Campbell Johnston Clark

Quarterly Case Update

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CONTENTS

Mitsui & Co Ltd & others v Beteiligungsgesellschaft LPG Tankerflotte MBH & Co KG & anor, ("The Longchamp") [2017] UKSC 86.

This case was an appeal from the Court of Appeal. Sitting in the Supreme Court were Lords Neuberger, Mance, Clark, Sumption and Hodge. The leading judgment was given by Lord Neuberger, with Lord Mance giving the only dissenting judgment.

The case concerned General Average, and the issue in dispute was the application of Rule F but also relevant were Rules A and C.

Rule A states

"There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure."

Rule C states

"Only such losses, damages or expenses which are the direct consequence of the general average act shall be allowed as general average. Loss or damage sustained by the ship or cargo through delay,

whether on the voyage or subsequently, such as demurrage, and any indirect loss whatsoever, such as loss of market, shall not be admitted as general average."

Rule F states

"Any extra expense incurred in place of another expense which would have been allowable as general average shall be deemed to be general average and so allowed without regard to the saving, if any, to other interests, but only up to the amount of the general average expense avoided."

The facts are of this case are well known, but by way of summary the MV Longchamp was boarded by pirates when transiting the Gulf of Aden in 2009. She was carrying a cargo of Vinyl Chloride Monomar. The bill of lading to which the cargo was carried under stated that "General Average, if any, shall be settled in accordance with the York Antwerp Rules 1974".

Initially the pirates demanded a ransom of US$6 million. However, over a period of 51 days this was negotiated down to about US$1.85 million. The ransom which was eventually paid of US$1.85 million was allowed under Rule A. What was disputed were those costs incurred during the 51 day period of negotiation for about US$160,000. These included (1) Crew wages (2) High risk area bonus (3) Crew maintenance and (4) Bunkers.

The adjuster said that these expenses were allowable under Rule F, because they allowed an amount of US$4,150,000 to be saved in common interest of all the property owners. Of course, the basis on which General Average works is that loss and expenditure incurred, as a direct result of trying to preserve a common maritime adventure, the resulting cost is shared equally between those whose property is at risk.

The Supreme Court decided that these costs of US$160,000 were allowable under Rule F.

Rule F permits expenses which are not qualifying under the Rules, to qualify as a General Average expense, but are capped *'only up to the amount of the general average expense avoided'*. The wording of Rule F reflects this by saying "*Any extra expense incurred in place of another expense which would have been allowable as general average shall be deemed to be general average"*.

The Court was mostly concerned with two propositions put forward by cargo interests as to why the amount of US$160,000 should not be allowed. The first was that the ransom saved was not "allowable". The second that the ransom saved was not "another expense".

In relation to the **first** point, Cargo interests' argument was that it would not have been reasonable to pay the initial ransom demand – i.e. it would not have been reasonably incurred within Rule A or therefore, as an expense which would have been allowable under Rule F.

Lord Neuberger's reasoning differed from that of the COA, and stated that the meaning of "an expense which would have been allowable" is to

an expense of a nature which would have been allowable. He also noted that Rule F was not concerned with quantum as such, because the wording of Rule F contained a cap in the last sentence.

He found that the US$160,000 fell within Rule F. That amount was incurred in order to avoid paying a ransom of US$6 million and in fact reduced it by just over US$4 million, and therefore, the US$160,000 was recoverable under Rule F. The US$6 million would have been an allowable expense in principle, and because of that the US$160,000 was allowable within Rule F.

Was the reduction an "alternative court of action"?

Cargo said that the reduced ransom was not an alternative course of action. They said that expense incurred to achieve the result, has to involve replacing that allowable item with a *different* cheaper item. The Court of Appeal recognised two leading texts on General Average support this point.

The traditional view of these "extra expenses" or "substituted expenses" can be seen in leading texts as Lowndes & Rudolf and Hudson & Harvey. Lowndes & Rudolf refers to an "alternative expense" or those in "substitution". Hudson & Harvey states that when incurring the expenses there is a choice between two different courses of action.

