The availability of damages in addition to demurrage - *The Eternal Bliss*

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A voyage charterer fails to discharge a cargo within the time allowed. The cargo deteriorates as a result of the delay, exposing the shipowner to a claim from the receivers which it settles at a cost of US$1.1 million. Can the shipowner recover damages in addition to demurrage to compensate it for that cost?

This is the question that came before the Commercial Court in ***The Eternal Bliss***. It is one that for many years had divided judges and commentators alike.

One school of thought held that an owner may recover damages as well as demurrage if it could prove a separate type of loss, one unrelated to the loss of the use of the ship as a freight-earning vessel. The other held that to be insufficient: on this view, an owner must prove both a separate type of loss and separate breach of contract (one other than the failure to load or discharge the ship within the laytime).

In deciding that it is unnecessary to prove a separate breach, Andrew Baker J has resolved a long-standing debate in the owner's favour.

Tom Bird acted for the owner, K Line Pte Ltd, instructed by Nick Austin and Mike Adamson of Reed Smith.

Background

The question arose in the course of arbitration proceedings between the parties concerning a voyage charter for the carriage of soybeans from Brazil to China. The charter was drawn up on an amended Norgrain form, which provided that demurrage, if incurred, was to be paid at a certain rate.

After tendering notice of readiness at the discharge port, the vessel was kept at the anchorage for some 31 days due to port congestion and lack of storage space ashore for the cargo. Upon discharge, it was said that the cargo exhibited significant moulding and caking throughout the stow in most of the cargo holds. Discharge was completed and the ship sailed away, but only after the provision of a US$6 million letter of undertaking in favour of the cargo receivers as security for their claim.

The owner later settled the cargo claim at a total cost of c.US$1.1 million. It commenced arbitration seeking damages or an indemnity in respect of that cost. No breach of contract was alleged against the charterer other than the failure to discharge within the laytime. The charterer contended that demurrage was the owner's exclusive remedy for the breach and that the claim was a bad one.

For its part, the owner argued that the demurrage rate only liquidates the damages for the detention of the vessel. The cargo claim liabilities, it said, were a different type of loss and therefore recoverable as damages in addition to demurrage.

Against this background, the parties agreed to invoke s.45 of the Arbitration Act 1996 and invited the court to determine this issue as a preliminary point of law on assumed facts. As Andrew Baker J noted at [22] of his judgment, the main point of principle involved asks what it is that demurrage liquidates: "It is well-established that demurrage is by nature liquidated damages, but in respect of what does demurrage, calculated in accordance with the voyage charter, fix (and therefore limit) the owner's recovery?"

Reidar v Arcos

Much of the academic and judicial debate on this topic has focused on the interpretations of the judgments of the Court of Appeal in ***Aktieselskabet Reidar v Arcos*** [1927] 1 K.B. 352, in particular after what was said about them in ***Suisse Atlantique v d'Armement Maritime v N.V. Rotterdamsche Kolen Centrale*** [1967] 1 AC 361.

In ***Reidar v Arcos*** the chartered vessel was to load a cargo of timber for carriage to Manchester. The charterers exceeded the laytime and demurrage became payable. This had a knock-on effect on the amount of cargo that the vessel could

lawfully carry. Owing to the delay, the vessel could only carry a winter deck load, about 30% less than the summer deck load which could have been carried had the cargo been loaded within the laydays.

The Court of Appeal held that the shipowners were entitled to recover damages representing the difference in freight between the summer cargo and the winter cargo, but the Lord Justices did not speak with one voice.

Bankes LJ found that there was a single breach of contract – the charterers' failure to load the vessel within the laytime – but held that the demurrage rate did not preclude the shipowner from claiming in respect of a separate type of loss (here, the additional freight). Sargant LJ agreed that the shipowners were entitled to recover, but found that there was a separate breach: the charterers' failure to load a "full" cargo. The contentious point has been whether Atkin LJ was with Bankes LJ in saying there was only one breach of contract or with Sargant LJ in saying there were two.

Whilst finding that Atkin LJ was properly to be considered a "two breach" man, Andrew Baker J held that ***Reidar v Arcos*** is not authority for the proposition that Bankes LJ's approach is wrong as regards the scope and effect of the demurrage clause. Disagreeing with Bankes LJ that there was only one breach did not amount to or imply disagreement with his conclusion that the owner's claim was sound if there were only one breach [37].

As Andrew Baker J noted, the debate over how to read the judgments in ***Reidar v Arcos*** (whilst important) had distracted from the underlying arguments of principle that ought to drive the answer to the question before the court.

Demurrage is liquidated damages for loss of use

Those underlying arguments of principle centre on the nature of demurrage. "Agreeing a demurrage rate", Andrew Baker J held, "gives an agreed quantification of the owner's loss of use of the ship to earn freight by further employment in respect of delay to the ship after the expiry of laytime, nothing more. Where such delay occurs, the demurrage rate provides an agreed measure by which the parties are bound for the owner's claim for damages for detention, but it does not seek to measure or therefore touch any claim for different kinds of loss, whatever the basis for any such claim." [61]

After a comprehensive review of the authorities, the judge noted that the preponderance of views evident in *dicta* discussing the nature of demurrage is that "it serves to liquidate loss of earnings resulting from delay to the ship through failure to complete loading or discharging within the laytime allowed by the charter" [88].

In ***The Bonde*** [1991] 1 Lloyd's Rep. 136, however, Potter J had found that in order to recover damages in addition to demurrage it is a requirement that the owner demonstrates that "such additional loss is not only different in character from loss of use but stems from breach of an additional and/or independent obligation".

Andrew Baker J held that the ***The Bonde*** [1991] 1 Lloyd's Rep. 136 was wrongly decided and should not be followed. The analysis of Potter J in that case was "premised on the faulty reasoning that if the majority view in ***Reidar v Arcos*** was that it was a 'two breach' case, it followed that Bankes LJ's approach was wrong in law for a 'one breach' case." [126]. This was a non sequitur.

Accordingly, the judge found that where an owner has suffered a different type of loss, it does not need to prove an additional and different breach of contract as a precondition to recovery. This approach is consistent with the rule in ***Inverkip Steamship Co v Bunge & Co*** [1917] 2 KB 193 that proving a breach other than the failure to load or discharge within the laydays does *not* result in recovery beyond demurrage for the detention of the ship after the expiry of the laytime.

Conclusion

This is a significant decision, which brings welcome clarity to the law and puts the principles applicable to the scope of a demurrage provision on a coherent footing.

Where a shipowner has suffered a different type of loss arising from a failure to load or discharge the vessel within laytime (such as cargo claim liabilities) there should be no need for the owner to establish a separate and independent breach of contract in order to recover damages in addition to demurrage.

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