



## Owners left 'on the hook' for demurrage

Successful appeal against the first instance decision in *K Line Pte Limited v Priminds Shipping (HK) Co Limited (The Eternal Bliss)*, which previously offered hope for ship owners facing cargo claims following extensive periods of delay, writes [Alexandra Bailey](#), Senior Claims Manager at CJC.

On 18 November 2021, the English Commercial Court of Appeal reversed the decision of the English High Court principally because most *dicta* (passing remarks made by a court in reaching its judgment) was in favour of the Charterers' position that demurrage should cover all consequences of delays in cargo operations. We recap on the facts and progress of the case to date, and how it may impact on contracts with a demurrage provision.

### The Facts

Owners K-Line (the “**Owners**”) and charterers Priminds (the “**Charterers**”) entered into a contract of affreightment for 9 separate voyages, each to be performed by vessels nominated by the Owners. The contract was based on an amended North American Grain Charterparty. One laycan per month would take place over a 9-month period (February – October 2015) with bespoke provisions for each voyage, therefore creating 9 individual voyage charters.

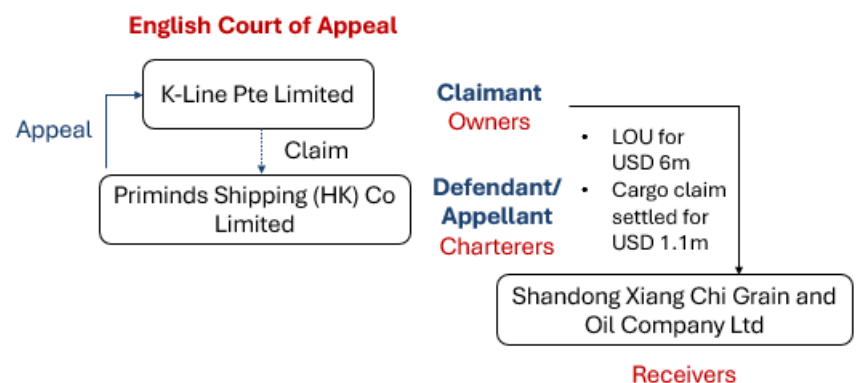
The dry bulk carrier ETERNAL BLISS (the “**Vessel**”) was nominated by the Owners to perform one of the above voyages. The Vessel duly loaded 70,133 mt. of soya beans at Tubarao, Brazil and proceeded to Longkou, China for discharge. Due to port congestion and a lack of storage space ashore, the Vessel remained at anchor for 31 days. When the Vessel was finally able to berth for discharge, the cargo is said to have exhibited significant moulding and caking throughout the stow of most of the cargo holds. The condition of the cargo had deteriorated because of the prolonged period of the Vessel at anchor. Consequently the Owners were forced to provide the cargo receivers with a letter of undertaking for US\$6 million to avoid the arrest and detention of the Vessel at Longkou. The cargo receivers finally accepted US\$1.1 million from the Owners in settlement of their claim.

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### High Court proceedings

Since the Owners' claim against the Charterers was not caused by any separate breach of charter, the parties agreed that the question of law as to whether the Owners' claim could be recoverable in addition



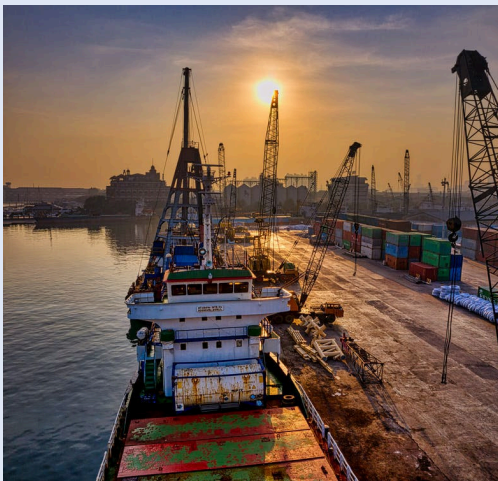
to demurrage, the only identifiable breach of charter, should be determined by the Court as a preliminary issue. The answer to this question of law principally turned on a) what is it that demurrage liquidates? and b) what does the law consider is covered by the demurrage rate? As with most demurrage clauses, the Norgrain demurrage clause neither defined what demurrage was, nor specified that demurrage was the remedy for all and any breach of the laytime allowance.