However, Lord Neuberger found that even with this common view and industry practice that it was not right in Law, and as he said, sometimes these types of points are tested in a Court and do not stand up to scrutiny. Lord Neuberger found that incurring the US$160,000 to save over US$4 million was an alternative course of action – the operating expenses were incurred to avoid paying a larger ransom.

Lord Neuberger dealt with Cargo interest's other arguments as well. With regards to the point that the expenses must have been incurred "consciously and intentionally" Lord Neuberger said that the further expenses were incurred in the place of a larger ransom – so this argument was rejected. As to the US$160,000 not being an "extra expense", the word "extra" would not be given a restrictive meaning. Cargo also argued that the delay may have occurred anyway, even if the full ransom had been paid, but in the previous judgment, it was considered more than likely that the vessel would have been released promptly had payment been made, the Supreme Court should be slow to interfere with this kind of finding by a lower court. Finally, the last argument for "indirect loss" was rejected for crew wages and maintenance. As a matter of policy demurrage and similar costs are not recoverable as General Average, but those costs which are incurred to mitigate what would be a larger general average claim should be recoverable.

Although this decision changes what held as 'standard industry practice', it is common sense decision, in terms of it supports the traditional English law approach to mitigating a loss. With this in mind this can be seen as a slightly less restrictive view in terms of treating expenses allowed under Rule F and the parties should take a more common sense approach where expenses have been incurred to lessen the overall GA cost. It also goes to show that common industry practice will not always be recognised at correct as a matter of law by the courts.

Sino Channel Asia Ltd v Dana Shipping & Trading Pte Singapore and Another [2017] EWCA Civ 1703

Introduction

This was an appeal against a first instance judgement of Sir Bernard Eder in the High Court. The case turned on whether service of the First Appellant's (Dana's) notice of arbitration on Beijing XCty Trading Limited ("BX") had been effective, and three principal issues arose:

1. Did BX have implied actual authority to receive the notice on behalf of Sino?
2. Did BX have ostensible authority to receive notice on behalf of Sino?
3. If the answer to the two issues above is "no", did Sino ratify the BX's receipt of the notice?

Facts

Sino Channel ("Sino"), a Hong Kong company set up by a Mr Jung, was persuaded by a business acquaintance to enter into an agreement in 2009 with BX for the provision of financial services. These services involved BX arranging back-to-back (except in relation to price) sale and purchase contracts in Sino's name, Sino obtaining the benefit of favourable purchase prices amounting to commission. Sino was to be responsible for the financial aspects of the transaction, BX the operational aspects.

It was undisputed that the respondents, Sino, were liable as charterer under a Contract of Affreightment ("COA") for the carriage of 275,000 mt of iron ore from Venezuela to China in five shipments, made with Dana as owner. However, Sino was fronting for BX, having played no part in negotiating or performing the COA. Although Sino had signed the COA, it was on behalf of a Mr Zhou, Director and owner of BX.

All communications post signing the COA were between Dana and a Mr Cai, a representative of BX, bar one- a letter dated 1 November 2013 inviting Dana for talks after dispute had arisen under the COA. Dana was however unaware of the fronting. Mr Cai had presented himself to Dana as "Daniel of Sino Channel". Subsequently in February 2014, Dana sent a notice of arbitration, both directly and via the brokerage channel, to Mr Cai, requiring Sino to appoint its arbitrator with 14 days.

Sino failed to respond or participate in the arbitration, with BX also not taking any effective steps to defend the claim. Mr Cai had sent three messages in response to the arbitration notices, the third of which was a fax purporting to be on Sino's paper with its signature and stamp, but turned out to have been copied and pasted. Consequently, Dana's arbitrator was appointed as sole arbitrator, and an arbitration award was eventually made, awarding Dana US$1,680,404.15 (plus interest and costs).

Sino later received a hard copy of the award by post a month after and applied to set the award aside, under subsection (1)(b) and/or (c) of section 72 of the 1996 Arbitration Act- rights of person who takes no part in proceedings.

First instance decision

The Judge had set aside the arbitration award on the basis that the arbitral tribunal had not been properly constituted and therefore the Award had been made without jurisdiction. The Judge had answered Issues 1-3 above in the negative.

