# Shipping E-Brief

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SHIPPING E-BRIEF
JULY 2008

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# Shipping

## Damages for late redelivery - The *Achilleas*

The House of Lords allows Charterers' appeal against the decisions of the lower Courts/arbitrators in favour of Owners.

Much discussion and debate has been generated by the decisions of Mr Justice Clarke, at first instance, and the Court of Appeal in the case of *Transfield Shipping Inc v Mercator Shipping Inc* (the "*Achilleas*") [2006] EWHC 3030 and [2007] EWCA Civ 901. The case has now found its way to the House of Lords which delivered its decision on 9 July 2008.

Readers will recall the background to the decisions as follows.

### Background

The *Achilleas* had been chartered by her Owners to Transfield ("Charterers") for a five/seven month charter with option (which was in the event exercised) to extend for a further similar period. The charter rate under the extended charter was US$16,450 pdpr. On the facts, the latest day for redelivery of the vessel was midnight 2 May 2004. The Charterers gave notices of redelivery including a ten day definite notice on 20 April. In anticipation of such redelivery, on 21 April, the Owners fixed the vessel for a four/six month period charter with Cargill at the rate of US$39,500 per day with a laycan of 28 April to 8 May.

In the event, the vessel did not load its final cargo until 24 April and was not redelivered until 11 May. In the intervening period there was a substantial fall in the dry market. On 5 May, when it became apparent to the Shipowners that the vessel was not going to make the cancelling date under the Cargill fixture, Owners approached Cargill to obtain an extension of the cancelling date. This was only agreed in return for a US$8,000 per day reduction in the hire rate, a reduction which was reflective of the market at that time.

The vessel completed her last voyage, was redelivered by Charterers and delivered to Cargill on 11 May.

### The Claim

The Owners claimed for their loss of profit on the Cargill fixture for breach by Charterers in failing to redeliver the Vessel by 2 May. Charterers disputed this, their position being that while they accepted they were responsible for the loss during the nine day overrun period assessed at the difference between the market and charter rate, they should not be responsible for the losses suffered by owners over the entire Cargill charter.

The parties agreed between themselves quantum so that on Owners' case the damages payable would be about US$1,365,000 net (equivalent to about 180 days at US$8,000 per day less brokerage etc) whereas on Charterers' case an amount of about US$158,000 would be payable.

### The Arbitrators

In a 2:1 decision, London Arbitrators ruled in Owners' favour and awarded damages in the amount of US$1,365,000. The majority Arbitrators held that missing a subsequent fixture was a "*not unlikely*" result arising from late redelivery of the vessel, taking the view that in "*today's market*", with its ease of communication and higher emphasis on maintaining vessels in almost continuous employment, such "*not unlikely results are known, recognised and accepted hazards of late redelivery*". In addition, the majority Arbitrators held that the type of loss suffered by the Owners, being compelled to renegotiate the terms of the subsequent fixture, was "within the contemplation of the parties as a not unlikely result of the breach".

### Mr Justice Clarke

In light of the findings of fact made by the majority arbitrators, Mr Justice Clarke concluded that the Owners' loss of profit could legitimately be treated as arising naturally from Charterers' breach and was, therefore, recoverable in full in the amount claimed under the first limb of the Rule in *Hadley v Baxendale*.

### The Court of Appeal

The judgment of the Court was given by Lord Justice Rix. He took the view that there was nothing wrong with the manner in which the majority arbitrators had approached the issue of remoteness. He observed that the nature of the

chartering market was at all times "*an open book*" to Charterers – "*it was their business, in which they were experienced*". He noted that both the Owners and the Charterers were in the same business and that a charterer of time charterered tonnage knows that a new fixture is very likely to be entered into by the owner of his chartered vessel so as to follow as closely as possible on the redelivery of the vessel.

In the circumstances, Lord Justice Rix came to the same conclusion as Mr Justice Clarke and the majority Arbitrators.

**The House of Lords**

The Appellate Committee of the House of Lords which heard the appeal was made up of Lords Hoffman, Hope, Roger and Walker and Baroness Hale. All five members of the Appellate Committee gave speeches allowing the appeal (in the case of Baroness Hale, with real reluctance) and finding in favour of Charterers. The basis upon which each of their Lords put the decision was not the same. However, running throughout all five speeches was the consistent theme that the loss of profit for which the Owners had claimed was not a loss that could, properly considered, be said to be the not unlikely result of the breach by Charterers in failing to redeliver the vessel on time. Their view was that the loss was of an exceptional or unusual nature and one for which it was not contemplated by the parties that liability would result.

The decision is of potentially wide application to the law of contract and it is worth considering each speech in turn.

**Lord Hoffman**

Lord Hoffman recognised that there was no authority directly on point but appeared to view the lack of any authority as being more supportive of Charterers' position, commenting that "*there is no case in which the question now in issue has been raised. But that in itself may be significant ….. Nowhere is there a suggestion of even a theoretical possibility of damages for the loss of a following fixture*". He approached the issue by considering that it would be logical to found liability for damages upon the intention of the parties which was to be objectively ascertained by interpreting the contract as a whole in its commercial setting. He regarded this exercise of interpreting the contract as a question of law.

His explanation for this approach was that because all contractual liabilities are voluntarily undertaken, it would be wrong in principle to hold someone liable for risks for which people entering into a contract in their particular market would not reasonably be considered to have undertaken. He had in mind that the view which parties take of responsibilities and risks will impact upon the terms of the contract and in particular the price to be paid. He put it in the following way:

"*anyone asked to assume a large and unpredictable risk will require some premium in exchange. A rule of law which imposes liability upon a party for a risk which he reasonably thought was excluded gives the other party something for nothing*".

Lord Hoffman drew on his own speech in the earlier House of Lords case of *Banque Bruxelles Lambert SA v Eagle Star Insurance Co. Ltd* [1997] AC191, which dealt with the proper assessment of damages that flowed from a valuer's negligent valuation of a property. That approach involved asking, as a first step, whether the loss for which compensation is sought is of a "kind" or "type" for which the contract breaker ought fairly to be taken to have accepted responsibility. If the answer to that question was "yes", the next step would be to ascertain the damages which would put the innocent party, so far as possible, in the same position as if the contract had been performed.

In determining whether or not a loss was of a type or kind for which a contract breaker could be treated as having assumed responsibility, Lord Hoffman considered that the principle to be applied was to determine what would have been reasonable, and would have been regarded by the contracting party, as significant for the purposes of the risk he was undertaking. Applying this to the facts of the *Achilleas*, Lord Hoffman considered that:

"*I think it is clear that [the parties] would have considered losses arising from the loss of the following fixture a type or kind of loss for which*

*the Charterer was not assuming responsibility. Such a risk would be completely unquantifiable, because although the parties would regard it as likely that the owners would at some time during the currency of the charter enter into a forward fixture, they would have no idea when that would be done or what its length or other terms would be. If it was clear to the Owners that the last voyage was bound to overrun and put the following fixture at risk, it was open to them to refuse to undertake it. What this shows is that the purpose of the provision of timely redelivery in the charterparty is to enable the ship to be at the full disposal of the owners from the redelivery date. If the charterer's orders will defeat this right, the owner may reject them. If the orders are accepted and the last voyage overruns, the Owner is entitled to be paid for the overrun at the market rate. All this will be known to both parties. It does not require any knowledge of the Owner's arrangements for the next charter*".

In conclusion he found that the "*findings of the arbitrator and the commercial background to the agreement are sufficient to make it clear that the Charterer cannot reasonably be regarded having assumed the risk of the Owner's loss of profit on the following charter*".

**Lord Hope**

Lord Hope acknowledged that he was, at first, inclined to find in favour of Owners, but changed his mind after considering the draft speeches of Lords Hoffman, Roger and Walker. Lord Hope considered that the "assumption of responsibility" formed the basis of the law of remoteness of damage in contract and that the key question should be "*whether the loss was a type of loss for which the party can reasonably be assumed to have assumed responsibility*".

While Lord Hope recognised that it was within the parties contemplation that loss would be suffered generally by reason of late redelivery, and that this would be loss of use at the market rate as compared with the charter rate, he considered that Charterers could not be expected to know "*how*" Owners would deal with the Charterers under any subsequent fixture. This, he considered, was something over which Charterers had no control at the time of entering into the contract and was completely unpredictable. As a result, he considered that there could be no presumption that the party in breach had assumed responsibility for any loss caused by delay where the loss "*is not the product of the market itself, which can be contemplated, but results from arrangements entered into between the Owners and the new Charterers, which cannot*". In his view, therefore, assumption of responsibility could not be expected to arise in respect of matters over which a party could have no control and could not quantify. In order for there to be an assumption of responsibility, Lord Hope considered that the contract breaker would need to have "*some information that will enable him to assess the extent of any liability*".

**Lord Walker**

Lord Walker also appeared to give support for the concept that the "assumption of responsibility" is the critical test but did so in terms that the underlying idea should be "*what was the common basis on which the parties were contracting?*". He put it in the following terms:

"*It is also a question of what the contracting parties must be taken to have in mind having regard to the nature and object of their business transaction*".

Lord Walker, in considering the facts of the *Achilleas*, considered that while it was open to the arbitrators to conclude that for the Owners to miss a subsequent fixture was a "not unlikely" result of the delay, it did not follow that Charterers should be liable for an exceptionally large loss when the market fell suddenly and sharply (explained as being by about 20%). He placed emphasis on a remark by Lord Justice Rix in the Court of Appeal that "*it requires extremely volatile conditions to create the situation which occurred here*".

In considering the majority arbitrators' decision, he disagreed with their approach that the appropriate test was that the type of loss claimed was foreseeable (in the sense of being a "not unlikely" result). Indeed, he considered this approach to be an error of law. Instead, in his view, what mattered was "*whether the common intention of reasonable parties to a charterparty of this sort would have been that in the event of a relatively short delay in redelivery an extraordinary loss, measured over the whole term of a renewed fixture….."was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within ...contemplation""*.

Lord Walker, as with Lord Hope, appeared to place significance on the fact that Charterers had no knowledge or control of the new fixture entered into by the Owners.

**Lord Roger**

Lord Roger took a slightly different approach. He considered that the basic point was that in the absence of special knowledge a party entering into a contract can only be supposed to contemplate the losses which are likely to result from the breach in question. It is those losses, he considered, for which a party in breach would be held responsible, the rationale being that if other losses had not been in contemplation, the parties will have had no opportunity to provide for them.

