

10 April 2019

ELENI SHIPPING LIMITED v TRANSGRAIN SHIPPING B.V.

[2019] EWHC 910 (Comm)

BEFORE: MR JUSTICE POPPLEWELL

CASE SUMMARY

On appeal against an arbitration award under section 69 of the Arbitration Act 1996, the Court considered the construction of two off-hire clauses in a time charterparty following the recent authorities on the principles applicable to the construction of commercial documents. Popplewell J observed that the application of these principles to time charters may give rise to particular considerations in view of the allocation of risk which is inherent in their nature.

Background

The Claimants were the owners of the vessel “ELENI P” and the Defendants were her sub-charterers. The sub-charter, dated 15 October 2009, was on the terms of an amended NYPE 1946 form. On 29 April 2010, the vessel loaded a cargo of iron ore at a port in Ukraine for discharge in China. The vessel sailed through the Gulf of Aden and into the Arabia Sea where she was attacked and captured by pirates on 12 May 2010. The vessel remained under seizure until 11 December 2010. In broad terms, the dispute between the parties was whether the owners were entitled to claim hire for the period during which the vessel remained under seizure.

The majority of the arbitral tribunal had concluded that the owners were not entitled to do so. That conclusion was based on clauses 49 and 101 of the charterparty.

Clause 49 (‘Capture, Seizure and Arrest’) provided that:

Should the vessel be captures [sic] or seized or detained or arrested by any authority or by any legal process during the currency of this Charter Party, the payment of hire shall be suspended for the actual time lost, unless such capture or seizure or detention or arrest is occasioned by any personal act or omission or default of the Charterers or their agents... (emphasis added)

Clause 101 (‘Piracy Clause’) provided that:

Charterers are allowed to transit Gulf of Aden any time, all extra war risk premium and/or kidnap and ransom as quoted by vessel’s Underwriters, if any, will be reimbursed by Charterers. Also any additional crew war bonus, if applicable will be reimbursed by Charterers to Owners against relevant bona-fide vouchers. In case vessel should be threatened/kidnapped by reason of piracy, payment of hire shall be suspended. It’s remain understood [sic] that during transit of Gulf of Aden the vessel will follow all procedures as required for such transit including but not limited the instructions as received by the patrolling squad in the area for safe participating to the convoy west or east bound.” (emphasis added)

Approach to Construction

Popplewell J followed the recent authorities on the principles applicable to the construction of commercial documents: see **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 WLR 896; **Chartbrook Ltd v Persimmon Homes Ltd** [2009] 1 AC 1101; **Re Sigma Finance Corp** [2010] 1 All ER 571; **Rainy Sky SA v Kookmin Bank** [2011] 1 WLR 2900; **Arnold v Britton** [2015] AC 1619; and **Wood v Capita Insurance Services Ltd** [2017] AC 1173.

He noted, however, that the application of these principles to time charters may give rise to particular considerations in view of the allocation of risk which is inherent in their nature. He said at [11] that:

Under a time charter the risk of delay is fundamentally on the charterer who remains liable to pay hire in all circumstances unless exempt from doing so under an off-hire provision. Accordingly the burden lies on a charterer to bring himself within the plain words of an exception from the obligation to pay hire; and, all other things being equal, doubts as to the meaning of such exceptions are to be resolved in favour of owners.

Notably, Popplewell J observed that this analysis did not constitute a departure from the general approach to contractual construction adopted in the recent authorities. All that it involves is taking into account the nature of risk allocation under a time charter as part of the wider context.

Clause 49

The majority of the tribunal had accepted the charterers' contention that the word "*capture*" in clause 49 was not qualified by the phrase "*by any authority or by any legal process*". On that interpretation, clause 49 extended to capture of the vessel by pirates. Popplewell J rejected this construction for three main reasons.

First, he considered the language of clause 49. The phrase "*during the currency of this Charter Party*" undoubtedly governs each of the four words "*captures [sic] or seized or detained or arrested*". This, he said, suggests that the phrase sandwiched between them ("*by any authority or by any legal process*") must similarly apply to each of the four words capture, seizure, detention and arrest. Moreover, the contention that the phrase "*by any authority or by any legal process*" was confined to arrests alone would render that phrase superfluous; how can a vessel can be arrested otherwise than "*by any authority or by any legal process*"?

Second, Popplewell J examined the contractual context in which clause 49 appeared. In particular, he noted the stipulation in clause 15 that "*detention by average accidents to ship or cargo*" would be an off-hire event. The qualification "*by average accidents to ship or cargo*" in clause 15 would be rendered inoperative if clause 49 applied to all detentions regardless of nature or cause. Therefore, the word "*detained*", and by extension the word "*captures*", in clause 49 must be construed as being subject to the qualification "*by any authority or by any legal process*".

Third, Popplewell J noted that the charterers' construction would lead to surprising and uncommercial results. If the word "*capture*" was unqualified it would, as he put it at [15],

cast on the Owners the risk of loss through a raft of circumstances where the risk is traditionally borne by charterers as part of the inherent nature of a time charter, such as detention of the vessel at a berth as a result of weather or port conditions or congestion.

Clause 101

It was common ground that the third sentence of clause 101, “[i]n case vessel should be threatened/kidnapped by reason of piracy, payment of hire shall be suspended”, needed qualification. The parties could not have intended the vessel to be off-hire as a result of piracy anywhere in the world. The dispute was whether the threat/kidnap must occur within a geographical area identified as the Gulf of Aden (the owners’ case) or whether the threat/kidnap must take place as an immediate consequence of the vessel being required to transit the Gulf of Aden (the charterers’ case). On this point, Popplewell J preferred the charterers’ interpretation.

A significant hurdle in the way of the owners’ construction was the unchallenged finding by a majority of the arbitration tribunal that the expression “*Gulf of Aden*” was not capable of definition in geographical terms in the context of a time charter of this kind. According to Popplewell J, this was fatal to the owners’ preferred interpretation (at [24]).

The owners’ construction also sat uneasily with the commercial purpose underlying clause 101. As Popplewell J said at [25], the purpose of clause 101 is to enable the charterers to trade the vessel through the Suez Canal. Clause 101 provides for a distribution of the resultant risks between the owners and charterers. Thus, the first two sentences of clause 101 allocate the additional cost of war risk premium, kidnap and ransom premium and crew war bonus to the charterers. Viewed in that light, the natural construction of the allocation of risk in the third sentence is that the vessel should be off hire if the vessel is detained by piracy “*as an immediate consequence of the transit [through the Gulf of Aden], rather than by reference to a particular geographical area*” (at [26]).

This conclusion is reinforced by the fact that the risks allocated in the second half of the first sentence (war risk premium, and kidnap and ransom premium) and the second sentence (crew war bonus) are not defined by reference to a geographical area. Instead, both these parts of clause 101 refer to payments which arise by reason of the vessel’s transit through the Gulf of Aden. A similar approach must apply to the construction of the third sentence of clause 101.

In result, the appeal failed on clause 101 but succeeded in relation to clause 49.

NOTE: *This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments of the Commercial Court are public documents and are available at: <https://www.bailii.org/ew/cases/EWHC/Comm/>*