Court of Appeal decision

The Appellants, Dana, appealed arguing that Issues 1-3 ought to have been answered in the affirmative.

The Court of Appeal noted meetings and correspondence between Mr Jung of Sino and Mr Zhou of BX. Mr Jung had sent a copy of the Award to Mr Zhou, who later told Mr Jung to ignore it and that he would "settle the Award". At that stage, Mr Cai had left BX, and the Court of Appeal also noted that Mr Zhou had that Mr Cai had not been "authorised to handle arbitration matters and had been acting without the authority of Mr Zhou or BX". Following enforcement proceedings in Singapore, Mr Zhou of BX signed a "Confirmation" at the request of Mr Jung, to the effect that Mr Zhou and BX would take full responsibility for the liabilities under the Award.

Issue 1- Implied Actual Authority

The Court of Appeal pointed out that when considering implied actual authority, the focus is on the "actual circumstances" of the principal and agent relationship and on what can be inferred from the parties' "conduct". Therefore the issue in this instance was the conferring of implied actual authority on BX to accept service of the notice.

Observing that this case was "most unusual", the Court of Appeal departed from the first instance Judge on this point, as the actual circumstances of the case dictated that the correct inference was that BX/Mr Cai did have implied actual authority to accept service. The "remarkable" commercial arrangements between Sino and BX was important, given Sino's contentment with complete passivity and Mr Zhou/BX's failure to honour the "Confirmation" could not have any impact on the extent of any implied actual authority so conferred- it was merely a risk from entering into a

fronting arrangement of this type, which Dana was unaware of. Given Sino's disinterest and passivity, the Court of Appeal concluded that there was no real expectation that Sino required the notice to be served on it. As with all the other aspects of the COA, BX was responsible for dealing with the notice, not Sino and therefore BX had implied actual authority to receive the notice. The Court also felt that had Mr Jung received the notice at the time, he would most likely have simply forwarded it to Mr Zhou of BX- as he did with the Award. In addition, the Court of Appeal gave weight to the fact that when Sino's brokers received the notice, they forwarded the notice on the BX, not to Sino.

As the implied actual authority issue had been answered in the affirmative, the arbitral tribunal had been correctly constituted and had jurisdiction to make the Award, and the other two issues no longer arose.

Issues 2 and 3- Ostensible Authority and Ratification

In relation to ostensible authority, the Court found that conduct of the unusual relationship between Sino and BX as discussed above, also formed the basis of how BX/Mr Cai's authority appeared to others, including Dana. There was a holding out on the part of BX/Mr Cai, but also in Sino's conduct of its relationship with BX. Despite noting that ostensible authority requires more caution than with implied actual authority, the Court was satisfied that there was ostensible authority in the circumstances. Dana was wholly unaware of BX, therefore it was just and fair that Sino, not Dana, bore the risk of BX's failure to honour its commitments.

The Court however was not convinced that Sino ratified BX's receipt of the notice, although this would only be relevant if the answers to Issues 1 and 2 were "no". There was no positive ratification by Sino of BX's receipt. In addition, section 72 permits a party in Sino's situation to take no action prior to enforcement proceedings, therefore the context of section 72 supports the Court's view on the absence of position ratification.

Therefore, Dana's appeal on Issues 1 and 2 was allowed but dismissed on Issue 3.

Comment

As the Court of Appeal took pains to mention, this was a case with unusual facts, and "complete passivity" was what did it for Sino.

For all intents and purposes, BX was responsible for the COA, and it made logical sense that BX had authority- both implied actual and ostensible- to receive notice of the arbitration. A belt and braces approach to adopt when entering into a fronting arrangement or similar would be to retain more control of/involvement in the conduct of the transactions governed by the fronting arrangement.

Sino unwisely placed too much trust in BX both before and after, and simply obtaining a letter of indemnity after the fact is not good enough security as Sino found to its cost, with BX unsurprisingly failing to honour the "Confirmation" signed. Some basic business advice- be careful where you put your trust!

