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NEIL JACKSON | OCTOBER 2023

Owner cleans up during hull cleaning

In Smart Gain Shipping Co. Ltd v Langlois Enterprises Ltd ("Globe Danae") [2023] EWHC 1683 (Comm) the High Court held that the owners were entitled to the charterparty rate of hire for time spent cleaning the vessel's hull after redelivery, as a claim in debt. The Court rejected the charterers' argument that the owners' claim was confined to damages for breach of charterparty. Neil Jackson provides the details.

The facts

Globe Danae was chartered for one time charter trip via the east coast of India to Brazil. Upon arrival in Brazil the cargo was rejected by the receivers, resulting in the vessel remaining idle in tropical waters for 42 days in laden condition during which time the hull became fouled. The cargo was eventually discharged and the vessel was redelivered to the owners. The owners arranged underwater cleaning at another port in Brazil where the vessel was subsequently delivered into her next fixture.

The charterparty was on an amended NYPE form. Rider clause 86 provided that if the vessel remained idle in tropical waters for more than 25 days, *"... underwater cleaning of hull including propeller etc. to be done at first workable opportunity and always at Charterers' time and expense. ..."*.

The dispute

The charterers admitted that the cleaning expenses were for their account. The owners claimed an additional USD 74,506.70 for the 2.29 days' cleaning time, this being the equivalent of hire at the charterparty rate. The charterers argued that their obligation to clean the hull ended upon redelivery, but the owners were entitled to damages to put them into the same position as if there had been no need to clean. That would require the owners to prove that they had suffered a loss of hire during cleaning.

The point of law for the High Court to decide was as follows:

> *"If a clause in a time charterparty provides for underwater cleaning will be done at the charterers' time, does that provision give rise to a claim in debt (so that if the owners undertake cleaning after redelivery, they can claim for the cleaning time even if they have not suffered a loss of time)?"*

The Court upheld the arbitration tribunal's decision that the owners had a claim in debt for a sum equivalent to hire at the charterparty rate, not damages, for the time spent cleaning the hull. It was not necessary for the owners to show there had been a loss of time.

Rider clause 86 did not confine the "*first workable opportunity*" to whilst the vessel was still in charterers' service. Cleaning was to be done "*always*" in the charterers' time, so the owners were entitled to the charterparty rate of hire regardless of whether cleaning took place before or after redelivery.

The Court noted that the charterparty contained provisions stating that some things were to be in "*charterers' time*", and others where the phrase "*loss of time*" was used instead. Therefore, the parties must have intended a distinction between the two. The consequence of that distinction was that where something was to be done in "*charterers' time*", the owners' claim would be in debt. By contrast, if the words "*loss of time*" were used, then a loss of time would have to be proved.

Commentary

This decision will likely be welcomed by any owners in a charterparty that states that hull cleaning is to be done in "*charterers' time*". The main practical advantage is that the owners will not be required to prove a loss during the cleaning time, which avoids the need to argue over (and potentially have to adduce expert evidence on) the market rate of hire post-redelivery. This should simplify the process of presenting and progressing claims of this nature.

Further, subject to a review of the charterparty in question this wording may well apply to other instances where an owner is left having to perform some task that ought to have been done by the charterers, whether that be hull cleaning, repairing stevedore damage, or something else, so long as the task in question is to be performed in "*charterers' time*".

However, this may not always be good news for owners. In a rising market, if by the time cleaning takes place the market rate of hire is higher than the charterparty rate, then the owners may have preferred to claim in damages.

Subject to the above proviso, the judgment is likely to be less welcomed by charterers. The Court attributed little significance to the charterers' point that, if cleaning took place whilst on-hire under the vessel's next employment, the owners could receive a windfall in the form of double hire (which, to us, seems an entirely possible prospect). The Court's view was that an owner would likely postpone the next fixture until the hull is cleaned, in order to avoid being in breach of warranty.

However, the judgment does not address the fact that in many cases, this may not be possible. For example, the cancelling date under the next fixture may not allow sufficient time for cleaning to take place. Some ports do not permit underwater cleaning and/or do not have the necessary facilities. Also, underwater cleaning in between fixtures whilst in ballast condition often cannot remove all fouling that accrued whilst laden, because some parts of the vessel's sides will not be accessible.

For further information, please contact:

Neil Jackson
Managing Associate
Neilj@cjclaw.com

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