January 2012 to June 2012

MARINE INSURANCE CASE UPDATES

High Court, Court of Appeal and Supreme Court Cases January 2012 to June 2012 Update 1

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HFW Marine Insurance Case Update No 1

Welcome to the first of our HFW Marine Insurance Case Updates which we now intend to produce on a six monthly basis[1]. The Marine Insurance Case Update aims to provide you with regular summaries of English Court cases relevant to the law of marine insurance including hull, war and cargo risks. We will also seek to include other cases which may be of interest in terms of procedural decisions, for example service out of the jurisdiction or anti-suit injunctions.

This Marine Insurance Case Update will form the basis of a presentation and we will contact many of you in the coming weeks to see whether such a talk would be of interest to your respective organisations.

This first update includes a rare commentary on general average liens exercised by Owners and a case involving attempted avoidance on the grounds of material misrepresentation and non-disclosure. Underwriters will also note the case where an application to re-amend their defence & counterclaim submissions to reflect a breach of warranty in respect of the vessel being laid up was largely rejected. On the procedural side there is useful clarification of the precise physical version of a claim form which needs to be served overseas and when one can extend the period of time in which to do so.

We hope you find the update useful and should you have any questions, then please do not hesitate to contact us.

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1. We are grateful to Ewelina Andrzejewska who provided assistance in researching the cases which follow.

UPDATE 1 INDEX

Atlasnavios-Navegacao v Navigators Insurance Company Limited [2012] EWHC 802(COM)

High Court of Justice, Queen's Bench Division: Mr Justice Hamblen

Mr Alistair Schaff Q.C. and Ms Rebecca Sabben-Clare (instructed by Ross & Co) for the Claimant

Miss Philippa Hopkins (instructed by Stephenson Harwood) for the Defendant

This is a trial of preliminary issues whereby the Court was asked to give its views on four questions.

Facts

The Claimant commenced proceedings under its War Risks Insurance Policy for a constructive total loss ("CTL") of the vessel "B ATLANTIC". In August 2007, the vessel loaded a cargo of coal in Venezuela for carriage to Italy in the course of routine trading. During a pre-departure inspection by the Venezuelan Authorities, three bags of cocaine were discovered strapped to her hull below the waterline. The vessel has been detained in Venezuela ever since. The Underwriters do not dispute that the vessel is a CTL but deny that the vessel's loss was caused by a peril insured against.

The Policy incorporated the Institute War Clauses and the Institute Hull Clauses. The Underwriters sought to rely upon the exclusions within Clause 4.1.5 of the Institute War Clauses:

"This insurance excludes…arrest restraint detainment confiscation or expropriation under quarantine regulations or by reason of infringement of any customs or trading regulations"

The judge held that the effect of the combination of the Institute War Clauses and Institute Hull Clauses was that:

1. An Insured's hull cover does not respond to the detention of a vessel unless caused by barratry or piracy.

2. With those exceptions, detention is prima facie covered under the War Risk Cover but subject to certain exceptions set out in Clauses 3 and 4.

3. Loss by malicious acts is insured under the War Risk cover but not under the Hull cover.

4. In addition, to the standard form cover, Section A of the slip broadened the cover for the consequences of malicious acts by including words *"including … malicious damage and vandalism, piracy and/or sabotage and/or terrorism and/or malicious mischief and/or malicious damage"*.

The Claimants contended that they knew nothing about the drugs and were not in the business of any attempted drugs trafficking. Whilst the Master and Second Officer were ultimately convicted of drug trafficking offences, it was the Claimants' case that there was no basis for such conviction, which was politically motivated. The Claimants therefore contend that the vessel was detained/confiscated in Venezuela pursuant to the orders of the Authorities as a result of the intervention of an unknown third

party who decided to affix narcotics to the vessel's hull for their own purposes. The Claimants' position was also that, on any analysis under Venezuelan law, the vessel should have been released from arrest by 31 October 2007 after a preliminary hearing took place. The ongoing detention of the vessel was contrary to local law and cannot therefore be the consequence of local Customs Regulations.

The judge considered the general approach in such case:

1. The exclusions contained in Clause 4.1.5 must be given a businesslike interpretation in the context in which they appear.

2. Any questions of construction should be answered in light of the fact that the Clauses are to be used worldwide and must be given a wide meaning.

3. The draftsmen are to be taken to have had in mind decisions of the court on earlier additions to the Clause which have given the wording a settled meaning.

4. The burden is on Underwriters to bring themselves within the exclusion.

Held

The four preliminary issues were as follows:

(1) Whether, in order for Underwriters to be able to rely on the exclusion in Clause 4.1.5, they must show that there was privity or complicity on the part of the insured in any infringement of customs regulations.

The Claimant did not pursue this contention and thus the judge answered in the negative.

(2) If not, whether Underwriters must show that there was privity or complicity on the part of the servants or agents of the insured in any infringement of customs regulations.

The judge noted that Clause 4.1.5 did not say that the infringement of Customs Regulations is one to which Owners, their servants or agents must be privy or in which they must be complicit. Had the draftsmen intended such an effect, they could easily have said so. In seeking to construe the Clauses imposing such requirements, the Claimant is, in effect, seeking to read or write in words that are not there. This question was also answered in the negative.

(3) Whether the exclusion in clause 4.1.5 is only capable of applying to exclude claims for loss or damage to a vessel, which would otherwise fall within insuring clause 1.2 or 1.6, and not the other perils insured against under clause 1 and/or Section A of the Conditions.

The judge agreed with the Underwriters' case. They argued that the exclusion in Clause 4.1.5 is capable of applying to exclude claims under insurance clauses other than Clause 1.2 or 1.6, even if, in practice, it is not wholly easy to identify the circumstances in which this would be the case. Even if for most practical purposes it will be the perils in Clauses 1.2 and 1.6 to which Clause 4.1.5 applies, the words of Clause 4.1.5 are general and apply to any loss, damage, liability or expense arising from the stated cause. If, for

example, there is a loss as a result of detainment which is alleged to be politically motivated, the assured cannot prevent Underwriters relying on Clause 4.1.5 by advancing its claim under Clause 1.5 rather than 1.2. Therefore, the third question was also answered in the negative.

(4) Whether the exclusion in clause 4.1.5 is capable of applying if an infringement of customs regulations is found not to be, or not reasonably arguably to be, a ground for the arrest, restraint, detainment, confiscation or expropriation of the vessel in question as a matter of the relevant local law.

It was a common ground that the exclusion in Clause 4.1.5 does not apply if an infringement of Customs Regulations is not reasonably arguably a ground for the arrest, restraint, detainment, confiscation or expropriation of the vessel in question. That being the case, the judge did not answer issue 4.

(1) Sealion Shipping Limited and (2) Toisa Horizon Inc vs Valliant Insurance Company (Defendant) v Valiant Insurance Company [2012] EWHC 50 (Comm)

High Court of Justice, Queen's Bench Division: Mr Justice Blair

Steven Berry QC and Nathan Pillow (instructed by Lax & Co LLP) for the Claimant

Robert Bright QC and Richard Sarll (instructed by Swinerton Moore LLP) for the Defendant

Facts

This case concerns a claim under a marine loss of hire policy issued by the Defendant in respect of the N.V. "TOISA PISCES". The claim arose from a propulsion motor breakdown in February 2009 which resulted in the Charterers, Mexican Oil Company Pemex, placing the vessel off-hire.

