

# Marine & Transit

## September 2009

In this quarterly instalment of our newsletter we review a number of shipping and marine cases reported over the summer in the Court of Appeal and Admiralty and Commercial Courts, with particular interest for cargo, hull and P&I insurers.

### Voyage charters – no warranty of safe berth

The Court of Appeal has given its judgment on whether there exists an implied warranty of berth safety in a voyage charter. Terry Donaghy, Partner at Weightmans, reviews the decision in **"The Reborn"** and its implications for vessel owners and charterers.

### Dangerous cargo – shipper liability or carrier consent?

When dangerous goods cause damage, are shippers inevitably liable? Mike Burns, Partner at Weightmans, analyses the decision in **The "Aconcagua"** and the competing carrier versus cargo debate.

### "Winner takes it all?" – collision liability and costs recovery

Do costs always "follow the event"? Terry Donaghy considers the Admiralty Court decision in **The "Western Neptune"** and how the apportionment of liability in collision actions may be reflected in costs awards.

### Charter termination and compensating waiting time

When cargo remains on board following charter termination, how, if at all, are vessel owners entitled to be compensated for delays? Mike Burns reports on the decision in **The "Kos."**

### Waking the dead – time to serve your claim form!

Claimants waiting to serve proceedings until late into the period of validity of the claim form do so at their peril. Emma Rice, Solicitor at Weightmans, considers the lessons of this Commercial Court decision involving the overturning of an order extending time for service.

Newsletter

## Voyage charters – no warranty of safe berth

**Mediterranean Salvage and Towage Ltd v Seamar Trading & Commerce Inc**  
**(The “Reborn” – Court of Appeal (Lord Clarke of Stone-cum-Ebony MR, Lord Justice Ricks and Lord Justice Carnwath) – [2009] EWCA Civ 531**

In this recent ruling, the Court of Appeal has confirmed that no term should be implied into a voyage charter party that the charterer had warranted a safe berth at the load port.

In the Commercial Court decision (reviewed in our November 2008 Marine newsletter), Mr Justice Aikens concluded that it was not necessary to imply such a provision in the charter and dismissed the owner’s appeal from the Tribunal’s award to that effect. The owners obtained leave from the judge to appeal to the Court of Appeal.

The charter party was for a voyage from Chekka in the Lebanon to Algiers. The owners claimed that the vessel had sustained damage during loading as a result of the hold being penetrated by a hidden underwater projection at the loading berth nominated by the charterers. The issue was whether the charterers had warranted the safety of the loading berth.

The charter was on an amended Gencon form and contained the following material provisions:

Box 10: Loading port or place (Cl.1) 1 BERTH CHEKKA – 27 FT SW PERMISSABLE DRAFT

Clause 1: The said Vessel shall... proceed to the loading port(s) or place(s) stated in Box 10 or so near thereto as she may safely get and lie always afloat ...

Clause 29: Owners guarantee and warrant that upon arrival of the Vessel to and/or prior to its departure from loading or discharging ports... the Vessel including... the vessel’s draft shall comply fully with all restrictions whatsoever of the same ports... including their anchorages, berths and approaches and that they have satisfied themselves to their full satisfaction with an about the port’s specification and restrictions prior to entering into this charter party.

The Court of Appeal considered that whether or not there was an implied warranty of safety depended upon the particular terms of the charter and on the normal rules for the implication of contractual terms. Further, an implied term had to be reasonable and necessary and not contradict any express term in the contract (following **Liverpool City Council v Irwin (1977)** and **Attorney General of Belize v Belize Telecom (2009)**).

The owners suggested that in the case of a time charter party, a warranty of safety would often be implied (relying on **The Evaggelos Th [1971]**). The Court however did not consider this approach was appropriate to a voyage charter party particularly where, as in this case, the danger at the berth was apparently unascertainable by either the owners or the charterers.

The simple issue at stake was which party had agreed to bear the risk that arose from the unsafe nature of the berth. How this risk should be borne would depend on all the circumstances and in particular the terms of the subject charter party.

In circumstances of this case, it did not follow from the mere fact that the charterers were under a duty to nominate the berth at Chekka that the charterers warranted that the berth was safe. It was significant that the word “safely” in Clause 1 of the printed standard charter terms had been struck out by agreement of the parties.

Further, by Clause 20, the owners warranted that upon arrival at the loading port the vessel would comply with all restrictions of the port including its berths and approaches. Any implied term as to safety of the loading berth would be inconsistent with that clause.

