# RS SHIPPING BULLETIN

**FEBRUARY 2011**

**REED SMITH**

RS SHIPPING BULLETIN

# 1 CARRIAGE OF GOODS

## 1.1 COURT OF APPEAL CONSIDERS THE MEANING AND REASONABLENESS OF THE 'NO SET-OFF' AND 'TIME BAR' CLAUSES IN THE BRITISH INTERNATIONAL FREIGHT ASSOCIATION TERMS

In *Rohlig (UK) Ltd v Rock Unique Ltd* [2011] EWCA Civ 18, the Appellant appealed against a summary judgment which had been granted to the Respondent freight forwarder.

The Appellant imported sandstone paving, purchased on fob terms, and engaged the Respondent to arrange the carriage of the stone from India to the UK. When a dispute arose, the Respondent commenced proceedings to recover its unpaid charges. In response, the Appellant alleged that as the Respondent was acting as its agent it was entitled to recover in respect of the ocean carriage only such amounts as it had paid to the carrier. The Appellant further alleged that, in breach of contract and of its fiduciary duty, the Respondent had overcharged in respect of the expenses of ocean carriage and other transport charges. As a result, the Appellant argued that (a) it was not liable to pay the whole of the amounts shown in the invoices on which the claim was based and (b) it was entitled to recover the amounts by which it had been overcharged in the past.

The contract incorporated the terms of the British International Freight Association (BIFA). At first instance it was held that clause 21(A) of these terms prevented the Appellant from setting off any claims in respect of earlier charges against sums due on the Respondent's invoices. Such claims were, in any event, time barred after nine months by clause 27(B). Both terms satisfied the requirement of reasonableness in s.11 Unfair Contract Terms Act 1977, and so the Respondent was entitled to summary judgment for the majority of its claim.

On appeal, the Appellant submitted that if any part of the sum claimed in an invoice was disputed, or could be shown not to be payable, nothing was "due" for the purposes of clause 21(A) and therefore the provision against set-off did not apply. Further, it submitted that clause 27(B) did not apply to causes of action which could not reasonably have been discovered before the expiry of the time bar. The Court held as follows:

1. Clause 21(A) does not prevent a customer from withholding payment on the grounds that the sum claimed has not fallen due at all. To the extent that the amounts claimed in the Respondent's invoices were not, or could not be, properly contested, they were "due". The Appellant's interpretation of clause 21(A) was incorrect. That clause simply provided that any sums due had to be paid without deduction. The judge did accept that the invoices were disputed in part and as a result he limited the amount in respect of which he gave judgment. However, he refused to give credit for the much larger amounts that were the subject of the counterclaim because clause 21(A) prevented the Appellant from setting them off against the sums due under the invoices. He was right to make this refusal, as the clause satisfied the reasonableness requirement.

2. Clause 27(B) is framed very broadly. The expiry of the time bar is intended to provide a complete discharge from all liabilities, whether known or unknown, and is capable of encompassing liability arising from errors in accounting procedures or misunderstanding of the contract which in this case had led to overcharging. Clause 27(B) discharged the

Respondent from liability to repay any amounts overpaid more than nine months before the counterclaim was served, provided it satisfied the requirement of reasonableness.

3. As regards the reasonableness of the time bar, this question should usually be considered separately in each case. However, where a standard condition is involved, the court should not draw fine distinctions between cases that are very similar in broad terms. It is important for commercial parties to know whether a particular clause will generally be regarded as reasonable in the context of routine contracts.

This case is an example of the court's willingness to deal robustly with commercial cases involving an attempt to invoke principles formulated for the protection of weaker contracting parties.

## 2 CONTRACT

### 2.1 HIGH COURT CONSIDERS THE ENFORCEMENT OF AN INDEMNITY WHERE THE PARTY INDEMNIFIED HAS NOT DEFENDED THE CLAIM

In *Rust Consulting Ltd v PB Ltd* [2010] EWHC 3243 (TCC), the Claimant requested that the court find the Defendant liable to indemnify it in respect of damages awarded to a third party. The Claimant had sold part of its business to the Defendant, another company in the same group. The sale agreement incorporated two indemnities. Prior to the sale, a third party had engaged the Claimant to carry out certain work, and had subsequently claimed damages for negligence and breach of contract. Shortly after service of the claim, the Claimant went into liquidation. The Claimant's liquidators consented to judgment for a sum which represented the maximum damages claimed by the third party, and then tried to recover this sum from the Defendant under the indemnity. The Defendant refused to pay, questioning the validity of the claim and arguing that in any event the indemnity did not cover the claim. It was further argued that the judgment did not bind the Defendant, as it was not a party to the court action. The Court was asked to decide whether the Defendant was bound to pay the judgment sum to the Claimant, or was entitled to demand proof that the Claimant was liable to the third party.