On the flip side, it is worth noting however that Dana could have avoided the ensuing complication by serving the notice of arbitration directly on Sino Channel at its registered office, but under these peculiar circumstances this did not prove costly, but a lesson to be learned is for service of arbitration proceedings to be done by all possible methods.

Dainford Navigation Inc -v- PDVSA Petroleo S.A "MOSCOW STARS" [2017] EWHC 2150 (Comm)

Summary

Interesting Judgment which details the criteria the English Court will consider when deciding whether to exercise its discretion to order the sale of a cargo under (contractual) lien.

Factual background

Vessel time chartered by Dainford Navigation Inc ("**Owners**") to PDVSA Petroleo S.A ("**Charterers**") (the "**Charterparty**"). Subsequently, a cargo of crude oil loaded on board the vessel at Puerto La Cruz, Venezuela for discharge in Freeport, Bahamas. Importantly, the cargo owned by the Charterers not by third party cargo interest.

Approximately US$4.5 million hire owed by Charterers under the Charterparty.

Owners exercised a contractual lien over cargo on board the vessel outside the disport pursuant to lien provisions under the charterparty/contract of carriage. The contractual lien provided Owners with a right to prevent discharge of the cargo pending payment of outstanding hire but not with an express right of sale over the cargo.

Charterers ordered the cargo to alternative disport, Curacao. Vessel proceeded to Curacao and, again, exercised a contractual lien over cargo outside the disport. Some payment s of hire made however outstanding balance not cleared.

Accordingly, Owners:

(a) Commenced arbitration and applied to Tribunal for an order for sale of the cargo; and
(b) Arrested the cargo with the leave of the Curaçao court.

The Tribunal granted Owners permission to apply to the English High Court for an order for the sale of the cargo

11 companies joined the arrest proceedings. Each of these arrestors was part of Owners "group of companies" and was owed sums by Charterers under alternative charters.

Parties respect arguments

Owners argued that the cargo should be sold with Owners' and the 11 other companies' security rights over the cargo being vested in the sale proceeds pending resolution of the arbitration proceedings.

Charterers argued *inter alia*:

(a) The court had no power to order sale pursuant to section 44 of the Arbitration Act where the cargo not the '*subject of the arbitral proceedings'*; and/or
(b) Even if such power existed, it could not be exercised within the scope of CPR 25.1(c)(v), as the cargo was not perishable nor was there some other good reason why it should be sold '*quickly'*;

Relevant legislation

Section 44(1) of the Arbitration Act 1996 provides: *"(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for purposes of and in relation to legal proceedings."*

Section 44(2) provides: *"Those matters are: (d) the sale of any goods the subject of the proceedings;"*

Section 25 .1(c)(v) of the Civil Procedure Rules (the "CPR") provides:

"(1) The court may grant the following interim remedies –

(c) an order –

(v) for the sale of relevant property which is of a perishable nature or which for any other good reason it is desirable to sell quickly"

Judgment

The Court rejected Charterers' arguments and ordered the sale of the cargo. In finding for Owners the court held:

(a) Section 44(2)(d) should not be read too narrowly. There was a sufficient nexus between the claim and the cargo as a contractual lien had been exercised over the cargo as security for the claim in arbitration
(b) There was good reason why it was desirable that the cargo should be sold quickly as, amongst other things, without an order for sale, hire would continue to accrue without being paid.

Comment

Court's decision primarily addresses whether a cargo under lien falls within the meaning of '*the subject of the proceedings*' under section 44(2)(d) of the Arbitration Act 1996.

It is also interesting that, in addition to the Owners, the eleven other arresting companies' right of security was preserved in the sale of proceeds from the cargo even where those companies had no contractual right of lien over the cargo.

Notwithstanding the above, in considering whether to make a similar application a claimant party should always first establish who the underlying owner(s) of the cargo is/are. The Court in the present matter did not decide what the position would be if the cargo was owned by a third party. It will no doubt prove difficult for a claimant to persuade the court to make an order for sale when the owner of the cargo is a third party due to the significant effect such an order would have on that third party's interest in the property.