The owners had agreed that they would investigate the berths at Chekka or to investigate the risk of getting to whatever berth was nominated, loading at it and departing from it. The implied term they sought was not necessary to make the contract work. Accordingly the owner’s appeal was dismissed.

The Court of Appeal’s decision is an important one for owners and charterers and reinforces the importance of the specific wording agreed between the parties to the charter in relation to the safety of otherwise of a load or discharge port.

The case illustrates that the court will be reluctant to imply any term in a charter party which is not necessary or which is inconsistent with specific terms clearly agreed between the parties in their contract.

**Terry Donaghy, Partner**  
**Weightmans LLP**

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## Dangerous cargo: shipper liability or carrier consent?

**Compania Sud Americana de Vapores SA v Sinochem Tianjin Import & Export Corp– Commercial Court (Christopher Clarke J.) [2009] EWHC 1880 (Comm)**

How do liability arguments unravel where vessel and cargo are damaged by fire/explosion, but where competing causes are shipper fault (shipping dangerous goods) versus carrier fault in the negligent stowage of those goods rendering them liable to ignite?

M.V. “Aconcagua” was on time charter to CSAV when there was an explosion in the No. 3 hold while the vessel was off the coast of Ecuador. The fire damaged vessel was abandoned with multi million dollar losses. The immediate cause of the explosion was discovered to be the self ignition of kegs of calcium hypochlorite stowed in a container loaded on board the vessel in Busan for carriage to Chile.

Immediately arising out of the incident were the vessel owners’ claims against CSAV in London arbitration (subsequently on appeal to the Commercial Court in 2006) for damage to the vessel, which proceeded on the assumption that the explosion was caused by the negligent decision to stow the container next to a bunker tank, and to heat the bunker tank during the voyage. CSAV were held liable to the vessel owners under the charter, given their NYPE clause 8 obligation to properly load, stow and trim the cargo. The reservation of the Captain’s right to supervise did not relieve CSAV of their primary duty to stow safely.

The present Commercial Court decision now saw CSAV seeking indemnity to the tune of \$27 million from the shippers, Sinochem, on the basis that the cargo was classified as dangerous under the IMDG code. Thus, CSAV claimed entitlement to indemnity under Article IV, rule 6 Hague Rules pursuant to which, in relation to dangerous cargo which the carrier does not consent to carry, “the shipper shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.”

Sinochem offered 2 lines of defence. First, they argued that CSAV *had* consented to the carriage of the goods. The cargo description of “UN 1748” was the key for CSAV to identify through the IMDG Code the risk of self ignition; accordingly, CSAV had informed consent. However, the court rejected the argument, holding that the test was what a prudent carrier, ordinarily experienced and skilful, but without the detailed knowledge of an expert chemist as to product hazard, could be expected to know about the cargo. Whilst the bill of lading notation indicated the goods were hazardous, a prudent carrier would not have knowledge that it could explode if exposed to a temperature of less than 40°C (which occurred here and was far lower than might usual be expected of the product).

Sinochem were similarly unsuccessful in arguing that the decision to stow the container surrounded on three sides by a bunker tank rendered the vessel unseaworthy, and that accordingly CSAV could not rely on the Article IV rule 2(a) negligence exception. The court held that given the vessel was in tropical waters, there was no causative proof that the bunker tank heating had in fact caused the cargo to ignite, as opposed to hot ambient temperatures. In any event bad stowage only rendered the vessel unseaworthy if it endangered the safety of the ship and could not readily be cured on the voyage. Here, the “Aconcagua” was only potentially in danger if the bunker tank was heated on the voyage but if no such heating had taken place the container would be entirely safe. There was nothing inevitable about the situation, and in any case there was no causative link. Even if there was a link then it was clearly an error in the management of the vessel giving CSAV a complete defence.

Emerging from this expert and complex case (claimant legal costs were reportedly over £3 million) it seems that hurdles presenting cargo interests in escaping liability in similar claims (often involving vast sums) are burdensome, notably establishing consent to the carriage of dangerous goods – not as obvious at it may seem – and seeking to prove vessel fault which will inevitably means having to demonstrate unseaworthiness so as to counter the carrier’s inevitable pleas of Hague (Visby) Art IV rule 2(a) exemption.

**Mike Burns, Partner**  
**Weightmans LLP**

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## “Winner takes it all?” – collision liability and costs recovery

**The Owners and Charterers of the ship “Western Neptune” v The Owners and Charterers of the ship “Philadelphia Express” – Admiralty Court (Mr Justice David Steel) – [2009] EWHC 1522 (Admlty)**

This recent decision by the Admiralty Judge gives further clear guidance on the court’s approach to awarding costs to a successful party in a collision case.