He, like, Lord Walker, noted Lord Justice Rix's remark that it "*requires extremely volatile market conditions to create the situation which occurred*". In Lord Roger's view this indicated that "*the extent of the relevant rise and fall in the market within a short time was actually unusual*" and that the Owners' losses stemmed from "*that unusual occurrence*".

In other words, Lord Roger concluded that the unusual occurrence of the extremely volatile fluctuations in market conditions was not a kind of loss that could be said to be the "not unlikely" result of the breach. He also placed reliance on the fact that Owners' dealings with Cargill were not known by Charterers.

In the course of his speech Lord Roger did recognise that there might be some instances where charterers might face an exposure for the sort of loss that owners were claiming. The two examples that he gave were:

**1.** There could be a situation where a Charterer could reasonably contemplate that a late redelivery of a vessel of a particular type in a certain area of the world at a certain season would mean that the market for its services would be poor. In such circumstances, Lord Roger recognised that owners might have a claim for some general sums for loss of business though that would not necessarily mean that a particular loss on a particular contract would be recoverable.

**2.**There could likewise be a situation where when the charterparty was entered into, owners had drawn charterers' attention to the existence of a forward charter of many months' duration for which the vessel had to be delivered on a particular date. In such a case, Charterers might face an exposure.

**Baroness Hale**

The last speech was given by Baroness Hale. She, as with Lord Hope, had initially taken the view that the appeal should be dismissed and that Owners should succeed in their claim. However, she was prepared to find in Charterers' favour upon the narrow basis that the loss in question was the result of an extremely volatile market which was unusual. Baroness Hale indicated that she did not necessarily agree with the idea of introducing into the law of contract the concept of the scope of duty (involving notions of assumption of responsibility) which has been developed in the law of negligent professional services. She put it as follows:

"*The rule in Hadley v Baxendale asks what the parties must be taken to have had in their contemplation, rather than what they actually had in their contemplation, but the criterion by which this is judged is a factual one*".

In concluding she said that "*if this appeal is to be allowed, as to which I continue to have doubts, I would prefer it to be allowed on the narrower ground identified by Lord Roger, leaving the wider ground to be fully explored in another case and another context.*"

**The future**

Undoubtedly, there will now be much reflection on the decision of the House of Lords and consideration of its wider implications. On its face, it seems that the decision may have a significant impact in all cases where damages for breach of contract are in issue, and not simply in the narrow case that was before their Lords, given the application by some of their Lordships of the concept of assumption of responsibility to the determination of remoteness of contractual damages. The extent of the impact will depend on how the House of Lords' decision is interpreted by the courts in

the future, and in particular what is determined to be the ratio of the decision. This may not be straightforward.

Reviewing the speeches of their Lords as a whole, it seems they were influenced by two principal factors. The first was that there was a general market expectation that the loss of the sort claimed by Owners was not one for which Charterers would be responsible and that, against that commercial background, it would not be appropriate to impose liability on Charterers. Second, the particular loss had arisen because of an extremely volatile market situation that could be regarded as unusual and not as "not unlikely" to result from the breach.

As to the first point, the introduction of the concept of "assumption of responsibility" (by Lords Hoffman and Hope, with some support from Lord Walker) in determining the kind of losses for which a contract breaker will be liable is, perhaps, one that may be regarded as unusual in the context of commercial contracts. This is particularly so where the contractual obligations in question do not involve any obligations akin to a duty of care.

In relation to the second point, it would appear that their Lordships equated the "unusual" losses in issue with a particularly lucrative contract which could not be said to be within the reasonable contemplation of the parties absent specific knowledge. However, if this is so, it would ignore the fact that the losses in question were the result of movements in the market, and not any particularly special transaction entered into by the Owners with their new charterers (the renegotiation of the Cargill charterparty rate simply reflected the then market rate). Given their Lords' acceptance that the parties, being experienced shipping business people, would be aware that the shipping market is a volatile one, the result might be viewed as surprising, particularly given that the Lords also accepted that in general where a kind of loss was foreseeable, it was recoverable even though the extent of the loss may not have been.

Arguably, the decision suggests that a loss due to ordinary market fluctuations is a different kind or type of loss to a loss due to extraordinary market fluctuations and that on the facts before them they were dealing with an extraordinary loss. If so, this may raise some interesting issues (particularly in the current uncertain economic climate) as to when an "ordinary" market fluctuation becomes an "extraordinary" one.

While the judgments of the lower Courts and the decisions of the majority Arbitrators may have come as a surprise (in particular to Charterers), it would seem, on initial review, that the decision of the House of Lords may introduce a distinct degree of uncertainty in determining the consequences of a breach of contract. Ultimately, it may be that the decision is one of public policy, which the law of remoteness is intended to reflect, that will have a narrow application. Only time will tell.

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## The 'disparity principle' and the appropriate levels of salvage awards in rescue towage cases.

On 10 July Mr Justice David Steel of the Queen's Bench Division of the Admiralty Court handed down the High Court Judgement in the matter of an arbitration between Tsavliris Salvage (International) Ltd and the owners of the vessel *Voutakos*, her bunkers, stores and cargo. This case had been appealed to the High Court on four questions of law, primarily centred around the so-called "disparity principle" and the appropriate levels of salvage awards in rescue towage cases.

**Background**

The *Voutakos*, a motor bulk carrier, suffered a main engine breakdown in the South Western Approaches to the English Channel on 19 October 2006. The vessel was bound from Puerto Prodoco, Columbia to Rotterdam with a cargo of nearly 175,000 tons of coal. A Lloyds Open Form salvage agreement was signed between the owners and Tsavliris Salvage. The salvors chartered *Fairmount Glacier*, an ocean going tug, which proceeded to the *Voutakos* and established a towage connection on the morning of 30 October. The *Voutakos* was at the time of the breakdown in the Atlantic and the *Fairmount Glacier* was by coincidence some three hours steaming away. A further tug, the *Alphonse Letzer*, was subsequently chartered in order to act as a steering vessel for the *Voutakos* which had begun to sheer once the wind strength increased to 6-7 on 1 November. The tugs and tow continued to Rotterdam and, with the assistance of 4 berthing tugs, the *Voutakos* berthed at Rotterdam

at 1900 on 3 November 2006. The total cost of the chartering the third party tugs (taken to be at the "commercial rate") was US$874,122.54.

**Initial Award**

On 20 July 2007 an initial award of US$1,750,000 was made against a salved fund of US$42,469,777.27. In making this award, the Arbitrator noted he had taken into account the level of out of pocket expenses in a case where the tow was totally sub-contracted to a third party. He found that there was no risk of physical danger other than immobilisation.

**Appeal**

This award was subsequently appealed by the salvors, on three grounds:

**1)** that, in making his award, the arbitrator had wrongly held that French and UK Emergency Towing Vessels were a viable alternative to the services that they had provided;

**2)** that the arbitrator's findings were inconsistent with regard to the difficulties of the salvage service rendered;

**3)** that the award was too low and unjust to the salvors.

Having failed on the first two grounds the Appeal Arbitrator (John Reeder QC) set out the factors making up what has come to be known as the "disparity principle", by which awards in rescue towing cases such as that of the *Voutakos* had come to be determined. By this principle, owners have sought to argue that in salvage cases resulting from immobilisation where only a tow is required and there is no great urgency, the sum awarded should not be wholly out of line with the commercial towage rates.

John Reeder QC rejected this principle as "seriously flawed". Further, and citing the case of 'The *Batavier*', he concluded that commercial rates are wholly irrelevant to the assessment of salvage remuneration. He went on to outline the difficulties associated with selecting an appropriate commercial rate and of applying a fixed multiple of this when making awards, whilst also judging that the principle is unnecessary given the existing considerations of a salvage award. He indicated he had carried out a review of recent towage cases and concluded that the application of the "disparity principle" had led to the stagnation of towage salvage awards which were now at such a level that they no longer encouraged salvage, as required by Article 13 of the 1989 Salvage Convention. He increased the award to US$2,700,000.

**High Court**

The Owners appealed to the High Court and posed the following four questions:

**i)** whether, when assessing salvage remuneration for a service consisting of towage for a vessel in no physical danger, the commercial rate for a service is a wholly irrelevant consideration;

**ii)** whether based on the findings of fact in the Appeal Award, as distinct from the appeal arbitrator's characterisation of the case , the "disparity principle" – which states that in salvage cases where there is only immobilisation, there exists no great urgency and only straightforward towage is required to effect a cure, it is important that the sum awarded should not be wholly out of line with the commercial towage rates – was properly applicable to the present case;

**iii)** whether the "disparity principle" is fundamentally flawed.

**iv)** Whether a general increase in awards in towage cases is required to comply with the requirements of the 1989 Salvage Convention.

Crucially, the Court answered the first question "no" and indeed went further, saying that the commercial rates were relevant in all cases. In rescue tow cases the relevance would be greater than say in cases where there was physical danger. The Court said that the commercial rates "*are admissible and relevant but their significance will depend on the facts of each case. In the simplest towage cases they maybe particularly influential and provide, subject to values, a floor to any award ...*"

This was enough for the Court to allow the appeal with Owners costs and to order the

award to be remitted to the Appeal Arbitrator for further consideration.

On the issue of the disparity principle he agreed that it was flawed but for reasons very different than those given by the Appeal Arbitrator. The Judge found that the disparity principle was flawed only in the narrow sense that it had been put to the Court in respect of rescue tows. In doing so the Court answered question ii) no, because the "disparity principle" in the restricted sense is flawed and iii) "yes" in the restricted sense described in question ii).

The Court decided that question iv) was not a question of law and therefore the Court could not consider it. It follows though that the review carried out by the Appeal Arbitrator into recent towage cases must be based on the wrong premise if, as seems likely, the Appeal Arbitrator had no regard to the commercial rates.

**Conclusion**

It is difficult at this stage to assess the full impact of this decision but it is clear that in any future case the Arbitrator must have regard to commercial rates in all aspects of a salvage operation before rendering an award. The relevance will be greater in rescue tow cases, particularly those where the service is sub-contracted to a third party where there is clear evidence of the rates charged. Whilst salvors may say they have been vindicated in showing that the disparity is flawed, the reality is that the commercial rates should now act as a constraining factor in the assessment of an award.

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## Package limitation under the Hague-Visby Rules Article IV Rule 5(a): when are goods lost or damaged?

### The *Limnos* [2008] 1 Lloyd's Rep.50

The Commercial Court has recently given a decision on the meaning of the words "goods lost or damaged" within Article IV Rule 5(a) of the Hague-Visby Rules.