It was held that, in order to recover under the indemnity, the Claimant must establish that it was liable to the third party either for the damages claimed, or for the amount of the judgment. It could not recover simply because there was a judgment against it in relation to a third party. The Court noted that there is no principle of law that a party who has given an express indemnity, and has been notified of litigation, is always estopped from challenging a judgment. The issues to consider are:

1. Has the indemnifying party agreed to pay whatever sum the court may have awarded? Such Any such agreement must be evidenced by clear words. If an indemnifier undertakes to pay any relevant judgment sum, then the indemnified party can recover. However, if the indemnity covers only actual liabilities of the indemnified party, these liabilities must be established.

2. Whether the indemnifying party is estopped from arguing that the amount agreed or awarded is more than was due is a question of fact. Factors to consider include: whether the indemnifying party was notified of the claim; what part, if any, the indemnifying party played in defending the claim (active participation may go further to establish estoppel); and the indemnifier's involvement in any settlement (agreement to a judgment may go further to establish estoppel).

3. If there was no agreement and no estoppel, then in order for the judgment to be binding on the indemnifying party, the party claiming the indemnity must prove its liability to the third party for the amount claimed.

The consideration of the law in this case has identified that there is no authority for the proposition that an indemnifier under an express contract of indemnity, who rejects the chance to take over the defence of the claim, is estopped from disputing the validity of the judgment or the reasonableness of a settlement.

## 3 COSTS

### 3.1 HIGH COURT CONSIDERS PRINCIPLES APPLICABLE TO THE ASSESSMENT OF FOREIGN LAWYERS' FEES

At a recent detailed assessment of costs hearing in the matter of *Almatrans S.A. v The Steamship Mutual Underwriting Association (Bermuda) Limited* we were representing the paying party, Steamship Mutual, following an adverse costs order in the substantive proceedings.

After a period of drawn out negotiations (dating back to September 2006) the only issue to be determined was a claim for Greek lawyer's fees. These were originally claimed in the sum of €95,100.00 however Almatrans subsequently made a concession reducing the amount to be assessed to €57,150.00.

The Points of Dispute raised a couple of issues of principle. Firstly as to whether these fees were going to be paid by the Claimant at all, due to the passage of time that had elapsed from the commencement of the proceedings up to date and a request was made for evidence that these fees had in fact been paid. In addition we were concerned as to the overall nature of the work done and whether such work was, in fact, progressive of the claim.

Advice was obtained from costs counsel and a further issue of principle was addressed in relation to how the English court assesses foreign lawyer's fees. Counsel advised that in accordance with the principle identified in *Societa Finanziaria Industrie SpA v Manfredi Lefebvre D'Oviodio De Clunieres Di Balsorano & Anor* where the court took account of how the relevant foreign court would assess the costs of the foreign lawyer. In this regard evidence, by way of a witness statement, was sought from George Panagopoulos as to the approach taken by the Greek courts when assessing Greek lawyer's fees. Our evidence was that the Greek courts usually allowed the recovery of Greek lawyer's fees based on a percentage of the value of the dispute usually at around 3%.

At the assessment hearing the costs officer accepted that the claimant should produce to the court evidence of their retainer, he accepted our Greek law evidence and after proceeding to assess the time claimed by the claimant's Greek Lawyer in detail he determined that the amount time claimed should be reduced to the equivalent of €17,000.00. He then considered the effect of the Greek law evidence on the overall fees to be allowed and decided that it was necessary to limit the Greek Lawyer's overall recoverable costs to 2% of the value of the dispute (US$220,000) i.e. US$ 4,400.00.

Our client had conceded a sum of £4,550.00 in the Points of Dispute. In the circumstances our client was awarded their costs of the assessment proceedings and after set-off of the claimant's costs of the substantive proceedings and interest our client is entitled to a balance in their favour of approx. £3,800.00. The claimant has indicated that they intend to appeal the costs officer's assessment.