The topic previously arose in **The Krysia [2008]** (reported in our November 2008 Marine newsletter). In that case, the “Europa” was found 70% and the “Krysia” 30% to blame for the collision. The owners of the

“Kyrasia” sought their full costs of the action whereas the owners of “Europa” argued they should only recover 70% of their costs in line with the apportionment on liability. However the court confirmed there was no practice in Admiralty matters that costs automatically follow the apportionment of liability between the vessels. Rather the usual rules on costs under CPR 44.3 will apply.

Under CPR 44.3 the starting point is that the successful or winning party is entitled to an order for their costs. Any departure from the starting point must have regard to all the circumstances of the case, including the conduct of the parties.

In this more recent case, the Admiralty Judge emphasised that the court has a flexible function to consider when justifying departure from the starting point under CPR 44.3. Liability was found 2/3rds: 1/3rd in favour of “Western Neptune” against “Philadelphia Express.” The owners of “Western Neptune” claimed all their costs as the successful party. However the Judge decided that various factors in the case justified the owners of “Western Neptune” only recovering 65% of their costs. The following issues were taken into account:

- The apportionment of liability can be a relevant factor (although not determinative).
- The nature of any settlement proposals – the owners of the “Philadelphia Express” had offered to settle liability at 60/40 at an early stage. However the owners of “Western Neptune” had only made an offer, described by the Judge as “way off the mark”, at a late stage in the proceedings.
- In the case a significant feature was also the fact that the owners of “Western Neptune” had made late disclosure of important evidence affecting the issue of liability.

The decision is of importance as it emphasises that the conduct of the parties during proceedings, particularly in relation to the making of appropriate settlement offers, can be a very relevant factor in influencing the costs award made in favour of the successful party.

**Terry Donaghy, Partner**  
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## Charter termination and compensating waiting time

### **ENE Kos v Petroleo Brasileiro S.A. – Commercial Court (Andrew Smith J.) – [2009] EWHC 1843 (Comm)**

Recent months have seen a number of premature charter terminations. This Commercial Court decision concerns a common situation of a time charter terminating due to charterer default, but the vessel being “detained” thereafter pending removal of cargo. On what basis (if at all) can owners be compensated for their loss of use?

The “Kos” was a VLCC chartered by her owners to Petroleo Brasileiro on a Shelltime 3 charter for 36 months. There was delay in payment of initial hire and owners gave notice of termination and subsequently, notice of withdrawal. Owners initially obtained a declaratory judgment as to the validity of withdrawal, and now sought damages, corresponding to the 2.64 days holding the cargo post termination, or about US\$410,000 based on the daily market rate for the vessel.

A number of varied and interesting submissions were put to the court by the owners.

Owners' principal argument was that their loss was a direct result of owners agreeing to load cargo onboard pursuant to the charter. As such under clause 13 owners were entitled to indemnity. However, the court held there was insufficient nexus between compliance with the order to load and the loss resulting. The indemnity clause had to be restrictively applied, and here the order to load was too remote from owners' losses. Instead it flowed from owners' decision to withdraw the vessel, over which charterer had no control and the result of which they could not quantify (**The "Achilleas" [2008] UKHL 48**).

Owners alternatively argued their entitlement to damages was a consequence of charterers' breach in failing to pay hire. Again, the court was unimpressed, since the effective cause of the loss was not the failure to pay hire, but was instead owners' decision to withdraw the vessel which was effective to break the chain of causation.

Nor did the court agree the existence of an implied term that following a valid withdrawal of the vessel the charterers would pay owners for the use of the vessel at the market rate until completion of discharge and for the cost of bunkers consumed for the period. Adopting the approach of the Privy Council in **AG of Belize v Belize Telecom Ltd [2009] UKPC 11**, where a contract did not expressly provide for what was to happen when a foreseeable event occurred, the most usual inference in such cases is that nothing was to happen. Applying that approach, because the charterer was silent on the point, it should be inferred that the parties did not intend there should be any such obligation.

Owners next submitted that at charterers' request they undertook fresh contractual commitments post termination, and were entitled to be paid appropriately. Doubtful, held the court, since the vessel remaining off Brazil was because the vessel was lumbered with charterers' cargo and there was no practical alternative but to await its removal. There was no suggestion of charterers requesting services.

Despite these arguments falling short, owners were finally successful in persuading the court that when the vessel was withdrawn from hire, the contract under which owners were bailees of the cargo came to an end, but owners remained bailees of it and as such were entitled not only to recovery of expenses incurred in preserving the cargo but also "reasonable remuneration" for providing – effectively – a floating warehouse (**The "Winson" [1982] AC 939**). Therefore, owners were entitled to recover the daily market rate for the vessel as corresponding to fair compensation.

