Breffka & Hehnke GmbH & Co KG & Ors v Navire Shipping Co Ltd & Ors [2012] EWHC 3124 (Comm)

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In the High Court of Justice Queen's Bench Division, before The Hon. Mr Justice Simon, 8-11 and 15 October 2012.

Shipping – Bill of Lading – Carriage of steel pipes – RETLA CLAUSE – Cargo partly damageg – Shippers realised that if the Bills of Lading were claused they would not be paid - Master issued clean bills of lading in exchange for the Letter of Indemnity – Whether such B/L constitute fraudulent misrepresentation.

The claim arose from the carriage of a consignment of steel pipes on the M/V 'Saga Explorer' from Ulsan in Korea to ports on the West Coast of North America and which were found damaged on arrival. Upon completion of loading in Ulsan master signed 13 Bills of Lading. All the Bills of Lading were not claused notwithstanding the fact that cargo surveyors on examination of the steel pipes recommended that some of the bills of lading shall be claused. Bills of Lading were signed by the master in exchange for the Letter of Indemnity. It was apparent that the shippers on completion of loading realised that if the Bills of Lading were claused they would not be paid and the owners' agent persuaded the master to issue clean bills of lading.

Bills of Lading included a RETLA Clause.

> RETLA CLAUSE: If the Goods as described by the Merchant are iron, steel, metal or timber products, the phrase 'apparent good order and condition' set out in the preceding paragraph does not mean the Goods were received in the case of iron, steel or metal products, free of visible rust or moisture or in the case of timber products free from warpage, breakage, chipping, moisture, split or broken ends, stains, decay or discoloration. Nor does the Carrier warrant the accuracy of any piece count provided by the Merchant or the adequacy of any banding or securing. If the Merchant so requests, a substitute Bill of Lading will be issued omitting this definition and setting forth any notations which may appear on the mate's or tally clerk's receipt.

The judge held that the master is bound on demand to issue to the shipper a bill of lading showing 'the apparent order and condition of the goods'. But before he can do that the master must form an honest and reasonable, non-expert view of the cargo as he sees it and, in particular, as to its apparent order and condition. The Master may ask for expert advice from a surveyor but ultimately it will be a matter of his own judgement on the appearance of the cargo being loaded.

With regard to RETLA clause upon ritical analysis of the Tokio Marine case the judge came to the following conclusion at paras 44-45, 49:

> *44. The RETLA clause can and should be construed as a legitimate clarification of what was to be understood by the representation as to the appearance of the steel cargo upon shipment. It should not be construed as a contradiction of the representation as to the cargo's good order and condition, but as a qualification that there was an appearance of rust and moisture of a type which may be expected to appear on any cargo of steel: superficial oxidation caused by atmospheric conditions. The exclusion of 'visible rust or moisture' from the representation as to the good order and condition is thus directed to superficial*

ED & F Man Sugar Ltd v Unicargo Transportgesellschaft mbH [2012] EWHC 2879 (Comm)

Full and updated version you can read on http://www.lawandsea.net

In the High Court of Justice, before Mr Justice Eder, 16 October 2012.

Shipping – Voyage charter – Sugar Charter Party 1999 - The fire had destroyed the conveyor-belt system linking at the loading terminal – Vessel incurred substantial demurrage in loading port - Force-majeure clause – Whether the charteres entitled to rely upon any of the specific force-majeure events set out in Force-majeure clause - mechanical breakdown and government interference.

At the time of the fixture, the vessel was discharging at Abidjan in Ivory Coast from where it was due to sail (for Brazil) on 10 or 11 June 2010. On the date of the fixture (9 June 2010), the charterers declared Paranagua as the loading port. The local agents at Paranagua (MARCON) in an email dated 14 June 2010, advised the parties that a fire has occurred at the Compania Brasilliera Logistica A/A terminal (CBL) which is the terminal normally used by the charterers and where they had initially scheduled the vessel to load. The fire had destroyed the conveyor-belt system linking the terminal to the warehouse rendering it, in the opinion of local experts, inoperable for at least 3 months. The agents further expressed the view that charterers would need to transfer the cargo intended for the vessel to another terminal.

