard Rix found, that Owners were fully entitled to be unwilling to give up their lien in the absence of a bond from MMO, even though the bond might not have added in any practical way to the sources of the liability to

the Owner. In his judgment, and in the light of *The Potoi Chau*, the clarity and certainty of MMO's obligations under the bond were a sufficient justification for Owners continuing to request one.

Sir Bernard Rix stated, that the only possible way MMO could succeed, was if the law absolutely required that a shipowner who had reasonably requested both a bond and a guarantee, but had received only the insurer's guarantee, must be regarded as having foregone his lien. However, he found no authority of any relevance which spoke in favour of such a conclusion.

Sir Bernard Rix did not derive great assistance from authorities on the loss of solicitors' liens. He stated, that Owners had made it clear to MMO that they were not willing to discharge the cargo, unless MMO provided security for all the cargo, which involved providing both a bond and a guarantee or a cash deposit for every bit of the cargo. It was impossible to infer, that there had been any waver of the lien, or that Owners had acted inconsistently with the lien. Even if the cargo had to be considered entirely separately, because they were carried under a separate bill of lading, Owners' request for a bond and an insurer's guarantee was not met. However, in Sir Bernard Rix's judgment, the cargo could not be considered separately. The requested bond referred to all four bills of lading and to the complete cargo.

In sum, Sir Bernard Rix found that Owners had been entitled to refuse to deliver the cargo for which the general average guarantee had been provided despite receiving and retaining the insurer's guarantee; and that even if it was not so entitled, he found that there were no damages payable to MMO.

Recovery of lien/Storage Costs by Owners

With regard to recovery of the storage costs for the cargo, the principle in *Somes (Joseph) v Director of British Empire Shipping Co 11 E.R. 459* applied at first instance, was, in Sir Bernard Rix's judgment, a narrow one, applicable to an artificer's lien but of doubtful status outside that context. In the usual case of an artificer's lien considered in Somes there was no breach of contract involved in the lienor's failure to remove his chattel from the artificer at the time due for payment, and it was not considered, that the lienee would incur expense as a result of exercising the lien.

Sir Bernard Rix found that the *Somes* principle was harsh and uncommercial in a highly commercial setting such as ship-building or ship-repairing. He found that there was no sign that the Somes principle was of wide application. It was subject to any express or implied contract for the payment of the expenses of retention. He found it significant that the examples of application of the Somes principle available to our Courts were few, and no case applying the Somes principle could be produced in the shipping context of carriage of goods by sea, having considered *Great Northern Railway Co v Swaffield (1873-74) L.R. 9 Ex. 132, Lyle Shipping Co v Cardiff Corp [1900] 2 Q.B. 638* and *Smailes v Hans Dessen and Co (1906) 12 Com. Cas. 117*, and having applied *Anglo-Polish Steamship Line Ltd v Vickers Ltd (No.1) (1924) 19 Ll. L. Rep. 9*.

Sir Bernard Rix stated that shipping is performed on the basis that time is money and that a ship is a travelling warehouse for which the cargo owner must pay either in the form of agreed freight or hire, or by way of damages for any breach of contract. If the ship is delayed by the cargo owner's failure to arrange timely discharge then the contractual arrangement contemplates that either by the means of

demurrage or general damages for detention, the cargo owner must pay. Sir Bernard Rix stated that the exercise of a lien must be reasonable and there must be no failure to mitigate damages. Furthermore the exercise of a lien was no excuse from contractual liability. Even if the Somes principle were prima facie capable of applying, he found, the contractual context, as contemplated in Somes itself, would take the case out of it.

Sir Bernard Rix did not accept the reasoning from the first instance. He stated as follows (para. 129):

"A shipowner should not be required to abandon his lien because the only other choices facing him were the disastrous ones of turning his ship into a floating warehouse for an indefinite period, or throwing the cargo into the sea, or storing them on land at his own expense".

Furthermore he observed as follows (para.133):

"If the expenses of exercising a lien may be claimed in a post-contractual situation of bailment, there should be all the more reason for reaching the same result in a contractual bailment".

Sir Bernard Rix found no reason why the lien for general average should be subject to a strict but narrow principle deriving from the English common law's artificer's lien, referring to *The Prins Knud [1942] AC 667 (PC) (at 689-690)*. Thus he allowed the appeal concerning the applicability of the Somes principle, and as a result, the appeal from the arbitrators' award failed and the award was upheld.

Les sociétés de droit Allemand Vega Reederei Freidrich Dauber Gmbh & Co KG (Hambourg) Partenreedererei M/S Heidberg (Hambourg) v La SAS Société des Pétroles Shell Assurances Mutuelles Agricoles Groupama

Court of Appeal in Bordeaux

Holman Fenwick Willan for the Applicants

Factual Background

During the night of 8/9 March 1991, "HEIDBERG", when leaving Bordeaux laden with a full cargo of grain, failed to negotiate a bend in the river estuary as a result of a navigational error and struck an oil jetty, partially destroying it, and causing some heat and wet damage to the cargo of grain resulting from the fire and the efforts to extinguish it.

Despite a limitation fund being constituted within days of the incident, the French courts refused to order the release of the Vessel from arrest and it took two and a half years, diplomatic exchanges between the German and French governments and three decisions of the French Supreme Court, the Cour de cassation, before decisions refusing to order her release were finally overturned.

By that time, however, the first instance court had determined the case on the merits, determining that the shipowner should be deprived of its right to limit liability on the basis of alleged under manning, and finding the shipowner liable to pay to the claimants a sum which proved to be some 25 times greater than the amount of the limitation fund. The Vessel continued to be held pending enforcement of the judgment, notwithstanding appeal in France and hotly contested enforcement proceedings in Germany.

The Vessel was finally released, some four years after the incident, against payment of the sums awarded. Perhaps ironically, given the allegations of under manning, the Vessel was authorised by the German authorities, and without intervention from the French authorities, to depart from Bordeaux with a complement of crew identical to that which was aboard at the time of the incident.

In order to bolster their allegations in the civil action, a criminal complaint was filed by the claimants and, in June 1995, the investigating magistrate decided to pursue charges against the directors of the owning company in connection with alleged forgery and the use of forged documents in respect of the use in the civil proceedings of the Vessel's crewing and tonnage documentation. The documents were alleged, although recognised as being true copies of the documents issued, either to have been obtained fraudulently and/or not to reflect the true position (according to the claimants). Unusually, a senior official from the German authorities agreed to give evidence before the French criminal court, and in June 1999 all criminal charges were dismissed by the first instance criminal court, with the criminal action finally being concluded by a decision of the criminal court of appeal in September 2003.

The appeal which had been commenced by the shipowner and its insurers in the civil action was, however, stayed for a period of more than eight years as a result of the criminal proceedings. Findings of fact by the criminal courts in relation to the manning of the Vessel were however to become important to the outcome of the civil claims.

The appeal in the civil action resumed in late 2003 and judgment was pronounced in May 2005, unexpectedly finding in favour of the claimants and continuing to deprive the shipowner of its right to limitation on the basis of an argument which had not even been raised by the claimants in any of the pleadings - that although the Vessel was properly manned in accordance with all applicable regulations (as had already been determined by the criminal court), the shipowner had nevertheless committed a fault sufficient to deprive it of its right to limit in failing to ensure that there existed as between the Master and the crew *"the confidence and cohesion indispensable to permit them to overcome difficulties which whilst unforeseen were not unforeseeable"*.

