RS SHIPPING BULLETIN

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REED SMITH

1 COSTS

1.1 COURT CONFIRMS ITS JURISDICTION TO HEAR APPLICATION FOR AN ORDER THAT THERE BE NO ORDER AS TO COSTS FOLLOWING DISCONTINUATION OF ACTION

In *Hoist UK Ltd v Reid Lifting Ltd* [2010] EWHC 1922 (Ch), the High Court considered whether it had jurisdiction to hear an application by a claimant under CPR 38.6 for an order that there be no order as to costs following the claimant's discontinuance of the action.

CPR 38.5 provides that proceedings are brought to an end against a defendant on the date of service of a notice of discontinuance. Further, CPR 38.5(3) provides that proceedings dealing with costs are not affected by discontinuance. CPR 38.6 provides that a claimant who discontinues proceedings is liable for the costs which the defendant incurred before that date, unless the court orders otherwise.

The Claimant's application that there be no order as to costswas made over a month after the claimant had discontinued proceedings. The Defendant argued that as a result there were no proceedings in which the application could be made, and so the court lacked jurisdiction. It submitted that an application under CPR 38.6 should be made either before or at the same time as service of the notice of discontinuance. The Defendant further argued that CPR 38.5(3) should be interpreted to mean that only costs proceedings which are already commenced at the date of discontinuance are not affected. This had to be the correct interpretation, it argued, because any application to set aside a notice of discontinuance must be made within 28 days of service of that notice. To permit costs applications to be made after such service would be unfair, because the defendant would be required to apply to set aside without knowing whether the claimant intended to apply for a costs order.

The court rejected the Defendant's arguments and held that it did have jurisdiction to hear the application. Applications by the defendant to set aside the notice of discontinuance and applications relating to costs are entirely unrelated. CPR 38.5(3) should be interpreted to allow an application to deal with costs whether or not such application has been made at the time of discontinuance.

This case confirms that costs proceedings can be commenced after the underlying proceedings have been discontinued. However, it should be noted that orders in a CPR 38.6 application are made at the court's discretion, and a factor which the court will need to take into account is the amount of time between the discontinuance of the action and the issuing of the application.

2 DAMAGES

2.1 HIGH COURT UPHOLDS LIQUIDATED DAMAGES CLAUSE IN SUMMARY JUDGMENT

The High Court, in *Azimut-Benetti SpA (Benetti Division) v Healey* [2010] EWHC 2234 (Comm), has granted summary judgment in favour of a shipbuilder seeking to enforce a liquidated damages clause.

Some contractual clauses fall somewhere between a penalty clause and a liquidated damages clause. In such cases, while the figure fixed as compensation may not wholly reflect the loss likely to be suffered by the innocent party, there is some commercial justification to the figure and it is not merely a deterrent. The courts have, over the years, suggested that such clauses may be enforceable, as they are not penalties.

In this case, an Isle of Man company (the Buyer) engaged a yacht builder to build a vessel for the Defendant. The Buyer was wholly owned by the Defendant. The contract provided that, in the event of late payment by the Buyer, the builder could end the contract and either retain or recover 20% of the contract price by way of liquidated damages. The Buyer defaulted on an instalment, and the builder sought to exercise these rights under the contract. The builder subsequently applied for summary judgment against the Defendant, who resisted the application and argued that this provision in the contract amounted to a penalty, and not a genuine pre-estimate of loss. The Defendant further submitted that, because it had raised this argument, the court was required to hear evidence from both sides at a full trial in order to determine whether 20% was indeed a genuine pre-estimate of loss.

Summary judgment was given, with the judge holding that it was not even arguable that the clause was a penalty. Rather than investigate the likely loss to the builder and compare this with the figure fixed in the contract, the judge considered whether there was a clear commercial and compensatory justification for the clause. He found that the Buyer's interest in avoiding the delay that might be involved in a recovery-based loss, and in getting an immediate refund of any excess payments, could be classed as such a justification.

This decision shows the courts' willingness to uphold liquidated damages clauses in contracts negotiated between parties of equal bargaining power. It also provides an example of the courts explicitly deciding a penalty clause issue by reference to the "commercial justification" test.

2.2 THE RECOVERY OF WASTED EXPENDITURE AS DAMAGES

The High Court has held, in *Omak Maritime Ltd v Mamola Challenger Shipping Co ("The Mamola Challenger")* [2010] EWHC 2026 (Comm), that wasted expenditure cannot be recovered as damages for breach of contract where an award of damages on that basis would put the Claimant in a better position than he would have been in had the contract been performed.

A charterparty was terminated following Owners' acceptance of Charterers' repudiatory breach. Owners were subsequently able to trade the ship at a higher market rate, and so they suffered no net loss. Nevertheless, they claimed damages for the expenses which they had incurred in modifying the vessel before delivery, as required under the charterparty.

