SHIPPING & TRADE LAW

Remoteness in contract, *The Achilleas* and *The Sylvia*: what does it all mean?

Has the decision of the House of Lords in The Achilleas *radically altered the test for remoteness of damages in contract? Is there now a broader 'assumption of responsibility' requirement? The recent judgment of the Commercial Court in* Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd ('The Sylvia') *[2010] EWHC 542 (Comm) answers both questions in the negative. It explains that* The Achilleas *lays down no new generally applicable test. The usual remoteness test will continue to apply to the vast majority of cases; and 'assumption of responsibility' will be relevant only in unusual cases.*

Introduction

Until 9 July 2008 commercial lawyers thought they understood the English law on the remoteness of damages in contract. The test was easy to state and relatively unproblematic to apply: was the loss caused by the breach of contract a kind of loss which, at the time the contract was concluded, the parties would reasonably have contemplated as not unlikely to result from the breach? That was the result of *Hadley v Baxendale* (1854) 9 Exch 341, as explained and refined in *C Czarnikow Ltd v Koufos (The Heron II)* [1969] 1 AC 350, particularly in Lord Reid's speech at 382G–383B. Further, provided that the parties reasonably contemplated the kind or type of loss as a not unlikely result, it did not matter that the extent of the loss was greater than they could reasonably have foreseen: the innocent party was entitled to recover its full loss, even if unforeseeably large. See *Jackson v Royal Bank of Scotland* [2005] 1 Lloyd's Rep 366.

The Achilleas

The Achilleas was a 'late redelivery' case. In breach of the time charter between the parties, the defendant charterers redelivered the vessel nine days late – on 11 May 2004 instead of 2 May 2004. However, the claimant owners had earlier entered into a follow-on charter at a rate of US$39,500 per day, with a cancelling date of 8 May 2004. As a result of the charterers' breach, the new charterers became entitled to cancel the new fixture. The owners were forced to reduce the new charter rate by US$8,000 per day to avoid cancellation.

They claimed the hire they had lost as a result of the charterers' delayed redelivery. The arbitrators, by a majority, awarded the owners US$1,364,584.37, being the US$8,000 per day reduction multiplied by the duration of the follow-on fixture. The dissenting arbitrator ruled that the damages should be limited to US$158,301.17, being the difference between the market and charter rates for the nine days of wrongful delay. The dissenting arbitrator's decision was based on the general understanding in the shipping market, that liability for late redelivery was restricted to the difference between the market rate and the charter rate for the overrun period.

May 2010
Volume 10 ▪ Number 4

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Applying the conventional analysis summarised above, Christopher Clarke J at first instance ([2007] 1 Lloyd's Rep 19) and the Court of Appeal ([2007] 2 Lloyd's Rep 555) both dismissed the charterers' appeal against the majority arbitrators' award.

The House of Lords, however, disagreed. It allowed the charterers' appeal and, agreeing with the dissenting arbitrator, held that the owners' damages were limited to the difference between the market and charter rates for the nine days' overrun. The five Law Lords each delivered a fully reasoned speech. Determining the ratio of *The Achilleas* is a matter of some difficulty. *McGregor on Damages* (18th Edition), para 6-173, takes the view that the ratio of *The Achilleas* lies in Lord Roger's orthodox approach discussed below. Conversely, *Chitty on Contracts* (30th Edition), para 26-100A, treats the case as imposing the broader 'assumption of responsibility' requirement as an 'additional and probably separate requirement of the remoteness rule'.

The confusion arises because *The Achilleas* discloses two distinct approaches to remoteness of damages. Lord Hoffmann articulated the 'broader' approach, holding that 'the extent of a party's liability for damages is founded upon the interpretation of the particular contract . . . construed in its commercial setting' (para 11). In his view, the fundamental question is: is the loss the '"kind" or "type" for which the contract-breaker ought fairly to be taken to have accepted responsibility' (para 15)? However, Lord Hoffmann conceded that 'in the great majority of cases', that question would be answered simply by applying 'the ordinary foreseeability rule' explained in *The Heron II*. If the loss satisfied that test, it will *prima facie* be recoverable. Only in unusual cases would that presumption be rebutted. Applying that approach and relying on the general understanding in the shipping market found by all the arbitrators, Lord Hoffmann held that 'the charterer cannot reasonably be regarded as having assumed the risk of the owner's loss of profit on the following charter' (para 26). Lord Hope adopted a similar analysis, ruling that foreseeability was not enough, and 'the question is whether the loss was a type of loss for which the party can reasonably be assumed to have assumed responsibility' (para 32). Lord Walker agreed with the reasons given by Lords Hoffmann and Hope.