By its decision pronounced in October 2007, the Cour de cassation overturned this decision, ostensibly on the basis of a point of procedure: that the Court of Appeal had failed to grant the shipowner a proper opportunity to address the relevant issue, and sent the case back for a full re-hearing.

Judgment

On 14 January 2013, the Court of Appeal in Bordeaux finally set the record straight, finding that there was no evidence to support the allegations of under manning, that the accident was the result of a clear and simple error of navigation, that the claimants have failed to demonstrate any fault sufficient to deprive the shipowner of its right to limit and that the owners are accordingly entitled to limit their liability.

The decision, adopting a strict application of the terms of the 1976 London Convention, is likely to be of great significance in the development of the law relating to the limitation of liability for maritime claims, notably in civil law jurisdictions, including in particular in those jurisdictions which look to French law as its source of law.

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A further appeal still remains possible to the Cour de cassation.

Bank of Scotland Plc v Owners of the M/V "UNION GOLD"; Owners of the M/V "UNION SILVER"; Owners of the M/V "UNION EMERALD"; Owners of the M/V "UNION PLUTO" [2013] EWHC 1696

High Court: Mr Justice Christopher Teare

Sandra Healy (instructed by Stephenson Harwood) for the Claimants

Background

Union Transport Group Plc is the owner of four small cargo ships "UNION EMERALD", "UNION SILVER" and "UNION GOLD" built in 2008. The fourth, "UNION PLUTO" was built in 1984. Bank of Scotland provided finance for the construction and purchase of three of the vessels built in 2008 which was secured across all four vessels along with a debt for the "UNION BRONZE". From late 2011 Union Transport was in default of these finance arrangements with the relevant notices being served by the Bank thereafter. The Bank's case is that approximately €13,000,000 is secured by mortgages across the four vessels.

In addition to the Bank there are other creditors of Union Transport with claims in rem against the vessels. The largest such claim is a claim by A&P Tees Limited for £211,405 in respect of repair work to the "UNION PLUTO". Other claims in rem are in respect of bunkers supplied to the vessels by various bunker companies, one of whom entered cautions against the release of the vessels on 5 June 2013.

In June 2013 the Bank of Scotland applied to the Court for an order that the 4 vessels be sold before judgment, or pendents lite, and that they be sold to a certain buyer at a certain price. They had received offers to purchase:

1. The "UNION SILVER" and "UNION GOLD" from the original shipyard that built them for €4,700,000 against a combined valuation of €3,000,000 for sale at public auction or maximum €5,500,000 for private sale.

2. The "UNION EMERALD" from an existing client of the bank for €2,700,000 against a combined valuation of €3,250,000 for sale at public auction or maximum €2,750,000 for private sale.

3. The "UNION PLUTO" from a new entity started by the managing director of Union Transport for €329,000 against a combined valuation of €225,000 for sale at public auction or maximum €315,000 for private sale.

Sales by the Admiralty Marshall

Justice Teare summarised the procedure for the sale of a vessel which has been arrested in rem. He noted that a claimant may seek an order that the vessel be sold in advance of obtaining judgment. However, even in such circumstances the vessel must be sold for the best possible price so that all claimants against the vessel may be satisfied to the greatest extent possible. In order to ensure that the best sale price is obtained, the Admiralty Marshall will have the vessel appraised by an experienced ship broker, tender

adverts and await bids. The Admiralty Marshall is not permitted to sell the vessel for less than the appraised value without leave of the Court. This process is internationally recognised as conferring on the purchaser of the vessel title which is free of liens and encumbrances. As a result any interference with the Admiralty Marshall's duties is contempt of Court.

A Mortgagee's Power of Sale

A mortgagee's power of sale exists to the extent that there is no contrary Court Order for the sale of the same vessel. However, that does not preclude a mortgagee from selling the vessel whilst under arrest, as long as there is no Court Order for a sale. However, such a sale while under arrest would not confer a title free of liens and encumbrances and, if under arrest, the vessel will still be under arrest. In addition anybody with a maritime lien against the vessel would still be able to enforce that lien after the mortgagee sale.

Judgment

The question in this case arises as to whether it is appropriate for the Court to depart from its usual procedure in circumstances where the Bank has identified a purchaser for the vessels at or above market price.

Justice Teare's concern was that the proposal by the Bank would not provide for any appraisement by the Admiralty Marshall. Whilst the valuations which had been put forward by the Bank were for the most part in accordance with the offers being made, the Court had not undertaken an independent assessment process.

Justice Teare noted that the Admiralty Marshall has considerable experience in such matters and has access to knowledge and information that the Court, looking at bland valuations, does not have. For example the Court notes that it is sensible to keep the valuation of the vessel to be sold confidential as making it public knowledge is likely to affect the amount bidders are likely bid. In addition, removing the advertisement system is also likely to depress the price that is obtained by the sale. The Court has previously discussed this in the case of *APJ Shalin [1991] 2 Lloyd's Rep. 62* when Sheen J noted that private negotiations could adversely affect the market because they could have the result that potential bids would be withheld. In *Halcyon the Great (2) [1975] 1 Lloyd's Rep. 525* Brandon J noted:

"It seems to me important that there should be no doubts in anybody's mind that when the ship is re-offered for sale she is re-offered freely to the whole world and not just for the purposes enabling any particular person who has in mind to make a particular bid to do so. If there is some particular person who has in mind to make a particular bid he will be free to compete with all other bidders."

Therefore Justice Teare concluded that it is wrong in principle for the Court to depart from the usual order that the Admiralty Marshall sell the vessel by appraisement, advertisement and inviting bids to purchase the vessel. To do otherwise would give the impression that the Admiralty Marshall is acting for a particular claimant in rem rather than an officer of the Court - he must have regard to the interests of all claimants in rem. On this basis the Judge refused the application in respect of the "UNION GOLD", "UNION SILVER" and "UNION EMERALD".

Justice Teare noted however that there were special circumstances in relation to the "UNION PLUTO". Those circumstances were that if the vessel was not sold by 7 June 2013 a long term contract would be lost risking the jobs of 42 people. The presence of this long term contract on such an elderly vessel (25 years older than the other 3 vessels) is of considerable attraction to the purchaser that has been identified and put forward by the Bank. Indeed if the contract had been lost Justice Teare thought it unlikely that this purchaser would be willing to buy the vessel. The purchaser was willing to buy the vessel for €329,000 against a value of €315,000. This particular fact or circumstance convinced the Judge that it was exceptionally appropriate to permit the Marshall to sell the vessel to Angel Shipping Ltd. In these circumstances, departing from the conventional and regular sale by the Admiralty Marshall does not give rise to any real risk of the Court's reputation for impartiality being tarnished.

Beazley Underwriting Ltd and others v Al Ahleia Insurance Company and other companies [2013] EWHC 677 (Comm)

Commercial Court: Eder J

N Calver QC (instructed by Morgan Lewis & Bockius LLP) for the Claimants

P Melwani QC and B Coffer (instructed by Ince & Co LLP) for the Defendants

Facts – The Insurance Policy

In 2005 the Kuwait underwriter Al Ahleia Insurance Company (the "Insurer") entered into an open cover construction all risk and third party liability insurance policy with the Kuwaiti Oil Company (the "Assured"). The Assured had commissioned the construction of 15 new crude oil storage tanks in Kuwait by Hyundai Heavy Industries. Under the insurance policy, the Insurer wrote 35% of the risk with the balance being provided by other local insurers Warba Insurance Company, Bahrain Kuwait Insurance Company, Gulf Insurance Company, First Takaful Insurance Company and Wethaq Takaful Insurance Company.