Article IV Rule 5(a) of the Hague-Visby Rules permits a carrier/ship to limit liability for "any loss or damage to or in connection with the goods" carried to 2 SDRs per kilogram of gross weight of the "goods lost or damaged". There has previously been no English legal authority as to what precisely the expression "lost or damaged goods" refers. The type of uncertainty which can be encountered when applying Hague-Visby weight limitation where only part of a cargo has been physically damaged is illustrated by the facts in The *Limnos*.

The judgment given by Mr Justice Burton was on a preliminary issue concerning a claim brought in respect of a shipment of US corn from Louisiana to Aqaba. The relevant bill of lading incorporated the Hague-Visby Rules. On arrival at Aqaba a small quantity of wetting damage was discovered in holds 2 and 3, which in total contained some 44,000 mt of corn. The wet damaged cargo (said to be 7 or 12 mt) was segregated and disposed of. It was alleged that a further 250 mt of the cargo in holds 2 and 3 suffered physical damage when kernels within the cargo were damaged by bulldozers during discharge. It was accepted by the Owners that this quantity, which had been physically damaged prior to or at the time of discharge, fell within the definition of "goods lost or damaged" under Article IV Rule 5(a) of the Hague-Visby Rules (the "conceded tonnage").

The preliminary issue was concerned with whether the weight of the remaining cargo in holds 2 and 3 also fell within the definition of "goods lost or damaged". As a condition of allowing discharge, the Jordanian authorities required that the remaining cargo from those holds be transferred into silos for fumigation. During fumigation the number of broken kernels increased, resulting in a depreciation in the value of the cargo. In addition, the entirety of the corn from the two holds acquired a reputation in the market as a distressed cargo which depreciated its price.

The cargo interests argued that the words "lost or damaged" included goods which have been "economically damaged". The Owners argued simply that "lost or damaged" meant goods physically lost or physically damaged only. The cargo interests' total claim was for US$1.55 million. If limitation was calculated by reference to all the cargo in holds 2 and 3, it would be calculated on the total weight of 44,000 mt, which would produce a limitation figure greater than the value of the total claim. If limitation was calculated by reference to the physically damaged cargo only (i.e. the conceded tonnage) limitation would be based on a maximum of 250 mt and limited to approximately US$85,000.

The Owners' argument and reasoning was preferred by Mr Justice Burton. He first held that the phrase "lost or damaged" referred to two categories of goods:

1. *"goods that are lost in the sense of vanished, gone, disappeared, destroyed…"* and

2. *"…goods that are damaged, in the sense of not being lost, but surviving in damaged form"*.

He rejected cargo interests' arguments that the remainder of the cargo, beyond the conceded tonnage, could be described as "economically damaged", holding that a claim for losses which were consequential upon physical damage could not be a claim for economically damaged goods. Therefore the entirety of the cargo interests' claim would be subject to limitation determined by reference to the weight of only the physically damaged cargo (the conceded tonnage).

The judgment leaves open a number of questions on the interpretation of the words "goods lost or damaged". The possibility that goods might be described as "economically damaged" on different facts remains. Mr Justice Burton commented that if it was an appropriate question to ask whether goods have been 'economically damaged' then this would have to be assessed at the time of delivery/discharge, by reference to whether the goods had then depreciated and whether there was a likelihood that some monies might need to be spent in relation to them. Mr Justice Burton also gave no view as to the position in respect of a claim for a pure economic loss (where the claimant has suffered no physical loss, such as with a claim for delay) stating that such claims were not in his view frequent.

It remains to be seen whether permission to appeal will be granted.

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## Collision claim - damages for loss of use – method of assessment?

*Owners of the Front Ace -v- Owners of the Vicky 1* [2008] EWCA Civ 101, Court of Appeal

A significant decision in relation to loss of use of a vessel, in which the Court of Appeal supported an alternative method of assessment of damages. This is the time equalisation method, entitling Owners to recover for trading losses sustained during the entire period of a substitute fixture, despite the fact that the fixture lost as a result of the defendant's wrong was for a substantially shorter period.

**Facts**

On 12 December 2002 the tanker *Vicky 1* came into collision with the VLCC *Front Ace* at Balikpapan, Indonesia. The *Vicky 1* admitted liability for the collision and the assessment of damages was the subject of a referral to the Admiralty Registrar. *Vicky 1* conceded that *Front Ace* was entitled to recover the cost of repairs and associated expenses. The issues before the Registrar related to the loss of a profitable fixture which the *Front Ace* had entered into with Chevron the day before the collision on 11 December 2002.

**Loss of Fixture**

Following the collision, the vessel discharged part of her cargo at Balikpapan and then proceeded to another Indonesian port, Cilacap, where she discharged the remainder. After discharging the cargo and completing the collision damage repair work, *Front Ace* was unable to meet the agreed laycan for the Chevron fixture and on 26 December, Chevron cancelled the charterparty. On 30 December, the Owners of the *Front Ace* entered into a new voyage charter with Vitol. The freight rate under the Chevron fixture was WS125, but, due to a fall in the market, the rate of the substitute

fixture with Vitol was only WS90. The cause of the vessel missing the laycan for the Chevron fixture was disputed, but it was found on the facts that the claimants were entitled to recover the loss flowing from the loss of the fixture. This decision was upheld by the Court of Appeal.

The Court of Appeal then went on to consider the question of assessment of the level of damages to be awarded to *Front Ace*.

The Registrar awarded damages assessed on a "time equalisation" method of assessment but reduced such damages by 20% on the basis that the losses of *Front Ace* should be treated as a loss of chance. *Vicky 1* appealed against the application of the "time equalisation" method contending that the "ballast/laden" method should be applied. *Front Ace* appealed against the reduction of 20% to their damages on the basis of the Registrar's finding of loss of chance.

**Ballast/Laden Method**

Under the "ballast/laden" method contended for by *Vicky 1*, both the Chevron fixture and the Vitol fixture would be defined as starting on completion of discharge of the vessel's previous cargo at Cilacap and finishing at the point of theoretical discharge of the Chevron cargo. In this way, each voyage would have a ballast leg followed by a laden leg (hence the term "ballast/laden" method) and a comparison would be made between the calculated time charter equivalent rate (voyage revenue less voyage expenses) on the lost Chevron fixture and the actual time charter equivalent achieved on the Vitol fixture, for the relevant period.

The Chevron fixture would have ended on 20 January 2003 and provided a profit of US$1,987,765. The Vitol fixture ended on 18 March 2003 and provided a net profit of US$3,180,891.

On the Defendant's case, the time charter equivalent for the lost Chevron fixture was US$62,371 per day (based on 31.87 days and profits of US$1,987,765.39) and for the Vitol fixture was US$35,773 (based on 88.92 days and profits of US$3,180,891). Therefore, the time charter equivalent difference was US$26,598 and, for the period of 31.87 days, the Registrar ought to have awarded the sum of US$847,648, with a reduction of 1% for agency.

As was recognised by the Registrar and the Court of Appeal, the ballast/laden method has some flaws. Firstly, it is unsuitable for VLCCs which have one major loading area, namely the Arabian Gulf, because it does not reflect the commercial importance to an owner of discharging as closely as possible to the Arabian Gulf. Secondly, it does not take account of different in voyage lengths. In this case, the Vitol fixture, which would have ended on 18 March, was far longer than the lost Chevron voyage, which would have ended on 20 January.

**Time Equalisation Method**

The Claimant's case on quantum relied upon the so called "time equalisation" method, as follows. In the period of 57 days between the end of the lost Chevron fixture on 20 January and the end of the Vitol fixture of 18 March, the vessel would have earned an average net figure of US$3,553,622. This figure represented the net earnings over the 57 days, derived from a very large selection of all the likely voyages which the vessel would have been able to perform in that period. Adopting this method, the Claimant's total loss was US$5,541,387 (US$1,987,765 lost profit from the lost Chevron fixture and US$3,553,622 lost profit for the following 57 days from the end of the lost Chevron fixture until the end of the Vitol fixture), less the profit made on the Vitol fixture of US$3,180,891, giving a total of US$2,360,496.

This "time equalisation" method had the advantage of taking account of the overall position until the end of the substitute charter. However, the Defendants argued that this method was too speculative for use in this context and would result in the court taking into account "uncertain and speculative and special profits".

The Court of Appeal upheld the Registrar's decision on the approach to quantum. The Registrar was not bound to apply the "ballast/laden" method in all cases where a claimant loses a fixture as a result of a collision. The method for calculating the loss of profit would depend upon the facts of the particular case. The Court of Appeal found that the experts appointed by each side were in agreement that the "time equalisation" method was the appropriate methodology and that in all the circumstances of this case the Registrar was entitled to prefer this methodology. The appeal of *Vicky 1* was disallowed.

On the second issue – the appeal by *Front Ace* – the Court of Appeal held that it was not correct to assess damages on the basis of loss of chance in circumstances where it could be established that the *Front Ace* would have been employed during the period of loss of use resulting from the collision. The appeal of *Front Ace* was allowed and the damages were awarded in full.

**Conclusion**

This decision reiterates the key principles relating to the assessment of damages for loss of use of a vessel arising from a collision at sea. The underlying principle of *restitution in integrum* – restoring the wronged party to the position they would otherwise have been in had the incident not occurred – should be applied but there is no fixed or set methodology by which the assessment of such losses should be made. The methodology to be adopted will depend on the facts of the individual case – in particular the type of vessel and its trading patterns. The Court is not bound to adopt a particular method of assessment.

Each case should be dealt with in light of its own particular facts with the objective of reasonably and accurately assessing what profit was lost as a result of the collision. In the case of the *Front Ace* it was appropriate to adopt the "time equalisation" method, but in other cases, involving other types of vessel engaged in different trading patterns, the "ballast/laden" may be more appropriate.

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## No implied right to change voyage orders under ASBATANKVOY form

*Antiparos ENE v SK Shipping* [2008] EWHC 1139 (Comm) (23 May 2008)

This case addresses the proper construction of clause 4(c), Part II of the ASBATANKVOY form - *"Any extra expense incurred in connection with any change in loading or discharging ports (so named) shall be paid for by the Charterer and any time thereby lost to the Vessel shall count as used laytime"*. Contrary to the tentative view expressed in Cooke, Andrew Smith J held in favour of Owners that under the standard ASBATANKVOY form, Charterers have no right to change ports after making their nomination and that Owners were entitled to recover the difference between the cost of bunkers that would have been supplied in accordance with the original bunker supply contract (entered into upon receipt of the original voyage instructions) and those that were supplied at an alternative bunkering port following the change of load ports.