-- Alan Gray

## 3.2 COURT OF APPEAL CONSIDERS VARIOUS POINTS RELATING TO THE PAYMENT OF COSTS AND INTEREST BY AN UNSUCCESSFUL PARTY

In its judgment on costs in *Thomas Crema v Cenkos Securities plc* [2010] EWCA Civ (10) the Court of Appeal considered various issues relating to the level of costs and interest to be paid by the unsuccessful Respondent.

The Respondent sought an order under CPR 44.3(6)(a) that the Appellant should only be allowed a proportion of its costs of both the first instance and appeal proceedings, arguing that the Appellant had lost on several points and that its case had been handled in an unfocused and wasteful way. The Court agreed that while both parties had taken bad points, those taken by the Appellant were greater and more time consuming, and so awarded the Appellant 75% of its costs.

In coming to this decision, the Court took account of a Part 36 offer made by the Appellant, which it had succeeded in beating. This result only affected the position relating to the costs at first instance (CPR 36.3(4)). In principle, therefore, the Respondent should have had to pay a certain proportion of indemnity costs, and interest on the costs awarded. However, such a decision is subject to CPR 36.14(4), which states that in considering whether it is unjust to make a costs order, the court will take into account all the circumstances of the case. Having done this, the judge concluded that the Appellant should not be entitled to full costs on an indemnity basis for the relevant period, rather he should be entitled to 75% of his costs (albeit still calculated on an indemnity basis). The judge also ordered that the Appellant was entitled to interest on these costs at the rate of 5% above base rate.

The Court also considered the Appellant's entitlement to interest on the principal sum awarded. The Appellant claimed that he was entitled to interest under the Late Payment of Commercial Debts (Interest) Act 1998 (the "Act") from the date on which the principal sum fell due. The Respondent accepted that interest was due, but argued (a) that the start date should be 30 days from the date when the sum became due and (b) that the Court should use its power under section 5 of the Act to reduce the rate of interest due to the conduct of the Appellant. The Court agreed that the interest should run from 30 days after the sum fell due, but refused to reduce the rate.

Finally, the Court considered whether the Appellant was entitled to interest under section 35A Senior Courts Act 1981 from the date on which the principal sum fell due to the date when interest under the Act began to run. The award of interest under section 35A is discretionary, and in this instance the Court held that no such interest should be awarded.

# 4 EU

## 4.1 NEW SANCTIONS AGAINST IVORY COAST ENTER INTO FORCE

On 14 January 2011, Council Regulation (EU) No. 25/2011 was adopted, which amends Council Regulation (EC) No. 560/2005.

The 2005 Regulation implemented a range of financial sanctions against Ivory Coast. Those natural or legal persons or entities identified by the UN as 'designated persons' were listed in Annex I of the Regulation. Article 2 of the Regulation provided that all funds and economic resources belonging to, held or controlled by the listed parties were to be frozen. Further, no funds or economic resources were to be made available, either directly or indirectly, for their benefit.

The new Regulation extends the list of sanctioned parties, with the new list to be inserted into the 2005 Regulation as Annex 1A.

For further information, please see the RS Client Alert dated 20 January 2011.

## 5 JURISDICTION

### 5.1 COMMERCIAL COURT CONSIDERS THE RELEVANCE OF A CLAIM'S PROSPECTS OF SUCCEEDING IN ANOTHER JURISDICTION WHEN ASSESSING WHETHER ENGLAND IS THE APPROPRIATE FORUM FOR THE CLAIM

In *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd and another* [2011] EWHC 56 (Comm), the Commercial Court considered an application to set aside an order granting permission to serve out of the jurisdiction.

The Claimant shipping company had fixed a charterparty following an exchange of emails between it, the Charterer and the Defendants. The Claimant subsequently alleged that the Charterer had repudiated the charterparty, and also that the charterparty had been guaranteed by the First Defendant. The Claimant therefore claimed under the guarantee, and obtained permission to serve the Defendants in India. In applying to have the order set aside, the Defendants argued that there was no serious issue to be tried, and that the Claimant could not show that it had a reasonable prospect of success, because the guarantee was unenforceable pursuant to the Statute of Frauds 1677 (the "Statute").

The application was dismissed, as the Claimant had a "well arguable" claim that was governed by English law. The judge considered that the English courts were far better equipped to deal with issues relating to the Statute than those of India. Further, there was evidence that, under Indian law, the guarantee would be void and unenforceable and the Claimant would therefore be bound to fail.