The policy contained the LEG2 exclusion which prevents any coverage under the insurance policy on the basis of a defective design. This point had been made clear to the Assured via the brokers, Aon. It was also drawn to the attention of the local underwriters when the reinsurance contract was entered into.

In March 2007, one of these tanks was found to be defective due to its installation and use of rubbish in the foundations. Estimates of the repair costs were in the region of $28,000,000.

Facts – The Re-Insurance Contract

The Insurer was acting as a local cedent underwriter of the London reinsurers which included AIG/Chartis, Beazley, Swiss Re, Transatlantic, Millennium, Liberty and XL as London underwriters (the "Reinsurers") .

Under the reinsurance contract the Insurer retained 7.5% of the risk and two of the following Insurers retained 1.5%. AIG reinsured 20% of the insurance contract which made them joint slip leaders with Beazley. Together with Millennium the three underwriters were claims agreement parties under the reinsurance contract. It was common ground that each of AIG, Beazley, Trans Re and Millennium, would be deemed to amount to the agreement of all reinsurers for the purposes of controlling and agreeing claims; and that it was not sufficient that only AIG's prior approval to any settlement between the Insurer and Assured was obtained by the Insurer, nor was only AIG given the right to control the negotiations which led up to the attempted settlement.

Both the insurance contract and the reinsurance contract were broked by AON.

The reinsurance contract included a claims control clause:

"Notwithstanding anything contained in the Reinsurance Agreement and/or the Original Policy Wording to the contrary, it is a condition precedent to any liability under this Reinsurance that:

a) the Reinsured shall upon knowledge of any loss or losses which may give rise to a claim under this Policy, advise the Reinsurers thereof as soon as reasonably practicable;

b) The Reinsured shall furnish the Reinsurers with all information available respecting such loss or losses and the Reinsurers shall have the right to appoint adjusters, assessors, surveyors or other experts and to control all negotiations, adjustments, and settlements in connection with such loss or losses.

c) No settlement and/or compromise shall be made and no liability admitted without the prior approval of Reinsurers.

In the event of a claim under the Original Policy Wording Reinsurers hereon agree that settlement shall take place at the same time as settlement or advance of funds under the said Original Policy Wording."

Facts – The Dispute

The claim was effectively negotiated directly between the Reinsurers and the Assured without any input from the Insurers who did not seek to rely on any defences in the underlying policy. They took this position because of their view that the reinsurance policy and the underlying policy were effectively back to back. The Reinsurers rejected the claim on the basis of the LEG2 exclusion.

In May 2009 the account for Kuwaiti Petroleum Company was coming up for renewal with Aon. Aon were anxious to retain the account and AIG/Chartis were anxious to maintain a commercial relationship with the Kuwaiti Petroleum Company. Aon therefore decided to try and agree the claim with AIG/Chartis alone. This resulted in some exchange of correspondence between Aon and AIG/Chartis direct which was subsequently forwarded to Beazleys who up until that point had not been consulted in any potential suggested claim settlements. Aon continued to negotiate with AIG/Chartis alone until such point that AIG made an offer to settle after the application of LEG2. At the time AIG/Chartis were expressly aware that it may take some time for the market to follow such settlement.

By October 2009 AIG/Chartis had agreed to pay their proportion (20%) of a settlement in the amount of US$19,163,173. They expressly noted that this was a settlement only as between AIG and the Insurer. In November 2009 AIG/Chartis paid their proportion of this settlement figure. The Insurers also paid their proportion of the retained risk under the insurance policy. Shortly thereafter the following market were informed that AIG/Chartis had entered into a settlement who had up until that point had not been consulted.

At no point had Beazley been involved in any settlement discussions. When Beazleys became aware of this settlement they wrote to Aon asking them how the settlement has been reached and how LEG2 had been applied. They asked how Aon expected the settlement to be applied across the market when none of the following market had agreed to it.

By this stage relations between AIG/Chartis, Aon and the following reinsurers was not positive and there was correspondence between Beazleys, Swiss Re, Trans Re, Liberty and XL debating whether or not they were obliged to follow AIG's settlement. At this point various of the Reinsurers instructed their own lawyers and it became clear that the following market considered AIG/Chartis' settlement a clear breach of the claim control clause.

In March 2010 the Assured issued proceedings against the Insurer in relation to this claim. It would appear that the Assured understood the agreement between AIG/Chartis and themselves to be a payment for the full amount of US$19,163,173 and by commencing proceedings in Kuwait were seeking payment of the balance. It would appear that the Assured were relying upon the fact that they understood the Insurer to have obtained the permission of the entire following reinsurance market to enter into the settlement.

Judgment

The Judge held that the claims control clause does operate as an exemption clause and therefore the Reinsurers could only rely upon it if the words were of a clear construction. A party relying upon the exemption clause must be construed against them.

The Judge rejected the argument that there was any breach of sub paragraph B of the claims control clause. He found that there had been no negotiations within the meaning of sub paragraph B which might give rise to a claim under the reinsurance policy.

The Reinsurers went on to allege that there had been a breach of sub paragraph C and that the Insurer had admitted liability for the entirety of the Assureds' claim on behalf of all of the Reinsurers. Entering into the settlement agreement was a breach of sub-paragraph C because the Insurer did not seek the prior approval of Beazley, Trans Re, or Millennium before admitting liability – they did not even tell Millennium what was happening.

The Judge found that it was important to construe sub paragraph C in the context of the claims control clause as a whole. As the last sentence of the claims control clause refers to settlement twice it is plain that when used the second time it is referring to a settlement in respect of which there is a reciprocal liability under the reinsurance contract. The Judge found it could not be referring to a settlement of, for example, the Insurer's own retention.

He went on to note that an Insurer should be free to admit, pay, settle or compromise any claims under the insurance policy to the extent to which it does not give rise to a claim under the reinsurance contract. He therefore concluded that clause C has no relevance to any settlement, compromise or admission of liability in respect of the AIG/Chartis share.

The next issue that was considered by the Judge was the meaning of the word settlement in the claims control clause and whether it covered a without prejudice settlement. The Reinsurers of course argued that it did include without prejudice settlements and the Judge agreed that any legally binding settlement would be caught by sub paragraph C regardless of whether it was without prejudice to liability, for example. The Judge went on to note that in his view the word settlement imports at the very least either a legally binding agreement or the actual transfer of consideration of some kind including what are sometimes described as ex gratia payments. He went on to consider whether such a settlement also required an admission of liability under the wording of sub paragraph C. He considered it did not. The question then arose whether there had in fact been a settlement between the Assured, the Insurer and AIG/Chartis. In essence he found that there had been no settlement on any of four possible occasions and

that even when the discussions had reached their most advanced they were at best offers and counter offers which were neither admissions of liability nor agreements to settle or compromise.

For those reasons the Judge found that there had been no breach of the claims control clause by the Insurer. As a result the Insurer was not barred from pursing their claim under the reinsurance contract.

