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Collision security – what is reasonable?

*The Court of Appeal has overturned the decision of the High Court in M/V Pacific Pearl Co Limited v Osios David Shipping in favour of the Appellants, who had offered security in the form of a Club LOU which was rejected by the Respondents because of the inclusion of a sanctions clause. Review by **Keeley Edmondson**, Associate at CJC.*

The facts

The PANAMAX ALEXANDER, SAKIZAYA KALON and OSIOS DAVID had collided in the Suez Canal on 15 July 2018. Their respective P&I Clubs, which were members of the International Group of P&I Clubs, immediately sought to agree jurisdiction and security for the claims arising out of the incident.

The owners of PANAMAX ALEXANDER (the **"Appellants"**) and the owners of OSIOS DAVID (the **"Respondents"**) entered into a bipartite Collision Jurisdiction Agreement (the **"CJA"**) on standard ASG2 terms, with the assistance of their P&I Clubs, which was signed on 16 August. As is the ordinary course of entering into such an agreement, the claims were to be determined by the English courts in accordance with English law, and each party was to provide security in a form reasonably satisfactory to the other.

Discussions proceeded as to the exchange of security between the parties. However, on 5 September 2018, an associated ship of the Appellant was arrested for security by the Respondent in South Africa.

The Appellant's P&I Club subsequently offered a draft LOU on 7 September which it was willing to provide and was based on the standard ASG 1 wording, save for the fact it also included a 'sanctions clause' which relieved the Club from its obligations under the LOU if it would be in breach of sanctions regulations, but also if any bank in the payment chain was unwilling to process the payment (whether rightly or wrongly).

It was the voyage history of the PANAMAX ALEXANDER which prompted the inclusion of the sanctions clause, as it had been on a voyage to Iran and the US had recently announced the re-introduction of sanctions on Iran.

The Respondents' concern was that the LOU would ultimately become worthless if the sanctions clause was included, and therefore the LOU was rejected and they refused to release the arrested vessel in South Africa unless security without the sanctions clause was provided.

This was provided by the UK Club (with whom the arrested ship was entered) a few days later.

The Appellant's P&I Club later repeated its offer of the LOU with the sanctions clause but this time supported by a guarantee from HSBC. This offer was not accepted.

Proceedings in the High Court

The Appellant commenced proceedings shortly after the rejection of their last offer and sought damages for breach of the CJA.

There were two issues for consideration in this claim:

1. Whether the LOU offered by the Appellant was in a form 'reasonably satisfactory' to the Respondents (notwithstanding that it contained a sanctions clause); and

2. Whether, if the LOU was in a reasonably satisfactory form, the Respondents were contractually obliged by the CJA to accept it.

The High Court focused on issue 1 and the Judge held that an objective test should be applied, assessed with reference to the position of a reasonable person in the position of the proposed recipient. He went on further to say that the sanctions clause itself was not an issue as its purpose was to suspend the liability to pay, not to terminate the LOU. The LOU was therefore in a reasonably satisfactory form.

As to the second point, the Judge rejected such an obligation in the simple manner of *"there are no words in clause C capable of bearing the suggested construction"*. In other words, there were no words in the LOU which explicitly obliged the recipient to accept the LOU.

The appeal

In summary, the appeal was allowed, and it was held that (i) the LOU was in a 'reasonably satisfactory' form; and (ii) the Respondent was obliged to accept the security offered and was in breach of the CJA for not doing so.

The Court held that it was clear that where parties enter into an agreement on the terms of ASG 2, they agree that where reasonable security pursuant to clause C is offered by one party, then the other cannot seek alternative or better security by way of arrest. If a ship has been arrested, it must be released on receipt of reasonable security.

The Court concluded that the effect of the wording of ASG 2 is to transfer jurisdiction in respect of a security dispute from a foreign court where a ship has been arrested, to the English courts. Once reasonable security has been provided, then there is no justification for an arrest.

Alternatively, the Court also concluded that a term would be implied that a party who was offered reasonable security would accept within a reasonable amount of time, as it was necessary for business efficacy. Without such an implied term, the objective of a CJA on ASG 2 wording would not be achieved.

The Respondent's notice

The Respondent had taken issue with the High Court Judge's conclusion that the LOU was in a satisfactory form. They argue that (i) the wording of the LOU should have been for the Club to use 'best endeavours' rather than 'reasonable endeavours' to obtain permission for payment; and (ii) that too much weight was given to the fact that the LOU was to be provided by a reputable P&I Club.

The Court, however, declined to interfere with the conclusion reached by the first instance Judge. This this was reached after an analysis of the LOU terms and the identity of the Club who was to provide it.

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