The Court noted that there is no automatic right for the English court to exercise jurisdiction over a foreign company, on grounds that the Claimant would be likely to fail in the courts of another country. However, if an arguable claim governed (in the view of the English courts) by English law would fail in the only realistically alternative foreign court because the contract would be invalidated by application of a provision of that foreign court's law, this is a strong argument in favour of England being the appropriate forum in which to hear the claim.

On the validity of the guarantee (which was evidenced in correspondence), the Court noted that where there is an agreement in writing it is entitled to look at all of the documents which are said to make up the agreement. Where agreements are made by an exchange of emails, the whole sequence should be considered. As regards the Statute, this was concerned with ensuring that guarantees could not be enforced if they were neither embodied in an agreement, made in writing, or are ones in respect of which a written document exists signed by the person said to be liable. If, on an analysis of the correspondence passing between the parties, there was an agreement, then the policy behind the Statute would not be frustrated.

## 5.2 HIGH COURT CONSIDERS THE POINT AT WHICH A COURT IS SEISED OF PROCEEDINGS FOR THE PURPOSES OF THE BRUSSELS I REGULATION

In *(1) Nordea Bank Norge ASA (2) Vasonia Shipping Co Ltd v (1) Unicredit Corporation Banking SpA (2) Banca di Roma SpA* [2011] EWHC 30 (Comm) the High Court considered an application to stay proceedings before it until proceedings commenced in the Italian courts had been determined.

Vasonia had chartered a vessel to an Italian company (the "Charterers"), by way of a time charterparty providing for English law and arbitration in London. The Charterers' obligations were secured by a demand guarantee provided by Unicredit in favour of Vasonia which was governed by English law and contained a non-exclusive English jurisdiction clause. The Charterers provided counter-security by way of a collateral deposit. Vasonia subsequently assigned its rights under the demand guarantee to Nordea.

When the Charterers failed to pay hire, Vasonia made a demand on Unicredit under the guarantee. Unicredit then threatened the Charterers that it would draw down on the collateral deposit. The Charterers commenced arbitration proceedings in England against Vasonia, claiming that hire had not fallen due because the terms of the charterparty had been varied. They also commenced court proceedings in Italy to prevent Unicredit paying out under the guarantee pending the outcome of the arbitration. The Italian court granted an interim injunction against Unicredit and ordered the joinder of Vasonia.

Prior to the order of the Italian court, Nordea and Vasonia had commenced proceedings against Unicredit in England in an attempt to enforce the demand guarantee. The Charterers subsequently issued further proceedings in Italy, against Unicredit and Vasonia, in order to determine Vasonia's rights under the guarantee, and Unicredit's rights in relation to the collateral. Unicredit applied for a stay of the English proceedings pending the outcome of these Italian proceedings.

It was held that the English court was first seized of proceedings between Unicredit and Vasonia. The Italian court could not be said to be first seised, when the initial proceedings issued there were between the Charterers and Unicredit. Vasonia was joined to these proceedings after the commencement of those in England. There could therefore be no mandatory stay under Article 27 of the Brussels I Regulation. Further, the English and Italian proceedings did not involve the same cause of action for the purposes of Article 27 and at the time the English proceedings were issued, there were no existing Italian proceedings which satisfied the description of "related proceedings" for the purposes of Article 28. The risk of irreconcilable judgments was not great enough to make the actions related.

Finally, the court noted that even if the pre-conditions for the exercise of the court's powers under Article 28 had been satisfied, it would not have been appropriate to grant a stay of the English claim as a matter of discretion.

## 6 PRACTICE AND PROCEDURE

### 6.1 COURT OF APPEAL COMMENTS ON THE FACTORS FOR A COURT TO CONSIDER WHEN DEALING WITH AN APPLICATION TO AMEND A STATEMENT OF CASE

In *(1) Claire Swain-Mason, David Jonathan Berry & Neil Gordon Kirby (Executors of CJ Swain, deceased) (2) Claire Swain-Mason (3) Abby Swain (4) Gemma Swain (5) Christa Swain v Mills & Reeve (A Firm)* [2011] EWCA Civ 14, the Appellant solicitors, against whom a claim of professional negligence had been brought, appealed against (a) the grant of permission for the Respondents to re-amend their particulars of claim, (b) the subsequent refusal to disallow the re-amendments and (c) the dismissal of its application for summary judgment.

