Clarification for necessaries claimants under s. 20(2)(m) of the Senior Courts Act 1981
If clarification were necessary

Paul Henton

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On 17 December 2020, judgment was handed down in ***Trans-Tec International SRL, World Fuel Services (Singapore) Pte Ltd v "the Columbus" and "the Vasco da Gama"*** [2020] EWHC 3443 (Admlty). The case concerned the definition of "a claim in respect of goods or materials supplied to a ship for her operation or maintenance" within the meaning of s. 20(2)(m) of the Senior Courts Act 1981.

Many practitioners will be aware of the ongoing Admiralty proceedings involving these two cruise ships, in which orders have been made for appraisal and sale, with numerous in rem claims proceeding against the proceeds of sale and being case-managed together. The decision in Trans-Tec concerned in rem claims against the vessels by bunker suppliers within the World Fuel Services Group (WFS). Paul Henton acted for the claimant companies, who were successful on all components of their claims.

In addition to the base price for the bunkers (c. US$3.7 million), the claimants claimed (i) contractual interest on overdue amounts at 2% per month (or 1 ½% per month on lower value invoices), (ii) administrative fees of 5% of the principal amount on all sums more than 15 days overdue (a contractual pre-estimate of the costs of chasing bad debts), and (iii) a contractual indemnity in respect of the claimants' costs. These claims all derived from WFS's standard terms and conditions as incorporated into the bunker supply contracts, which were governed by US law (General Maritime law, and/or Fla State law).

In circumstances where the proceeds of sale of the Vessels will be insufficient to satisfy the many claims against the funds, another group of in rem claimants (P&O/ Carnival) challenged the recoverability of items (i)-(iii) against the proceeds of sale, arguing that these items should instead rank as in personam claims and be re-directed against the (impecunious) former operators of the vessels. The P&O/Carnival entities were represented by John Kimbell QC and Celine Honey.

The issue which arose was whether the additional contractual claims amounted to claims "in respect of" the underlying bunker supply to the vessels for the purposes of s. 20(2)(m). At first blush it is hard to see what else these claims could be "in respect of", if not the supply of bunkers to the Vessels. However, the P&O / Carnival entities argued that it was necessary to analyse each head of claim separately: and that claims for contractual interest, collection costs etc. were merely ancillary to but not directly in respect of the underlying supplies.

The Court accepted Mr Henton's submission that these items were part and parcel of the price for the bunkers, and that it was impermissible to "unpick" or "slice and dice" the contractual terms upon which the bunkers were supplied. The main reasons were as follows:-

(i) The P&O/ Carnival entities' arguments involved placing an inappropriate gloss on the statutory language of s. 20(2)(m);

(ii) It is well-established that the words "in respect of" are "wide words which should not be unduly restricted": the Edinburgh Castle [1999] 2 Lloyd's Rep 362. There was no remit for giving it the unduly narrow or restricted reading for which P&O/Carnival contended;

(iii) There was no difference in principle between the WFS claims and the decision of Clarke J in the Kommunar[1997] 1 Lloyd's Rep 1: a case concerning claims on a general account by parties advancing finance for bunkers rather than providing the physical supply. The claims on the general account had succeeded, including in respect of contractual interest;

(iv) The Hong Kong case of the Oriental Dragon HCAJ 162/2012, as cited by P&O/Carnival, was distinguishable in that the claimants had supplied a wide variety of goods and services. In such cases it was necessary to consider each supply separately and consider whether or not it fell within the statutory language. The present case concerned the supply of a single commodity: bunkers.

(v) P&O's contentions, if accepted, would mean that a bona fide supplier of necessaries to a ship would have to bring two separate claims: one in rem against the ship or her proceeds of sale, the other in personam against the operator. This made no sense in terms of fairness or procedure. In many cases it would allow the counterparty to ignore or bypass the consequences of their contractual bargain and would lead to a wasteful multiplicity of actions.

(vi) Ultimately the administrative fees and contractual interest were simply incidents of the contract for the supply of bunkers which followed from the non-payment of the price. The collection costs were at a further remove, but no less part of the contractual bargain. Where the contract concerned the supply of a single commodity, the Court would not unpick the contractual consequences of non-payment or treat them as separate or distinct claims for the purposes of s. 20(2)(m).

The decision provides timely guidance on the interpretation of s. 20(2)(m) of the 1981 Act: particularly so in these turbulent times where the cruise ship market has faced unprecedented turmoil and where ship arrests are increasingly common.

Necessaries claimants in single-commodity cases will take comfort in the knowledge that, provided the commodity in question ranks in rem, the remainder of their contractual bargain will be respected in full by the Admiralty Court. They will not be left to pursue in personam claims against the (possibly impecunious) operators to enforce those aspects of their contractual remuneration structures which their competitor-claimants do not like.

For claimants under multiple-supply contracts (as in Edinburgh Castle and Oriental Dragon), it remains necessary to analyse each underlying supply separately to establish whether or not it ranks as a claim "in respect of goods or materials supplied to a ship for her operation or maintenance". Difficult questions of causation may arise in claims under "mixed supply" contracts: e.g. where the supplier has the right to claim contractual interest, administration fees or contractual indemnity costs on the entirety of the overdue account. Issues may arise as regards (say) whether particular collection costs (solicitors, correspondents etc.) were incurred "in respect of" the supply of the bunkers/necessaries, or else in respect of the non-necessaries part of the claim. Or indeed whether they are to be apportioned pro-rata or by some other means reflecting their degree of relation to the necessaries and non-necessaries parts of the claim.

Finally, it remains to be seen whether the same wide/unrestricted approach will be taken in claims under other sub-sections of s. 20(2) of the 1981 Act, where different connectives are in use- such as "for", "arising out of", "in the nature of" and so on. Arguably, just as the wide choice of words is to be respected under sub-section (m), so the drafters' decision not to use "in respect of" in these other sub-sections must too be respected. Whether this leads to differential treatment as between the different types of in rem claimant when it comes to contractual indemnities, administrative fees, contractual interest and the like, remains to be seen.

Paul Henton

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Paul is an experienced Commercial practitioner recommended in the directories in four distinct practice areas: Shipping, Energy, Commodities/International Trade, and Aviation. Paul has been instructed at all levels of the Court system, including the Court of Appeal, Privy Council and Supreme Court.

> view Paul's full profile paul.henton@quadrantchambers.com