The Defendant argued that it was entitled to avoid the policy on the grounds of material non-disclosure and/or misrepresentation. They relied on a number of policy defences, including whether or not there was a failure on the Claimants' part to exercise due diligence.

The "TOISA PISCES" was capable of dynamic positioning allowing her to automatically maintain her position above a wellhead. The case focuses on a number of instances involving the motors of the vessel which had not been disclosed to the Defendants. As a result of which the Defendants contended they were entitled to avoid the policy. The first undisclosed incident occurred in 2004 when a starboard motor failed due to the stator breaking loose from the frame. When the vessel arrived in Mexico for repairs later in 2004 the Claimants chose to replace the starboard motor with a new motor by a different manufacturer to avoid the possibility that repairs would take some considerable time. The motor was a different type manufactured by Louis Allis. This resulted in the vessel being off-hire for over 7 days before resuming service.

A second incident occurred in 2005 when unusual vibrations were detected in the port motor. At the time it was thought that the source of the vibration was not the stator core. The port rotor was replaced with the repaired rotor that had been taken from the starboard motor in 2005. During these two incidents the vessel was insured by Transmarine for three policy years between 2003 to 2006. The cover was limited to 60 days with 34 days excess period, as a result of which the Claimants did not make a claim under the policy.

There were further incidents in February 2009 when the port motor could not be restarted. This was replaced with the old starboard motor. However, on 10 March 2009 during testing of the starboard motor a further failure occurred with the hydraulic system. Another, further incident occurred to the starboard motor on 25 April 2009. As a result of these incidents, the vessel was placed off-hire until 19 May 2009 .

The Claimants did not have any loss of hire insurance between the policy of 2006 and that of 2008. In 2008 the Claimants decided to resume the loss of hire cover. The risk was broked as a good risk to the Defendant in terms that the vessel had an "*excellent hull record*" with only one hull claim and "*no major business interruption*". The loss of hire policy was subject to a limit of 30 days each accident or occurrence or series of accidents or occurrences arising out of one event. There was an excess of 14 days any one occurrence, and 21 days in respect of machinery claims.

The Defendant argued that the events of 2009 constituted three separate incidents with each one constituting less than 21 days loss of hire and therefore no claim payable, or in the alternative much less than the 30 days claimed by the Claimants.

Material non-disclosure and misrepresentation

The Defendants relied on the following sections from the Marine Insurance Act 1906:

S.18(1) *"the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract".*

S.20(1), *" Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract".*

S.20(4), *"A representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer".*

Held

The policy stated that there had only been *"one hull claim on the vessel"*, when there had been two in 2004 and 2005. In terms of the undisclosed second hull claim, the Commercial Court found that although disclosure of this might have been *"good broking practice"*, the issue was whether the hull claims were material to the loss of hire policy. It was found that they could only be material insofar as they caused the undisclosed periods of offhire.

In terms of the undisclosed periods of offhire in 2004, the Court held that these were not material as it was for a short period of time, over four years prior to the placing of the policy and had not resulted in any claims under the previous policy with Transmarine.

In terms of inducement, the Court was not satisfied on the evidence that the Defendant would have proceeded differently had they been told of the two hull claims or the 10 days offhire in 2004.

The Defendants' alternative case to avoid the policy was failure on the Claimants' part to exercise due diligence. The Defendants argued that the breakdown resulted from want of due diligence within the meaning of the Inchmaree clause of the ITCH whereby the *"the underwriters expressly agree to undertake such risks- provided that such loss or damage has not resulted from want of due diligence by the Assured, Owners or Managers"*. The Court followed the authority in *Secunda Marine Services Ltd v Libery Mutual Insurance Company* 2006 NSCA 82, that want of due diligence is negligence, and that it is *"a lack of reasonable care"*, rather than recklessness as the Defendants alleged. The Court held that the failures alleged by the Defendants did not amount to negligence as there was no reason to doubt the adequacy of the inspection in 2006 and, accordingly, the Claimants' technical managers' reliance on the inspection.

With regard to the question of aggregation, the experts agreed that there was no technical causal link between the three incidents which occurred on 25 February, 11 March and 25 April 2009. There were therefore three separate occurrences. However, the Court held that the Claimants were entitled to claim for the full 82 days off hire resulting from the original breakdown on 25 February 2009. The Claimants could not have reasonably done anything to shorten the period of time it took the vessel to get back on-hire as a result of the first incident. The Claimants dealt with the initial problem by replacing the starboard motor, which if successful would have resulted in no loss of hire claim. Unfortunately the hydraulics failure obstructed this effort and then, finally, the starboard motor failed after only a few days at sea. The Court held that the whole period of off-hire counted and consequently the Defendants failed in their arguments that the period was split into three separate "occurrences".

European Group Ltd and others v Chartis Insurance UK Ltd (formerly known as AIG (UK) Ltd and AIG Europe (UK) Ltd) [2012] EWHC 1245 (Comm)

High Court of Justice, Queen's Bench Division: Mr Justice Popplewell

R Ansell and S Goldstone (instructed by DAC Beachcroft LLP) for the Claimants

G Blackwood and G Morgan (instructed by Waltons & Morse LLP) for the Defendants

Facts

This case required the court to determine which of two insurers was liable for losses caused by fatigue stress cracking to tubes in economiser blocks which were installed in a new waste recycling plant facility (Facility) in respect of a project near Slough. Fourteen blocks made their way by road from Bucharest to Constanta and then by ship from Constanta to Southampton. Two blocks were transported solely by road.

Lakeside Energy from Waste Limited (Lakeside) was the developer of the Facility. Itochu Corporation (Itochu) and Takuma Corporation (Takuma) were the engineering, procurement and construction contractors for the Facility, together referred to as EPC Contractors. The manufacture of the economiser blocks was subcontracted to Vulcan SA (Vulcan) by EPC Contractors.

The Claimants and Defendant were the insurers for the Erection All Risks, Public Liability and Delay in Start Up Insurance Policy (EAR Policy). This policy provided cover against physical loss, destruction and damage to all items needed for the incorporation of the project. The policy commenced upon the attachment of lifting gears and similar equipment at the Facility. The policy named Lakeside and EPC Contractors as the assureds.

The Defendant was also the insurer for the Primary Marine Project Cargo/Delay in Start Up Insurance Policy (Marine Policy). This policy provided cover during transit against all risks of loss or damage (in respect of the economisers' cover started from the time the goods left the factory in Bucharest and terminated on delivery at the Facility). The Marine Policy incorporated the Institute Cargo Clauses A which excluded liability for *"loss, damage or expense caused by inherent vice or nature of the subject matter insured"*. The policy named Lakeside and all Lakeside's engineers including the EPC Contractors as the assureds.