The vessel was chartered on ASBATANKVOY terms for a single voyage from the Arabian Gulf to South Korea or Japan, to *"load: 1/2/3SP(S) in AG"* and discharge at up to two safe ports in the Korean/Japan range.

Clause 4 of the ASBATANKVOY form provides:

"NAMING LOADING AND DISCHARGE PORTS

*(a)* *The Charterer shall name the loading port or ports at least twenty-four (24) hours prior to the Vessel's readiness to sail from the last previous port of discharge, or from bunkering port for the voyage, or upon signing this Charter if the Vessel has already sailed.…*

*(b)* *…*

*(c)* *Any extra expense incurred in connection with any change in loading or discharging ports (so named) shall be paid for by the Charterer and any time thereby lost to the Vessel shall count as used laytime."*

On 21 March 2007 Charterers nominated the load ports of Ras Laffan for loading on 28/29 March and Mina Al-Ahmadi for loading on 29-31 March. On

the same day Owners arranged to bunker the vessel at Mina Al-Ahmadi for US$301 pmt and so informed Charterers. On 23 March Charterers indicated that they might change the voyage instructions and did so on 26 March, confirming instructions to load at Ras Laffan on 28/29 March and at Ras Tanura on 4 April. Owners therefore cancelled the Mina

Al-Ahmadi bunker stem and arranged to bunker at Ras Tanura which was the most expedient bunkering port in the circumstances. The reasonableness of Owners' decision to bunker at Ras Tanura instead of Mina Al-Ahmadi following the change of orders was not disputed. The bunkers at Ras Tanura were priced according to the published price on the date of completion of delivery and in the event cost US$355 pmt, or US$217,721.52 more than if they had been supplied at Mina Al-Ahmadi as originally arranged.

Owners brought a claim against Charterers under clause 4(c) for the difference between the cost of the bunkers that would have been supplied at Mina Al-Ahmadi and those supplied at Ras Tanura.

Owners also put their claim on an alternative basis for the difference between the cost of bunkers that Owners argued that they would have arranged to have supplied at Fujairah had Charterers' revised nomination been given at the outset, and those supplied at Ras Tanura. This was premised on Owners' assertion that if Charterers had originally nominated Ras Laffan and Ras Tanura as load ports, they would not have bunkered the vessel at Ras Tanura, but at Fujairah on or about 26 March 2007, where the bunkers would have cost US$304 pmt or US$205,626 less than the bunkers supplied at Ras Tanura. By the time the amended voyage instructions were provided, however, bunkers were no longer available for loading at Fujairah prior to the commencement of the voyage.

In both cases, Owners asserted that Charterers' revised orders were given in breach of contract.

Charterers denied liability, arguing:

i) It is implicit in clause 4(c) that they had a right to revise the original nomination, otherwise clause 4(c) would have no application in the absence of a departure from the standard ASBATANKVOY form by way of an express provision for a right to revise a nomination;

ii) That the loss of opportunity to obtain bunkers more cheaply in Mina Al-Ahmadi was not within clause 4(c), which is directed to circumstances where a vessel is required to deviate from her course after she has set out for the nominated port and, as a result, incurs extra expense by way of fuel consumption and lost time; and

iii) If (contrary to their primary submission) the additional cost of bunkers did fall within clause 4(c), that the "extra expense" is the difference between the expense incurred and that which would have been incurred had the revised nomination been the original nomination. Charterers disputed Owners' assertion that they would and/or could have arranged the supply of bunkers at Fujairah on or about 26 March if Charterers had issued their amended nomination originally.

The Judges findings were as follows:

*(i) No implied right to revise orders under clause 4(c)*

Charterers' argument that they had a right to revise the original nomination was rejected. An unlimited right to change nominations could have far reaching effects, especially where the charter provided for several alternative port ranges at a considerable distance from each other and, absent express wording, the parties could not be taken to have intended to confer such a right. Even if clause 4(c) had conferred upon Charterers a right to revise the nomination, this could not be exercised after the date by which the load ports were to be named under clause 4(a). (This was the case even though on the facts the load ports were originally named later than is required by clause 4(a).)

*(ii) Clause 4(c) is not intended only to compensate for deviation type losses*

Charterers' argument that the indemnity in clause 4(c) applied only in relation to expenses arising by way of deviation resulting from a change in nominated port was also rejected. As a matter of ordinary construction the clause called for a comparison between what expenses would have been incurred if there had been no change of the nominated ports and the expenses incurred as a result of the change. There was nothing in the wording of the first or second limb of the clause,

nor in its commercial purpose, to confine its application to expenses arising by way of deviation. To hold otherwise would have the arbitrary effect that if Owners had decided to maintain their original bunker stem at Mina Al-Ahmadi, their deviation and additional fuel expenses would have been recoverable under clause 4(c), whereas on the actual facts Owners' additional bunker costs, having made the sensible decision to change the bunker stem, would not be.

That freight was payable by reference to Worldscale, and that the Worldscale schedule was premised on the basis that *"Bunkers are deemed to be available at every port at the bunker price stated …"* did not assist Charterers. Clause 4(c) is designed to transfer from Owners to Charterers' expenses of a kind that Owners would normally bear. That bunkers were usually for Owners' account and that Owners usually bore the risk of price movement did not support an argument that Owners should bear those costs in the circumstances contemplated by clause 4(c).

(iii) *Compensation for **extra expense** incurred in connection with a change of load ports*

Charterers' final argument, that the expenses were to be assessed by reference to the difference between the expenses incurred and those that would have been incurred if the revised nomination had been given initially, was also rejected. Such a construction introduced a notion of reliance by Owners upon the original nomination and there was no justification for this in the wording of the clause. Moreover, Charterers' interpretation focused on the original nomination, whereas the clause was concerned with extra expenses *"incurred in connection with any change"*.

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## Can a Shipowner claim common law damages from a yard that has failed to build and deliver a vessel?

*Gearbulk Holdings Limited v Stocznia Gdynia SA* [2008] EWHC 944 (Comm)

In today's market this is a very significant decision, as the Commercial Court has extended existing authorities and held that by recovering monies under the refund guarantee the Buyer had affirmed the contract and was therefore precluded from claiming damages at common law.

**Facts**

The Defendant Yard failed to construct and deliver three bulk carriers which had been ordered by the Claimant Buyer. The Buyer therefore terminated the contracts and called on the refund guarantee for repayment of the pre-delivery instalments/advances plus interest. The Buyer then commenced arbitration against the Yard claiming damages at large for repudiatory breach.

The Sellers' obligations in respect of refunds of the pre-delivery instalments were set out in clause 5 of the contracts. The clause provided that those obligations would be secured by a Refund Guarantee.

Clause 10 of the contracts, which applied in the event of the Seller's default, included a provision that the *"Purchaser shall not be entitled to claim any other compensation and the Seller shall not be liable for any other compensation for damages sustained by reason of events set out in this Article and/or direct consequences of such events other than liquidated damages specified in this Article"*.

Mr Justice Burton has held that the wording of clause 10 did not exclude the Buyer's right to terminate the contract if the Yard were in repudiatory breach, nor did the wording exclude or limit the Buyer's right to claim damages at common law. However, he also held that the Buyer was precluded from claiming damages at common law for repudiation by virtue of it having affirmed the contracts and recovered monies, plus interest, from the refund guarantor in accordance with the provisions of the contract.

On appeal to the Commercial Court by the Yard Mr Justice Burton upheld the decision of the Arbitrator (Sir Brian Neill) that:

a. In order to exclude common law rights there have to be clear words in the contract and there were no such clear words in this contract to rebut the presumption that the Buyer retained its common law rights arising out of repudiation.

b. That the wording in clause 10 did not limit the Yard's liability in circumstances where a Buyer terminated at common law, as the relevant clause only referred to the specific events set out and not to termination for repudiatory breach.

Mr Justice Burton allowed the appeal and differed from the arbitrator when he found that the Buyer was precluded from claiming damages at common law, by virtue of them having affirmed the contracts and recovered monies plus interest from the refund guarantor in accordance with the provisions of the contract.

Mr Justice Burton considered the law and reached his conclusion on the basis that the Buyer chose to enforce a provision in the contract which was very significant to it (i.e. seeking payment under the refund guarantee) and enforce the contractual provisions, which enabled it to obtain a secured sum against a third party and that the Buyer claimed interest in accordance with the contractual provision. He concluded that this meant that the Buyer had affirmed the contract and elected against repudiation. He found that the refund guarantee could only be enforced *"in the event that the purchaser shall exercise its right to terminate this contract pursuant to any of the provisions hereof"*. In accordance with the agreed terms he therefore found that the Buyer's right to a refund could only be accessed by enforcing the terms of the contracts, which they did in each case, therefore affirming the contract and electing against repudiation. Mr Justice Burton considered that his judgment was in line with the law as established by the Court of Appeal decision in *United Dominion Trust (Commercial) Ltd v Ennis* [1968] 1 QB 54 and that he was bound by it.

It is also important to note that although one of the letters which terminated the ship building contract expressly put the Yard on notice that they were in repudiatory breach, that such breach was being accepted and that the exercise of their right of termination was made without prejudice to their right to claim damages by reason of the repudiatory conduct, Mr Justice Burton found that was not sufficient to protect the Buyer's right to common law damages, as they could call on the guarantee (which they did) only if they terminated the contract in accordance with its provisions and effectively affirmed the contracts.

Therefore although it is possible to protect a Buyer's rights to claim damages at common law for repudiatory breach and to claim a refund for instalments paid in advance, this must be done in the wording of the contract, not the termination notice. Where there is no clear indication in the wording of the contract, it appears that Owners will be faced with a choice if a Yard fails to deliver – either to claim a refund of the instalments paid from the refund guarantor or to pursue the yard for damages arising out of the repudiatory breach.

Leave to appeal to the Court of Appeal has been granted and a hearing is scheduled to take place late 2008/early 2009. Watch this space!

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## Salvage: why no state immunity for the Iraqi government?

*The Altair [2008]* EWHC 612

This is not an attempt to open a political debate as to the independence or otherwise of the Iraqi government! Instead it is a discussion of the recent UK Commercial Court decision in *Ministry of Trade of the Republic of Iraq and Another v Tsavliris Salvage (International) Ltd ("The Altair")* [2008] EWHC 612 (Comm), which decided some interesting questions concerning a shipowner's right to bind owners of cargo to salvage agreements and whether the defence of state immunity is available in that context.