CHS Inc Iberica SL & CHS Europe SA v. Far East Marine SA [2012] EWHC 3747 (Comm)

Commercial Court: Mr Justice Cooke

David Walsh (instructed by Hill Dickinson) for the Claimants

Adam Turner (instructed by Reed Smith) for the Defendants

Facts

The Claimants ("CHS") were the owners of a consignment of corn carried by the Defendants, the owners of the vessel "DEVON" ("Owners" and the "Vessel") from Varna in Bulgaria to Tarragona in Spain.

The Vessel suffered a main engine breakdown some 14 miles out of the load port and was towed back the next day. Repairs were carried out and the voyage then continued. The result was that the vessel arrived at the discharge port some 59 days later than she should have done.

It was common ground between the parties that the effect of the delay was that some of the cargo arrived at destination caked and mouldy. Owners contended however that only about 600mt of cargo was damaged and that this could/should have been mixed with sound cargo and sold without any loss/diminution in value and therefore that the salvage sale of 3,020mt was completely unnecessary.

Decision in relation to Seaworthiness and Due Diligence

The Judge, Mr Justice Cooke, noted that he had heard no evidence from anyone on board the Vessel at the time of the incident, including the Chief Engineer, nor from any expert who attended at Varna to investigate the cause. The Judge was also not satisfied that the Owners had disclosed all documents in their control relating to the cause of the damage and it was *"inconceivable"* that there would not have been documents/correspondence with regard to causation. Further there were no photographs, no contemporary notes and no parts were sent for analysis.

The Judge suggested there were two possible reasons for this, either (i) such documents did exist but have not been disclosed, or (ii) that there was a deliberate policy not to set out the cause in the documents and those instructed were prevailed on not to do so.

Against this background and on expert evidence the Judge found that the vessel was unseaworthy at the commencement of the voyage by reason of the condition of the SW cooling system and its dirty and partially blocked state, which led to a failure in the cooling system which manifested itself within 3 hours of sailing from Varna in the form of high temperatures in the luboil for the main engine. Further, the Owners had no system in place for the proper monitoring of temperatures in the engine luboil or pressures in the SW system. The system failure also indicated a failure to exercise due diligence.

The Condition of the Cargo

On the basis of the temperatures recorded in various sections of various holds at the load port, the Judge concluded that the process of fermentation was already taking place at the load port.

Upon opening the holds at the discharge port bad smells and high temperatures were noted. The Judge found that these findings were not inconsistent with the condition of the cargo found at the load port some two weeks or more earlier, but represented a worse condition.

The cargo was therefore segregated. The sound cargo was discharged first and taken to a silo. The damaged and partially damaged cargo was taken to a warehouse.

The Judge accepted CHS' position that although analysis revealed no toxins within the cargo and even though it was only destined to be used as animal feed, the visual appearance of the damaged cargo (black, discoloured, caked, mouldy etc) and malodorous smell meant that from commercial point of view CHS could not resell the cargo as sound, nor could they mix it with sound cargo to bring it within overall maximum moisture specifications because this would lead to rejection by customers and to dispute, with loss of reputation and business goodwill.

Further the Judge accepted the practical difficulties of admixing the damaged cargo with sound cargo. The only way to do this would have been as it came off the Vessel as it went onto conveyors and into the silos. Once it had been segregated, to attempt to transport the damaged cargo from the warehouse to the silo and re-mix with sound cargo therein was *"logistically difficult if not impossible to achieve, and if achievable, would have been excessively expensive".*

The Owners' criticisms of the salvage sale of the damaged cargo and the price achieved were also rejected. The Owners submitted that the whole process of salvage sale was unnecessary and that it arose from CHS' concern to recover its consequential losses in the shape of extra discharge costs, trucking costs, costs of segregation, storage, testing and analysis. It was suggested that CHS had sold the 3020 MT at an undervalue, maintaining to its cargo insurers and the vessel's P&I Insurers that its condition was much worse that it knew it to be. It was suggested also that the original idea was to deceive insurers recovering from them the consequential losses as a discount from the values of the cargo, as if the cargo damage itself gave rise to an equivalent loss of value whilst keeping the cargo itself and then selling it at market value for profit. In this regard the Judge held as follows:

"The notion that CHS were out to deceive insurers and to pretend that cargo was damaged when it was not makes no sense at all. CHS would always be able to claim for the consequential loss caused by the delayed voyage and the discharge /segregation / storage/ testing and analysis costs if there was any basis for the claim for physical damage as there clearly was (and if liability for unseaworthiness could be established). They had no need to claim consequential losses as physical cargo damage and every reason to maximise the sale price of the cargo to keep their losses down and to make recovery from cargo insurers/P&I insurers. I reject the idea of any conspiracy to maximise the loss to insurers whilst making a profit which would not be taken into account."

Interestingly for future cases along similar lines the Judge to a very pragmatic and practical approach to the suggestion that upon discharge too much sound cargo had been mixed with damaged cargo and said the following:

"...segregation of bulk corn cargoes was not easy, which is self evidently the case if discharge is done by means of grabs. Some good cargo will inevitably be taken out with the bad and since the aim is to ensure that all the damaged cargo is removed, it is likely that the segregators will err on the side of caution and that what will be removed is a mix of sound, suspect and damaged goods. Once parcels are separated from the main cargo in this way, apart from piles which can be seen to be obviously good, the balance cannot be seen as sound in itself".

As to the losses suffered by CHS the Judge accepted the following claims:

1. Sound arrived value less the salvage sale price, which properly reflected the value of the damaged cargo.

2. Additional stevedoring costs and warehouse costs paid in order to segregate the damaged cargo in the amount of €81,017.75. This comprises extra charges for the slow rate of discharge caused by the need to separate suspicious looking cargo and discharge it by crane into trucks instead of onto the elevator, the costs of transportation by truck into the warehouses (as opposed to the silo), and the rental for the two warehouses for a month.

3. The agents' charges for the salvage sales.

4. SGS charges for analysis etc.

5. Spanish lawyers fees for arresting the vessel in order to obtain security for the claim. In this regard the Judge said the following:

   "It was submitted by Owners that these were irrecoverable in principle, as the costs of foreign proceedings, by reference to the decision in The Ocean Dynamic [1982] 2 Lloyd's Rep 88 at p94. I do not accept this submission since the proceedings here were for security purposes and would fall to be decided alongside liability issues in these proceedings, unlike the protective writ with which Goff J, as he then was, had to deal. There is no substance in the argument that the arrest was premature and unnecessary. CHS were entitled to arrest the vessel to obtain security for their claim and until full investigation it could not be known what the extent of the claim was. Owners' P&I Club put up a negotiated Club letter in due course to obtain the release of the vessel. There is nothing unusual about that and the costs of arrest are a foreseeable and sufficiently direct consequence of the breach to be recoverable."

Ust-Kamenogorsk Hydropower Plant JSC (Appellant) v. AES Ust-Kamenogorsk Hydropower Plant LLP (Respondent) [2013] UKSC 35

Supreme Court: Lord Neuberger, Mance, Clarke, Sumption, Toulson LJJ

Lord Goldsmith QC and Sophie Lamb (instructed by Debevoise & Plimpton LLP) for the Appellant

Toby Landau QC and Jessica Wells (instructed by Allen & Overy LLP) for the Respondent

Facts

The Appellant ("JSC") was the owner and grantor of a concession to operate a hydroelectric plant in Kazakhstan. The Respondent ("AES") was the operator of the plant. The concession agreement was governed by Kazakhstan law, but it contained an arbitration clause governed by English law requiring the parties to submit to ICC arbitration in London. In a dispute between the two parties, JSC commenced proceedings in Kazakhstan.