Lord Roger purported to adopt the 'orthodox' approach based on the *Hadley v Baxendale*/*The Heron II* 'ordinary foreseeability rule'. He held that, contrary to the findings of the majority arbitrators, the parties would not reasonably have contemplated that an overrun of nine days would 'in the ordinary course of things' cause the owners the kind of loss claimed. He reached that decision because the loss claimed occurred 'only because of the extremely volatile market conditions' (para 60), was more extensive that either party could quantify at the time of contracting (para 61) and arose from an 'arrangement with a third party about which the charterers knew nothing' (para 62). Lord Walker agreed with the reasons given by Lord Roger, and Baroness Hale reluctantly agreed to allow the appeal on those grounds.

It is, with respect, difficult to see how the result in *The Achilleas* can be supported under the 'orthodox' approach, as Lord Roger sought to do. Firstly, as Lord Hoffmann pointed out in para 25 of his speech, the question of whether the kind of loss was foreseeable as a not unlikely result of the breach is a question of fact (*Monarch Steamship Co Ltd v Karlshamns Oljefabriker (A/B)* [1949] AC 196, p223 (per Lord Wright); *The Heron II* [1969] 1 AC 350, p397B-D (per Lord Morris)) and arbitrators' findings of fact are final. As Steyn LJ explained in *Geogas SA v Trammo Gas Ltd (The Baleares)* [1993] 1 Lloyd's Rep 215, 228, the 'arbitrators are the masters of the facts' and 'a Court ought never to question the arbitrators' findings of fact'. Since the majority arbitrators found that the loss claimed was foreseeable as a not unlikely result of the charterers' breach, under the 'orthodox' approach, that should have been the end of the debate.

Secondly, only a few years earlier, the House of Lords decided in *Jackson v Royal Bank of Scotland* [2005] 1 Lloyd's Rep 366 that the extent of the loss need not be foreseeable provided the 'kind' or 'type' of the loss was foreseeable. Thus, the result cannot be justified on the basis that the losses were unforeseeably large. Finally, knowledge of the terms of the third party contract from which the loss flows has never been a requirement. The defendants in *Victoria Laundry (Windsor) Ltd v Newman Industries Ld* [1949] 2 KB 528, p543 were held liable to compensate the claimants even though they did not know of the terms of the contracts lost by the claimant laundry: all that was required was that the losses be in respect of 'contracts to be reasonably expected'. There was nothing to suggest that the follow-on charter in *The Achilleas* had been concluded on anything other than normal market terms. The fact that the market had been higher when it was concluded and then dropped did not take that contract out of the ordinary: movement is the essence of a market.

The Sylvia

As discussed above, in *The Achilleas*, the House of Lords held that where a vessel on time charter is redelivered late by charterers, an owner's damages are limited to the difference between the charter and market rates for the overrun period and that an owner cannot recover lost profits on a cancelled follow-on fixture. The issue in *The Sylvia* was whether a similar limit applied where the owner's breach of charter caused his time-charterer to lose a sub-fixture. The arbitrators below and the Commercial Court on appeal both held that it did not.

The tribunal had found that the owners had been in breach of their due diligence and maintenance obligations, as result of which *The Sylvia* had been detained by port-state control. This

in turn led to the charterers missing the cancelling date on their sub-fixture, which the sub-charterers then cancelled. The substitute employment which the charterers were able to find post-cancellation was less profitable than the cancelled fixture. The charterers claimed the difference from owners and the tribunal found in their favour.

The owners appealed, contending, in reliance on *The Achilleas*, that the charterer's only recoverable loss was the difference between the charter and market rates for the period of the detention and that the profits lost on the cancelled sub-fixture were too remote to be recoverable.