The case involved a challenge by the Ministry of Trade of the Republic of Iraq and the Grain Board of Iraq of an arbitration award on the grounds that: (1) there was no valid arbitration agreement that bound them; and (2) that the Grain Board, the cargo interest under the award, was immune from arbitration proceedings as it was part of the Ministry of Trade, and was entitled to claim state immunity.

**The salvage agreement**

On 28 August 2006 The *Altair*, laden with a cargo of wheat, grounded in Kuwaiti waters close to Umm Qasr. On 1 September 2006 the Owner of the vessel entered into a salvage agreement with Tsavliris on a Lloyd's Open Form ("LOF"). The LOF was signed at Piraeus by a representative of Tsavliris and by an employee of the vessel's Managers acting on behalf of the Shipowners. The salvage services were successfully carried out and the vessel was refloated on 7 September 2006.

**The arbitration proceedings**

In the arbitration proceedings in relation to the LOF, Tsavliris asserted that the salvage agreement bound the Owners of the cargo laden onboard the salved vessel and that the Grain Board was the owner of that cargo and was liable for cargo's proportion of salvage.

It was held by the Tribunal that the cargo was the property of the Grain Board, that the Grain Board was a separate entity from the Government of Iraq, that the cargo was a commercial cargo, and that the Grain Board had agreed to arbitration because it was a party to the LOF by virtue of Article 6.2 of the 1989 Salvage Convention, which provided:

"*The Master shall have the authority to conclude contracts for salvage operations on behalf of the owner of the vessel. The Master or the Owner of the vessel shall have the authority to conclude such contracts on behalf of the Owner of the property on board the vessel.*"

The Arbitrator went on to find that the Grain Board should pay US$496,510.87, plus interest and costs, in respect of cargo's contribution to the cost of salvage services.

**The Commercial Court: arguments on jurisdiction**

The first issue to be addressed on appeal from the Arbitrator's finding to the Commercial Court (Mr Justice Gross) was whether a valid arbitration agreement was ever entered into. That is to say: were the owners of the cargo bound by the LOF?

The Judge found that they were, and reasoned as follows. Section 224 of the Merchant Shipping Act 1995 incorporates the provisions of the Salvage Convention into UK law. As the LOF provided for arbitration in London and the UK is a State Party to the Salvage Convention, the Salvage Convention applies to LOF arbitration proceedings. The Court noted that it was irrelevant that Iraq has neither ratified nor acceded to the Salvage Convention, as this is not the test for the application of the provisions of that Convention to this matter.

Article 6.2 of the Salvage Convention gave the Master and Owner express authority to conclude salvage contracts on behalf of the Owners of cargo carried onboard the vessel. It was not necessary (as was argued by the Iraqi appellants), that the contract must be concluded by the Master or Owner personally, or by the Owners' employees, rather than the Managers' employees. The Owners of the cargo were therefore bound by the LOF. On the evidence the Judge went on to find that the Grain Board was the Owner of the cargo and, as a consequence, a party to the LOF. Therefore, subject to any argument about state immunity, the Arbitrator did have jurisdiction to make an award against the Grain Board for a contribution to the Salvor's reward for their services.

**The Commercial Court: arguments on immunity**

The second issue of interest was whether the Grain Board was immune from arbitration proceedings on the basis of state immunity. The Judge began by considering s.9(1) of the UK's State Immunity Act 1978, which provides:

"*Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration.*"

By virtue of the operation of article 6.2 of the Salvage Convention, the Managers, as agents of the Shipowners, concluded the LOF on behalf of the Grain Board. There could be no dispute that the LOF was agreed in writing. Accordingly, it followed that the Grain Board agreed in writing to arbitration in accordance with the LOF, as a result of which the challenge on the ground of state immunity failed.

The Judge commented that this finding reflected the strong maritime policy interest in rewarding salvors: there is no unfairness in a State, having enjoyed the benefit of salvage services, being required to pay for them. In the words of Lord Wilberforce in an earlier case on state immunity, to require a state in such circumstances to honour an arbitration award is "*neither a threat to the dignity*

*of that state, nor any interference with its sovereign functions*" (*I Congreso* [1983] AC 244, 262).

The challenge to the arbitration award ended there but the Judge went on to consider the position under s.14 of the State Immunity Act in case there was a different result, which might have had an effect on enforcement. Under s.14, if the Grain Board was a 'separate entity' distinct from the Ministry of Trade, it would be immune from jurisdiction if the proceedings related to anything done by it in the exercise of sovereign authority and the circumstances were such that a state would have been immune. On this issue, it was argued that, although it was not an aid cargo, the cargo was intended for "public distribution" in Iraq, that it had not been acquired for commercial purposes and that this was not a normal government commercial transaction. The Judge confirmed that, even if the motive or purpose of the acquisition of the cargo had a governmental interest, that is not the test. The relevant test for immunity under section 14(2) went to the character of the act, rather than its motive or purpose. The act of entry into the LOF did not have the character of a governmental act.

Finally, the Judge found that Tsavliris was entitled to enforce the award in the same manner as a judgment and succeeded in its application for a freezing injunction. On the latter application, the judge held that on the evidence there was a real risk that in the absence of a freezing injunction the award would go unsatisfied: the Grain Board had refused to provide security pursuant to the LOF, had refused to participate in the arbitration, had failed prior to the hearing to make any offer to honour the award on a basis which protected its position for the purposes of the hearing, and had failed throughout the hearing to make any offer of an undertaking to honour the award in the event that its arguments were unsuccessful.

**Conclusions**

What, then, are the lessons to be learned from this case? It underlines the authority of Shipowners, their employees and agents, to enter into LOF contracts on behalf of cargo interests, no matter who they may be, including State parties. Consistent with the trend in public international law towards a restrictive approach to sovereign immunity, it also confirmed that a state entity, such as the Iraqi Grain Board, cannot shelter behind the cloak of state immunity (even, as in this case, where the purpose of the shipment was for distribution to the Iraqi population, rather than profit), where the character of the act in respect of which it claims immunity is not a governmental one. As the act of entering into a salvage agreement is not governmental in character (put another way, it is an act which any private citizen can perform), state entities cannot claim state immunity in respect of that act. Finally, the Judge in this case had no hesitation in granting an injunction to freeze State assets where the State had previously shown no intention to pay up voluntarily.

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## Demurrage and responsibility for stowage and reversibility of laytime

### London Arbitration 06/08

In London Arbitration 06/08 – 722 LMLN 3, 21.05.08, Owners successfully recovered demurrage from Charterers who were unable to rely on defences that the condition of the vessel's gear caused delays during loading, or that Owners should be responsible for delays due to the incompetence of stevedores who were under the Master's direction and control.

This arbitration concerned a charter on an amended Gencon Form which threw up a number of issues.

Firstly, Charterers complained that the derrick serving one of the holds was not working properly, reducing the capacity to load/discharge the Vessel. The Charterparty provided that where insufficient power prevented the efficient working of cargo gear, "time thereby lost" should be deducted from laytime. The Tribunal held that "time" generally meant "laytime" and that this clause applied prior to the expiry of laytime, but only where there was a causal connection between the loss of efficiency and an actual loss of time.

On the other hand, once laytime had expired and the Vessel was on demurrage, if there was an inefficiency or breakdown of the cargo gear, that amounted to a default on the part of the Owners, this could provide a defence to Owners'

demurrage claim. This was provided that the Charterers could demonstrate a causal connection between the Owners' default (ie the breakdown/ inefficiency) and an actual loss.

Charterers asserted that they ought to be allowed to count time on a pro-rated basis, having made an assessment of the partial inefficiency. This was however deemed artificial and unsustainable because Charterers had not, under general principles of damages, demonstrated that they had suffered an actual loss.

The second issue concerned stowage of the cargo. The handling of the cargo by the stevedores caused further delays at the loading port and there were problems stowing the cargo, which was in jumbo bags. There were subsequent delays caused by the need to replace damaged jumbo bags at the discharge ports. The Charterers relied on a clause of the charterparty providing that the stevedores were under the direction and control of the Master, who was to be responsible for the proper loading, stowage, discharging and seaworthiness of the vessel. Charterers said that the Owners were therefore responsible for time lost due to bad stowage. Owners said in return that the stevedores were incompetent and that this negated the Clause. Owners relied on clause 5 of the Gencon charter which provided that cargo shall be stowed trimmed, tallied and lashed by Charterers, free of risk, liability or expense to the Owners.

The Tribunal held that the obligation on Charterers was to employ a firm of stevedores whose workers were not only competent but who were properly equipped. It was obvious on the facts that heavy fork-lifts would be needed to shift the cargo to make proper use of the available space in the holds. The Tribunal considered that the lack of proper equipment (i.e. forklifts) was sufficient to demonstrate incompetency on the part of the stevedores and therefore the Master could not be held responsible for the delays due to bad stowage. Charterers also had no separate defence to demurrage based on default on the part of Owners/their servants. Charterers were further estopped from relying on any delay caused by re-bagging the cargo by the terms of an LOI they had given which indemnified Owners in respect of any liability due to torn and damaged bags and re-bagging.

The Tribunal also considered a clause in the Charterparty providing that laytime was fully reversible in the Charterers' option. The Tribunal found that, on the basis that the reversibility of laytime was an option, it only took effect if exercised. The Charterers failed to exercise their option and the fact that reversibility was mentioned in their final submissions in the arbitration did not amount to an exercise of the option.

As to the end of demurrage, it was found that, where Charterers ordered the vessel to remain at port pending loading of further cargo, which was not in fact loaded, laytime/time on demurrage continued to run after actual loading had completed and until the Vessel was ordered to proceed.

Finally, Owners were also found to have a valid claim for deadfreight where Charterers produced no evidence that an additional quantity of cargo could not have been loaded.

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## Bailment in Hong Kong – delegation to independent sub-contractor does not absolve bailee from responsibility

*Samsung Electronic Limited (and others) v (1) J & C Cargo services Company Limited (2) Yeung's Logistics Company* HCCL 14/2005

There is often a misconception that a bailee who sub-contracts part of the care of goods to an independent contractor discharges their duty to the bailor simply by believing it has selected a competent sub-contractor. This was a misconception held by the Defendants in this case, to their cost.

The Hong Kong Commercial Court has helpfully set out the correct test that a bailee for reward must satisfy when caring for a bailor's goods. The Court also clarified that once the plaintiff bailor has established that the defendant bailee has lost (or damaged) the goods in question, then the burden of proof switches to the bailee to establish that it took "all reasonable care" for the goods.