AES issued proceedings before the English High Court claiming declarations that the arbitration clause was valid and enforceable and seeking an anti-suit injunction restraining JSC from pursuit of the proceedings in Kazakhstan.

Burton J at First Instance held that: (1) the English court had jurisdiction to grant an anti-suit injunction pursuant to section 37 of the Senior Court Act 1981 because the Claimant was relying upon a contractual right (ie the arbitration clause) not to be sued in foreign country; (2) the proceedings in Kazakhstan were in breach of the agreement; and (3) the English court was not required to recognise the judgment of the Kazakhstan court as it was in breach of the arbitration clause. This was confirmed by the Court of Appeal.

The order dated 16 April 2010 giving effect to Burton J's judgment declared that JSC "*cannot bring*" and "*is restrained from bringing ... the claim, the subject matter of the [Kazakhstan proceedings], or any other claim arising out of or in connection with any matter or thing in relation to the provisions of the Concession Agreement …., save only for [excepted matters], otherwise than by commencing arbitration proceedings in the International Chamber of Commerce in London and pursuant to its Rules."*

By its order dated 1 July 2011 giving effect to its judgment, the Court of Appeal simply dismissed the appeal against Burton J's order.

It is noteworthy that AES did not themselves intend to start arbitration proceedings.

The Decision of the Supreme Court

The issue on appeal to the Supreme Court was whether the English court has power to declare that the claim can only properly be brought in arbitration and/or to injunct the continuation or commencement of proceedings brought in any other forum outside the Brussels/Lugano regime.

AES relied upon section 37 Senior Courts Act which states that *"The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so"*.

Whilst couched in wide terms, it was common ground that the discretion under section 37 is not unfettered and only applies (a) where one party can show that the other party has invaded, or threatens to invade, a legal or equitable right of the former for the enforcement of which the latter is amenable to the jurisdiction of the court, and (b) where one party to any action has behaved, or threatens to behave, in a manner which is unconscionable.

JSC argued that the *"negative obligation"* (that is to say the obligation not to pursue proceedings in breach of an arbitration clause) only applies when an arbitration is on foot or proposed, whereas in this case AES had no intention of starting arbitration proceedings themselves.

The Supreme Court unanimously rejected this contention stating that *"the negative aspect of a London arbitration agreement is ... a right enforceable independently of the existence or imminence of any arbitral proceedings"*.

JSC's alternative argument was that the Arbitration Act contained *"a complete and workable set of rules for the determination of jurisdictional issues"*. The general rule is that the arbitral tribunal should consider jurisdictional issues in the first instance. Unless and until one or other party commences an arbitration, the Court should keep a distance. Any more general power contained in section 37 has been superseded by the Arbitration Act, or should at least no longer be exercised.

JSC essentially argued that the correct procedure should be for AES to commence arbitration, the arbitrators could rule on their own jurisdiction under section 30 of the Arbitration Act, their ruling could be tested under sections 32, 67 and/or 72 and in the meantime the Court could be asked to give interim relief under section 44.

The Supreme Court held that even if arbitration proceedings were commenced, the relief sought would be essentially the same (i.e. an anti-suit injunction) and the Court would be called upon to determine the Tribunal's jurisdiction and enforce the order. There was therefore *"every reason"* why the court should be able to intervene directly under section 37. To do so cannot be regarded intervening in the arbitral process and/or frustrating the choice the parties have made to use arbitration rather than litigation as the means for resolving their disputes. On the contrary, the Supreme Court found that in denying that the court has any relevant jurisdiction, JSC was seeking to benefit by AES's reliance on an arbitration agreement, while itself denying its existence.

The Supreme Court further held that section 44 of the Arbitration Act is not intended either to exclude or to duplicate the Court's general power to act under section 37 of the Senior Courts Act. Where an injunction is sought to restrain foreign proceedings in breach of an arbitration agreement - whether on an interim or a final basis and whether at a time when arbitral proceedings are or are not on foot or proposed - the source of the power to grant such an injunction is to be found not in section 44 of the Arbitration Act, but in section 37 of the Senior Courts Act. Such an injunction is not *"for the purposes of and in*

relation to arbitral proceedings", but for the purposes of and in relation to the negative promise contained in the arbitration agreement not to bring foreign proceedings, which applies and is enforceable regardless of whether or not arbitral proceedings are on foot or proposed.

The Supreme Court therefore concluded:

"In some cases where foreign proceedings are brought in breach of an arbitration clause or exclusive choice of court agreement, the appropriate course will be to leave it to the foreign court to recognise and enforce the parties' agreement on forum. But in the present case the foreign court has refused to do so, and done this on a basis which the English courts are not bound to recognise and on grounds which are unsustainable under English law which is accepted to govern the arbitration agreement. In these circumstances, there was every reason for the English courts to intervene to protect the prima facie right of AESUK to enforce the negative aspect of its arbitration agreement with JSC."

Thus the appeal was dismissed.

Versloot Dredging BV v HDI Gerling Industrie Verischerung AG and others [2013] EWHC 1666 (Comm)

High Court: The Honorable Mr Justice Popplewell

Chirag Karia QC and Tom Bird (instructed by Sach Solicitors) for the Claimants

Nigel Jacobs QC and Ben Gardner (instructed by Ince & Co) for the Defendants

Background

The "DC MERWESTONE" (the "Vessel") was insured for 12 months from 1 April 2009 under a policy which included the Institute Time Clauses – Hulls 1.10.83 ("ITC") and the Institute Additional Perils Clauses ("IAPC").

In January 2010 the Vessel called at Klaipeda, Lithuania, to discharge a cargo of soya meal and load a cargo of scrap metal. During this time, the weather was exceptionally cold and the hatch covers and gangways froze over with ice. In order to open the hatches, the Vessel's crew had to chip the ice off the hatch covers. They then used the Vessel's emergency fire pump to blast the chipped ice away. When the crew had finished using the emergency fire pump, they drained the deck lines, however, they did not drain the pump of seawater and they failed to close the sea valve. As a result, some seawater remained in the hose and its filter. Given the extremely low temperatures, the water in the pump froze and expanded, causing the casing to crack and the strainer lid to become distorted so that it no longer functioned as a seal. The crack and distortion caused an open space between the sea water outside the Vessel and the bowthruster space. While the Vessel remained in the port, no water entered through this open space because the ice had frozen and created a barrier. However, after the Vessel left the port, she entered warmer waters and the ice melted, allowing water to enter the bowthruster space. The main engine became submerged in water and the Vessel was rendered incapacitated while sailing off the coast of Poland en route to Bilboa, Spain.

The bowthruster room should have been able to withstand the ingress of water. The room is meant to be watertight and it is fitted with a bilge alarm which should normally alert the crew to an ingress of water in the engine room within sufficient time for the pumping system to be deployed by the crew. However, the bulkhead between the bowthruster space and the duct keel was not watertight, and therefore the water was able to ingress the duct keel tunnel. The duct keel tunnel should also have been watertight, however, it was not and, as a result, water was able to enter the engine room. The Vessel's engine room pumping system was also deficient, which prevented the crew from stemming the ingress of water.