The vessel arrived on 20 June 2010 and tendered notice of readiness to load at 2330 hours. The Statement of Facts showed that in the absence of an available berth the vessel remained off the port until 14 July 2010, when she weighed anchor and entered the inner roads of the port awaiting berthing instructions. However, berth 212, that was ultimately used, was one of the three (212, 213 or 214) where the vessel would have berthed had the fire not taken place. Loading commenced on 18 July 2010 and was completed on 20 July 2010 at which time the vessel sailed for the discharging port in the Black Sea.

In accordance with the charter party terms the owners contended that time began to count at 1400 hours on Monday 21 June 2010 and that allowing for rain periods and permissible laytime (23,500 metric tons per weather working day = 3.91666 days) laytime expired at 2353 hours on 25 June 2010. Thereafter the vessel was on demurrage continuously up to 1300 hours on 20 July 2010, when loading was completed.

The relevant terms of the Charterparty are as follows:

> "Clause 3: … the said vessel…shall…sail and proceed to 1-2 safe berth(s), 1 safe port (intention Santos) but not south of Paranagua…"
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> "Clause 6: … The Act of God, perils of the sea, fire on board, in hulk or craft, or on shore, crew, enemies, pirates and thieves, arrests and restraints of princes, rulers and people, collisions, stranding and other accidents of navigation excepted, even when occasioned by negligence, default or error in judgement of the Pilot, Master, mariners or other servants of the Shipowners. Not answerable for any loss or damage arising from explosion, bursting of boilers, breakages of shafts, or any latent defect in the machinery or hull, not resulting from want of due diligence by the Owners of the ship, or any of them, or by the ship's Husband or Manager."
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> "Clause 19: … At loading port, even if loading commences earlier, laytime for loading to begin at 1400 hours if e-mailed notice of readiness to load is tendered to agents before noon and at 0800 hours next working day if e-mailed notice of readiness is tendered to agents after noon… At loading port(s) in the event of congestion Master has the right to tender notice of readiness at the customary waiting place in ordinary office hours by email to agents whether in berth or not, whether in port or not, whether in free pratique or not, whether customs cleared or not…"
>
> "Clause 28: In the event that whilst at or off the loading place…the loading…of the vessel is prevented or delayed by any of the following occurrences: strikes, riots, civil

Greatship (India) Ltd v Oceanografia SA de CV [2012] EWHC 3468 (Comm)

Full and updated version you can read on http://www.lawandsea.net

In the High Court of Justice Queen's Bench Division, before Mrs Justice Gloster, 5th October 2012.

Shipping - Time Charter – Supplytime 89, cl.10(e) – Suspension of ship's services for non-payment of hire in time - Whether the owners were entitle to temporarily withdraw the vessel without 5 days notice?

By a time charterparty on an amended BIMCO Supplytime 1989 form owners agreed to charter the "Greatship Dhriti" to Oceanografia SA de C.V. for two years. Clause 10(e) provided as follows:

> 10(e) Payments –
> [1] Payments of Hire, bunker invoices and disbursements for Charterers' account shall be received within the number of days stated in Box 23 from the date of receipt of the invoice. Payment shall be made in the contract currency in full without discount to the account stated in Box 22. However any advances for disbursements made on behalf of and approved by Owners may be deducted from Hire due.
> [2] If payment is not received by Owners within 5 banking days following the due date Owners are entitled to charge interest at the rate stated in Box 24 on the amount outstanding from and including the due date until payment is received.
> Where an invoice is disputed, Charterers shall in any event pay the undisputed portion of the invoice but shall be entitled to withhold payment of the disputed portion provided that such portion is reasonably disputed and Charterers specify such reason. Interest will be chargeable at the rate stated in Box 24 on such disputed amounts where resolved in favour of Owners. Should Owners prove the validity of the disputed portion of the invoice, balance payment shall be received by Owners within 5 banking days after the dispute is resolved. Should Charterers' claim be valid, a corrected invoice shall be issued by Owners.
> [3] In default of payment as herein specified, Owners may require Charterers to make payment of the amount due within 5 banking days of receipt of notification from Owners; failing which Owners shall have the right to withdraw the Vessel without prejudice to any claim Owners may have against Charterers under this Charter party.
> [4] While payment remains due Owners shall be entitled to suspend the performance of any and all of their obligations hereunder and shall have no responsibility whatsoever for any consequences thereof, in respect of which Charterers hereby indemnify Owners, and Hire shall continue to accrue and any extra expenses resulting from such suspension shall be for Charterers' account.

