Piracy, Complete Code of Insurance and Manipulation – Herculito Maritime v Gunvor in the Court of Appeal

Guy Blackwood QC

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Guy Blackwood QC, leading Oliver Caplin of Twenty Essex win in the Court Of Appeal: ***Herculito Maritime Limited (Owners' interests) v. GUNVOR (Cargo Interests), 'THE POLAR".***

This was a claim by the owner of the mv POLAR to recover cargo's proportion of general average expenditure, the expenditure in question consisting of a ransom payment to pirates who had detained the vessel in the Gulf of Aden. The claim was defended by the cargo owners on the ground that the shipowner's only remedy in the event of having to pay a ransom to pirates was to recover under the terms of insurance policies, the premium for which was payable by the voyage charterer.

By a charterparty dated 20th September 2010 the shipowner chartered the vessel to Clearlake Shipping Pte Ltd for a voyage from one or two safe port(s) Tallin/St Petersburg range to one safe port Fujairah or, in charterer's option, one or two safe port(s) or STS transfers in the Singapore area.

An additional Gulf of Aden Clause provided as follows:

"Any additional insurance premia (including, but not limited to, those in respect of H&M, crew, P&I kidnap risks and ransoms), crew bonuses (which to be in accordance with the international standard) shall be for chrtrs account. Max USD 40,000 for charterer's account for any additional insurance premium except for crew bonus which to be max USD 20,000 for charterers account."

A cargo of 69,493.28 mt of fuel oil was loaded at St Petersburg between 29th September and 2nd October 2010.

Six bills of lading were issued. The shipper in each case was Warley International Ltd, part of the Rosneft group, and the consignee was "to the order of BNP Paribas (Suisse) SA". Bills of lading 1 to 5 contained these words of incorporation on their face: *"... pursuant and subject to all terms and conditions as per TANKER VOYAGE CHARTER PARTY indicated hereunder, including provisions overleaf."* Bill of lading 6 provided, on its reverse side: *"All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause are herein incorporated."*

While transiting the Gulf of Aden on 30th October 2010, the vessel was seized by Somali pirates. She was held captive for ten months before being released on 26th August 2011. In order to obtain this release, a ransom payment of US $7.7 million was paid, refunded by the K&R and hull & machinery war risks underwriters, who sought a contribution in general average from cargo interests' underwriters.

Two issues arose:

1. Whether the phrase "bill of lading holders" was to be substituted for "charterers' on incorporation of the Gulf of Aden Clause from the charterparty into the bills of lading.
2. Whether Owners had agreed, by the Gulf of Aden Clause to constitute their own insurance fund as a complete code for recovery in the event of general average expenditure by payment of ransom on piratical seizure, with the consequence that Owners could not seek a general average contribution from bill of lading holders (Cargo Interests).

On Issue 1, the Court of Appeal held that no manipulation was appropriate, because there was nothing in the bills (or the charterparty) to say how liability for the premium would be apportioned between different bill of lading holders.

On Issue 2, the Court of Appeal held that the bills of lading did not exclude Cargo Interests' liability. The risk of piracy and the potential need to pay a ransom were not only foreseeable but were foreseen by the parties to the bill of lading contracts and

dealt with expressly by them.

The parties knew that, if the shipowner was to allow its vessel to transit the Gulf of Aden, insurance against this specific risk would need to be taken out. They knew or could be taken to have known that payment of such a ransom would give rise to general average. It would have been straightforward in the circumstances, if that is what they intended, to say in terms that cargo was not to contribute in general average in the event of such a payment.

But the parties had not done so, instead leaving an implicit understanding to this effect to be inferred (on the Cargo Owners' case) by reference to complex arguments concerning the incorporation of charterparty terms into a bill of lading contract.

That was an unnecessarily convoluted way to express a simple concept, which at least called into question whether this is what the parties intended.

In the premises, the "presumption" referred to in ***Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd*** [1974] AC 689, 717 applied, *"in construing such a contract one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption".*

Guy was instructed by HFW, Richard Neylon and Jenny Salmon

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"Guy has a top class legal brain combined with an unbelievable ability to assimilate the facts of a case. He is a master cross-examiner and has a huge work ethic." (Legal 500, 2022)

Guy has a comprehensive commercial practice, which includes large contractual disputes, international arbitration, insurance & reinsurance, banking & finance, civil fraud, energy & utilities, public international law including bilateral investment treaty arbitration, commodities and shipping.

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