Owners' Claim

The Owners brought a claim for €3.2 million under the H&M policy. The ITC covered damage to the Vessel caused by "*perils of the seas"* and *"negligence of Masters Officers Crew or Pilots"*. Further, the IAPC extended cover to *"loss or damage to the Vessel caused by any accident or by negligence, incompetence or error of judgment of any person whatsoever"*. This Clause was subject to the proviso that the loss or damage had *"not resulted from want of due diligence by the Assured, Owner or Manager"*.

The Owners main argument was that the proximate cause of the loss was the ingress of seawater into the bowthruster room. Such a loss was a peril of the sea pursuant to ITC Clause 6.1.1. The Owners also put forward the argument that coverage was available under ITC Clause 6.2.3 or IAPC Clause 1.2 on the grounds that the loss was caused by crew negligence in relation to the emergency fire pump, which was not the result of want of due diligence on the part of the Assured/Owners/Managers; and/or by contractors' negligence in failing to seal the duct keel at both ends, which did not result from want of due diligence by the Assured/Owners/Managers.

Underwriters' Defence

The underwriters denied all liability, arguing that the loss was not caused by a peril of the sea, but rather, by crew negligence through the crew's failure to drain the emergency fire pump and to close the sea valve. The underwriters further argued that the loss fell outside ITC Clause 6.2.3 and IAPC Clause 1.2 because the loss resulted from want of due diligence by Owners and/or Managers through their failure to make available appropriate cold weather procedures; to have in place a proper and effective system for testing and maintaining the bilge alarm system; to inspect and maintain the forward and aft bulkheads in the duct keel; and to have a fully functioning system for the maintenance of the bilge and ballast pumping system.

Alternatively, the underwriters argued that the Vessel was unseaworthy with privity of the owners as per section 39(5) of the Marine Insurance Act 1905; and finally that the claim was forfeit on the grounds that it was supported by fraudulent evidence given by the Owners when they presented the claim to underwriters in 2010 and 2011.

Held

Popplewell J held that that the loss was caused by a peril of the sea and therefore the Owners had a valid claim under the policy.

A peril of the sea is comprised of two elements:

1. a fortuity giving rise to an event which is not bound to happen; and

2. a fortuity which is *"of the seas"* (i.e. of a marine character).

Popplewell J found that the seawater ingress could be considered a fortuity since it arose from an unexpected incident and it could further be considered *"of the sea"* because the accident was specific to the maritime nature of the adventure (despite the underwriters argument that the events leading to the issue with the emergency pump could have happened on land).

As regards the underwriters' argument that the negligence provisions were rendered ineffective by the want of due diligence on the part of the Assured/Owners/Managers, Popplewell J found that although there was very little by way of cold weather guidelines and procedures available to assist the crew in times of extreme weather, there had not been a causative want of due diligence. The loss was therefore proximately caused by a peril of the sea.

Further, Popplewell J rejected the unseaworthiness claim. Under Section 39(5), where a Vessel is sent to sea in an unseaworthy state and the assured was privy to the unseaworthiness, the insurer is not liable for any loss arising out of the unseaworthiness. Underwriters submitted that the Owners were aware of the deficient condition of the engine room pumping system. Specifically, underwriters argued that Owners knew about the blockages in the bilge pipes and consequently requested that the ballast line be cut rather than connected to the bilge system while attempting to empty the water from the engine room. Popplewell J rejected this argument on the grounds that cutting the ballast lines was carried out in order to create a new source of suction given that the pumps were not functioning at full capacity. Popplewell J did not consider that he had seen sufficient evidence that the Owners knew about the blockages, nor did he consider that the blockages were causative of the loss.

In light of the above, Owners' claim for the cost of repairing the main engine was found to be recoverable in full since the loss had been caused by an insured peril under the H&M policy. However, the underwriters still had one defence available to them: the fraudulent device defence. This defence was successful and notwithstanding the fact that Owners had established a valid claim under the policy, the claim was entirely forfeited.

Underwriters' fraudulent device defence was that a crewmember had deliberately or recklessly given a false account of the casualty in a letter to underwriters' solicitors. The false account was to the effect that the crew had not investigated the bilge alarm that had sounded shortly after the ingress of water because the Vessel was rolling in heavy weather at the time. It later emerged that the bilge alarm had not sounded and therefore the explanation as to why the alarm had not been investigated was false. Popplewell J found that this evidence was false and misleading and that the particular crew member in question had no reason to believe it was true, and that he was reckless in his actions. He also found that the false account was intended to promote the claim.

Accordingly, Popplewell J rejected the Owners' claim. He expressed regret at having to do so since he considered that the Owners' fraudulent conduct was only mildly culpable. It was not a carefully orchestrated deceit, but rather a reckless untruth told on one occasion only and abandoned well before the case went to trial. Popplewell J considered that the forfeiture of the claim was disproportionally harsh in the circumstances and expressed the view that a more flexible test of materiality should be adopted which would permit the Court to consider whether it was just and proportionate to deprive an assured of his substantive rights in light of all of the circumstances of the case. However, as the law currently stands, Popplewell J did not feel he had any other choice than to reject the claim in full.

Appeal

This case illustrates the draconian effect of the fraudulent device principle. At the time of writing, it is understood that Popplewell J has given the Owners leave to appeal to the Court of Appeal on this point. It will be interesting to see whether the Court of Appeal upholds Popplewell J's decision or whether it will explore the alternative test Popplewell J advocated in his judgment. It is therefore likely that this topic will resurface in the near future.

Versloot Dredging BV v HDI Gerling Industrie Verischerung AG and others [2013] EWHC 581 (Comm)

High Court: Mr Justice Christopher Clarke

Chirag Karia QC (instructed by Sach Solicitors) for the Claimants

Nigel Jacobs QC (instructed by Ince & Co) for the Defendants

Background

The case concerns an application by the Owners of the "DC MERWESTONE" for an injunction requiring the defendant underwriters and their solicitors to withdraw their instruction and/or request and/or encouragement to a Han Gravendeel of Doldrums not to talk to and/or provide evidence and/or information to the claimants' solicitors outside the presence of the defendants' solicitors, and to restrain them from inducing or encouraging Han Gravendeel not to talk to or provide information and evidence to the claimants outside the presence of the defendants' solicitors.

Mr Han Gravendeel is a surveyor engaged by brokers, on behalf of the defendant underwriters, to determine the cause of the casualty and the extent of the loss. He attended at two ports and during permanent repairs and interviewed the crew, surveyed the Vessel, reported to underwriters, reviewed repair options and attended meetings at the claimants' offices. He also carried out tests on parts of the ship and liaised with average adjusters and issued a detailed report to underwriters.

The claimants had no surveyors themselves, but they had unfettered access to Han Gravendeel and his report had been disclosed to the claimants.

The defendants served a very short statement from Mr Gravendeel accompanied by a Civil Evidence Act notice, saying that he may not be called at trial because he was beyond the seas and was not compellable to attend (save by the time the matter come to a hearing it was apparent he would attend the eventual trial and be available for cross examination).