Moreover, both policies provided cover in the event that damage led to delay in the start up of the project and contained a clause which meant that if it was not possible to determine whether the cause of the damage to the insured's property occurred before or after the arrival at the Facility, both policies would contribute 50% to the claim.

Fatigue crack damage to the tubes was discovered in February 2008. Upon investigation it became clear that the fatigue cracking was caused by resonant vibration, which occurred between Bucharest and arrival at the Facility. The costs of repairing the tubes and associated costs were claimed under both policies by Takuma. As such, a dispute arose between the EAR Policy insurers and the Marine Policy insurers as to whether the damage had arisen prior to arrival at the Facility.

The Defendant argued that the vibrations could not have occurred during road and sea transport. They argued that it was likely that these occurred due to turbulent winds at the Facility. Alternatively, the Defendant put forward a case based on the inherent vice exception in the Marine Policy. This argument is based on the principle that if a loss could have two proximate causes, one being within the ambit of the insurance policy and one being expressly excluded, the exclusion comes into effect. Thus, in any event, if the resonant vibration was the cause there was an additional cause comprising one or more of the following: (a) stress imparted on the economisers; (b) quality of the welds; and (c) the set on design of the cracked tubes. These were referred to as inherent vice and it was argued that these excused the Defendant from liability.

The Claimants contended that the vibrations occurred during transport, most likely during road transport due to missing packing between rows of tubes (which meant they could recover 100% of the claim). If it was not possible to determine the cause, they could recover 50% of the claim in line with the clause in the policies.

EAR Policy insurers settled their claim for £4,600,000. The Claimants now claim the respective proportion of £3,680,000 (£4,600,000 minus Defendant's 20% share in its capacity as an EAR Policy insurer). It was noted that only £4,300,000 was established as a proved loss.

Moreover, there were issues as to the Claimants' title to sue, measure of loss recoverable and effect of deductibles.

Following the hearing, three issues remained:

1. Was the cause of damage resonant vibrations during transit or wind after arrival at the Facility?

2. If resonant vibrations during transit were an additional cause in addition to the inherent vice, could this exclude the Defendant's liability?

3. Did the assured suffer the insured losses of at least £4,600,000? If so, how much?

Held

1. Was the cause of the damage resonant vibration during transit or wind after arrival at the Facility?

The court accepted the evidence of the Claimants' expert that resonant vibration by wind could be ruled out. It was not a realistic enough mechanism to explain the damage. This was largely based on the amount and duration of wind to which the tubes were exposed as well as the pattern of damage to the blocks which was inconsistent with the cracking resulting from wind.

However, in relation to the issue of causation, Popplewell J adopted a cautious approach. Referring to the 50/50 contribution clause in both policies, he stated that the clause would be applicable if: *"(a) there was such certainty that it is not possible to reach any conclusion as to when the damage occurred; or (b) one theory is so improbable that even if the other theory is ruled out, it cannot as a matter of common sense be described as more likely than not to have occurred"*.

In line with the above, since Popplewell J had eliminated wind as a cause, he had a duty to look into the theory of vibration during transport to see whether it was possible to conclude more likely than not to have occurred. Popplewell J further stated that if it were not possible to reach such a conclusion, (due to unsatisfactory evidence or improbability of the conclusion based on common sense), then he would not be able to treat it as a proximate cause of damages.

On reviewing the expert evidence, Popplewell J concluded that the road between Bucharest and Constanta may have presented sufficient roughness to have caused the vibration. Moreover, the packing between the tubes was missing and/or ineffective and could also have accounted for the damage. As such, the transport by road in Romania, which possibly may have been exacerbated by damage caused during the journey in England, was a credible and realistic theory for the vibrations. In any event, the transport theory was much more likely than the wind explanation and so on the balance of probabilities Popplewell J concluded that the damage occurred prior to arrival at the Facility, the damage being caused by vibrations during transport.

2. If resonant vibrations during transit were an additional cause inherent vice, could this exclude the Defendant's liability?

The Defendant's inherent vice argument was rejected. The economiser blocks on leaving the factory were designed to and reasonably expected to survive transportation. It was the missing/ insufficient packing which was the proximate cause of loss rather than the inherent condition and/or design of the economiser blocks. The missing/insufficient packing was a fortuity and so there was no room for an inherent vice to be treated as another proximate cause of the loss.

3. Did the assured suffer the insured losses of at least £4,600,000? If so, how much?

Popplewell J concluded that the assured had suffered an insured loss of at least £4,600,000 and were entitled to judgment for their respective proportion.

Clothing Management Technology Limited and Beazley Solutions Limited trading at Beazley Marine UK [2012] EWHC 727

Queen's Bench Division (Mercantile Court): His Honour Judge Mackie QC

Mr Richard Sarll (instructed by Browne Jacobsen) for the Claimant

Mr Tim Marshall (instructed by Waltons & Morse) for the Defendant

Facts

The Claimant is a clothing manufacturer and supplier based in the United Kingdom who used suppliers in Romania and Morocco to manufacture garments in mass production for re-sale in the United Kingdom.

In September 2008, the owner of the factory in Beltram, Morocco, disappeared and left the workers unpaid. The Claimants entered into negotiations with the workers to ensure the garments were finished. The Claimants paid the workers directly for the finished garments that left the factory. Work resumed at the factory for a few months. However, on 5 November 2008 the workers demanded an immediate payment of £80,000 in return for the resumed work. This was refused. As a result the workers refused to resume working and prevented the release of the finished garments.

The Claimants therefore looked to make a claim under the marine policy which covered *"clothing, fabric, finished and semi-finished garments ..." ... "whilst in store at named locations ..."*. The marine cargo policy also included a marine insurance clause which stated as follows:

"Notwithstanding the fact that some or all of the movements covered by this policy of insurance are not subject to the Marine Insurance Act 1906, it is expressly agreed and declared that the terms, conditions, warranties and other matters contained with the Marine Insurance Act 1906 shall be applicable hereto."

Decision

a) Actual Total Loss or Constructive Total Loss

The first issue concerned whether or not the Claimants had suffered an actual total loss ("ATL") or constructive total loss ("CTL"). The Claimants' primary case was that they had suffered an ATL within the meaning of Section 57 of the Marine Insurance Act 1906; *"… where the assured is irretrievably deprived thereof … there is an actual total loss"*. The Court rejected this and referred to *the Bunga Malati Dua* [2011] Lloyds Rep 338, at 350 where the test for an ATL had been applied with *"utmost rigour"*. The court concluded that in the present case the assured had not been irretrievably deprived of the property, as the goods had not been destroyed and may well exist, and further that had legal action been pursued, the goods may well have been recoverable.

The Claimants argued in the alternative that there was a CTL and referred to Section 60(1) of the Marine Insurance Act 1906 which provides "*… there is a constructive total loss (i) where the assured is deprived of the possession … goods and (a) it is unlikely that he can recover … goods"*. The Claimants argued that

there was a CTL as it was unlikely that the Claimants could recover the goods. The court held that there was a CTL despite no notice of abandonment being given, in accordance with Section 62 of the Marine Insurance Act 1906. There was a CTL from about 5 November 2008 at which point it was unlikely that the Claimants would be able to recover the goods within a reasonable time.