London Arbitration 28/17

London Arbitration 28/17

This arbitration concerned the apportionment between owners and charterers of a cargo claim brought by receivers under bills of lading.

Background

Pursuant to an amended New York Produce Exchange (NYPE) 1946 charter form, owners of the subject vessel fixed her to the respondent charterers for the carriage of a cargo of bagged rice.

Charterers had entered into the charter to meet a similar commitment they had entered into whereby by a booking note with another merchant they agreed to transport the cargo for the intended voyage.
The booking note incorporated the terms of a previous charter for a similar cargo involving a different vessel, and the fixture note and previous charter (on the Synacomex 90 form) were incorporated into the relevant bills of lading.

In the event, cargo interests brought a cargo claim against owners alleging short delivery, wet damage and other forms of cargo damage in the amount of US$186,299.72 plus survey fees of €15,738.32.

Owners settled the claim in the sum of US$110,000 and then commenced arbitration proceedings against charterers seeking to recover the settlement sum, together with interest and costs.

Owners' arguments

Owners claimed they were entitled to be indemnified by charterers for the settlement sum on the grounds that the bills of lading imposed greater liabilities upon owners than they accepted under the terms of the charter because the bills incorporated the booking note and the underlying charter, clause 5 of which made the master responsible for stowage.

Clause 66 of the subject charter provided that Congen bills were to be used but clause 73 allowed the charterers to use liner bills provided that the charterers appeared as the carrier.

Owners argued that prior to the issue of the bills of lading, the terms of the charter had been varied to show charterers as "the carrier", making the bills of lading charterers' bills. Owners relied on correspondence between the parties in which owners had sought to clause the bills of lading but charterers wanted clean mate's receipts/bills of lading, suggesting that owners' proposed endorsement was unnecessary because charterers would be shown as the carrier and therefore the mate's receipt could be signed clean.

Decision

Liability under bills of lading vs charterparty

Held, there was no evidence that the voyage in question was part of a liner service (i.e. a regular service operated on a regular route). The fact that

Congen bills were used, rather than Conline bills, confirmed that those were owners' bills signed for the master and therefore for owners. They related to a charterparty rather than themselves containing all the relevant provisions relating to the contract of carriage.

The tribunal rejected owners' argument that the particular exchange relied on amounted to a variation of the charter.

Clause 8 of the subject charter referred to cargo being loaded and discharged by charterers, without transferring responsibility for those operations to the master. Additionally, the second unnumbered paragraph of clause 73 made charterers responsible for loading and discharging. The tribunal held that paragraph could not be confined to the situation where liner bills had been issued.

Short delivery

The tribunal held there was inadequate evidence to determine the cause of the shortage, specifically what proportion of the shortage was due to a lesser quantity being loaded than was billed and what proportion resulted from miscounting and/or theft of bags at the disport.

It appeared in this case that the shortage claim had been settled with cargo interests at around 90 per cent. The tribunal commented this was unusually high, not least because it was probable that the discharge was arranged by the receivers and therefore, in so far as the alleged shortage was due to misconduct by their own stevedores, the cost thereof should not be recoverable. A valid claim would only exist if the shortage was due to short loading.

In any event, there was evidence that the charterers had approved the proposed settlement for the shortage claim and agreed to contribute 50 per cent under the NYPE Inter-Club Agreement. The shortage element was dealt with accordingly, on the basis the parties could not resile from their earlier agreement.

Wet damage

It was common ground between the parties' experts that the wet damage to the cargo occurred from condensation. However, there was disagreement as to whether the condensation occurred as a result of a failure to ventilate properly (which would lie with the owners) or due a failure to stow the cargo properly (which would lie with the charterers), or if it resulted from both causes in part.

On the particular facts, the tribunal held it was not possible to precisely ascertain how much of the wet damage arose from one cause and how much from the other. Liability for the wet and associated damage was therefore divided equally between the parties, with half of the sum paid to the cargo interests falling to the owners' account and 50 per cent (plus interest) to the charterers.

Comment

This case turned on its particular facts. Nonetheless it provides useful comment on the circumstances in which owners can claim an indemnity from charterers in respect of cargo claims.

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