The dispute arose from instances of non-payment of hire during the currency of the charterparty and owners' purported suspension of the vessel's services for non-payment of hire, relying on their right to do so under part [4] of Clause 10(e). The Arbitrators upheld charterers' submission that it was an express or implied requirement of part [4] of Clause 10(e) that owners would give five banking days' notice of intention before exercising their right to withdraw, on the basis that the period of grace and express notification provision contained in parts [2] and [3] of Clause 10(e) governed part [4]. The owners' appealed.

The question of law considered by the court was formulated as follows:

> Whether on the proper construction of Clause 10(e) of the BIMCO Supplytime 89 form in order for Owners' right to withdraw the vessel from the Charterparty temporarily to be validly exercised, Owners are required to give Charterers 5 banking days notice of the suspension.

Minerva Navigation Inc v Oceana Shipping AG [2012] EWHC 3608 (Comm) (13 December 2012)

Full and updated version you can read on http://www.lawandsea.net

In the High Court of Justice Queen's Bench Division, before Walker J., 13 December 2012.

Shipping – Time charter – Amended NYPE 1946 cl.15 - Whether the Vessel is off-hire for a particular period merely because the vessel is not efficient for the services then required during that period, or whether the charterers have to further show a net loss of time resulting thereby?

Pursuant to the charterparty on amended NYPE 1946 form the vessel The Athena in October 2009 the loaded a cargo of wheat at Novorossiysk in Russia for carriage to Syria. Bills of lading were issued on 24 October 2009 showing the discharge port as Lattakia or Tartous, both in Syria. The vessel arrived at Tartous on 1 November 2009, but the cargo was rejected by Syrian receivers on the ground that it was contaminated and the vessel thereafter remained in Syria for a substantial period. The events at Tartous had the consequence that Syrian law prohibited re-export of the cargo other than to its country of origin. On 5 January 2010 charterers told the Master that discharge would be in Libya. On 12 January 2010 charterers asked owners to tell the Syrian authorities that the cargo would be returned to Novorossiysk, something which was clearly untrue. The vessel departed Tartous on 16 January 2010, nominally for Novorossiysk. The charterers advised owners that the original bills of lading were held by their agents in Novorossiysk and instructed the owners at 1725 hours on 19 January 2010 as follows:

> … we forbid berthing/discharging and releasing the cargo to receivers until our next written instructions. Hereby we confirm that receivers [have the] right to take samples only. Upon arrival please anchor at road port Benghazi and [await] our further instructions.

Vessel contrary to these orders stopped in international waters about 50 miles from Libya at 2328 on 19 January 2010, and began drifting. On 30 January 2010 problems with the returning of the original bills of lading were resolved. The drifting period ended at 22.14 on 30 January 2010, at which time the vessel proceeded to Benghazi. The vessel berthed at Benghazi on 3 February 2010. Discharge of the cargo was eventually completed at about noon on 18 February 2010.

The Arbitrators held that master was in breach of his duty to prosecute the ordered voyage with the utmost despatch; and failed to comply with the charterers' orders. However the arbitrators then unanimously held that no damages were payable for that breach. This decision was explained in a way that although there was an immediate loss of time in that the vessel's arrival at Benghazi was delayed for this period, but there was no any overall loss of time, and had the Vessel proceeded directly to Benghazi arriving some time early on 20th January 2010, she would have not berthed any earlier than she did.

With the regard to off-hire claim the Arbitrators agreed with the charterers that the consequence of the Master's failure to proceed directly to Benghazi was a loss of time by her delayed arrival at that port. Whether the same time would have been lost for other reasons had she proceeded directly to Benghazi is irrelevant to a claim under the off hire clause. The time was lost in relation to the service immediately required of her and that is sufficient. The owners appealed.

The grant of leave to appeal was on the question of law:

Whether under clause 15 of the NYPE charterparty (and of the present Charterparty) the vessel is off-hire for a particular period merely because the vessel is not efficient for the services then