The Claimants relied on Section 62(7) of the Marine Insurance Act 1906 which provides "*Notice of abandonment is unnecessary where, at the time when the assured received information of the loss, there would have been no possibility of benefit to the insurer as notice were given to him."* The Claimants' case was that there was no realistic possibility of the Claimants being able to exercise effective control over the salvage. In any event, by this point the insurers, who were aware of the situation, could have intervened.

b) Failure to give notice

The Defendants relied on the clause that stated "*immediate notice be given in writing"* and "*that Underwriters are informed about the event as soon as possible but in any event within seven (7) working days".* These were expressed as conditions precedent as to liability. The Court held that although the Claimants had sought details of the relevant insurance on the 25 September 2008, this was not a point in time at which the Claimants were aware of any claim under the policy, as up to this point the Claimants were of the view that the problems had been contained. It was held that the written notice given on the 8 October 2008 was effective as the Claimants did not know of and/or were not aware of any event that could give rise to a claim before 29 September 2008. Further, as late as 19 and 20 October 2008 the workers were still sending out finished goods.

c) Theft

The policy contained an exclusion which stated "*loss or damage due to attempted theft or attempted threat unless following forcible and/or violent entry and/or exit.*". The Court held that it was for the Defendants to prove that there was theft. There was no proof of who took what or when, or that the workers had acted dishonestly. The exclusion did not apply.

d) Whether the loss arose from "*the absence, shortage or withholding of labour of any description whatsoever resulting from any strike, lock-out, labour disturbance, riot or civil commotion*"

The Defendants contended that the cause of loss was within clause 3.7 of the Institute's Strike Clauses. The Court held that the actions of the workers did not resemble anything close to a riot or civil commotion. The Court held that the exclusion related to consequential loss and not loss of possession which the Claimants had insured against.

e) Was there a "*capture, seizure, arrest restraint or detainment...and the consequences thereof or any attempt thereat?*"

From the facts, the Court held that there was no evidence of a seizure within the meaning of the exclusion and that the actions of the workers did not suggest a "*forcible dispossession by an overpowering force*".

f) Sue and labour

The Defendants contended that the Claimants were in breach of their obligations under Section 78(4) of the Marine Insurance Act 1906 which provides "*it is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss.*" The Defendant argued that it was not appropriate to continue the shipment of goods due to what they described as the volatile and unpredictable nature of the workers at the factory at the time. The Court agreed that it may have been unwise to send further fabric to the factory at the time when the situation in the factory was unpredictable, however it was considered by the Court as part of an overall strategy by the Claimants to complete the garments to fulfill existing orders.

g) Storage questionnaire

The Defendants contended that the completion of the storage questionnaire was a condition precedent to cover and that the cover terminated if the deadline for that submission was missed. The questionnaire was only provided on 23 December 2008 and the Claimants contended that any non compliance with the condition was waived on 19 January 2008 when the Defendants stated that "*cover will continue*". The Court held that it was clear from the terms of the storage questionnaire that the cover was in place from inception until 1 December 2008.

h) Quantum/valuation

The Claimants claimed for "*invoice value*". The term invoice value in the policy referred to the full price, which could have been obtained by the Claimants and not the "*shipping value*". The Defendants contended that "*invoice value*" could only mean the wholesale invoice value. The Defendants referred to Section 16(3) of Marine Insurance Act 1906 which provides that "*the insurable value is the prime cost of the property insured, plus the expenses of and incidental to shipping and the charges of insurance upon the whole*". The Court rejected this argument and held that the policy was valued under Section 27 of the Marine Insurance Act 1906 and did not become unvalued if there were no actual relevant invoices or conflicting invoices. Further, it was obvious that the Claimants would want to have insured against the loss if the garments did not come out of the factory and reach the customers. The value was the price that the customers were going to pay for the garments and therefore the loss that the Claimants would suffer if they went astray. The Court held that as this was a valued policy, it was not necessary for the Claimants to prove the loss in detail.

Elafonissos Fishing & Shipping Company v Aigaion Insurance Company SA [2012] EWHC 892

High Court, Queen's Bench Division: Mrs Justice Gloster

Michael Nolan Esq (instructed by Reed Smith LLP) for the Claimant

Miss Liisa Lahti (instructed by Clyde & Co (Greece) LLP) for the Defendant

This was an application by Defendant Insurers Aigaion Insurance Company SA ("Insurers") for permission to re-amend their Defence & Counterclaim and to introduce additional witness evidence. The opposition to this application was based on the grounds that the amendments had no realistic prospect of success, and that the additional evidence being sought was not relevant.

Facts

The incident in question gave rise to a claim in December 2006 when the fishing vessel "AGIOS SPYRIDON" allegedly suffered loss whilst laid up at anchorage in Madagascar. At around 1430 hrs on 25 September 2006, a cyclone reached the Madagascan port, causing the vessel to drift from her anchorage inland. The vessel continued to drift, despite efforts to drop a second anchor by the Master, until she eventually hit the quayside with her bow and then her portside. As a result, the Assureds put forward a claim for damage to the vessel's rudder and right anchor in the amount of €253,842.54.

At the Case Management Conference, the High Court allowed the Defendants to amend their Defence to include an allegation of material non-disclosure. They wished to allege that, amongst other things, the Claimants had not disclosed to the Insurers that the vessel would be lying at anchor as opposed to inside the confines of the port. Following a mediation in January 2012, the Defendants served their expert reports along with a proposed re-amended Defence & Counterclaim. The re-amended Defence sought to include various amendments:

(i) An allegation that the expression *"warranted laid up from 1.11.06 until 28.02.07 BDI import of Mahajanga"* was a warranty by the Claimant that the vessel would be in "*hot lay up*";

(ii) An allegation that the vessel was not laid up in port at all because she was not laid up according to Class;

(iii) That the vessel was obliged to be laid up in accordance with port regulations;

(iv) That the vessel would be laid up in a seaworthy condition; and

(v) Various other amendments (not material to this summary).

Held

It was agreed that in general amendments ought to be allowed and will only be refused if it is clear that they have no real prospect of success. It is important that any amendments should be sufficiently precise, and a party will not be permitted to raise by amendment an allegation which is unsupported by evidence.

The judge noted that this was a late application, albeit not extremely late. He did not think that this was a case where the Claimant could point to any real prejudice if the amendments were allowed. The judge allowed some of the amendments, but not all, on the basis that those he refused did not have a realistic prospect of success.

He further considered the phrase "*hot lay up*", and found no evidence that the words were used consistently in the marine insurance industry. As a result, he found that the Insurers had no realistic prospect of establishing "*hot lay up*" as a customary meaning imposing customary requirements as to notification or as to engine recommissioning time. It is effective as between Class societies. He went on to find that there is no commercial necessity to imply a term to the effect that the vessel would be in "*hot lay up*". Nor is such a term sufficiently certain to satisfy the requirements for implication.

He did not make any findings as to the admissibility of evidence, which was left for the trial judge. He also ordered that the Defendant Insurers were to pay the costs of the application and the costs of and occasioned by any amendments incurred in relation to the customary meaning of "*laid up*".

