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Maritime law in 2016: a review of developments in case law

By Dr Johanna Hjalmarsson

This article summarises and explains some of the most important legal developments in maritime law, including the law of marine insurance, ship sale and the sale of goods, in 2016.

The scope of this analysis encompasses the common law jurisdictions of England and Wales as well as Singapore, Australia and Hong Kong. Highlights include the Supreme Court’s decision that the shipowner must pay for bunkers received in the OW insolvency; a decision establishing the Australian position on maritime liens; a definition of insurance fraud, with a controversial departure from 15 years of established thinking; as well as a rare decision to break the shipowner’s right to limit liability.

Admiralty jurisdiction

As the economic downturn continues across many sectors of the global maritime industry, with litigation in its wake, ship arrest continues to be an important tool to extract security for claims. The law continues to develop in equal measure.

The importance of the registered ownership of vessels was considered by Singapore courts in the course of 2016. The judges had the benefit of a series of judgments from the Hong Kong courts on similar issues. In The Min Rui [2016] SGHC 183, a consignment of steel structures had been damaged on board Min Rui some time between June and August 2014. The plaintiffs sued as owners, consignees or bill of lading holders in respect of that cargo. It was common ground that the defendant was the defendant in personam, having been the owner of Min Rui when the claim arose. The defendant’s jurisdictional challenge was limited to the question of whether the defendant was the beneficial owner in respect of all the shares in the vessel on 16 December 2014, the date on which the plaintiffs issued the in rem writ. The defendant’s case was that it had sold Min Rui in October 2014 to a bona fide purchaser for value and was no longer the owner, although it remained on the Hong Kong Shipping Register as the named registered owner on 16 December 2014. Belinda Ang Saw Ean J allowed the appeal from the decision of the Assistant Registrar, allowing the prima facie inference of ownership arising from the registration as owner to be displaced by evidence of alternative ownership.

Towage

Towage contracts are a somewhat idiosyncratic beast – the knock-for-knock clause establishing that with certain exceptions, each party is to bear its own losses is the core clause. Such clauses are widely used in the industry and their import carries through to the insurance side, towage warranties being a feature of marine insurance contracts impacting on subrogation rights.

In one case, another frequently used wording came up for review, namely that the vessel should be provided for towage in “light ballast condition”. In Regulus
Ship Services Pte Ltd v Lundin Services BV and Another [2016] EWHC 2674 (Comm); [2016] 2 Lloyd's Rep 612, Regulus had agreed to tow the defendants’ vessel for a lump sum under a TOWCON-based contract. The voyage took longer than expected, and Regulus claimed delay payments at the contractual rate on the basis that the vessel had not been provided “in light ballast condition”, also seeking damages in respect of the cost of excess fuel, port demurrage charges and other expenses. For Regulus, “light ballast condition” meant that she would be “carrying (as well as any ‘constants’ and consumables) the minimum ballast that will enable the particular vessel to proceed safely and in a seaworthy condition on her intended voyage”. Lundin for its part preferred the subsequent statement that: “At its simplest it comes to this: ballast is any material placed on board the vessel to add weight and the reference to “light” refers to the least amount of ballast with which the vessel can safely and properly proceed on her voyage”. Phillips J preferred the interpretation of Regulus, thus reducing the leeway available to Lundin to include its knowledge of the vessel’s behaviour and general stability in the equation.

Limitation of liability: tonnage limitation

A common feature of much of shipping litigation is the shipowner’s and associated parties’ right to limit liability – which arose in litigation on several occasions in 2016. A rare decision to break the shipowner’s right to limit liability was the result in Kairos Shipping Ltd and Another v Enka & Co LLC and Others (The Atlantik Confidence) [2016] EWHC 2412 (Admlty); [2016] 2 Lloyd’s Rep 525. The emphasis of the judge’s consideration was on the strength of the cargo claimants’ evidence that their loss had been caused as a result of the vessel being scuttled. If this was the case, the prerequisite of article 4 of the Convention on Limitation of Liability for Maritime Claims 1976 for denying the right to limit to the shipowner was fulfilled: the right to limit is denied where the loss results from the shipowner’s personal act committed with the intent to cause such loss. Rights to limit liability are lost only on very rare occasions, and the standard of proof has only rarely been judicially considered.

Charterparties and contracts of carriage

Continuing with the theme of limitation of liability, but moving to package limitation, two judgments were handed down in 2016, both of which would have changed the law fundamentally if the relevant argument had succeeded; but both of which have – thus far – failed in that ambition.