In order to decide the appeal, Hamblen J had to ascertain the *ratio dedidendi* of *The Achilleas*. He noted the confusion on this point due to the disparity between the two approaches adopted by their Lordships. After reviewing their speeches and subsequent commentary on the case, Hamblen J concluded that:

> *'In my judgment, the decision in* The Achilleas *results in an amalgam of the orthodox and broader approach. The orthodox approach remains the general test of remoteness applicable in the great majority of cases. However, there may be "unusual" cases, such as* The Achilleas *itself, in which the context, surrounding circumstances or general understanding in the relevant market make it necessary specifically to consider whether there has been an assumption of responsibility. This is most likely to be in those relatively rare cases where the application of the general test leads or may lead to an unquantifiable, unpredictable, uncontrollable or disproportionate liability or where there is clear evidence that such a liability would be contrary to market understanding and expectations.'*

He added that 'in the great majority of cases it will not be necessary specifically to address the issues of assumption of responsibility,' holding that this was consistent with the approach taken in other post-*Achilleas* decisions, most importantly, the recent decision of the Court of Appeal in the non-shipping case of *Supershield Ltd v Siemens Building Technologies FE Ltd* [2010] 1 Lloyd's Rep 349.

In an important passage for practitioners, arbitrators and the commercial community generally, the judge emphasised further that, '... it is important that it be made clear that there is no new generally applicable legal test of remoteness in damages. It appears that in a number of cases, this is being argued and that decisions are being challenged for failing to recognise or apply the assumption of responsibility test. This results in confusion and uncertainty'.

Applying these principles to the tribunal's decision, Hamblen J held that they had not erred in law by concluding that lost profits on a sub-fixture lost due to an owner's breach of contract were not too remote. He relied on the fact that period charters often contain an express liberty to sub-let, and that there is both judicial and academic authority for the view that they are recoverable. In particular, in *The Derby* [1984] 1 Lloyd's Rep 635, Hobhouse J had clearly recognised that such a claim could properly be made. He also pointed out that where a sub-fixture is lost, there will often be a loss regardless of market considerations because charterers will have to find substitute employment with the vessel in a distressed position.

There were, in addition, important differences between *The Achilleas* and the facts of *The Sylvia*. In particular there was no market understanding or expectation that a charterers' loss is limited to the difference between the charter and market rates for the period of the delay caused by the owner's breach. On the contrary, the general understanding – supported by Hobhouse J's judgment in *The Derby* and results in arbitral references and assumptions made in other court cases – was that damages could be recovered for loss of a sub-fixture. Also, it was less likely that an unquantifiable loss would arise because the lost sub-charter could never be longer than the length of the head charter itself, and, in many cases the cancelled sub-fixture would be a voyage charter in any event.

On this basis, the owners' appeal was dismissed. Leave to appeal was also refused.

The present state of the law

The judgment of Hamblen J in *The Sylvia* is the latest word on this issue. Along with the dicta of the Court of Appeal in *Supershield Ltd v Siemens Building Technologies FE Ltd* [2010] I Lloyd's Rep 349, para 43, it suggests that *The Achilleas* has added a gloss to the orthodox 'foreseeability test' under which, in very unusual cases, losses satisfying that orthodox test will nevertheless be held to be unrecoverable because the circumstances demonstrate that the breaching party could not reasonably be taken to have assumed responsibility for such losses. Indeed, the Court of Appeal in *Supershield* went even further by suggesting that this additional gloss can operate not only to restrict recovery but to expand it: losses that were not sufficiently foreseeable could nevertheless be recoverable if the contract construed in its commercial context demonstrated that the breaching party had assumed responsibility for such unforeseeable losses.

One thing is, however, clear from *The Sylvia* and the other judicial pronouncements on *The Achilleas*. The courts are strongly discouraging defendants from 'trying their luck' by relying on *The Achilleas* to avoid or reduce their liability. Whatever principle that case establishes, it is likely to be applied only in the rarest of cases.

Chirag Karia of Quadrant Chambers acted for the successful charterers in *The Sylvia*.

Chirag Karia and David Semark, Barristers, Quadrant Chambers

Defining times – art 5(1)(b)

It currently seems fashionable to refer to the European Court of Justice ('ECJ') questions relating to art 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('the Regulation').