Metall Market OOO v Vitorio Shipping Ltd (The "Leman Timber") [2012] EWHC 844 (Comm)

High Court of Justice, Queen's Bench Division, Commercial Court: The Hon. Mr Justice Popplewell

Mr Chirag Karia QC (instructed by Clyde & Co) for the Claimant

Ms Claire Blanchard QC (instructed by Stephenson Harwood) for the Defendant

Facts

The "LEHMAN TIMBER" was captured by Somali pirates in May 2008 on her maiden voyage. The Owners paid a ransom to secure the release of the Vessel and she sailed for Oman as a port of refuge. En route the Vessel suffered an engine breakdown which resulted in her having to be towed into port. The Owners declared general average and appointed average adjusters who attempted to collect general average security from the cargo interests including the claimant Metal Market OOO ("MMO"). However MMO refused to provide a bond or a cash deposit and did not pay Owners their proportion of the general average. Only some of the cargo belonging to MMO was insured and an insurers' guarantee ("General Average Guarantee") was provided for that part of the cargo.

As such, Owners exercised their general average lien over the unsecured cargo and discharged the cargo into a warehouse which resulted in them incurring costs for storage and insurance of the cargo. In the subsequent arbitration Owners sought to recover a contribution from MMO to both the general average adjustment and the costs incurred in the protection and storage of the cargo. MMO denied that it had any liability to contribute in general average and counterclaimed for conversion of the cargo. The arbitral tribunal found in favour of the Owners and found MMO liable for their proportion of general average and the storage costs. All MMO's counterclaims were dismissed.

MMO appealed to the Commercial Court on the grounds that the Owners should have to deliver the cargo for which the General Average Guarantee had been provided. Further, MMO stated that they should not be liable for the storage costs of the cargo.

The questions before the Court were:

1. Were Owners entitled to refuse to deliver cargo in purported exercise of a lien for general average contribution even though they had accepted a General Average Guarantee from the insurers of that cargo? In other words by accepting the General Average Guarantee, had the Owners lost their lien?

2. Should Owners be able to recover storage and other expenses incurred having exercised their lien over cargo?

Held

Popplewell J found that the General Average Guarantee provided by the insurer was intended to operate together with a general average bond. The practice of seeking both a general average guarantee and a bond is well entrenched and referred to in many authorities. This meant that the General Average Guarantee without the bond did not mean that the lien exercised by Owners had been destroyed. This is because with a bond an Owner can be certain that the cargo interest will respond to a claim for general average regardless of any later arguments regarding liability.

In respect of storage costs and other expenses MMO relied upon the case of *Somes v British Empire Shipping Co* (1860) 8 HL Cas 338, where it was held that it is not possible to recover costs incurred in the exercise of a lien over goods. In *China Pacific SA v Food Corporation of India (The Winson)* (HL) [1982] AC 939, Lord Diplock took the principle developed in Somes to be authority for the following proposition:

"*Where a company or individual exercises a lien over goods and refuses to provide redelivery despite a demand, which in the absence of the lien they would have a legal obligation to comply with, the entity cannot recover loss and expenses which are incurred solely for their own benefit*".

Popplewell J, following the common law position, found that it is possible to recover expenses incurred in the preservation of goods from the owner of goods providing that the owner is not denied possession purely because there is a lien being exercised over the goods. Neither should Owners be able to recover storage cost for breach of contract. Whilst Owners through the exercise of a lien had the choice to store the cargo either on board or in a warehouse, they should not receive the costs of storage in a warehouse. This is because this could not be construed as being reasonable mitigation for the greater cost of storing the goods on board the vessel.

There was no breach of contract for the same reasons, in that MMO had tried to take delivery of the cargo and the only reason that delivery did not occur was because Owners were prevented from exercising the lien. Following *Moller v Jecks (1865)* 19 C.B.N.S. 332, a person cannot recover damages which have been caused by their own acts.

From a practical point of view, cargo underwriters should note that the failure to provide a general average bond where general average security has been provided, does not destroy the Owner's right to a general average lien. However this does not give Owners the right to refuse delivery of the cargo and charge cargo owners for the costs of enforcing that lien. This makes the decision of whether Owners should exercise their general average lien a more complicated one in circumstances where a guarantee exists but no bond has been provided.

(1) Albert John Martin Abela, (2) Albert J.M. Abela SRL and (3) Albert J.M. Abela Catering and Interactive Systems v Ahmed Baadarani [2011] EWHC 116 (Ch)

Court of Appeal: Lord Justice Longmore, Lady Justice Arden, and Lord Justice McFarlane

Mr Paul Greatorex (instructed by M & S Solicitors Ltd) for the Appellant

Mr Clive Freedman QC & Mr Tim Penny (instructed by PCB Litigation LLP) for the Respondents

Facts

The proceedings were based on allegations of fraudulent misrepresentations and conspiracy in respect of a contract for the sale and purchase of shares owned by the Defendant in an Italian company. This contract dated 26 March 2002 was governed by English law and contained a non-exclusive jurisdiction agreement for the English Courts. The Claimants alleged that the Defendants, at the time of the sale, were aware that the shares were worthless but nevertheless concealed this important fact.

The Defendants denied these allegations, and in any event claimed that since the proceedings were only instituted in England on the 30 April 2009, the Claimants were time-barred. In turn, the Claimants argued that the earliest they knew of the alleged fraud was in May/June 2003 when they received reports from a firm of forensic accountants, Kroll. It was at this point that the Claimants started both criminal and civil proceedings in Lebanon, where the Defendant is resident.

On 14 September 2009 Morgan J granted the Claimants permission to serve the English Claim Form and associated documentation on the Defendant in the Lebanon, and extended the time for service of the Claim Form until 31 December 2009. The First Defendant has now applied to set aside both the permission to serve him the documents in the Lebanon and the extension of time. The Second Defendant has made no such attempt.

Held at first instance

At first instance, the First Defendant argued that there was no real issue between himself and the Claimants pursuant to CPR 6.37(2). As such, England is not the proper place in which the claim should be brought, especially since proceedings already existed in the Lebanon. In any event, the English proceedings were time-barred. Sir Edward Evans Lombe at first instance decided that the service effected on the First Defendant's lawyer on 22 October 2009 in Lebanon was to be treated as good service, and he retrospectively validated that alternative service. The decision was appealed.

Held in the Court of Appeal

(a) The proper place for proceedings

The Court of Appeal held that the reasons given by Sir Edward Evans Lombe for England being the proper place for the proceedings were compelling ones – i.e. the parties had agreed that the English Court is to have jurisdiction. This left the Defendant to argue two points on appeal, namely that the:

1. Claimant had decided in October 2003 to institute proceedings in Lebanon, and should not be allowed to change tack and start proceedings in England (nearly six years later); and

2. undertaking not to continue the civil proceedings was inadequate for the protection of the Defendants because they still remained at foot and nothing had changed since the Claimants gave their undertaking to the Court.

The first argument was dismissed on the basis that the agreement should be upheld, even if the Claimant has been somewhat dilatory. The second argument is equally dismissed as the Defendant was adequately protected and would not be doubly vexed by the further proceedings.