The Respondents (and claimants in the main action) had amended their particulars of claim, and had then been granted permission by the court to re-amend. On allowing this re-amendment, the judge stated that the Appellant could apply for the re-amendment to be disallowed if the evidence, once adduced, did not support it. The Appellant made such an application, arguing that the re-amendment advanced a different case to that originally pleaded. At the same time it applied for summary judgment. The judge did not hear evidence on either application, but dismissed them both as being unnecessary, tactical and an abuse of process.

On appeal, the orders permitting the re-amendment and then refusing to disallow it were set aside on the basis that the judge had misdirected himself as to both the correct approach to a late amendment and the precision required of pleadings. The case should have been allowed to proceed on the basis of the original pleading. Further, the judge should have required the re-amendment to be supported by evidence before considering whether to allow it, as this would have given the Respondent more time to consider the implications of the amendment.

As regards late amendments, there is a heavy burden on a party seeking to raise a new and significantly different case to show the strength of the new case and to demonstrate why justice to all parties requires that this new case be pursued (following *Worldwide Corp Ltd v GPT Ltd*, Unreported, 2 December 2998, CA (Civ Div)). Permission in this case had in fact been given on a false basis, as the judge's understanding of the new case was different from that ultimately advanced. This vitiated his decision. The subsequent refusal to disallow the re-amendment was open to criticism as he had not heard any evidence, and had taken the wrong view as to the amount of detail that the Appellant was entitled to be given in a pleading.

The application for summary judgment was also dismissed, as the claim was to proceed on the basis of the original pleading.

### 6.2 HIGH COURT CONSIDERS THE PRINCIPLES APPLICABLE TO THE REVOKING OF FINAL ORDERS AND CAUSE OF ACTION ESTOPPEL

In *Re Surety Guarantee Consultants Ltd v QBE Insurance (Europe) Ltd and Markel International Insurance Ltd and another* [2010] EWHC 3172 (Ch), the Applicants applied to set aside an order which itself

had set aside a previous judgment. The Court's judgment contains a useful analysis of CPR 3.1(7), which provides that the power of the court to make an order includes the power to vary or revoke that order. The judgment also considers the circumstances in which final orders may be varied or set aside, and the principles on which cause of action estoppel is based.

The judge stated that a literal reading of CPR3.1(7) suggests that the court does have jurisdiction to revoke a final order. The Applicants argued that no such jurisdiction existed, and the judge said that they were "probably" right. While he did not in fact have to decide this point, in reaching his conclusions on the application the judge reviewed the authorities on final judgments. He emphasised the importance of finality in litigation, and noted that the principles on which final judgments might be varied or set aside are limited, well established and clearly founded on public policy. It would take an exceptional case for a new procedural rule to displace or extend those principles.

It makes no difference whether or not a final order was made without the judge having adjudicated on the merits. A final order remained a final order, whether it resulted from an admission, default by or consent of the defendant, proof before a judge at trial where the defendant did not appear, or an adjudication on the merits after a fully contested trial.

The judge also considered the rules on cause of action estoppel. The identity of the parties is crucial, as cause of action estoppel arises between the same parties to different cases, or between their privies. The next point to consider is the facts: the facts decided in any suit cannot be litigated again between the same parties, and are conclusive evidence between them, as are material facts alleged by one party and directly admitted by the other. Estoppel applies even if the court has not adjudicated on the proceedings in which the admission was made. Finally, the estoppel continues to operate even if one party subsequently alleges that that the facts or judgment to which the estoppel relates are, in fact, wrong. If they are wrong, they must be challenged on appeal or not at all.

It is useful to view the judge's comments on the scope of the court's jurisdiction under CPR 3.1(7) in light of the judgment in *Independent Trustee Services ltd v GP Noble Trustees Ltd* [2010] EWHC 3275.

## 6.3 SERVICE ABROAD IS NOT NECESSARILY GOOD SERVICE SIMPLY BECAUSE IT IS NOT CONTRARY TO THE LAW OF THE COUNTRY WHERE SERVICE IS TO BE EFFECTED

In *(1) Amalgamated Metal Trading (2) Marex Financial Ltd (3) Sucden Financial Ltd v Alain Baron* [2010] EWHC 3207 (Comm), the Commercial Court was required to determine whether a claim form and particulars of claim had been properly served on the Defendant in Peru.