**The facts**

Samsung Electronics Limited ("Samsung") sold a consignment of approximately 6,000 mobile telephones to a Hong Kong company, Ezcom

Electronics Limited ("Ezcom"). J&C Cargo Services Limited ("J&C Cargo") were retained by Ezcom to deliver the telephones by road from Hong Kong airport to their warehouse in Kowloon, Hong Kong. J&C Cargo in turn sub-contracted the collection and delivery of the telephones to a small local haulier, Yeung's Logistics Company ("Yeung"). Yeung had been one of J&C Cargo's sub-contractors for over five years during which there had been no other losses of this nature. There were no written contracts or standard terms between Ezcom and J&C Cargo, or J&C Cargo and Yeung.

The goods were allegedly stolen in transit. Ezcom claimed on their insurance policy and insurers brought a subrogated claim against J&C Cargo and Yeung's as bailee and sub-bailee of the goods respectively.

The driver was the only witness to the theft. He claimed that it had been necessary to leave his assistant, who would otherwise have been in the truck with him, at the airport after collection. He then claimed that a stranger had entered the cab of his truck via the passenger door while he was at traffic lights en route to his destination. His evidence was that the central locking system for the cab to the truck was broken and that the windows were wound down. Moreover, it was his evidence that it was known to various other transport companies that the locking system in this truck was broken. The driver claimed that the stranger then forced him, at knife point, to swallow some tablets which caused him to lose consciousness. When he regained consciousness the telephones had disappeared from his truck.

**The law**

The Court clarified the following principles with regard to bailment under Hong Kong law:

(a) a bailee for reward will be liable for loss or damage of the goods unless he can prove that he took all *reasonable care for the goods;*

(b) the burden of establishing that all reasonable care was taken is not discharged by simply delegating the care of the goods to an independent contractor;

(c) unless it can establish that it took all reasonable care then a bailee cannot avoid liability for loss or damage caused by the negligent acts of a sub-bailee or independent contractor;

(d) the obligation to take all reasonable care includes the bailee taking appropriate steps to stop goods being stolen by employees, servants or agents of the bailee. Failure to take such steps is a breach of the primary duty owed by the bailee to the bailor.

In concluding the Judge stated that *"at the end of the day … … in the vast majority of bailee cases the issue comes down to whether, on the evidence, the bailee/sub-bailee … … are able to successfully discharge the burden of proof which lies upon them … of taking all reasonable care."*

Taking the driver's account at face value, which the Judge stated *"required a certain suspension of disbelief"*, there could be no doubt that Yeung's carelessness caused the loss of the telephones. There was no need for insurers to challenge the driver's evidence in order to implicate him in the theft. Since neither J&C Cargo nor Yeung had been able to establish that they took reasonable care, judgment was given against them both.

**Comment**

This case serves as a useful reminder that liability for goods entrusted to the care of a bailee for reward cannot be avoided by the mere fact of sub-contracting the care to a third party. This remains so even when the third party is one with whom the bailee has a long-established commercial relationship.

Carriers who choose to sub-contract out the care and/or physical carriage of goods provided to them as bailees for reward should ensure that, in the event that these goods are lost or damaged by the sub-bailee or sub-contractor, they can produce documents to demonstrate to a Court that they took all reasonable care, both (i) in selecting the sub-contractor and (ii) in so far as it was possible, that the sub-contractor had in place suitable systems to care for the goods in question.

Such documentation should include standard terms and conditions for sub-contractors setting out appropriate minimum standards of care to be taken with respect to the goods. For a road haulier

transporting high-value goods, such conditions may include the requirement that the locking system to the cab must be working and engaged during transport, the windows must be wound up and a second person must be present in the passenger seat.

In the case of long term sub-contractors a Court may expect to see some evidence of enquiries being made by the bailee to ensure that the sub-contractor is abiding by such terms. For a new contractor, enquiries into their operational practices and loss might also be carried out prior to their retention.

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## Delay and the risk of inconsistent decisions leading to discontinuance of an anti-suit injunction in London

*Verity Shipping S.A. and others v N.V. Norexa and others* [2008] EWHC 213 (Comm)

In *Verity Shipping S.A. and others v N.V. Norexa and others* [2008] EWHC 213 (Comm) the Owners applied to continue an anti-suit injunction in London prohibiting the Cargo Interests from prosecuting proceedings in the Antwerp Court. Mr Justice Teare held that the risk of inconsistent judgments, which might cause a third party to suffer an injustice, was a strong cause or good reason to discontinue the anti-suit injunction. In addition, Mr Justice Teare held that the Owners should have applied for an injunction long before they did, having waited some three years from commencement of the Antwerp proceedings before making their application.

### The facts

Verity Shipping S.A. were the Owners and Managers of The *'Skier Star'*. By a voyage charterparty dated 12 December 2004 the vessel was chartered to an Argentine company for the carriage of fresh fruit and vegetables from Campana to Antwerp. Bills of lading were issued in Campana dated 3 January 2005, incorporating the English law and London arbitration clause from the charterparty. N.V. Norexa et al. (cargo interests) claimed to be the holders of the bills of lading and the insurers of the cargo. The cargo was discharged at Antwerp on 20 and 21 January 2005, but was condemned by the Belgian Federal Agency for Food Safety ("FAVV"), who alleged oil vapour contamination.

### The proceedings in Antwerp

On 21 January 2005 the Cargo Interests issued proceedings in Antwerp, alleging that the Owners were liable for the loss of the cargo. The Antwerp proceedings were adjourned on 8 February 2005, pending the production of the Court appointed surveyor's report. The Owners subsequently issued proceedings in Antwerp against FAVV, seeking an indemnity in respect of any liability they might have to the Cargo Interests. The surveyor's preliminary report was published on 18 April 2006 and, following a series of comments and questions being raised by the Owners and answered by the surveyor, the final report was submitted to the Antwerp Court on 13 March 2007.

### The proceedings in London

On 27 November 2007 the Owners informed the Cargo Interests that they would seek an anti-suit injunction in England unless the Cargo Interests agreed to withdraw their claim in the Antwerp Court. The Cargo Interests declined to do so and the Owners, on 21 December 2007, sought and obtained an anti-suit injunction in the Commercial Court in London restraining the Cargo Interests from taking any further steps in the Antwerp proceedings. The Owners subsequently applied to continue the anti-suit injunction.

The present position under English law is that the Court has jurisdiction to grant an anti-suit injunction to enforce an arbitration clause notwithstanding that a defendant has already commenced proceedings in the EU; see *The Front Comor* [2005] 2 Lloyd's Rep. 257. (However, the question of whether such a jurisdiction is compatible with the Brussels Regulation has recently been referred to the European Court of Justice; see *The Front Comor* [2007] 1 Lloyd's Rep. 391. The burden rests on the party seeking to resist the anti-suit injunction and proceed elsewhere to demonstrate strong cause or good reason why it should be permitted to break its contract. If the defendant cannot discharge that burden then an anti-suit injunction should be issued and/or upheld.

### The submissions in London

1. The risk of inconsistent decisions

The Cargo Interests suggested that there was a risk of inconsistent decisions between the arbitration in London and the proceedings in the Antwerp Court, as FAVV could not be a party to the London

arbitration, even though the Owners had sought an indemnity from them. This was, the Cargo Interests submitted, the first "strong cause or good reason" for discontinuing the anti-suit injunction. The Owners' response to that argument was that if there was such a risk, then that was a risk they were willing to take as the price of enforcing the London arbitration clause.

2. Delay

The Cargo Interests' second argument was that the Owners had waited until December 2007 to seek an anti-suit injunction in circumstances where they knew, in January 2005, that the Cargo Interests were proceeding against them in Antwerp contrary to the London arbitration clause. The Cargo Interests relied on *The Angelic Grace* [1995] 1 Lloyd's Rep. 87, in which Lord Justice Millet said that the English Court need feel no diffidence in granting an anti-suit injunction "*provided that it is sought promptly and before the foreign proceedings are too far advanced*." The Owners said in response that in Antwerp they did not have to register their objection to the jurisdiction until after the Court survey process had been completed. In other words they alleged that the survey process was "jurisdiction neutral" and that, following the finalised survey and failed settlement talks, they had promptly sought an anti-suit injunction from the English Court.

3. Time bar

The Cargo Interests' third argument was that an arbitration claim in London would now be time barred under the one year limitation period provided by the Hague or Hague-Visby Rules. The Owners, on the other hand, pointed out that the Cargo Interests had not obtained a copy of the charterparty and were therefore unaware of the London arbitration clause until it was mentioned by the Owners in November 2007. As such, the Cargo Interests had simply failed to protect their cargo claim in the contractual forum, and the presence of a time bar defence could not amount to a reason, let alone a "strong and good reason", to refuse the anti-suit injunction.

**The Commercial Court's decision**

Firstly, Mr Justice Teare held that by reason of the Owners' decision to claim against FAVV in Antwerp, there was a risk of inconsistent decisions which might cause an injustice to FAVV. For example, if the London arbitration were to conclude that the loss of cargo was caused by the Owners' breach of contract, but the Owners persuaded the Antwerp Court to find that FAVV was liable to the Owners, then FAVV may have suffered an injustice. If the Antwerp court tried both the Cargo Interests' claim against the Owners and the Owners' claim against FAVV, there would be no risk of inconsistent decisions and no risk of injustice to FAVV.

Secondly, the Owners did not seek the injunction promptly and before substantial progress had been made in the Antwerp proceedings. Mr Justice Teare added that even if his finding of delay was wrong, the risk of inconsistent decisions and therefore of injustice to a third party, FAVV, amounted by itself to a "strong cause or good reason" for not granting an anti-suit injunction. Mr Justice Teare did, however, dismiss the Cargo Interests' time bar defence as they were unable to show that they had acted reasonably in not protecting their cargo claims in the contractual forum.

Accordingly, the Court ordered that the anti-suit injunction should not be continued.

**Comment**

This decision reinforces two key principles which any party considering an application for an anti-suit injunction should bear in mind: firstly, that unless there are exceptional circumstances for doing so, that party should not participate (above and beyond entering an appearance, for example) in proceedings in a non-contractual forum; and: secondly, that party should not delay in making its application.

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## Rule B Attachment – not an alternative to seeking security for costs

*Naias Marine S.A. -v- Trans Pacific Carriers Co. Ltd.* United States District Court – Southern District of New York [07 Civ. 10640]

In a recent decision the New York Southern District Court has confirmed that a Rule B attachment cannot be used to obtain security for costs in the absence of an underlying maritime claim. Although many readers will be familiar with Rule B attachments, for those who are not, it suffices to know that they are primarily used by parties to obtain security in respect of a maritime claim.