(b) Time bar

The second ground of appeal was that the claim was time-barred due to inadequate service. The Claimants alleged that service occurred in the Lebanon on 22 October 2009. The Defendant disputed such service, because the Defendant's lawyer did not have instructions to accept service, notwithstanding the alleged Power of Attorney held by the Defendant's Lebanese lawyer. As such, the Claimants had to apply for a further extension of four months, granted by Sales J on 16 December 2009, extending the validity of the Claim Form until 30 April 2010.

Whilst service on the Lebanese lawyers was not a form of service originally anticipated in the Order of Morgan J, the judge at first instance nevertheless decided that because the CPR was to be construed as giving the Court both the (1) power to order alternative service in a case concerning service of proceedings out of the jurisdiction; and (2) power to order the steps taken on an earlier occasion to bring the Claim Form to the attention of the Defendants by an alternative method that constituted good service, it would be right to make a declaration that the steps taken to serve the Lebanese lawyers on 22 October 2009 amounted to good service. The Court of Appeal commented that the judge at first instance by implication must have taken the service on the Lebanese lawyers to be valid under local Lebanese law, as it would be very unusual for a judge to validate a form of service which was not valid by local law.

The Court of Appeal held that the Court had power to order alternative service outside the jurisdiction. However, they went on to note that this power needed to be exercised cautiously and should be regarded as exceptional. Therefore, it would usually be inappropriate to validate retrospectively a form of service which was not authorised by an order of an English judge when it was effected and was not good service by local law.

A Claimant who requires a retrospective validation of a method of service in a foreign country must show that the method of service which is to be retrospectively validated was good service by local law. The service in Lebanon was not good service as a matter of English law. Furthermore, the Claimants failed to discharge their burden of proof in that regard. They did not show that: (1) the Power of Attorney authorised the Lebanese lawyers to accept service; or (2) that such service was accepted.

In respect of (1), the Power of Attorney required further authorization from the Defendant when he wanted the Lebanese lawyers to act. In respect of (2), a signature for receipt did not constitute acceptance of service. The fact that the Lebanese lawyer did not return the documents for four months does not affect the position.

The judge at first instance should not have retrospectively validated the service as good alternative service unless there was a very good reason to do so. To avoid the claim becoming time-barred is not in itself a good reason. This is the case even if both personal service and service through diplomatic channels has become impossible.

The Court of Appeal went on to note that the Claimants were *"asking for trouble"* by only issuing the Claim Form shortly before the limitation period expired. If the Claim Form had been issued four years earlier, and a diligent process server instructed, good personal service may well have been facilitated. The appeal was dismissed and the Order of Sir Edward Evans Lombe was set aside.

Robert Lawrence Weston v (1) Kenneth William Bates (2) Leeds United Football Club Ltd [2012] EWHC 590 (QB)

High Court of Justice, Queen's Bench Division: Mr Justice Tugendhat

Simon Myerson QC (instructed by Ford & Warren Solicitors) for the Claimant

Jacob Dean (instructed by Carter Ruck) for the First Defendant

This is an appeal from the judgment of Master McCloud concerning service of a Claim Form outside the jurisdiction.

Facts

This case concerns a libel action in respect of publications made in August, September and October 2009. A Claim Form was issued on the last day before the expiry of the one-year limitation period in respect of the first publication. The Second Defendant was served within the jurisdiction on 30 November 2010. Permission to serve out of the jurisdiction in Monaco was given on 22 December 2010 by order of Master Leslie in respect of the First Defendant, Mr Bates. Thereafter, steps were taken to serve Mr Bates in Monaco through local agents in accordance with a procedure permitted by local law. This was in accordance with r.6.40(3)(c), which provides:

"Where a party wishes to serve a Claim Form or other document on a party out of the United Kingdom, it may be served – … (c) By any other method permitted by the law of the country in which it is to be served".

Agents were sent to Mr Bates' home in an attempt to serve him there. However, Mr Bates was not at home, and the documents were left at the Town Hall for collection. The documents included a version of the Claim Form (which was a black and white printout with a translation). The printout showed the English Court stamp *"Defendant's Copy"* and had also been affixed with the seal of the *Huissier* in Monaco, and the blue seals of the translator.

Mr Bates argued that the order of Master Leslie permitting service of the Defendants out of the jurisdiction ordered the service of the Claim Form and not a copy of the same. In response, Mr Weston requested a declaration that the steps taken by him amounted to valid service or, in the alternative, that an order be granted that the steps taken by him amounted to good alternative service of the Claim Form, and that he had retrospective permission to serve the Claim Form by any alternative method, or for an extension of time, pursuant to CPR 7.6(1). Mr Weston argued that the steps already taken clearly brought the Claim Form to the attention of Mr Bates which means the service falls within CPR 6.15(1) or (2).

Mr Bates' application was dismissed by Master McCloud. However, Master McCloud did allow permission to appeal. In her judgment, she held that service was validly effected because it was pursuant to CPR 6.40(3) and the actions taken were by a method permitted by the law of Monaco. She expressed grave doubts as to whether, if service were effected within the jurisdiction, anything less than a sealed copy of the Claim Form (first generation copy) would suffice, save as in cases where the rules specifically

so provide (e.g. service of fax or by e-mail). She considered that she had no jurisdiction to extend time under CPR 7.6 because Mr Weston had not taken all reasonable steps to comply with CPR 7(5). In any event, she would not have exercised her discretion in his favour because to do so would deprive Mr Bates of his limitation defence. Likewise, she would not have exercised her discretion in favour of Mr Weston under CPR 16.15 or CPR 16.16 because the error by solicitors is not such as to justify an order dispensing with service, or permitting retrospective service, even where, as here, it is admitted that the steps in fact taken had brought proceedings to the notice of Mr Bates.

Held

Appeal dismissed.

Mr Justice Tugendhat found that it was English law that determined what documents needed to be served. He went on to find that he would more readily infer that there is no requirement for a claim to have affixed to it the Court seal if service was effected under CPR Part 6.40(c). He noted that he was not referred to any provision of the CPR or Practice Directions pursuant to which additional *"first generation"* copies could be obtained from the court staff over the counter. Even if they were available, they are not the same as the first original Claim Form under CPR 7.5.

The judge contended that CPR 6.40(3)(c) only provides that the steps required to bring a Claim Form to a person's attention may be taken by any method permitted by the law of the country in which those steps are to be taken. If those steps are successful in bringing the Claim Form to that person's attention by such a method, there is no additional requirement that a particular hard copy of the Claim Form be used. The concepts of *"original"*, *"first generation copy"* and *"second generation copy"* are useful concepts but they are not terms that can be derived from the CPR. As far as the CPR is concerned, what constitutes a Claim Form is a matter of substance. The words *"Claim Form"* are not a reference to a particular hard copy of a document.

Mr Justice Tugendhat held that parties proposing to serve a Claim Form will be well advised to continue the present practice of normally serving a copy of the Claim Form which bears a seal affixed by the Court Office. Nothing in this judgment should be taken as casting doubt on the desirability of serving proceedings in this way. Any failure to do so is capable of giving rise to delay and waste of costs if the authenticity of the Claim Form has to be proved otherwise than by means of the seal affixed by the Court.