Wood Floor Solutions v Silva Trade SA

The latest judgment of the Court is that in *Wood Floor Solutions v Silva Trade SA* (Case C-19/09), handed down on 11 March 2010. The dispute between the parties arose out of the termination of a commercial agency contract that was performed in several member states. Wood Floor relied on art 5(1)(b) of the Regulation to found jurisdiction in Austria, where the company had established its seat. Silva Trade challenged the court's jurisdiction, arguing that more than three quarters of Wood Floor's turnover was generated in countries other than Austria, and that art 5(1) did not provide for such a case. Silva Trade argued that if the place of performance could not be established because the obligation in question was not subject to geographical limitations, art 5(1) was inapplicable and jurisdiction should instead be founded on art 2.

At first instance, the Landesgericht Sankt Pölten rejected the jurisdictional challenge holding that commercial agency contracts were covered by the definition of 'provision of services' in art 5(1)(b), and that where services were provided in a number of countries, jurisdiction should be founded at the service provider's centre of business. That decision was appealed before the Oberlandesgericht Wien, who referred the matter to the ECJ.

The ECJ confirmed that the second indent of art 5(1)(b) was applicable to cases where services are provided in several member states. Referring to its judgment in *Color Drack* (Case C-386/05), the Court noted that regarding the sale of goods, where there are several places of delivery of the goods, the 'place of performance' must be understood as the place with the closest linking factor between the contract and the court having jurisdiction. Therefore, as a general rule, it will be the principal place of delivery, which shall be determined on the basis of economic criteria.

Unsurprisingly, the Court took the same approach in relation to the provision of services, vaguely identifying 'the place of the main provision of services.' The Court outlined that for commercial agency contracts, it is the commercial agent who characterises the contract and provides the services. Thus, the place of performance must mean the place of the main provision of services by the agent, which must be deduced from the contract itself.

Where the contract does not identify the place of the main provision of services, either because there are several places or because no specific place is expressly provided for, but the service has been carried out, the Court provided an alternative formula. In such a case, account should be taken of the place where the agent has for the most part carried out his activities in performance of the contract, provided that the provision of services in that place is not contrary to the parties' intentions as it appears from the contract. Factors to take into account include the time spent at the location and the importance of the activities carried out there.

In the alternative scenario, where the place of the main provision of services cannot be determined from the contract or from actual performance, the 'place of performance' shall be the agent's domicile. It is therefore irrelevant where the commercial agency has its registered office, even though it may be coincidental to the actual place of performance or an agent's domicile.

Car Trim GmbH v KeySafety Systems Srl

Beforehand, on 25 February 2010, the ECJ handed down its judgment in *Car Trim GmbH v KeySafety Systems Srl* (Case C-381/08). Here, the preliminary reference to the Court considered the difference between contracts for the 'sale of goods' and contracts for the 'provision of services' under art 5(1)(b) of the Regulation, and how to determine the place of performance for contracts involving carriage of goods.

Car Trim supplied KeySafety with components used in the manufacture of airbag systems. A dispute arose regarding the termination of the supply contracts and an action for damages was brought before the German Regional Court of Chemnitz, being the place where the components were manufactured. The Regional Court held that it had no jurisdiction to rule upon the action, and the Higher Regional Court also dismissed the appeal. Car Trim subsequently brought an appeal before the German Federal Court of Justice, who referred the matter to the ECJ.

The first question essentially asked whether contracts for the supply of goods *to be produced or manufactured* were contracts for the sale of goods or contracts for the provision of services, in particular where the customer has specified certain requirements with regard to the provision, fabrication and delivery of the components to be produced.

The ECJ confirmed that the Regulation does not define nor provide any distinguishing features of the two types of contract. Instead, art 5(1) identifies as a connecting factor the obligation which characterises the contract in question. It was noted that European and international legislation generally deemed contracts for the supply of goods to be manufactured or

produced as contracts of sale, save for certain exceptions, where, for example, the customer undertakes to supply a substantial part of the materials necessary for their manufacture. The Court thus concluded that the fact that the goods need to be produced or manufactured does not alter the classification of the contract as one for the sale of goods. Conversely, where all or most of the materials from which the goods are manufactured are supplied by the purchaser, the Court tentatively surmised that the contract should be classified as one for the provision of services.

It was further held that the supplier's obligation under the contract could be a defining characteristic. Where the seller is responsible for the quality of the goods and their compliance with the contract, that responsibility will 'tip the balance' in favour of classification as a contract for the sale of goods. Equally, where the seller is responsible only for correct implementation in accordance with the purchaser's instructions, the contract should be classified as a provision of services.