The Peruvian Civil Procedure Code provides that notification of judicial documents must be carried out by the Judiciary Office of Notifications by means of a written notice personally delivered to the recipient. The Claimant in this case had instructed a process server in Peru to effect service on the Defendant. A dispute arose between the parties as to whether service had

been properly effected by the process server, and the Defendant applied for relief under CPR 11. The parties submitted as follows:

1. The Claimant argued that unless a method of service was specifically prohibited by the law of the country in which service was effected, any method of service which a claimant may choose would be sufficient. The Defendant's response was that the service did not comply with Peruvian law, and so was not a permitted method of service pursuant to CPR 6.40(3)(c).

2. The Claimant submitted that if service was bad, the Claimant should be permitted to serve the claim form on the Defendant's London solicitors pursuant to CPR 6.15. The Defendant responded that, since the Civil Procedure (Amendment) Rules 2008 came into force, there was no power to order alternative service on a party upon whom ordinary service would be governed by Part 6 (IV).

The Court held as followed on these two points:

1. The relevant provision of the Peruvian Civil Procedure Code was mandatory, and so service had to be effected in the prescribed form. It is not correct that where a country expressly provides for methods of service within its jurisdiction but does not expressly provide that service by other means is illegal then it is to be inferred that service by other means is permitted for the purposes of CPR 6.40(3)(c).

2. The power to order alternative service under CPR 6.15 is limited to service within the jurisdiction. However, CPR 6.37(5)(b)(i) does confer jurisdiction on a court to order service by alterative means in respect of service out of the jurisdiction. It is impossible to contemplate a regime for service out of the jurisdiction without the power to order service by alternative means in appropriate cases.

The Court's judgment appears to confirm that where proceedings are served under CPR 6.40(3)(c), the method of service must be either expressly permitted, deducible from the relevant state's conduct, or carry some form of positive approval. It would however still be open to a claimant, where appropriate, to apply for an order for alternative service. In such a case, the chosen method must simply not be contrary to the law of the relevant state, albeit not necessarily permitted by it.

## 7 SHIPPING

### 7.1 COMMERCIAL COURT RULES ON ISSUES OF CONTRIBUTION AND INDEMNITY ARISING OUT OF DAMAGE CAUSED TO A VESSEL AT A SHIPYARD

The underlying dispute in *BMT Marine and Offshore Survey Ltd (t/a Salvage Association) v Lloyd Werft Bremerhaven GmbH* arose out of damage caused to a vessel while undergoing hot works at a shipyard ("LWB"). The works were being carried out pursuant to a conversion contract which was governed by German law. At the time of the fire, the vessel was insured by the First and Second Claimants under a policy governed by Italian law, and under which the owner of the vessel and LWB were named as co-assured. Under the policy, as a condition precedent to liability, a shipyard and/or project risk assessment survey had to be carried out by LWB and the Defendant surveyors.

The Claimants (the insurers, as assignees of the vessel's owner) commenced proceedings against the Defendant seeking to recover their loss on the grounds that it had failed to exercise reasonable care and skill in performance of the survey. The Defendant commenced Part 20 proceedings (the proceedings which were before the court in this instance) against LWB, claiming a contribution or indemnity for any liability that it was found to have to the Claimants, on the grounds that the fire was caused by the fault of LWB or of those for whom it had been responsible. This claim was originally pursued under the Civil Liability (Contribution) Act 1978 (the "Act"). Various issues of both German and English law were directed to be heard as preliminary issues.

The Court held that, as a matter of German law, the owner of the vessel had, by the contract with LWB, waived any right to bring a claim against the yard. Also as a matter of German law, LWB could have no liability to the owner of the vessel in respect of the alleged loss. In case the judge was wrong on those issues, he also dealt with the issue of whether, under English law, the Defendant could claim contribution from LWB under English law, assuming that the Act applied. For this to be the case, the Defendant would have had to show that the owner of the vessel was entitled to compensation in respect of damage done to the vessel against both the Defendant and LWB.

It should be noted that the Court's decision was based heavily on an analysis of the provisions of both the conversion contract and the insurance policy. The details are set out in the Court's judgment.

### 7.2 COURT OF APPEAL CLARIFIES ISSUES RELATING TO MARINE INSURANCE, PIRACY AND THE TREATMENT OF RANSOM PAYMENTS AS A MATTER OF ENGLISH LAW AND PUBLIC POLICY

In *Masefield AG v Amlin Corporate Member Ltd* [2011] EWCA 24, the Court of Appeal considered an insurance claim by cargo owners following the seizure by pirates in the Gulf of Aden of the vessel carrying the cargo.