BNP Paribas SA v (1) OJSC "Russian Machines", (2) OJC Management Company "Ingosstrakh-Investments" and others [2012] EWHC 1023 (Comm)

High Court of Justice, Queen's Bench Division: Mr Justice Teare

Stephen Houseman (instructed by Clifford Chance LLP) for the Claimant

Vasanti Selvaratnam QC and Henry Ellis (instructed by Bryan Cave) for the Second Defendant

This application concerns the retrospective validation of service of a claim form in the context of CPR 6.15(2).

Facts

On 24 November 2011 Blair J dismissed challenges to the jurisdiction by the First and Second Defendants. Blair J declared that the claim form had been validly served on the Second Defendants by way of service on lawyers acting for the Second Defendant in Russia. However, pursuant to the subsequent decision in *Abela v Baadarani* [2011] EWCA Civ 1571 it was decided that service on lawyers in Russia was not good service.

In light of the above, the current application was issued on 28 February 2012 by the Claimant pursuant to CPR 6.15(2) that proceedings were validly served on the Second Defendant. The application was opposed by the Second Defendant. The court was being asked to validate retrospectively as good service the provision of the claim form to Bryan Cave in June 2011, which brought the claim form to the attention of the Second Defendant.

Held

An order pursuant to CPR 6.15(2) is a retrospective declaration of service. This part provides:

"On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative service or at an alternative place is good service".

In an application pursuant to CPR 6.15(2) the applicant must show that there:

a) have been steps taken to bring the claim to the attention of the defendant; and
b) is good reason to make the declaration.

a) steps taken to bring the claim to the attention of the defendant

Mr Justice Teare concluded that once Bryan Cave had been instructed, which may have been on or before 27 June 2011, for the purpose of challenging the jurisdiction of the court, at that time the claim form was brought to the attention of the Second Defendant.

However, Mr Justice Teare further commented that the Claimant cannot rely on service of the Amended and Re-Amended Claim Forms on Bryan Cave on 14 December 2011 and 2 March 2012. This does not

support the argument that the claim was brought to the attention of the Second Defendant. If this was taken into account, the Court would be acting contrary to Blair J's express intentions that his order should not prejudice the Second Defendant's position.

In any event, the claim was still clearly brought to the attention of the Second Defendant before 14 December 2012. However, the mere fact that the claim has been brought to the attention of the Second Defendant does not amount to a good reason in itself.

b) good reason to make the declaration

The nature of good reason was summarised by Mr Justice Teare in *JSC BTA Bank v Alyazov and Khazhaev* [2011] EWHC 2988. He commented that although proceedings served by an alternative method will come to the attention of the defendant more quickly, this is only a consideration, and is not a sufficient reason for an order to be made. Therefore, a mere desire for speed and/or to avoid delay was unlikely to amount to a good reason. Facts specific to the defendant (e.g. if there are reasons to believe that the defendant will avoid service) or facts relating to the proceedings (e.g. in the case of an injunction) can justify service by an alternative method. It was however noted that some flexibility may be permitted in cases where litigation has been prejudiced by lengthy periods.

Mr Justice Teare held that although the court must exercise its powers under this part cautiously, in the current case good reason had been shown for an order under CPR 6.15(2). This was based on the facts surrounding this case. The nature of relief sought was an anti-suit injunction aimed to protect an arbitration taking place in London and as such there was a need for the trial to be heard promptly. It is likely that service via the Hague Convention route would not have taken place in time to enable the trial to proceed. Moreover, disclosure had been agreed to take place in August 2012 and any delay would have put the projected early trial at risk. Mr Justice Teare further drew on the fact that 9 months had already elapsed since the Foreign Process Section had transmitted the papers to Russia, when the estimated period for service was 3 to 6 months.

The Order was granted.

Global 5000 Limited v Mr Sarang Wadhawan [2012] EWHC Civ 13

Court of Appeal: Lord Justice Rix, Lord Justice Sullivan and Lord Justice Lewison

Mark Hapgood QC and Jasbir Dhillon (instructed by Ince & Co) for Appellant

Robert Lawson QC and Tim Marland (instructed by Gates and Partners) for the Respondent

Facts

The Claimant/Appellant, Global 5000 Limited (Global) brought a claim under a contract of guarantee whose terms were said to be contained in a letter dated 9 August 2008 written by Mr Wadhawan, the Defendant/Respondent and Managing Director of an Indian company, Privilege Airways Pvt Ltd (Privilege). The guarantee was said to have been concluded by Global and Privilege entering into a Purchase and Sale Agreement for an aircraft dated 14 August 2008 (PSA). The PSA was governed by English law and contained an agreement for arbitration in England.

Soon after the conclusion of the PSA, Privilege reneged on the arrangement and failed to make payments to Global. In turn, Global terminated the PSA and started arbitration proceedings. Moreover, Global commenced court proceedings against Mr Wadhawan claiming that he had agreed in a letter to procure and/or see to it that Privilege complied with its obligation under the PSA.

For the purposes of applying for permission to serve out of the jurisdiction against Mr Wadhawan, who lived in India, Global relied on the alleged contract of guarantee (collateral to the PSA). It was contended that the contract of guarantee was itself governed by English law so that one could rely on the jurisdictional gateway in CPR PD 6B para.3.1(6)(c).

"(6) A claim is made in respect of a contract where the contract –
...
(c) is governed by English law..."

Permission to serve out was granted on 6 September 2010. Mr Wadhawan issued his challenge to the jurisdiction on 2 December 2010. The *inter partes* hearing before Beatson J occurred on 14 March 2011. At this stage Global amended the way in which it had presented the jurisdictional gateway argument. It submitted that the contract *"in respect of"* which the claim was made was the PSA (and *not* the contract of guarantee).

In the opinion of Beatson J, the relevant contract for the jurisdictional gateway was the alleged guarantee. He held that the claimant must make out a good arguable case as to the existence of that contract. In this instance the Claimant had failed to do so. Service of the Claim Form was set aside.

Two main issues survived to the appeal:

a) Do the allegations of a contract of guarantee meet the merits test of a serious issue to be tried?

b) Can Global rely on the PSA, the contract governed by English law, "in respect of" which the claim is made, despite the fact that Mr Wadhawan is *not* a party to it?

Held

a) Do the allegations of a contract of guarantee meet the merits test of a serious issue to be tried?

Global failed to show that there was a serious issue to be tried. Lord Justice Rix was not persuaded by the argument that the letter should be understood as an *"offer of a promise to see to it that Privilege would pay for the aircraft, an offer to stand behind Privilege's obligations, and thus as the offer of a guarantee"*. This is in part based on the fact there is nothing in the letter which has the express wording of any form of guarantee. Phrases including *"my personal assurance that I want to proceed with the transaction" and "I will pay for the aircraft by the end of August"* are not sufficient to support the guarantee argument because they are undermined by the context/ full sentence in which they appear.