The background correspondence to the application is that Jim Cashman (Sach Solicitors) contacted Hans Gravendeel with a view to discussing the matter. Hans Gravendeel took instructions from Paul Billowes (Ince & Co LLP) who suggested it would be inappropriate for such a meeting to take place because he had provided not only factual evidence but also technical evidence, this being a reference to the fact that Hans Gravendeel had been involved in discussions with Ince & Co and the defendants' expert as the case developed after his original report, as well as giving technical advice at the time of the original casualty. Ince adopted the position that if Jim Cashman had factual questions to put to the witness then he should address them to Ince & Co. They later also offered a face to face meeting if they were also present. Sach Solicitors/Versloot Dredging then made the application for relief to the High Court.

Prior to the hearing there was further correspondence which the Judge summarised as follows: *"Ince & Co wrote to Sach Solicitors again offering a further alternative solution. The solution was that they would take the defendants' instructions as to whether they were prepared to indicate to Hans Gravendeel that he*

might meet with Sach Solicitors to be interviewed ahead of the trial without Ince & Co being present if Sach Solicitors gave an undertaking that they would not trespass into matters that might be subject to confidentiality or privilege in any interview or other communication with Mr Gravendeel, and if they agreed to provide a full note or, better, a recording of any interview with Mr Gravendeel and any correspondence with him. The initial response to that message was that Sach would seek their client's instructions in respect of the undertaking if the defendants paid the costs of their application, but would not in any event record the interview, or provide a note of it.

Accordingly, Ince & Co have in turn offered, firstly, that the claimants should provide a list of questions of fact for Mr Gravendeel to answer to them; secondly, that they would invite Mr Gravendeel to attend at trial in order that he could be cross-examined – something which they referred to in their letter of 10 January; thirdly, that he should be questioned in their presence; and fourthly, that he should be questioned without them being present against an undertaking with a note or preferably a transcript. An undertaking has been offered by Mr Cashman today that in any interview he would not ask questions about any communications between Mr Gravendeel and underwriters or Ince & Co from the time that the litigation was contemplated upon the basis that any privileged material would form part of those communications. No method of procedure has been agreed. In particular, Sach & Co are unwilling for there to be a recording or a transcript of any interview upon the footing that that may discomfort the witness and preclude him from giving full evidence to them."

The Judge summarised the claimant's case as being that they are entitled to free and unimpeded access to Hans Gravendeel, and that they are entitled to ask him questions without Ince & Co being there, not least because, if Ince & Co are there, they will or may learn from the questions something of the claimants' thinking about the case which would be privileged. They say that any attempt to prevent them from enjoying such access is a contempt. They rely upon the oft-cited proposition that there is no property in a witness, and they submit that the court need not be concerned about any breach of confidence or privilege because of the undertaking offered by Jim Cashman not to trespass into those areas in any interview.

Judgment

In the face of the above impasse Mr Justice Christopher Clarke had to decide what access Sach Solicitors and their clients were entitled to the witness.

The Judge noted the statement that there was no property in a witness but said this did not determine the course of action that the court should take and it was also necessary to consider questions of confidence, privilege, the position of the witness himself, and the impact of the Civil Procedure Rules. Not least as Hans Gravendeel was in possession of information which was the subject of obligations of confidentiality towards the defendants. Further given he attended meetings with the defendants, the defendants' experts and Ince & Co, he will have been privy to "*privileged trains of enquiry and thought processes*" which attract litigation privilege.

The Judge noted that the fact that there is no property in a witness undoubtedly means that party A cannot prevent party B from calling as a witness at trial (under subpoena if necessary) someone from whom A obtained a statement or whom he intended to call himself. A has no right to have the witness to himself,

or for no one else to have him. Further, a witness, once called, may be required to give evidence, if it is relevant, which would otherwise be confidential to A.

However pre trial the Judge considered that:

1. The decision whether or not to cooperate with a party to whom no relevant contractual or fiduciary obligations are owed is that of the witness in question. Absent a subpoena or other compulsory process, a witness cannot be compelled to provide assistance and information. He may make his own choice.

1. Second, the *"no property in a witness"* rule means that, in cases where no question of breach of confidence arises, a solicitor commits no impropriety simply because he seeks information and takes a statement from a witness, even though that witness has given a statement to the other side. He must not, of course, tamper with evidence or threaten or intimidate the witness or suborn him, but that is a different matter.

2. The fact that a witness could at trial be compelled to reveal confidential information does not mean that he is entitled to do so before trial.

3. Neither before nor at trial is a witness entitled to reveal information which is legally privileged unless there has been a waiver, or unless one of the relevant exceptions applies.

4. It cannot be a contempt of court for a party to whom obligations of confidence are owed, or who is the beneficiary of legal privilege, to tell a witness that he may not reveal information which is truly confidential or privileged.

On the facts of the case the Judge noted that the defendants were not seeking to interfere with the identification of a witness, or preventing a witness from giving evidence at trial. In addition Hans Gravendeel has, in effect, been tendered for cross-examination, so he will be available at court.

The Judge reviewed the cases referenced by the claimant and though he considered they were different to the situation in this matter he believed they embodied a general principle that it may be a contempt of court to interfere with attempts to interview a potential witness, or to prohibit the other side from getting the facts from him. Whether or not there is a contempt depends on whether the interference is improper. If it is, it does not cease to be so because the witness in question is scheduled to appear at the trial at the behest of the opposing party and may be subject to cross-examination thereat.

The Judge therefore rejected the assertion by the underwriters that it was an answer in the present case to the claimants' application to say evidence from Hans Gravendeel will be available at trial. This is because improper interference with access to a witness may mean that, although the witness is called at trial, the entirety of the evidence that he could give is not in fact elicited, because it has not been elicited by the party who called him, and because the opposing party was not aware, or not fully aware, that that witness had such evidence to give, with the result that the best evidence is not available to the court.

The Judge said whether this is the case will depend on the facts of each case and it is not possible to be prescriptive as to what circumstances will, and what circumstances will not, constitute improper interference. He did however state that some matters can, however, be specified including that threats or promises made in order to persuade a witness to decline to be interviewed would be improper. But a solicitor for party A is entitled to raise legitimate concerns about questions of confidence and privilege, and indeed to tell a witness for party A, who may be about to be interviewed by the solicitor for party B, that he is not at liberty to break any confidence that he owes to party A or to reveal privileged information in respect of which party A alone can give a waiver. What a solicitor is not entitled to do, or indeed a party, is to order or instruct a witness or a potential witness not to attend an interview with the opposing solicitor or to tell him that he has no real choice in the matter, or to put pressure on him not to comply. Nor must he make it appear that the witness can only be interviewed if the solicitor or his principal consents.

The Judge concluded that:

"I have come to the conclusion that it is not appropriate or necessary to grant injunctive relief against the defendants on the grounds that they are acting, or are likely to continue acting, in an unlawful way. The high-water mark of the case for the claimants is contained in Mr Billowes' email of 24 October to Mr Gravendeel, where he referred to "your instructions not to discuss the matter with him [Mr Cashman]". Those words may have been somewhat ill-chosen. The context was the distinction that was made between technical advice and purely factual matters and to the view taken by Ince & Co that it was wholly inappropriate for there to be discussion in relation to the technical advice which had been given, the nature of that advice being that it, or at least some of it, had occurred in a privileged context".