### Facts

Naias Marine S.A. ("Owners") chartered the vessel STENTOR to Trans Pacific Carriers Co. Ltd. ("Charterers") under a time charter. The charter was governed by English law and all disputes were to be referred to arbitration in London under the LMAA procedure.

Charterers commenced arbitration in London claiming that Owners had wrongfully withdrawn STENTOR from their services in breach of the charterparty. Charterers then obtained a Rule B attachment order in New York covering their principal claim, interest and costs ("the First Order"). Owners did not seek counter-security from Charterers and the First Order was dismissed by consent upon the provision by Owners of a bank Letter of Guarantee as alternative security. Owners also confirmed in open correspondence that they had no counterclaim in the underlying arbitration.

Two weeks after the First Order was dismissed Owners obtained their own Rule B attachment Order ("the Second Order"). Owners claim in the Second Order was limited solely to the estimated costs of defending the London arbitration. It was, in effect, no more than a claim for security for costs.

### The main issues before the Court

Charterers applied to have the Second Order dismissed on the basis that Owners did not have the valid *"maritime claim"* needed to trigger the Court's Rule B jurisdiction. The two main issues before the Court were:

(a) What law was to be applied in determining whether Owners claim was a *"maritime claim"*; and

(b) whether the costs of defending a claim that arose under a charterparty fall within the definition of a maritime claim.

### (a) The governing Law

Owners argued that the law to be applied in determining whether their claim was properly a maritime claim was American federal law. They asserted that Rule B is a procedural remedy and federal law applies to procedural issues even if a foreign law governs the underlying contract.

Charterers maintained that English law, the law governing the charter, was to be applied to this question although they also submitted that the same result is reached under American law. The Court considered decisions by other Courts in the district where it had been held that the law governing the contract applied to questions of whether a claim had *accrued*, whereas federal law applied to whether the making of an attachment order was *reasonable*.

The Court held that as English law governed the underlying charterparty, it was English law which must be applied to determine whether Owners claim was a maritime claim.

### (b) Security for costs – a maritime claim?

Owners argued that because its arbitration defence costs arose out of an arbitration agreement contained in a charterparty, which is a maritime contract, the claim for legal costs must be a maritime claim. The burden of proving that the claim for costs was a maritime claim fell upon Owners. However, no evidence from an English lawyer on this issue was actually put before the Court by Owners.

Although a maritime claim is not a term of art under English law (the equivalent English term being *"admiralty claim"*), Charterers argued that legal costs arising in an arbitration do not fall within the definition of an admiralty claim. Whilst

a claim under the charterparty would be a maritime claim, the legal costs and fees arise under an arbitration award and are distinct from the charterparty. An arbitration award is not an agreement in relation to the use or hire of a ship. If Owners succeed in the reference they may have a claim for legal fees and costs, but such a claim would not be an admiralty claim under English law.

The Court agreed, holding that although the arbitration arose out of an alleged breach of a maritime contract, this did not make a claim for arbitration defence costs, with nothing more, a maritime claim. The Court also commented that the position would be the same under American federal law.

Accordingly, the Second Order was dismissed.

**Comment**

The Rule B procedure is not an alternative means for a defendant, without a counterclaim, to obtain security for its costs. However, a party in that position does still have the option of applying to the Tribunal for security for their costs within the arbitration itself, providing the relevant grounds can be met. Although it provides welcome clarification on this point the Court decision does have a logical flaw. Whilst a party with a maritime claim can use the Rule B procedure to obtain security for its estimated costs in pursuing that claim, the defending party without a maritime counterclaim cannot obtain security for its defence costs through the same procedure. This appears to be inequitable.

However, the Court expressly declined to comment on whether Owners would have been successful if they had applied for an order under Rule E(7), which allows a defendant to seek counter-security when the counterclaim "*arises from the same transaction or occurrence that is the subject of the original action*". Moreover, the question of whether Owners could have obtained counter-security for their legal costs had they requested it in response to the First Order was not addressed.

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# Commercial Disputes

## Freezing injunctions under the Arbitration Act 1996

*Mobil Cerro Negro Limited v Petroleos de Venezuela S.A.* [2008] EWHC 532 (Comm)

This case involved a successful application by Petroleos de Venezuela S.A. ("PDV"), the national oil company of Venezuela, to set aside a freezing order obtained by Mobil Cerro Negro Limited ("Mobil") under s44 of the Arbitration Act 1996 (the "1996 Act"). The grounds for setting aside the freezing order were: (1) it was not "just and convenient" under s37 of the Supreme Court Act 1981 (the "1981 Act"); (2) the case was not one of urgency under s44(3) of the 1996 Act; and (3) given the seat of Arbitration was not in England, it was "inappropriate" to grant the order under s2(3) of the 1996 Act.

**Background**

In 1997 Mobil, part of the Exxon Mobil group, entered into an "Association Agreement" with a subsidiary company of PDV named Lagoven Cerro Negro, S.A. ("CN"). PDV guaranteed the performance of the obligations of CN under the Association Agreement pursuant to a guarantee subject to ICC arbitration in New York.

Venezuelan legislation which took effect in June 2007 in relation to Venezuelan oil effectively brought about the expropriation of Venezuelan oil interests from foreign companies to companies which were at least 60% Venezuelan owned. This 'expropriation legislation' envisaged that replacement commercial arrangements would be made with those affected by the expropriation. Negotiations led to agreement with many other oil companies, but not with Mobil. Mobil therefore made a demand under the PDV guarantee in respect of compensation said to be due under the Association Agreement.

On 24 January 2008 Mobil applied for and obtained a 'without notice' freezing order against PDV which froze its assets worldwide up to a total sum of US$12 billion. This was the largest freezing order ever granted by the English court. Soon after the granting of the freezing order Mobil commenced ICC arbitration proceedings in New York to enforce the guarantee. PDV duly applied to

set aside the freezing order, and succeeded in doing so on 18 March 2008.

**The Decision**

Mr Justice Walker set aside the freezing order for three reasons:

**1.** There was not a sufficient connection with England and Wales. Such a connection was necessary, in the absence of fraud, for the order to be just and convenient under s37 of the 1981 Act. As the court had no personal jurisdiction over PDV, and the seat of arbitration was in New York, the only way Mobil could have established a sufficient connection with the jurisdiction was by showing that PDV had significant assets within England and Wales. It attempted to show this, but failed. In particular Mobil failed to show that PDV was the "effective controller" of certain bank accounts belonging to other companies located within England. The judge agreed that PDV had no office, conducted no business operations, had no bank accounts, real property or other assets of any kind in the jurisdiction.

In any event, Mobil did not establish that PDV was unjustifiably disposing of its assets. In particular the fact that PDV had adopted a policy of disposing of assets in America and Europe and transferring them into Venezuela, or to countries perceived to be friendly to the Venezuelan government, did not amount to unjustifiable conduct. Mr Justice Walker noted that Venezuela was a party to the New York Convention and that therefore an ICC award under the guarantee was enforceable against PDV in Venezuela, including through the use of injunctive relief by the Venezuelan courts. Mobil had produced no evidence which showed that enforcement in Venezuela would be any more difficult than in any other Country.

**2.** Mobil was unable to show that the case was one of urgency as required by s44(3) of the 1996 Act. Mr Justice Walker noted that the only urgency relied upon by Mobil concerned the need for prompt action to prevent dissipation of assets. As the Judge concluded that Mobil had not shown that PDV was dissipating its assets, Mobil had failed to show that the case was one of urgency.

**3.** Given that the seat of the arbitration was New York, in the absence of fraud or some other significant factor, and in the absence of substantial assets located within the jurisdiction, it was "inappropriate" under s2(3) of the 1996 Act to continue the freezing order. The most appropriate jurisdiction for Mobil to seek a freezing order was Venezuela. Mr Justice Walker reviewed the authorities and noted that just because the 1996 Act places further restrictions on the power of the court to grant freezing injunctions in aid of foreign arbitration than in respect of foreign litigation (i.e. urgency and appropriateness), the general principles of comity nevertheless remain notwithstanding the additional hurdles.

**Conclusion**

This decision is important as it confirms that the Court has the same wide power to grant freezing orders in aid of foreign arbitration as it does in aid of foreign litigation (subject to the further hurdles imposed by the 1996 Act). However although the Court has this wide power it will only use it sparingly. Indeed unless there is an allegation of fraud, or there is a substantial link with England and Wales, the English court will show deference to the Court of the seat of the arbitration.

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## Part 36: is it worth the fight?

*Lisa Carver v BAA PLC* [2008] EWCA Civ 412 C/A (22/04/08)

Following *Lisa Carver v BAA Plc [2008]* the cost consequences of "beating" a Defendant's Part 36 offer to settle by a nominal amount are no longer so clear cut.

Prior to the introduction of the revised CPR Part 36 on 6 April 2007, a Claimant who beat a Defendant's Part 36 offer to settle by as little as £1 would be deemed to have been the successful party in the litigation, and could expect a costs order in its favour. Following the change in the rules in April 2007 and the above Court of Appeal decision this is no longer the case.

**The Facts**

Miss Carver, an air hostess, injured her ankle entering a defective lift which had stopped 2 feet below floor level at Gatwick Airport on her

way to work on 31 March 2003. BAA accepted liability before the proceedings were started and the only issue was quantum. BAA had made an interim payment to the Claimant of £520 in February 2004 and, in addition to this payment, in June 2006 made a payment into Court of £4,000. Various other offers were also made in the interim but all offers and payments into Court were ignored by the Claimant.

**The Award**

The matter proceeded to trial in April 2008. After trial the Claimant was awarded the sum of £4,686.26 inclusive of interest but her costs totalled £80,000. Taking interest into account, the Claimant "beat" the Part 36 offer by only £51. Given that the Claimant "beat" the Part 36 offer by only a very small margin, the Judge at first instance awarded BAA their costs from the date of the offer. The Claimant appealed to the Court of Appeal. Lord Justice Ward took a dim view of the Claimant's conduct, commenting *"to have incurred about £80,000 in costs to contest a claim under £5,000 fills one with despair"*. Even though it was recognised that in monetary terms the Claimant had "beaten" the offer, the Court of Appeal awarded the Defendant its costs from June 2006, the date of the final payment into Court.