Moreover, the factual matrix does not support the existence of a guarantee. There is nothing to suggest that what was being sought was in fact a guarantee. If a guarantee was being sought, it is likely that the terms of such a guarantee, including the extent of any such guarantee would have been discussed. Again, there is no evidence of this and the factual matrix reveals only Global's concern that Privilege was not a serious buyer. In sum, the letter is a mere apology for the delay and an explanation from Mr Wadhawan that he wishes to proceed with the transaction.

As such, since the alleged guarantee did not even reach the merits test of a serious issue to be tried, it was not necessary to consider whether it met the standard of the good arguable case test. The Appeal was dismissed.

b) Can Global rely on the PSA, the contract governed by English law, *"in respect of"* which the claim is made, despite the fact that Mr Wadhawan is *not* a party to it?

This issue did not have to be decided in light of the above, but since it was of importance the judge provided his opinion on it.

Paragraph 3.1(6) did not require a claim to be *"under"* a contract so long as it was *"in respect of"* it. This is a broad expression. Lord Justice Rix summarised the four tests which could satisfy the standard of a good arguable case under para 3.1(6) stemming from case law.

1. Connection test – it has to be shown that the claim has a connection with a contract (*Greene Wood & McClean LLP v Templeton Insurance Ltd* [2009] EWCA Civ 65). However, it is not clear whether this test can be used where two contracts are under contention and where the contract relied upon is not one to which the defendant is a party.

2. Sufficient connection – it has to be shown that there is some relevant legal connection between the claim and the other contract. A mere factual connection is not enough. This test may be more appropriate for cases where two contracts are under contention.

3. Demonstrate existence of both contracts – the existence of both contracts has to be demonstrated (i.e. the contract being relied upon for passing the jurisdictional gateway and the contract which is a link in the chain which takes one to the other contract). However, Lord Justice Rix did not fully agree with this interpretation.

4. Variation of Hamblen J's reasoning in *Cecil v Bayat* [2010] EWHC 641- If a claim is made under or pursuant to one contract, can the claimant choose to say that the claim is being made in respect of the other contract because it suits the claimant to do so, where the other contract exists and meets the jurisdictional gateway test but the first contract neither exists nor meets the test? Lord Justice Rix stated that one could not do so.

In sum, Lord Justice Rix concluded that *"where a claim is made under or pursuant to a contract, that is the contract "in respect of" which it has to be shown, to the standard of good arguable case, that it exists and that one or other of the requirements of para 3.1(6) has been met"*.

The Appeal was dismissed.

Star Reefers Pool Incorporated V. JFC Group Company Limited [2012] EWCA 14

Court of Appeal: LJJ Rix, Sullivan and Lewison

Mr Steven Gee QC and Mr Peter Stevenson (instructed by Messrs Swinnerton Moore LLP) for JFC

Mr Charles Kimmins QC and Mr Luke Pearce (instructed by Messrs Stephenson Harwood) for Star Reefers

This is a Court of Appeal decision on appeal of from the High Court regarding an anti-suit injunction granted in favour of Owners, Star Reefers Pool Inc. ("Star Reefers") against JFC Group Company Limited ("JFC"). At first instance, the High Court held JFC's actions in commencing Russian proceedings to be vexatious and oppressive and granted an anti-suit injunction in favour of Star Reefers.

Background

By way of background the underlying proceedings arise out of two charterparties entered into between Star Reefers and Kalistad pursuant to which Kalistad chartered three reefer ships from Star Reefers for a period of 36 months (the "Charters"). Star Reefers contend that Kalistad's obligations under the Charters were guaranteed by JFC which is effectively the parent company of Kalistad.

Star Reefers allege that Kalistad repudiated the Charters by redelivering the vessels early and thereby causing Star Reefers substantial loss and in the underlying actions Star Reefers seeks to recover about US$16.5 million, from JFC under the guarantees.

English court proceedings

On 13 October 2010 Star Reefers commenced court proceedings against JFC in England seeking payment of unpaid hire and damages for repudiation of the Charterparties under the two letter guarantees issued by JFC. Star Reefers also obtained (ex parte) an anti-suit injunction by which the English court ordered JFC not to take any further steps in the Russian proceedings. Additionally, the Court (Clarke J) gave permission to serve proceedings out of the jurisdiction on JFC in Russia, on the basis that the guarantees were governed by English law, that England was the natural forum and that JFC's action in Russia was vexatious and oppressive.

On 8 November 2010 the English action came before Teare J, who upheld the decision on granting the anti-suit injunction, on the basis that (1) the Russian proceedings had been commenced with a view to frustrate the English proceedings and (2) there was an apparent weakness in the Russian proceedings, which suggested that the proceedings were vexatious and oppressive. As such he upheld the anti-suit injunction and ordered the action to continue.

Court of Appeal Decision

The Court of Appeal considered the general test for granting anti-suit injunctions and provides a useful summary of the relevant criteria for granting an anti-suit injunction, in particular the ambit of *"unconscionable conduct"* - a largely undefined term.

The court began with summarising the basis for granting an anti-suit injunction.

1. An anti suit injunction may be granted in support of a binding agreement for exclusive jurisdiction (in the absence of a strong reason not to do so). This was not the case here because the guarantees did not contain any such exclusive jurisdiction clause.

2. In the absence of an exclusive law and jurisdiction clause, an anti suit injunction may still be granted where:

   (a) England would be the natural forum for the resolution of the dispute; and

   (b) the **conduct** of the party to be injuncted had to be unconscionable, vexatious or oppressive.

   See ***SNIA v Lee Kui Jak*** [1987] 1 AC 871.

3. The court went on to consider the findings in ***Deutsche Bank AG v Highland Crusader Offshore Partners LP*** [2010] 1 WLR 1023 (see Update 27) which expands on the test and sets out a non-exhaustive list of conditions which could indicate vexatious and oppressive behaviour.

4. Generally, factors such as whether the injuncted party is abusing the process by commencing '*hopeless*' parallel proceedings, or if there is bad faith or interference with the justice of the natural forum, then this could be evidence of oppressive and vexatious behaviour.

This case was, however, a different story.

First, the court noted that JFC had in fact disputed jurisdiction from the very beginning since it was not a party to the charterparties. It had not agreed to litigate or arbitrate in England. As such, commencing proceedings in Russia would in itself, not invade on the subsequent English court proceedings.

Secondly, the court noted that JFC could either engage in the arbitration proceedings and take the risk of a subsequent enforcement claim in Russia under the New York Convention, dispute jurisdiction and appoint an arbitrator without prejudice. JFC took the latter approach and then went on the attack in Russia - which they were entitled to. The principles of Russian law in relation to offer and acceptance offered a clear advantage and supported JFC's case and the court said that:

"It is hard to see that a party can be said to be acting unconscionably when it seeks a legitimate juridical advantage in a foreign court, especially where that is the court of its domicile, the place where any obligation falls to be performed and the place where, if there was a contract of guarantee created by the posting of the guarantee letters to Star Reefers from Russia, those contracts were made."

On this basis the Court of Appeal allowed the appeal and set aside the anti-suit injunction against JFC.

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