The Court of Appeal considered whether seizure by pirates amounts to an actual total loss under a marine insurance policy, and also whether the payment of a ransom is either illegal or contrary to public policy.

For further information on this case, please see the RS Client Alert dated 31 January 2011.

## 7.3 SPAIN BECOMES FIRST NATION TO RAFITY THE ROTTERDAM RULES

On 19 January 2011, Spain deposited its ratification of the Rotterdam Rules, becoming the first nation to do so.

The Rules will enter into force on the first day of the month following the expiration of one year after the deposit of the 20th instrument of ratification, acceptance, approval or accession. It is currently thought that several countries are waiting for the United States to ratify the Rules before depositing their own ratification.

The full text of the Rules and their current status can be found online.

## 7.4 COMMERCIAL COURT RULES ON THE NATURE OF ADVANCE PAYMENT GUARANTEES ISSUED BY AN INSURANCE COMPANY GUARANTEEING THE REPAYMENT OF PAYMENTS MADE UNDER SHIPBUILDING CONTRACTS

In *Meritz Fire & Marine Insurance Co Ltd v (1) Jan De Nul NV (2) Codralux SA* [2010] EWHC 3362 (Comm), the Defendant dredging companies had entered into three shipbuilding contracts with a Korean shipbuilding company (the "Builder"). These contracts contained a requirement for advance payment guarantees, which were given by the Claimant insurer. The Builder subsequently merged with another company, and the shipbuilding part of the business was transferred to a new company ("NewCo"). When NewCo got into financial difficulties, the Defendant terminated the contracts and sought the refund of all payments made. NewCo was subsequently declared bankrupt, and the Defendant made demands for payment under the guarantees.

The Claimant sought a declaration that it was not liable under the guarantees. It argued that they were contracts of suretyship rather than performance bonds, and that it had been discharged from liability as a result of the changes in the corporate identity of the shipbuilder and also of various material variations in the contracts. Further, the Claimant argued that as a result of the corporate changes, the Defendant was unable to make a contractual demand which would trigger liability under the guarantees.

The Court held that the guarantees were performance bonds or demand guarantees, on the following grounds, which satisfied three of the four requirements for a demand guarantee:

1. the underlying transactions, i.e. the shipbuilding contracts, were between parties in different jurisdictions;

2. the guarantees did not contain provisions either excluding or limiting the defences available to a surety in a classic guarantee where the surety's liability was secondary; and

3. the undertaking contained in the guarantees was to pay on demand within 30 days of that demand

The fourth attribute of a demand guarantee is that the instrument be issued by a bank, while in this instance they were issued by an insurance company. The insurance company was, however, providing financial instruments in return for a fee.

The guarantees were also subject to the Uniform Rules for Demand Guarantees of the International Chamber of Commerce, and their provisions satisfied the definition of a "demand guarantee" in these rules. Further, that the obligation to pay was conditioned by the presentation of a specified document rather than evidence of the underlying facts pointed in favour of primary liability. The Court also noted that the authorities were clear on the point that just because an instrument refers to the contractual performance for which it is security and the circumstances which constitute default, this does not prevent it from being a demand guarantee or performance bond.

It was further held that even if the guarantees were demands of suretyship, the Claimant had not been discharged from liability as a result of the changes in corporate identity as it had affirmed the guarantees after these changes had taken place.

Finally, the Court held that the Defendant was entitled to make a demand which triggered liability under the guarantees after the dissolution of the original shipbuilding company. The contracts expressly provided for payment under the guarantees in the case of such dissolution. It made no difference that the shipbuilder was dissolved as part of a reorganisation which put a new entity in its place.

RS SHIPPING BULLETIN

This Bulletin is a summary of developments in the last month and is produced for the benefit of clients. It does not purport to be comprehensive or to give specific legal advice. Before action is taken on matters covered by this Bulletin, reference should be made to the appropriate adviser.

Should you have any queries on anything mentioned in this Bulletin, please get in touch with Sally-Ann Underhill or Alex Allan, or your usual contact at Reed Smith.

**Reed Smith LLP**
The Broadgate Tower
20 Primrose Street
London EC2A 2RS
Phone: +44 (0)20 3116 3000
Fax: +44 (0)20 3116 3999
DX 1066 City / DX18 London
www.reedsmith.com

**Email: sunderhill@reedsmith.com**
**aeallan@reedsmith.com**



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