The second question concerned the concept of 'delivered' in contracts involving carriage of goods. Firstly, the Court made it explicitly clear that parties enjoy a freedom to contract in defining the place of delivery of the goods. In shipment sales, for example, contracting on cif or fob terms will usually result in the place of delivery being the port of loading, when the goods are taken 'across the ship's rail'.

The court must therefore determine whether the place of delivery is 'apparent' from the provisions of the contract, without reference to its substantive law. If it is, then that place is to be regarded as the place of delivery for the purposes of art 5(1)(b). Where the contract is silent however, regardless of the substantive law of the contract, the place of delivery shall be the place where the goods were physically transferred or should have been physically transferred to the purchaser *at their final destination*. Accordingly, it is the place where the purchaser obtained, or should have obtained, actual power of disposal over the goods.

Previous judgments and pending references

Other recent judgments include *Peter Rehder v Air Baltic Corporation* (Case C-204/08), and *Falco Privatstiftung & Thomas Rabitsch v Gisela Weller-Lindhorst* (Case C-533/07). In *Rehder*, the Court held that, in the case of air transport of passengers from one member state to another, the court having jurisdiction under art 5(1)(b) to deal with a claim for compensation based on the transport contract, is the court which, at the appellant's choice, has jurisdiction over the place of departure or the place of arrival of the aircraft, as agreed in the contract. In *Falco Privatstiftung*, the Court held that a contract under which the owner of an intellectual property right grants its contractual partner the right to use that right in return for remuneration is not a contract for the 'provision of services' under art 5(1)(b). Such a contract however, would fall under art 5(1)(a), which, in accordance with art 5(1)(c), is applicable to contracts which are neither contracts for the sale of goods nor contracts for the provision of services. Consequently, use of the principles that developed from the Court's case law in relation to art 5(1) of the Brussels Convention, must still continue to be made as regards interpretation of art 5(1)(a) of the Regulation.

References still pending before the ECJ regarding art 5(1)(b) include that of *Electrosteel Europe SA v Edil Centro SpA* (Case C-87/10) and *Ronald Seunig v Maria Hölzel* (Case C-147/09). The former considers whether the place of delivery is the place of final destination of the goods covered by the contract, or the place in which the seller is discharged of his obligation to deliver – this matter has seemingly been dealt with in *Car Trim*. The latter deals with the same questions as those outlined in *Wood Floor*. Both judgments should therefore be handed down presently, and it will be interesting to see if any differences in the judgments are apparent.

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P&I insurers' information duties

Under what circumstances may an injured third party claim directly from the insurer of its tort feasor? The Third Parties (Rights Against Insurers) Act 2010 will enter into force upon decision by the Secretary of State, and when it does, P&I insurers will for the first time be subject to the information duties provided for by the Third Parties Act.

The Third Parties (Rights Against Insurers) Act 2010 which will replace the homonymous Act from 1930 received Royal Assent on 25 March 2010. Having passed through the House of Lords and the House of Commons in just over three months, it was nevertheless 10 years in the making, the Law Commissions having issued the underlying report as long ago as 2001 (LC272). The 2010 Act will, like its predecessor the 1930 Act, apply in cases of insolvency and in cases of company winding up and will allow injured third parties to claim directly against the insurer. Given the particular structure of the shipping business, with one-ship companies whose only asset may have been lost in connection with the very event that gave rise to the liability, that right is particularly pertinent. An injured person or widow cannot very well pursue a whole family of companies and its directors via Rule B attachments

and arrests in the manner of a judgment creditor, as seen recently in eg *Vitol SA v Capri Marine Ltd (No 2) (The Thor)* [2010] EWHC 458 (Comm) and *Brave Bulk Transport Ltd v Spot On Shipping Ltd* [2009] 2 Lloyd's Rep 115.

P&I insurers and the 1930 Act

P&I insurers considered themselves exempt from the 1930 Act by virtue of not being insurers, until *The Vainqueur Jose* [1979] 1 Lloyd's Rep 557 settled the issue the opposite way. In that case, the judge held that a P&I insurer is an insurer and that its Rules provide the terms of the policy. Although the judge did not purport to speak generally but was making a point about the particular case, it appears clear that P&I insurance is indeed insurance, at least insofar as the indemnity is not a matter of Directors' discretion.

