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SHIPPING
COMMOTION IN THE OCEAN: COURT OF APPEAL RESTORES TRADITIONAL TEST FOR OFFHIRE

The Court of Appeal allowed the Charterers' appeal, set aside the Commercial Court decision, and unanimously restored the arbitrators' award. It held that, in determining whether a vessel was off-hire, the Court need only enquire into the service immediately required of the vessel at the time of the off–hire event. It is not necessary to enquire into *"the chartered service overall"* or the entire voyage or maritime adventure.

The Court of Appeal's decision in this matter is an important judgement on the interpretation of the NYPE off–hire clause; an area of frequent disputes between owners and charterers.

By reversing the decision of the Commercial Court and reaffirming the view of the LMAA arbitrators, the Court of Appeal signalled it preference for a practical, commercial approach to the construction of the NYPE off–hire clause; an approach which conforms with conventional principles for determining whether a vessel is off–hire.

From both the commercial and legal points of view, it is submitted that the Court of Appeal's decision was the right one.

Background

The vessel was chartered on a modified NYPE 46 form. Clause 15, the off–hire clause, provided that:

> *"...in the event of loss of time from ... default of master ... or by any other clause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost..."*

The vessel loaded a wheat cargo in Russia for Syria. Bills of lading were issued. The cargo was rejected by its receivers and the Charterers ordered the vessel to sail for Libya and anchor *"at road port Benghazi."*

The bills of lading had to be returned to the Owners to be reissued. Instead of proceeding as ordered by the Charterers, the Owners instructed the vessel to proceed to international waters about 50 miles off Libya, where she drifted for 11 days, until the problems with the bills of lading were resolved. The vessel than proceeded to Benghazi, waited for her berth, and discharged her cargo.

The Charterers claimed that the vessel was off–hire for the period she spent drifting. The Owners asserted that because of the issue with the bills of lading, even if the vessel had proceeded to port immediately, she would not have been able to commence discharging any sooner. Therefore, these was no net loss of time and the vessel remained on–hire for the disputed period.

The Arbitration Award

The arbitrators found in the Charterers' favour. Although there was no overall loss of time (as Owners had submitted), the vessel was off–hire for the period in question. The failure to proceed to the port roads anchorage when ordered to do so constituted a *"default of Master"*. Following *The Berge Sund* [1993] 2 Lloyd's Rep. 453, the relevant test was whether there was an *"immediate loss of time"* in relation to the service then required. The arbitrators also relied on relevant sections of *Time Charters* (6th Ed., para 25.2).

The Owners appealed.

The Commercial Court Decision

The issue on appeal was whether a ship is off–hire under the NYPE clause merely because she is not efficient for the service then required, or whether the charterer also has to show a net loss of time resulting from that inefficiency.

Owners challenged the arbitrators' interpretation of the off–hire clause and, relying in part on *Time Charters* (6th Ed., paras 25.53-25.54), the Commercial Court allowed Owners' appeal. The Court held that the correct test under clause 15 of NYPE 46 was whether there had been a *"net loss of time"* in the overall progress of the adventure. On that test, i.e. extending the enquiry about lost time to the discharge operation and beyond, there was no loss of time.

Commotion in the ocean

After leave to appeal to the Court of Appeal was granted but before the appeal was heard, the authors of *Time Charters* wrote a paper for the LMAA. (This can easily be found on the LMAA website). They acknowledged that *The Athena* raised a *"genuinely novel point"*, namely an attempt by the Owners to use subsequent events to defeat a claim for off–hire.

Nevertheless, they criticised the Commercial Court decision as lacking in clarity and following the challenging reasoning of Tuckey J. in *The Ira* [1995] 1 Lloyd's Rep.103. They urged a *"thorough review of the operation of the off hire clause".*

The Court of Appeal decision

The Court of Appeal set aside the Commercial Court decision and unanimously restored the arbitrators' award.

Tomlinson LJ, delivering the lead judgement, focused on the net loss of time provision in the off–hire clause. Having considered earlier authorities, he conclude that *"whether the same amount of time would have been lost for other reasons at another stage in the chartered service is not a relevant consideration…".* Clause 15 *"is concerned to identity an actual period of real time during which time is being lost, not an identifiable length of time by which " the chartered service" or what the judge sometimes called "the charter service overall" can be said to have been delayed."*

There were four reasons for this conclusion.

First, this conclusion was the *"natural construction of the language"* of Clause 15.

Second, there were *"sound practical reasons"* for declining to construe *"time thereby lost"* as net loss of time over the entire maritime adventure. The Court of Appeal's approach *"avoids intricate calculations, enabling the parties to know where they stand without having to wait on events subsequent to the period of inefficiency"* which is *"a consideration of prime importance bearing in mind the remedies available to the owners in the event that payment of hire is not made punctually".*

Third, the Commercial Court's approach was flawed: *"The use of the word "overall" begs the question what are the beginning and the end points of what is being measured. Without more, "the charter service overall" would seem to be a reference to the entirety of the service to be performed under the charter".* However, *"[i]t is immediately apparent that, quite apart from the fact that there is no justification in the wording for the adoption of this approach, it would lead to precisely those intricate and speculative enquiries which were deprecated both by this court in Vogemann v Zanzibar and by Robert Goff J in The Pythia."*

Assessing time lost by reference to *"the chartered service overall"* would also *"give rise to the distinct possibility that the same triggering event could give rise to different consequences in terms of off-hire in back to back charterparties of differing length".*

Finally, in an ordinary case, *"a vessel drifting at sea without proceeding to the port during a period when the vessel would otherwise have been awaiting a berth will have the result that the charterers are unable to start time running against their sub-charterers and the same will ordinarily be true as between sellers and purchasers".* As such, the Commercial Court's *"notion of the charterers gaining a windfall in the event that the vessel is off-hire during the drifting period is wholly illusory"* since the Master's *"arbitrary action has resulted in the upsetting of the normal allocation of the risk of delay".*

Comment

The position following the Court of Appeal's decision in *The Athena* is clear: it is not permissible to take into account events which occurred after the end of the off-hire event.

Although a blow for Owners on this particular occasion, this is by no means a pro-charterer decision. On a different day, on different facts, the same reasoning can equally lead to a favourable result for owners.

The Commercial Court's decision cannot be criticised as insensible or lacking in common sense. Nevertheless, the Court of Appeal rightly restored the traditional test for off-hire; namely the mechanical allocation of time regardless of fault. What charterers and owners require in their daily operations is the certainty of a simple, practical test. They have had the benefit of this for years and the Court of Appeal has ensured that they continue to do so.

(The full case citation of *The Athena is Minerva Navigation Inc v Oceana Shipping AG (The "Athena")* [2013] EWCA Civ 1723).

Click here for more details on the above case.

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