The dispute went to arbitration, and the tribunal held that Owners were entitled to claim these expenses even though they had suffered no net loss and indeed had more than recuperated the losses they were claiming. Charterers appealed this decision.

Charterers' appeal was allowed. The judge acknowledged that Owners had the right to claim damages in the form of expenses incurred by them in reliance on the contract being performed (the principle of reliance loss). However the crucial question was whether the principle in *Robinson v Harman* (1984) 1 Ex 850 (the principle of expectation loss, i.e. that damages should put the injured party in the position he would have been in had the contract been performed) applied and, if so, how.

The challenge facing the judge was the lack of binding authority on whether damages for wasted expenditure (i.e. reliance based damages) could be awarded where to do so would put the claimant in a better position than he would have been in had the contract been performed. The judge answered in the negative to this question, as a result of his conclusion that reliance loss is essentially a species of expectation loss, and that there is only one fundamental principle underlying the two (that set out in *Robinson v Harman*).

The judge's conclusion runs contrary to the opinions of Professor Treitel, in The Law of Contract and it is likely that this matter will be revisited by a higher court. In the meantime, Teare J's judgment in this matter includes interesting analysis of many of the authorities on how to calculate expectation- and reliance-based damages.

3 EU

3.1 EUROPEAN COMMISSION ANNOUNCES FORMAL INVESTIGATION INTO INTERNATIONAL GROUP OF P&I CLUBS

The European Commission has commenced a formal investigation into the International Group of P&I Clubs. The aim is to investigate whether the claim-sharing and joint-reinsurance agreements of the P&I Clubs infringe EU competition rules.

It does not appear that there have been any complaints made to the Commission which sparked the investigation, rather the Commission fears that provisions in agreements between clubs within the International Group may harm shipowners and insurers that are not members of the Group.

It is not known for certain how long the investigation will take. From past experience it can be estimated that the investigation will take at least one year and if a Statement of Objections is issued (which will be done if the Commission comes to a preliminary conclusion that EU competition rules have been breached), it may take a further year before the Commission makes a final decision on the matter.

3.2 EUROPEAN PARLIAMENT PASSES RESOLUTION ON REFORMS TO BRUSSELS REGULATION

On 7 September, the European Parliament passed a resolution regarding proposals to reform the Brussels Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The resolution adopts all of the proposals for reform contained in the report of the European Parliament's Committee for Legal Affairs, which was published on 23 June 2010.

The key proposals are:

- The exequatur procedure should be abolished. This concept refers to the decision by a court authorising the enforcement in that country of a judgment, arbitration award, or court settlement given or made abroad.

- The arbitration exception should not be deleted, rather it should make it clear that judicial procedures relating to the validity or extent of arbitral competence are excluded from the scope of the Regulation.

- The court designated in a jurisdiction clause should not be required to stay its proceedings if proceedings are commenced in another court. There should be an associated requirement that any jurisdictional disputes should be decided expeditiously by the chosen court.

- The court designated in a jurisdiction clause should have the option to stay its proceedings where another court is better placed to hear the case.

- The Regulation be amended to give effect to exclusive jurisdiction clauses in favour of the courts of non-European states. Further, in relation to rights in rem in respect of immovable property in non-European states, the rules on exclusive jurisdiction in Article 22 of the Regulation be extended to cover such property.

- Guidance on when a court should grant interim measures in support of proceedings elsewhere should be incorporated into the Regulation.

The Commission will consider this Resolution and formulate its legislative proposals, after which the reforms will move forward under the ordinary legislative procedure. The Commission's proposal is expected to be published on 14 December 2010.

3.3 EUROPEAN COMMISSION ADOPTS NEW RULES AIMED AT IMPROVING SAFETY PERFORMANCE OF SHIPS

On 13 September 2010, the European Commission adopted new rules to enhance and improve the safety performance of ships. From 1 January 2011, the rules will introduce a new online register which will list shipping companies that are performing poorly on vital safety inspections (i.e. port state controls), while those with good safety records will be given good public visibility. Companies and states which appear to be performing poorly will be subject to intensive, co-ordinated inspections in EU ports.

The new regime will see an EU-wide harmonisation of port state control inspection standards. All safety inspections carried out in EU ports will be tracked, and a risk analysis will be produced which will determine the frequency and priorities for inspections by the relevant Member State authorities.

The new system will allow for a more effective use of inspection resources in ports, and will allow high risk ships and companies to be more easily targeted. It also means that manufacturers and other industries will be able to choose the shipping companies they use in full knowledge of their safety record.