P&I Club rules have always contained a pay-to-be-paid clause. This was first necessitated by the fact that P&I Clubs were mutual insurers with unlimited liability, made up of shipowners who were happy to insure each other but did not wish to bear the risk of each others' insolvency. The pay-to-be-paid clause (or pay-first clause) ensured that a shipowner who had not first paid its own debts because it was incapable or unwilling could not go on to claim for them from the club. These clauses, the House of Lords held in the joined cases *The Fanti and The Padre Island (No 2)* [1990] 2 Lloyd's Rep 191, permitted a P&I Club to reject a claim from an injured third party because: (1) before the insolvency event, the shipowner who had incurred a liability but had not yet paid did not enjoy any rights capable of transfer; (2) although s1(3) prevented contract clauses from taking effect that change the rights of the parties on insolvency, a pay-to-be-paid clause was not such a clause; and (3) assuming that contrary to the argument in (1), there are rights of the insured are capable of transfer to the third party, they will be transferred only together with the liabilities, so that in order to claim against the insurer, the third party must first effect payment to the injured party – and payment to oneself is an impossibility.

Lord Goff clarified in an additional speech that cargo interests were expected to maintain their own insurance and could not expect to claim from the shipowner's P&I insurers. He also issued a word of warning: if P&I Clubs were seen to discontinue the practice of paying claims for death and personal injury, legislation would be required.

The 2010 Act

The 2010 Act provides a change in relation to its applicability. Section 9(5) provides that:

> *'The transferred rights are not subject to a condition requiring the prior discharge by the insured of the insured's liability to the third party.'*

This provision is specifically designed to prevent pay-to-be-paid clauses from taking effect to prevent a transfer of rights to the third party. Pay-to-be-paid clauses are therefore universally rendered ineffective by this provision. The Act goes on to provide, in s9(6):

> *'In the case of a contract of marine insurance, subsection (5) applies only to the extent that the liability of the insured is a liability in respect of death or personal injury.'*

Thus, pay-to-be-paid clauses will take effect in the context of contracts of marine insurance, defined as contracts that fall under the definition in s1 of the Marine Insurance Act 1906 (s9(7)), only where the liability is not one in respect of death or personal injury. As a result, injured crew and passengers and the survivors of deceased crew and passengers will be entitled to claim directly against the shipowner's P&I insurer under the Act.

Following *The Fanti* and *The Padre Island (No 2)*, The Law Commission in the 2001 Report (LC272) underlying the Act already noted that there had been reports of use of the clause by non-marine liability insurers. Since then, *Markel International Co Ltd v Craft (The Norseman)* [2007] Lloyd's Rep IR 403 provides an example of an incorporated insurer, not owned by shipowners but forming part of a corporate structure, attempting to use the pay-to-be-paid clause in a case of a claim by a widow in respect of the death of an oil rig worker. At issue was only the insurer's request for an anti-suit injunction against the widow's proceedings in Tunisia and therefore the full arguments and the decision are not available to us.

Scope of application

The legislative change applies only to death and personal injury claims – other marine insurance claims are excluded from the scope of the 2010 Act by s9(6). **Cargo claims** as before continue to be subject to the pay-to be paid clauses by virtue of s9(6) of the Act. They therefore continue to fall under *The Fanti* and *The Padre Island (No 2)*. The second ground for rejecting the cargo claimants' appeal, under s1(3) of the 1930 Act, clearly will lose its effect as the 1930 Act is repealed. It will be replaced by s17(1) of the 2010 Act according to which:

> *'A contract of insurance to which this section applies is of no effect in so far as it purports, whether directly or indirectly, to avoid or terminate the contract or alter the rights of the parties under it in the event of the insured … becoming a relevant person …'*

However as was determined in *The Fanti* and *The Padre Island (No 2)*, s1(3) had no impact on pay-to-be-paid clauses and nor it would appear will this clause, in conformity with the reasoning of Lord Brandon. It nevertheless remains true that a pay-to-be-paid clause does not create liabilities, and that therefore if the

shipowner has not paid a claim by the time it becomes insolvent, there is nothing to transfer (the first ground); and indeed once there is a transfer of an entitlement, that entitlement is transferred along with the duty, including the duty to first pay the claim before it can be re-claimed from the insurer (the third ground). These remain applicable to cargo claims.