The decision therefore provides a sensible answer to a common problem, and perhaps shows that faced with a series of alternative arguments, it is often the most straightforward reasoning – here one of simple bailment – rather than technical arguments of charter construction – which the Commercial Court (and for that matter London maritime arbitrators) tend to follow.

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## Waking the dead – time to serve your claim form!

**FG Hawkes (Western) Ltd v Beli Shipping Co Ltd – Commercial Court (Gross J) – [2009] EWHC 1740 (Comm)**

Once limitation has been protected by issue of proceedings, there can be an assumption that the service of those proceedings can be affected leisurely and the court will grant time extensions for service if required “on the nod.” However, this Commercial Court decision provides a wake up call that parties are expected to take prompt steps to serve proceedings.

In this case an order extending time for service of a claim form was set aside where there had been neglect or oversight by the claimants and/or their legal representatives in getting on with service until too late in the day.

The claim involved a consignment of plywood shipped from China to Swansea. During discharge, the cargo was found to be damaged by mould due to water ingress. The terms of the bill of lading contained a one year time limit for bringing proceedings in respect of loss or damage to cargo. The shippers, however, waited until 11 months after discovery of the damage before alerting the ship owners’ P & I Club to a potential claim. In doing so, they sought an extension of time, which was granted. Two further extensions of time were also given. The claim form was eventually issued on the last day of the final time extension.

The Civil Procedure Rules (“CPR”) provide that once a claim form has been issued, it must be served by midnight on the calendar day four months after the date of issue. This period is extended to six months if the claim form is to be served out of the jurisdiction (CPR 7.5).

As the claim form in this case was for service out of the jurisdiction, the claimant shippers had six months from the date of issue within which to serve it. However, they failed to take any steps to do so until three weeks before the end of the six month period, when they asked the owners’ P&I club to confirm the owners’ address for service. Not obliged to provide such information, the club declined. A week before the period for service expired, the claimants therefore obtained an *ex parte* order for a further time extension.

The claim form was then served on the owners at their registered office in St Vincent. In response, the owners applied to have the order extending time for service set aside.

CPR 7.6 provides that a claimant may apply for an order extending the period for service. However, the general rule is that such an application must be made within the period allowed for service (CPR 7.6(2)). If a claimant applies to extend the time for service after the period allowed for service has expired, the court may make such an order only if: (a) the court has failed to serve the claim form; or (b) the claimant has taken all reasonable steps to serve the claim form within the time allowed but has been unable to do so; and (c) the claimant has acted promptly in making the application.

In this case, the claimants had made their application before expiry of the period allowed for service. In theory, the test ought therefore to have been less stringent. However, following a recent line of authorities such as **Hashtroodi v Hancock [2004] EWCA Civ 652** , **Collier v Williams [2006] EWCA Civ 20**



and **Hoddinott v Persimmon Homes (Wessex) Ltd [2007]** EWCA Civ 1203, the court took a more rigorous stance. In doing so, it referred to the dicta of Lord Dyson LJ in **Collier v Williams** (above):

“When deciding whether to grant an extension of time under CPR Rule 7.6(2), the court is required to consider how good a reason there was for the failure to serve in time... the stronger the reason, the more likely the court will be to extend time; the weaker the reason, the less likely.”

This is a more subtle exercise than that required under CPR Rule 7.6(3), which provides that unless all reasonable steps have been taken the court cannot extend time. However, it is apparent that a time extension will not be granted or upheld without good reason.

Here the claimants relied on the fact that their solicitors had done nothing for five months while they were focussing on the claim against cargo insurers. They also argued they had a good arguable case and that because the owners had known proceedings had been issued and their nature, they would not be prejudiced by a short extension of time.

Although the court acknowledged these were all good points in the claimants’ favour, these reasons did not outweigh the claimants’ neglect or oversight in getting on with service until too late – discovering the defendants’ address was not a task giving rise to any undue difficulty, all that was required was timely attention to that matter. It was also the court’s view that whilst the solicitors might hope for a helpful response from the P & I club or ship’s managers, they were not entitled to expect or assume they would co-operate.

The court therefore allowed the application holding that there was no reason for the failure to serve the claim form within the time allowed other than incompetence, neglect or oversight on the part of the claimants or their legal representatives.

Ultimately, the lesson here is that a claimant who sails close to the wind allowing time limits to drift takes the risk that any time extension granted *ex parte* might be set aside at the *inter partes* stage.

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