**Analysis**

- Old Rules

  *Fails to better a Part 36 payment*

- New Rules

  *Fails to obtain a judgment more advantageous than a defendant's Part 36 offer*

Under the old CPR Part 36, a marginal difference of £51 would have been sufficient to entitle the Claimant to her costs of the proceedings (following the general rule that the "loser" pays the "winner's" costs). Under the new rules, however, even though in monetary terms the Claimant had "beaten" the Defendant's offer, the Court of Appeal concluded that the sum awarded was not "*more advantageous*" (applying the wording of the revised Part 36) than BAA's payment into Court, taking into account all the circumstances, including the level of irrecoverable costs incurred by the Claimant in taking the matter to trial.

**The Future**

The Court of Appeal's decision has stressed the significance of assessing all the circumstances (not purely from a monetary perspective) in terms of deciding whether a Claimant has "beaten" a Part 36 offer. This in turn means that a recipient of a Part 36 offer and his advisers cannot simply assess the likely quantum of the award in deciding whether to accept an offer safe in the knowledge that if he beats it, he will be awarded his costs. Instead, a far broader assessment will be required as to whether by fighting the case the Claimant's position will be more advantageous than it would have been had he accepted the offer. That assessment is far less tangible than the old regime, where all that was required was a cold, hard assessment of quantum.

The upshot is that a Claimant will have to think long and hard before rejecting a marginal offer of settlement even if he is confident that it falls somewhat short of his likely assessed liability.

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# Business & Finance

## Employment Law Update

Employment law continues to change and develop at a rapid pace. We set out below some recent developments which may be of interest to employers.

**Employment Bill**

The Employment Bill has just completed its transition through the House of Lords. The main changes proposed by the Bill are the repeal of the statutory dismissal and grievance procedures which will be replaced by a discretionary code of practice. This development will be greeted with relief by many employers. Since October 2004, it has been unlawful for an employer to dismiss an employee in all but very limited circumstances without first following the statutory disciplinary and dismissal procedures. Failure to follow these procedures automatically renders a dismissal unfair in most cases, even where the dismissal was justifiable on the facts. A proposed new code of practice has been published by the conciliation service, ACAS. This is based on basic principles

such as the importance of handling disciplinary and grievance matters in a prompt and consistent manner and the right of appeal for employees. Tribunals will have the power to increase or decrease an award to a claimant by up to 25% where the code of practice applies but is not followed by either party. The government's aim is for the Bill to receive royal assent in the summer of 2008, though most of the Bill will come into force at a later date. The dispute resolution provisions are widely expected to come into force in April 2009 and we will report nearer that time.

**Failure to Follow Statutory Disciplinary and Dismissal Procedures**

As reported above, the current statutory dismissal procedures will be rendered obsolete when the new Employment Bill receives royal assent and comes into effect. In the meantime, however, employers must continue to observe them strictly. In a recent case (*Yorkshire Housing v. Swanson*) the Employment Appeal Tribunal held that a dismissal is automatically unfair when the employer delays unreasonably in following the statutory dismissal procedure. In that case, the employer had delayed for five months between holding a disciplinary meeting and writing a letter dismissing the claimant. That was held to be an unreasonable delay which led to a finding of automatic unfair dismissal.

**EU Agreement on Working Time Directive**

Under the Working Time Regulations 1998 (which implemented the Working Time Directive) employers are obliged to take all reasonable steps to ensure that each worker's average working time (including overtime) does not exceed 48 hours per week, with individual workers having the right to "opt out". In recent years, however, the European Commission has been increasingly concerned about abuse of the opt out provision and, in 2004, proposed that it be abolished or restricted. The UK government amongst others has been unwilling to accept any proposals to end or restrict the opt out provision. On 9 and 10 June 2008 ministers with the Employment, Social Policy, Health and Consumer Affairs Council met to discuss the future of the Working Time Directive, including the opt out provisions. During these discussions, it was agreed that the opt out from the maximum 48 hour working week will be preserved. However, certain safeguards are likely to be imposed, for example that an employee cannot opt out until he/she has been employed for a month and there will still be a cap of 60 hours on average. We will report further when these measures are implemented.

**Disability Discrimination**

On 25 June 2008, the House of Lords handed down judgment in the case of *Mayor and Burgesses of the London Borough of Lewisham v. Malcolm* which makes major changes to the law in relation to disability discrimination. Whilst this was a housing case, the House of Lords has substantively changed the test for disability-related discrimination and the decision will have implications for employment situations as well.

Mr Malcolm was a secure residential tenant of Lewisham. He was schizophrenic – a fact that was unknown to Lewisham. He sub-let the property without consent and Lewisham sought possession. Mr Malcolm argued that he was being discriminated against by reason of his disability as he would not have behaved in such an irresponsible manner, but for his schizophrenia. The House of Lords dismissed the discrimination claim and in reaching its decision, considered the test for disability-related discrimination claims under the Disability Discrimination Act 1995 (DDA).

Under the DDA a person discriminates against a disabled person if:

(a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats, or would treat, others to whom that reason does not or would not apply; and

(b) he cannot show that the treatment in question is justified.

The key issues considered by the House of Lords were: the appropriate comparator; whether the "reason" (for the treatment in question) related to the disability; and whether the person must know of the disability. The House held:

- Comparator - The appropriate comparator is somebody to whom the underlying reason still applies so in this

case, the question was not whether Mr Malcolm had been treated less favourably than someone who had not sub-let his property but whether he had been treated less favourably than a non-disabled comparator who had illegally sub-let.

- Reason – "A reason which relates to the disabled person's disability" has to be construed narrowly. In this case, it was not sufficient that there was some connection between the disability and the decision to sub-let the flat. The disability was required to have played some part in the decision making process.

- A person can only be liable for discrimination if they know (or ought reasonably to know) that the individual is disabled.

By extension of these principles to an employment situation, if, for example, an employer dismisses a disabled employee for being on sick-leave for a year, then the reason for dismissal will be the absence from work, not the disability (even thought that may have caused the absence) and the correct comparator will be someone who was not disabled but was nevertheless off work for a year.

It may take some time for the full impact of this decision to be felt, but what is clear is that it will make it harder for employees to bring claims for disability discrimination and any such claims should be reviewed in the light of this guidance.

**Compromise Agreements**

In *Collidge v Freeport Plc* the Court of Appeal has upheld a High Court decision that an employer did not have to make a payment due under a compromise agreement if the employee was in breach of a warranty given in that agreement. Mr Collidge was a founder, director and employee of Freeport Plc. He was suspended pending an investigation into his activities, but subsequently resigned pursuant to a compromise agreement. The agreement provided that he would receive certain sums on the termination of his employment. All payments were specified to be "subject to and conditional upon the terms set out below" which included a warranty that there were no circumstances of which Mr Collidge was aware that could constitute a repudiatory breach of his employment contract or would have entitled Freeport Plc to terminate his employment without notice.

Before the termination payment became due, Freeport Plc discovered a number of matters which suggested that Mr Collidge was in breach of the warranty. They therefore refused to make the payment and Mr Collidge issued proceedings. The Court of Appeal upheld the High Court's decision that the warranty was a condition precedent to Freeport's liability to perform its obligations under the agreement, so that Freeport was not obliged to make the payment, on the basis that:

- The agreement was structured in such a way as to make the performance by Freeport of its obligations conditional upon Mr Collidge's obligations.

- The agreement was reached against the background of Mr Collidge's suspension and investigation into his conduct. Had the investigation proceeded it would have revealed grounds for summary dismissal. However Freeport had instead entered into the compromise agreement and continued with its investigation on the basis that it had the protection of the warranty.

Following the guidance in this case, employers should check that payment provisions in compromise agreements are tied to any warranty given by the employee that there are no circumstances of which he/she is aware that would entitle the employer to dismiss him/her summarily. In addition employers should, where practical, complete any investigations before entering into a compromise agreement, to give them more leverage in the exit process if misconduct is uncovered.

**Restrictive Covenants**

In the recent case of *WRN Limited v Ayris*, the High Court considered the enforceability of contractual non-solicitation and non-dealing restrictions in relation to customers.

Mr. Ayris worked for WRN Ltd, a television and radio broadcasting and transmission services company. When he left WRN Mr Ayris removed

contact business cards, emailed contacts regarding his departure and copied his work email address book. Several days later he joined WRN's principal competitor. WRN sought injunctions requiring him to comply with various restrictive covenants contained in his employment contract.

The Court considered the non-solicitation and non-dealing covenants contained in Mr Ayris' contract of employment and found the covenants in question to be unreasonably wide and consequently unenforceable, because they sought to restrict Mr Ayris from having contact with any of WRN's customers, not only those with whom he had actually dealt. However, the Court gave some other helpful guidance on the scope of restrictive covenants. For example, it accepted that it was reasonable for there to be no geographical limitation as WRN was a global business and that a six month restricted period was not unreasonably long as that is how long it would take for WRN to replace Mr Ayris and for his replacement to establish himself with the company's contacts.

The Court also considered whether Mr Ayris had breached restrictions in the use and disclosure of confidential information. It held that while he was in breach of his obligations to WRN in taking business cards and copying email addresses, this was because they belonged to WRN, but they were not confidential business information because much of that information was available on WRN's website and could easily be reproduced.

The Court's analysis and decision turned on the particular facts of the case and the drafting of the restrictive covenants in question and the outcome is not surprising. However, the guidance in relation to the geographical scope and restricted period of such covenant is helpful. Further, the High Court accepted that the reasonableness of restrictive covenants should be considered as at the date of the employment contract, not at the date of termination. Employers should therefore review restrictive covenants when employees are promoted to more responsible roles, where they may have more customer dealings and access to company information and consider imposing new restrictive covenants when appropriate.

**Age Discrimination**

The law on age discrimination, introduced through the Employment Equality (Age) Regulations 2006, continues to develop. Job advertisements should be tailored so as not to be caught by the Regulations. In the Northern Ireland Industrial Tribunal case *McCoy v. James McGregor & Sons Ltd and Ors,* a job advertisement seeking applicants with "youthful enthusiasm" was found to fall foul of the Regulations. Thus even references to qualities associated with people of a particular age may give rise to an inference of discrimination and should be avoided. Questions about age and date of birth should be deleted from application forms and instead be collected through a separate diversity monitoring form.

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## Other News

### Ince Asia offices win shipping award

Ince & Co's Hong Kong, Shanghai and Singapore offices have won the Seatrade Asia Maritime Law Award.

Singapore partner Richard Lovell received the award on behalf of the firm at the Seatrade Asia awards dinner held at the Shangri-La Hotel, Singapore on 13 May 2008.

These are the pre-eminent awards for the Asian maritime industry and the event was well attended by the shipping community.