In Vinnlustodin HF and Another v Sea Tank Shipping AS [2016] EWHC 2514 (Comm); [2016] 2 Lloyd’s Rep 510, the pithy question before the judge was whether package limitation rules in the Hague Rules were applicable to bulk cargoes. The claimant owner of a damaged cargo of fishoil sought damages from the defendant carrier. The fishoil was carried on board the tanker Aqasia pursuant to a charterparty dated 23 August 2013. The charterparty provided for English law and arbitration and incorporated the Hague Rules. The cargo was described in the charterparty as “2,000 tons cargo of fishoil in bulk”. The defendant’s case was that the carrier was entitled to package limitation under the Hague Rules; article IV rule 5 could be applied to bulk or liquid cargo by reading the word “unit” as a reference to the unit used by the parties to denominate or quantify the cargo in the contract of carriage. The claimants argued that the word “unit” could only refer to a physical item of cargo, or to a combination of physical items bundled together for shipment, so that
article IV rule 5 did not apply to a liquid or other bulk cargo: when cargo is shipped in bulk, there are no relevant “packages” or “units”. The judge held that the words “package”, “unit” and “piece” referred to individual physical items of cargo, not a unit of measurement or customary freight unit, so that package limitation was unavailable to the shipowner in this instance.

Formation of contracts

A small number of cases in 2016 addressed the issue of whether a contract had been formed. The place to begin is perhaps with a case on the conclusion of charterparty contracts. The Singapore court held in *Tiptop Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2016] SGHC 173 that no binding charterparty had been concluded because the relevant communication had been “subject to review” of charterers’ pro forma charterparty “with logical amendments”. The conclusion is not controversial and the case is possibly limited to its facts, the terms in question having been supplied upon request purely for information, but the observations are of interest nevertheless, given how finely tuned such cases generally are, with a flurry of communications between the parties and a pervasive lack of clarity in retrospect as to whether main terms, standard terms or anything at all has been agreed.

Interpretation

A judgment that arguably did not get its fair share of attention in 2016, principally because it was handed down on the same day as the decision in *PST v OW*, was *NYK Bulkship (Atlantic) NV v Cargill International SA (The Global Santosh)* [2016] UKSC 20; [2016] 1 Lloyd’s Rep 629. The Supreme Court, led by Lord Sumption with a dissenting judgment by Lord Clarke, considered issues under a time charterparty on amended NYPE terms, stipulating inter alia that the vessel would be off-hire during any period of detention. The disponent owners NYK Bulkship had chartered *Global Santosh* to Cargill for one time-charter trip from Sweden to West Africa. The cargo was one of six shipments of cement sold by Transclear SA (a sub-charterer) to IBG Investment Ltd on C&FFO terms under a contract of sale. IBG were the notify party on the bill of lading, which also specified the discharge port as “Port Harcourt (Ibeto Jetty)”. IBG was responsible for the unloading of the cargo and was liable to pay Transclear demurrage under the sale contract if unloading of the cargo was delayed. At Port Harcourt, *Global Santosh* was arrested by mistake as a result of an arrest order procured by Transclear, prohibiting discharge of the cargo for the demurrage owed under the sale contract. Following a subsequent court order authorising the cargo’s release, discharge of the cargo began on 15 January 2009 and was completed on 26 January 2009, for which period Cargill argued that it was entitled to withhold hire.

The Supreme Court allowed Cargill’s appeal against the Court of Appeal’s decision, holding that as between the parties to the charterparty, responsibility for cargo handling lay with Cargill, and that IBG and Transclear were the agents of Cargill for this purpose, not in the strictly legal sense but within the natural meaning of the word. However, the factual situation of the case was that even if Cargill was responsible for the acts or omissions of its agents in cargo handling, that responsibility could not be engaged where the issue was precisely a failure by the agents to handle the cargo; the issue was not some problem arising from discharge, but that the vessel had been prevented from discharging. Defective performance of cargo handling operations was one thing – absence of cargo handling operations was another.
Ship construction and sale

A number of shipbuilding cases were decided in the course of the year. These cases are often intensely contractual in nature; yet there are factors pointing to their conclusions being confined to the sector itself. While shipping cases generally have had a tremendous impact on contract law over the years, ship construction cases are often idiosyncratic in nature in that the contract is intended as a complete, independent code. This makes conclusions somewhat less immediately transferrable to the general contractual context.