Further, in any event the Judge did not think there is a prospect of unlawful behavior in the future on the part of the defendants or their solicitors which justifies injunctive relief. As he explained matters have *"moved on"* since the early e-mail correspondence.

Effect of the CPR

As a footnote the Judge rejected a further submission by Nigel Jacobs QC for the underwriters that once a witness statement has been served on a party in litigation, any rights that the opposing party may have in relation to that witness are governed by the CPR. Under CPR 32.5 and there was a proper and regulated procedure whereby a party can cross-examine a witness at trial under the *"protection"* of the Judge and the party on whose behalf he is called, which makes it inappropriate to allow *"advance cross-examination"* by permitting an interview pre trial. The Judge rejected this argument noting that the CPR is a procedural code which lays down rules for the production of witness statements for use at trial and that it cannot be treated as the sole source of rights and obligations in respect of witnesses and the taking of their statements from the moment that a statement of the witness in question has been served. Those rights and obligations are or are not must be governed by the law relating to confidence, privilege and contempt.

Guidance offered to the witness/for the interview

The Judge offered the following guidance to the witness:

QUOTE

26. Mr Gravendeel is (subject to the qualification that I shall mention) free to give evidence to, and to be interviewed by, Sachs Solicitors, and Mr Cashman in particular. If he is so interviewed, he does nothing wrong in allowing that to happen. The qualification is that he is not at liberty to reveal confidential or privileged information in relation to which he owes duties to the defendants. Such information is likely to be information that has been communicated to him, or by him, in communications between him and the defendant insurers and their experts and their solicitors. However, if he has factual evidence to give of what he saw or witnessed, he is not precluded from informing Mr Cashman of that fact simply because he has also told Ince & Co or the defendants of the same fact. Nor, if he has a technical opinion, is he precluded form expressing a technical opinion, because he may also have expressed it to the defendants or Ince & Co. What he is precluded from revealing are the confidential exchanges between the defendants and their advisors and himself.

27. Whether or not Mr Gravendeel is interviewed is something for him to decide. In that respect, he has a free choice. He should not regard himself as being under any instruction not to be interviewed, nor does he require the consent of the defendants or Ince & Co in order that he may be interviewed. If he attends such an interview, it is common ground that he can take notes of the interview if he wishes, and can reveal them to Ince & Co and the defendants.

28. There is a dispute as to whether, if he attends such an interview, he should have his evidence recorded or the subject of a transcript. As to that, whether or not he wishes there to be a recording or a transcript available to all parties is a matter, in the first instance, for him to decide. If he wants either of those, he will no doubt seek to agree that with Sach/Mr Cashman. If that is agreed, all well and good. If that is not acceptable, then it will be for him to decide whether or not he is prepared to be interviewed in circumstances where there is no recording and no transcript. It would not be lawful for the defendants or their solicitors to put pressure on him as to what course he should take. Nor should he feel himself to be under any such pressure. Nor would it be lawful to penalise him in any way for taking whatever course it is that he decides to take. I do not intend by that to indicate that it is not open to the defendants or their solicitors to express a point of view or a preference, but it must not amount to pressure, it must not indicate that their consent is required, and it must be apparent that the choice is, as I have said, a free choice, and that the choice is his. He will, I am sure, understand that the effect of being interviewed may result in his being called as a witness by the claimants, which they are perfectly entitled to do, or that he may be asked in cross-examination on behalf of the claimants, if he is called by the defendants, questions which are, in whole or in part, derived from what he has said when interviewed by Mr Cashman. In the nature of things, it is also possible that if he declines to be interviewed by Mr Cashman, he may be asked why that is so.

UNQUOTE

Versloot Dredging BV v HDI Gerling Industrie Verischerung AG and others [2013] EWHC 1667 (Comm)

High Court: The Honorable Mr Justice Popplewell

Chirag Karia QC and Tom Bird (instructed by Sach Solicitors) for the Claimants

Nigel Jacobs QC and Ben Gardner (instructed by Ince & Co) for the Defendants

Background

This judgment involved an application by the defendant underwriters for permission to re-re-amend their defence submissions. The draft re-re-amended defence submissions were served on the claimant Owners of the "DC MERWESTONE" on 20 March 2013. This was the day before final oral submissions were to be heard in respect of the substantive dispute between the parties (see above) .

The draft re-re-amended defence submissions raised a new allegation of non-disclosure in relation to the Captain's failings to properly implement a safety management system. The underwriters argued, when serving the draft, that they had only been in a position to draft these amended pleadings following oral evidence heard in the substantive hearing during the week of 4 March 2013, well over a week before the draft pleading was eventually served. The suggestion by the underwriters was that this application to re-re-amend the defence submissions should wait until the court's judgment on the substantive case.

The Judge was not content with this proposal, and arranged for further time to be made available on Wednesday 27 March 2103 with skeletons to be exchanged in advance. When skeleton arguments were served by the Underwriters on Monday 25 March 2013 they had recast their re-re-amended defence submissions yet again. The Judge noted that this second version of the re-re-amended defence submissions differed from the first in a number of key respects:

1. It relied on actual knowledge, and not on constructive knowledge;

2. It removed references to the Captain and referred generically to the officers and crew of the vessel;

3. It characterised the failure as an endemic and long-term failure which the claimants and/or managers themselves considered to be a long-term problem;

4. It gave some detail, albeit by way of example rather than definition of the particular documentary failings which had been relied upon.

Judgments

The Judge cited the case of *Brown v Innovatorone Plc [2011] EWHC 3221* when identifying the relevant principles for allowing an application to amend submissions.

When applying these principles, the Judge noted that the defendants had given no explanation for the delay between the oral evidence which they say gave rise to the re-re-amended defence submissions and their actual service. This was a period of some 14 days. The Judge went on to note that even prior to this oral evidence being given, the underwriters were in a position to advance a non-disclosure argument in relation to the implementation of the safety management system on board. He said that this was possible following the expert report of Mr MacFarlane dated 11 February 2013 and his subsequent evidence at the trial. He said the oral evidence that was heard that the defendants seek to rely upon was *"merely colour"* in relation to a state of affairs which the underwriters could have alleged from a time well before the beginning of the trial. He went on to note that the prejudice to the underwriters if the amendments were refused was very small, unless his decision on the substantive merits of the case in which he had found in favour of the underwriters was overturned on appeal. Even then, he noted that the degree of prejudice depends on the strength of the new non-disclosure defence in respect of which there is a serious debate.

On the other hand, the noted that the prejudice to the owners in the allowing the re re amended defence submissions was very significant. It would necessitate a three or four day hearing, further pleadings, further disclosure, and further witness statements. The Judge estimated that it would not have been ready for determination before June 2013, and it is quite possible that it would have been delayed till 2014. This would have deprived the Owners of a judgment on their claim until the end of 2013 or well into 2014. This ongoing delay would have given rise to a real risk that the owners would have been unable to survive as a going concern, given that their only asset was the vessel which was the subject of the insurance contract.

Lastly, the form of the amendment was found to be unsatisfactory and lacked particularisation of documentary failings. On this basis alone, it would require further refinement before it could be properly allowed or its full ramifications could be assessed.

On the basis of this analysis, the Judge held that this was a very late amendment, and that the underwriters had failed to discharge the heavy burden upon them to justify allowing it in circumstances where the prejudice to the owners would be substantial.

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