4 INSURANCE

4.1 HIGH COURT RULES ON LAW APPLICABLE TO REINSURANCE CONTRACT

In *Stonebridge Underwriting Ltd v Ontario Municipal Insurance Exchange* [2010] EWHC 2279 (Comm), the Commercial Court found that it was strongly arguable that parties to a reinsurance contract placed in London by London brokers with a London reinsurer, and incorporating a number of standard London market clauses, had impliedly chosen English law as the governing law of the contract.

The reinsured was the insurer of a number of Canadian municipalities under two pool arrangements. The reinsurers had reinsured under a slip policy written in the Lloyd's market on standard London wording on a back to back basis with the underlying policies. Disputes arose, and the reinsured commenced proceedings in Ontario. The reinsurers contested jurisdiction and commenced proceedings in England for negative declaratory relief. The question for the court to decide was whether England was the most convenient forum for hearing the action, or whether the English proceedings should be stayed. The High Court held that they should be allowed to continue.

Under English conflict of law rules, which the English court was bound to apply, there was a strong case that the law applicable to the reinsurance agreement was English law. Article 3 of the Rome Convention provides that a London market placement on London terms impliedly chooses English law. Alternatively, the presumption in Article 4 of the Rome Convention works in favour of the place of business of the reinsurers.

The fact that the direct policy was governed by the law of Ontario and the two contracts were back to back did not prevent the application of English law. Further, in reinsurance cases where there was an issue of construction of a policy governed by English law (whether by agreement or by default), that issue should be determined by an English court.

5 JURISDICTION

5.1 COURT DECLINES TO STAY ENGLISH PROCEEDINGS IN FAVOUR OF PARALLEL PROCEEDINGS IN FLORIDA

In *Royal Sun Alliance Insurance Plc and others v Rolls Royce* [2010] EWHC 1869, the High Court considered, but declined to clarify, the controversial decision by the ECJ in *Owusu v Jackson* [2005] QB 801 relating to the interpretation of Article 2 of the of the Brussels Convention (now superseded by Article 2 of the Brussels Regulation).

Article 2 states that "persons domiciled in a Member State shall, whatever their nationality, be sued in the court of that Member State". This rule can only be displaced if one of the exceptions set out in the Regulation applies, for example a jurisdiction clause.

In *Owusu*, the ECJ ruled that a court on which jurisdiction is conferred by Article 2 cannot decline jurisdiction on the ground that the court of a non-member state would be a more appropriate forum. This was the case even if the jurisdiction of no other member state was in issue, or the proceedings involved no factors connecting the situation with another member state. The ECJ reasoned that Article 2 was of a mandatory nature. However, the ECJ in *Owusu* declined to answer whether this applied to other circumstances, including where identical or related proceedings were pending before the courts of a non-member state court. This has become known as "the *Owusu* point".

In the present case, Rolls Royce sought to stay proceedings brought against it by Royal Sun Alliance, either generally or pending determination by the US courts of their jurisdiction in proceedings brought by Rolls Royce against Royal Sun Alliance in Florida. Royal Sun Alliance argued that the English court had no discretion to decide that the defendant could be sued in a country other than where it was domiciled on the ground of parallel proceedings in a non-member state, and therefore could not order a stay of proceedings. Rolls Royce, on the other hand, argued that the Brussels Regulation did not apply where the alternative proceedings had been commenced in a non-member state. It submitted that Article 27 (i.e. that the court first seised shall be the first court to deal with the case) could be applied by analogy, and the Florida courts were the first seised.

The judge ruled that Rolls Royce had not shown that Florida was the appropriate forum for the trial of the claim. Its application for a stay was therefore refused, and the court was not required to decide the *Owusu* point.

This case illustrates the oddity of the ECJ's approach in *Owusu*, in that it declined to address the wider implications of this decision. While it is disappointing that the High Court has not ruled on whether or not the decision of the ECJ in *Owusu* can be applied to wider circumstances, the judgment in the present case contains a useful summary of the authorities on the point and identifies the issues that need to be resolved by the courts post-*Owusu*.

6 PRACTICE AND PROCEDURE

6.1 53RD UPDATE TO CPR

The latest update to the Civil Procedure Rules came into force on 1 October 2010.

Perhaps the most significant updates relate to the disclosure of electronic documents (Part 31 and Practice Direction 31B) and the procedure for appealing arbitration awards (Practice Direction 62).

In relation to electronic disclosure, the newly introduced Practice Direction 31B aims to regulate the approach that should be taken with regards to material which is relevant to a case and which is stored electronically. Procedures are set down to ensure that parties discuss electronic documents and disclosure early on in the case, and the Electronic Documents Questionnaire is introduced to enable the parties to provide information to each other on the scope and extent of their electronic disclosure.