Pollution liabilities have been and continue to be subject to The Merchant Shipping Act 1995. That Act excludes the application of the Third Parties (Rights Against Insurers) Act 1930 and will be amended to exclude the application of the 2010 Act. It provides for an alternative system of information through certificates required to be carried on board ship, so that there is never any doubt as to who is the insurer and what the insurance is for.

Cargo claims, pollution claims and claims for death and personal injury make up the bulk of claims against P&I insurers. Any other types of claims will equally fall outside the 2010 Act by virtue of s9(6).

Duty to provide information

The most important effect of the 2010 Act is the duty of insurers and other persons to provide information to the injured third party about the insurance. This duty in itself has been controversial over the years. Without going into the ins and outs of that controversy, it is sufficient here to point to sched 1 to the 2010 Act which stipulates what information must be provided and in what order, providing enforcement procedures with which insurers and others possessing the relevant persons must comply. Crucially, the third party is entitled to request relevant information from any person who may possess it and the schedule also provides for enforcement measures including court orders against persons who do not comply with a request.

Johanna Hjalmarsson

Case update

The Eagle Prestige [2010] SGHC 93 and The Engedi [2010] SGHC 95

Arrest – good arguable case – disclosure; arbitration – stay of arrest

Facts and proceedings

These two cases arose in Singapore out of the same set of facts, namely the grounding on 10 November 2008 of *TS Bangkok*, resulting in hull and propeller damage. TS Lines was the disponent owner of that vessel. EP Carriers ('EPC') was the sub-charterer of *TS Bangkok* at the time it grounded, having chartered it from TS Lines, and was also the owner of *Eagle Prestige*. On 2 December 2008 TS Lines commenced proceedings *in rem* against *Eagle Prestige*. On 22 December 2008 *Eagle Prestige* was sold for US$1 and 'other good and valuable consideration' to Capital Gate Holdings ('CG') and renamed *Engedi*. In February 2009 EPC entered into provisional liquidation by way of a creditors' voluntary winding up. TS Lines also commenced arbitration against EPC in London pursuant to the charterparty in respect of the damage to the vessel and outstanding hire.

Before the Singapore courts, there were two separate actions. The action in *The Eagle Prestige* [2010] SGHC 93 was for arrest of that vessel. TS Lines was the plaintiff, EPC (the original owner) was the defendant and CG (the new owners) was the intervener. The Assistant Registrar set aside the arrest of the vessel and TS Lines appealed. The action in *The Engedi* [2010] SGHC 95 was commenced by TS Lines in defence of the arbitration in London, seeking a stay of the admiralty action *in rem* pursuant to s6 of the International Arbitration Act (Cap 143A, 2002 rev ed). TS Lines was granted a stay and CG appealed.

The law

In the first action, there were two main issues. The first was what it meant that the claimant needed to show a 'good arguable case'. The second was what disclosure was expected of TS Lines in making the application for arrest. Both questions depended on the interpretation of the Court of Appeal's landmark judgment in *The Vasiliy Golovnin* [2008] SGCA 39; noted by Tan, D and Tan, HT in STL Vol 9(1) pp 3-6.

Thus, CG argued that when an application for arrest is made or challenged, the arresting party is required to show a good arguable case on the merits of the claim. It was argued that *The Vasiliy Golovnin* in this respect departed from the principles set out in *The St Elefterio*. The judge however rejected this contention and said that *The Vasiliy Golovnin* should not be interpreted as changing the law, but that it must be read to mean that an *in rem* plaintiff need only show that the claim fell within one of the heads listed in s3(1) of the HCAJA, corresponding to s20(2) of the UK Senior Courts Act 1981 (until recently called the Supreme Court Act 1981). There was no further onus on the *in rem* plaintiff to go beyond that early stage to prove the further point that the claim is likely to succeed, unless there was a separate challenge that the action was so frivolous as to be summarily dismissed.