Owners' position	Charterers' position
<p>The Owners submitted that they were not claiming damages for detention because their liability for the cargo damage claim was unrelated to the loss of use of the ship as a freight-earning vessel. Instead, they were claiming damages for the retention of the cargo on board the Vessel, giving rise to the loss. While this was a by-product of the delay to the ship it was a different kind of loss.</p>	<p>The Charterers submitted that the Owners' claim was still only a claim for detention of the Vessel because the deterioration of the cargo and the consequent loss and expense all resulted from the Vessel being delayed at Longkou beyond its laydays.</p>

### The Court's position

Baker J did not think that Charterers' position was quite right because it placed them at odds with the judgment in the Court of Appeal decision in *Reidar v Arcos*. In that case "if being a result of delay to the ship beyond the laydays meant a loss could not be recovered separately from or additionally to demurrage, the decision in the *Reidar v Arcos* would have gone the other way". The consulted case law also leaned towards the only nature of demurrage being that "it serves to liquidate loss of earnings resulting from delay to the ship through failure to complete loading or discharging within the laytime allowed by the charter".

Charterers' trump card though was the case of *The Bonde*. That case involved a contract of sale rather than a charterparty, where the buyer claimed for an increase in the price it had to pay for the cargo following a delay in loading of the cargo i.e., a harm separate from and different in kind to the detention of a ship. Potter J decided in *The Bonde* that the Buyer could not recover damages beyond demurrage because the only breach by the seller had been the failure to load at the contractual rate.



However, Baker J at first instance considered it appropriate to depart from *The Bonde* and answered the question of law in this case in the affirmative: Owners were entitled to recover damages for their indemnity claim from cargo receivers, in addition to demurrage as they were able to establish a separate loss arising out of the failure to discharge the cargo within the permitted time.

### Court of Appeal proceedings

Males LJ did not accept Baker J's judgment in the High Court for the following reasons:

1. While it is possible for contracting parties to agree that a liquidated damages clause should liquidate only some of the losses arising from a particular breach, such an agreement would be unusual and surprising.
2. The loss of prospective freight earnings is likely to be one factor considered in the negotiation of the demurrage rate by the contracting parties, but not the only factor.
3. To consider the demurrage rate only to cover the loss of prospective freight earnings is too narrow an interpretation.
4. Liability for cargo claims is a risk insured against by a ship owner. Whereas a charterer will not typically have insurance against liability for delays arising from a failure to complete cargo

operations within the laytime allowance. Therefore, Owners' interpretation of what the demurrage rate covers disturbs the balance of risk inherent in the parties' contract.

5. *The Bonde* judgment has stood for 30 years without apparently causing any dissatisfaction in the market, and the criticism of this judgment by the High Court is not accepted.
6. Allowing the appeal provides clarity and certainty to the market.

The Court held that demurrage liquidates all types of loss arising from the Charterers' failure to complete cargo operations within the contractually permitted time.

### **CJC Perspective**

1. The decision by the Court of Appeal will bring dismay to Owners K-Line and to owners who are exposed to bearing the consequences of local delays or market fluctuations beyond their control, e.g. for cargo claims, unexpected port or bunker costs, increased crew costs or hull fouling expenses etc. Unless owners can establish a separate breach of contract, the demurrage rate will be the exclusive remedy for all losses arising out of charterers' failure to complete cargo operations within laytime and owners cannot claim anything further for the delays.
2. This case has highlighted Owners' exposure to such delays, and it would not be unreasonable for Owners to consider including contractual clauses stating that demurrage only covers certain stated categories of loss. Indeed, at paragraph 59 of the Court of Appeal judgment, Males LJ suggests the same. While this may not be as necessary if Owners are successful before the Supreme Court (watch this space), including such a clause may help owners avoid being left "on the hook" for such unexpected delays, and also assist both owners and charterers in avoiding expensive disputes after the event.

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