The amendments to Practice Direction 62 aim to regulate the materials which are submitted to the court in relation to applications for permission to appeal arbitration awards. Only certain documents may be placed before the court, and limits are placed on the length of parties' skeleton arguments. The aim appears to be to ensure that the court is only provided with what it absolutely needs in such an application.

A note has been produced on the updates most relevant to the Shipping Group. This can be found on ReSearch and in hardcopy in the Shipping Know How folders(in the CPR General, Disclosure and Arbitration files).

6.2 COURT CONSIDERS THE INTERPLAY BETWEEN FREEZING INJUNCTIONS AND APPLICATIONS TO CHALLENGE THE COURT'S JURISDICTION

In *JSC BTA Bank v Ablyazov and others* [2010] EWHC 2219 (QB), the High Court made an order that the Respondents would be barred from defending the claim unless they complied with the disclosure obligations set down in a freezing order, despite the fact that they had challenged the court's jurisdiction.

The Claimants had successfully applied for a freezing order against the Respondents, some of whom were located outside the jurisdiction. The freezing order contained disclosure provisions, which the Respondents failed to comply with. They issued an application challenging the jurisdiction of the English court, and seeking to have the freezing order set aside. The Claimants had, in the meantime, applied for an unless order that the Respondents be barred from defending the claim unless they provided the required disclosure.

The Respondents submitted that an unless order should only be made if breach of the freezing order would affect the overall fairness of the proceedings, or render the further conduct of the proceedings unsatisfactory. This argument was rejected.

The judge commented that in fraud actions such as this one, if an unless order could not be made while a challenge to the jurisdiction was pending, wrongdoers would flourish as the pending challenge would preclude the court from enforcing the disclosure order. An order for contempt of court, especially against those respondents who were located out of the jurisdiction, would be of little value. Without an unless order, the Claimants could make either no or a severely restricted recovery. It was also relevant to take into account the likelihood of the jurisdictional challenge succeeding: in this case, such success was seen to be very unlikely.

The unless order was granted, but in order to avoid rendering the Respondents' challenge to the jurisdiction nugatory, the order provided that any judgment entered could not be enforced or executed without the Court's permission, pending the determination of the Respondents' application.

The Court noted that while the considerations in favour of making the order sought were overwhelming, the prejudice that the Respondents would suffer, if they produced the information and were subsequently successful in their challenge to the jurisdiction, was minimal.

7 SHIPPING

7.1 IS A NOTICE OF READINESS INVALIDATED BY FAILURE TO OBTAIN FREE PRATIQUE WITHIN THE TIME SPECIFIED IN THE CHARTERPARTY?

This issue was considered by the High Court in *AET INC Ltd v Arcadia Petroleum Ltd (The "Eagle Valencia")* [2009] EWHC 2337 (Comm).

When the vessel arrived at the loadport, the NOR was tendered but the berth was occupied, and the vessel was required to wait at anchorage. Free pratique was granted around 20 hours after the NOR was tendered, and the vessel did not berth for over two days more. A dispute arose between the parties as to the commencement of laytime. The principal issue was whether the NOR was invalidated because the vessel failed to secure free pratique within six hours, as required under the charterparty.

Part II, clause 13.1.a2 of the Shellvoy 5 form, on which the vessel was chartered, provides that where the vessel does not proceed immediately to berth, time shall start to run six hours after either (i) the vessel is lying in the ordered or usual waiting area, (ii) written notice of readiness has been tendered, or (iii) the specified berth is accessible.

The charter also incorporated the Shell Additional Clauses February 1999 (SAC), clause 22.1 of which provided that if Owners fail to obtain free pratique either within six hours after the NOR was originally tendered or when time would otherwise normally commence under the charter, the original NOR shall not be valid. Clause 22.5 stated that the NOR shall not be invalid where authorities do not grant free pratique at the anchorage but clear the vessel when she berths. Clause 22.6 provided that under such conditions the NOR would be valid unless the timely clearance of the vessel for free pratique is due to the fault of the vessel.

Charterers argued that SAC 22 applied: Owners had failed to obtain free pratique within six hours of the NOR, and so the NOR was not valid. Owners submitted that the NOR met all the requirements of Part II of the charterparty, and that Charterers could not rely on SAC 22 to invalidate it.

The court held that the NOR was, and remained, valid. In general, SAC 22 sought to give Charterers a measure of protection if certain clearance criteria were not achieved when time

would normally start to run under Part II. However, where the running of time fell within 13.1.a2, a failure within six hours to obtain free pratique would not necessarily have any adverse consequences for Charterers. If the vessel fell within 13.1.a2, there was no need to obtain free pratique during the six hours immediately following the NOR.

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This Briefing 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 Briefing, reference should be made to the appropriate adviser.

Should you have any queries on anything mentioned in this Briefing, 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
reedsmith.com

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

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