Accordingly, while the conclusion of Sir Jeremy Cooke in *Star Polaris LLC v HHIC-Phil Inc (The Star Polaris)* [2016] EWHC 2941 (Comm); [2017] 1 Lloyd's Rep 203 that the phrase “consequential or special losses” was not to be read in consonance with *Hadley v Baxendale* may appear alarming at first sight, the conclusion is contingent upon the nature of shipbuilding contracts. *Star Polaris* was built by the defendant yard and delivered to the claimant buyer on 14 November 2011. On 29 June 2012 she suffered serious engine failure and was eventually towed to South Korea for repairs. The defendant shipyard denied all liability for the incident. The buyer contended that the engine failure was caused by the shipyard’s breaches of contract, and claimed compensation encompassing the cost of repairs and expenses caused by the engine failure. The contract excluded losses for “consequential ... losses, damages or expenses”, which a tribunal had interpreted as referring to a cause-and-effect relationship, and not to the principles established by *Hadley v Baxendale*. Upon appeal, the judge agreed. He held that the contract provided a complete code between the parties, and that the factual matrix against which the words “consequential losses” and “special losses” should be read did not extend to the accepted meaning of those words in English law. “Consequential or special losses” in this context had a wider meaning than the second limb of *Hadley v Baxendale*.

Sale of goods

OW insolvency and litigation

The Hanjin insolvency has already given rise to a number of court cases across several jurisdictions. It is the most high-profile shipping insolvency after the OW bunker insolvency, which has already given rise to a number of judgments in many jurisdictions – not all of which are consistent with each other.

Perhaps the most hotly anticipated judgment from the UK Supreme Court in 2016 was *PST Energy & Shipping LLC and Another v OW Bunker Malta Ltd and Another (The Res Cogitans)* [2016] UKSC 23; [2016] 1 Lloyd’s Rep 589, delivered on 11 May 2016. The facts were standard for a post-OW litigation: The first respondents, OW Bunker Malta Ltd (“OWBM”) had supplied 1,000 mt of fuel oil and 100 mt of gasoil to Res Cogitans at Tuapse pursuant to a contract which incorporated its standard terms of business. Those terms provided for payment 60 days after delivery and included a retention of title clause under which property was not to pass to the vessel’s owners or managers until the bunkers had been paid for in full. The contract provided that from the moment of delivery the vessel was entitled to use the bunkers for the purposes of propulsion. OWBM had obtained the bunkers under a contract with the ultimate parent company of the group, “OWBAS”, which had obtained them from another bunker supplier, “RMUK”. RMUK had obtained the bunkers from one of its associated companies, “RNB”, which had facilities at Tuapse and made the delivery to the vessel.
The contract between OWBAS and RMUK incorporated RMUK’s standard terms which provided for payment to be made 30 days after delivery and also included a retention of title clause. That contract did not allow the owners to use the bunkers for the purposes of the propulsion of the vessel pending payment. OWBAS then entered into restructuring before the Danish courts; an event of default under the financing agreement. The arbitration tribunal, Males J at first instance and the Court of Appeal had held in unison that the Sale of Goods Act did not apply to the contract.

Maritime insurance

There were significant developments in marine insurance in the course of the year. The volume of general insurance litigation in England and Wales had shrunk perceptibly ahead of the entry into force of the Insurance Act 2015 in UK, which made the establishment of precedent under existing law redundant – but such considerations did not necessarily affect marine insurance litigation which continued undeterred. Some significant developments resulted. In *Connect Shipping Inc and Another v Sveriges Angfartygs Assurans Forening (The Swedish Club) and Others (The Renos)* [2016] EWHC 1580 (Comm); [2016] 2 Lloyd’s Rep 364, issues related to notices of abandonment arose for consideration of the court. This venerable old concept is certainly in need of updating for the modern context of complex metal-structure ships with a variety of materials and technological equipment on board, as well as the speed of modern communications. The case also addressed the method of assessment of the amount of loss and whether salvage costs incurred prior to notice of abandonment could be included.

Concluding observations

As 2016 moved into 2017, while some issues had been resolved, others remained wide open. The decision of the Supreme Court in *The DC Merwestone* is final and binding, but follow-up questions must now be asked about the correct analysis and remedy where the insurance claimant has suppressed a defence – and is the conclusion that a fraudulent device can now be withdrawn or corrected with exonerating effect correct? *The Res Cogitans* has already been called upon to support an argument in a liability case – will it influence the law in broader terms going forward, or is it confined to its facts? Some of the decisions discussed in this text remain under appeal with a higher court – we await decisions in *The New Flamenco* and *Gard Marine and Energy v China National Chartering* from the Supreme Court. *The Yusuf Cepnioglu* was granted leave to appeal to the Supreme Court in November 2016. *The Atlantik Confidence* is awaiting a decision on permission to appeal to the Court of Appeal, as is *Vinnlustadin v Sea Tank Shipping AS*. *Shagang Shipping v HNA Group* will be heard in the Court of Appeal in June 2017, and *The Renos* has equally received permission to appeal, and is awaiting hearing in November 2017. The future looks promising.

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