There was a follow-up question as to the burden of proof where the claim was unmeritorious or clearly unsustainable. It was, the judge said, open to a defendant to apply at an early stage of the proceedings for the writ *in rem* and action to be struck off on the ground that it was vexatious and had no chance of success. The court must then assess the sustainability of the action. At this early stage, the validity of the claim was relevant, and the burden lay on the defendant to show that the case was wholly and clearly unarguable. Failing this, the court should not order the striking out of the action.

The second question in *The Eagle Prestige* was whether the arresting party's duty of disclosure in an application for a warrant of arrest extended to plausible defences on the merits of the claim. It was said that there were provisions in the charterparty that provided a complete defence to the action and argued that these ought to have been disclosed by the plaintiff, pursuant to a duty per statements in *The Vasiliy Golovnin* that the plaintiff must disclose 'plausible, and not all conceivable or theoretical defences'. The judge declined to view the failure to refer to the provisions in the charterparty as fatal to the action; such omission did not constitute a failure to make full and frank disclosure. 'Plausible defences', she said, must refer not to defences but to material facts which were of such weight that their omission at the application stage constituted an abuse of process. Such omission was strictly not a *defence* to the claim; it was an objection to the claim or arrest being brought at all. In the context of the duty to make full and frank disclosure, a failure to disclose such material facts would be a ground for discharging or setting aside the warrant of arrest for material non-disclosure. Another interpretation might lead the court to examine the merits of the claim rather than just the merits of the action *in rem*. Defences to the claim such as exclusion clauses and Hague-Visby Rules defences that went to the merits of the claim, rather than to jurisdiction, need not be disclosed as they were not material to the grant or refusal of the *ex parte* application. There was a material difference between a case such as the present, and a case such as *The Vasiliy Golovnin* where the arrest in Singapore was based on obviously frivolous and vexatious claims.

In the second action, *The Engedi*, Capital Gate Holdings ('CG') appealed against a decision by the Assistant Registrar whereby TS Lines was granted a stay of the admiralty action *in rem* in favour of arbitration in London pursuant to s6 of the International Arbitration Act (Cap 143A, 2002 rev ed). Judith Prakash J set aside the stay order of the Assistant Registrar. The precise question was whether actions *in rem* fell under the ambit of s6 of the IAA. The arguments, briefly, were on the one side that it would be artificial to maintain a distinction between *in rem* claims and other claims, and that all claims should be subject to a stay under s6 *contra*; and that the *in rem* claim was not a subject of the arbitration agreement so that no stay ought to be granted. Prakash J took the view that she was not obliged to stay the action, because there was no arbitration agreement between the plaintiff and the defendant, which was the *res*. This, she said, was a decision virtually without practical effect since the usual situation would be that the plaintiff and the owner of the *res* would proceed with the action *in personam* and the action *in rem* would be stayed under the court's discretionary powers. By contrast, here the owner of the *res* was not the defendant but the intervener and had no part in the arbitration action. The arbitration action is likely to be undefended, due to EPC's liquidation. In such circumstances, the *in rem* claim could not be a subject of the arbitration agreement and there should be no stay of the admiralty action. Although the option was open to the parties, the intervener ought not to be forced to participate in arbitration in London against its will. The risk of multiplicity of proceedings ought to be on the plaintiff who had in fact commenced the action *in rem* by arresting *Engadi*.

Comments

At least one of the decisions, namely that on arrest, is said to be under appeal to the Court of Appeal of Singapore. That jurisdiction is proving to be fertile ground for decisions on arrest, including lately *The Vasilyi Golovnin* and *The Catur Samudra*; both noted in various issues of this publication. These two decisions are likely to make Singapore a more attractive arrest jurisdiction, because the burden of proof on the arresting party is ameliorated compared to a strict interpretation of *The Vasiliy Golovnin*; on the other hand, plaintiffs may think twice before arresting a vessel in respect of a claim already subject to arbitration or proceedings *in personam* elsewhere, in the hopes of a successful action against the *res*, since the Singapore Court showed no hesitation in allowing a second set of *in rem* proceedings.

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Lloyd's List

ISSN 1471 9614

***Shipping & Trade Law* is published by:** Lloyd's List, Telephone House, 69–77 Paul Street, London EC2A 4LQ, UK • tel: +44 (0)20 7017 5532 • fax: +44 (0)20 7017 4781

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Printed by: Premier Print Group, Bow, London. This newsletter has been printed on paper from sustainable sources.