

Making Waves

THE NEWSLETTER FOR THE CLIENTS AND CONTACTS OF
SWINNERTON MOORE

A Matter of Life and Death...

By Peter Crowley

The firm recently became involved in a matter for Club clients following the death of two stevedores in a Charterer Member's vessel.

The vessel loaded a part-cargo of logs at a Gabonese port and then sailed to the Congo to complete. Owners and Charterers were both very experienced log-carriers.

It is not a custom of this trade to ventilate cargoes.

At the Congolese port the hatchcovers were opened and two stevedores entered a part-loaded hold to prepare it for the top-up cargo. A few minutes later they were noticed to be missing. A search revealed them apparently unconscious in the hold. Crewmen who entered the hold to assist became unwell and had to leave. It was only when, a few minutes later, the Bosun and two other crewmen arrived with breathing apparatus, that the stevedores could be removed. Unfortunately, they were dead.

Owners, Charterers, and their respective Clubs were anxious, above all, to find out precisely what had happened so that similar

tragedies could be avoided in the future.

We therefore arranged that jointly-appointed UK consultants attend at the discharge port, and that atmospheric testing be undertaken at the vessel's intermediate bunkering port.

Before the testing, all concerned had assumed that the cause of death was poisoning by the chemicals used to fumigate the logs before loading in Gabon.

However, the tests established that those preconceptions had been entirely wrong; the cause of the stevedores' death was asphyxiation caused by oxygen depletion in the bottom of the hold. That depletion had itself been caused by a combination of extensive mould on the logs, the humidity inside the holds and insufficient (or no) ventilation between the two ports. The fumigants played no part.

The moral of this story – too late for the two men concerned – is that trade custom is no longer appropriate, log cargoes should be ventilated thoroughly during voyages, and hatches opened as long as possible before cargo operations commence, especially when cargo has been loaded or is being carried in humid conditions.

Firm Development

The firm is delighted to welcome Hannah Charles as an assistant solicitor having completed her period of training. Hannah is particularly interested in contentious work and is currently assisting Joe Atkinson in a contested collision case.

The firm also welcomes Gordon Armstrong as its practice manager on a consultancy basis. Following



Gordon and Hannah.

his retirement last year as Senior Clerk of Quadrant Chambers, Gordon has been retained to assist with the management of the practice.

He brings with him an in-depth knowledge of legal maritime London and provides a very safe pair of hands on the tiller.

ISSUE 7 ▶ MARCH 09

Swinnerton Moore Solicitors LLP

Cannongate House
62-64 Cannon Street
London EC4N 6AE
T: +44 (0) 20 7236 7111
F: +44 (0) 20 7236 1222
E: info@swinmoore.com
W: swinmoore.com

Law Office Skinitis

99 Akti Miaouli
Piraeus 185 38, Greece
T: +30 210 42 90 478
F: +30 210 42 90 472
M: +30 694 702 4846
E: soto@swinmoore.gr

Remedy Law Firm

40-42 Nevskiy Prospect
St. Petersburg, 191011
Russia
T: +7 812 703 5100
F: +7 812 325 3247
E: general@remedy.spb.ru
and
2nd Floor, 3 Skakovaya str
Moscow, 125040, Russia
T/F: +7 095 789 8939
E: general@remedy.spb.ru

Marine Legal Services SIA

Edward Kuznetsov
11 Elisabetes Street
Riga 1010, Latvia
T: +371 67 359 670
F: +371 67 359 671
E: Edward@marinelegal.lv

Gienapp & Visker

Heuberg 1
20354 Hamburg, Germany
T: +49 (0) 40 32 80 77 0
F: +49 (0) 40 32 80 77 22
E: info@gienapp-visker.de

International Law Offices Odessa & Kiev

57, 2/4 Observatory Lane
Odessa 65014, Ukraine
T: +38 (048) 715 5855
T/F: +38 (048) 249 6925
E: odessa@interlegal.com.ua
and
4, 3 Kudryavskiy Uzviz
Kiev 04053, Ukraine
T: +38 (044) 332 1283
F: +38 (044) 499 6679
E: kiev@interlegal.com.ua

Shipping Matters

Rule B

Two very recent decisions on Rule B may affect the way this procedure develops. In *STX Pan Ocean v. Glory Wealth* the U.S. Court of Appeal has confirmed that Rule B attachment is not available against a company having a registered address in New York. The connection is probably as tenuous as the fleeting relationship that Electronic Funds Transfers have to New York, but perhaps it represents a fair compromise.

In addition, in *Cala Rosa Marine v. Sucres et Deneres Group*, District Judge Shria Scheindlin has ruled that for the Rule B Order to be effective, the bank must be holding the EFT when the process is served. She also ruled that the process must be served by the U.S. Marshall and the Marshall's costs must be paid by the claimant in the action.

Perhaps, as a result of the above two decisions, we may see a drop in the 60 or so Rule B applications which have recently been filed on a daily basis in New York.

Lien on sub-freights

A number of issues arise in relation to this jurisdiction on which we are likely to see cases decided in the Courts in the near future.

- Is hire "freight" – In *The Cebu*, the lien on sub-freights was successfully attached to hire, but in *The Cebu (No. 2)*, before a different judge, the Court said that if the lien is expressed to be on sub-freights it does *not* include hire. You should check which form of NYPE charter you are on and/or whether the lien provisions are amended to include hire as well as sub-freight;
- The identity of the lien is somewhat unclear. Is it a charge, *i.e.* a form of mortgage, or is it an assignment? It certainly is not a "lien" because there is no possession.
- Registration – In *Ugland Trailers* the lien was treated as a charge and was void against the liquidator because it should have been registered in England and Wales. Will we see a similar approach by liquidators in other cases where time charter operators have gone into liquidation, so the liquidators will reclaim monies paid pursuant to the "lien"?
- In a number of cases parties agree to take an assignment of monies due

from sub-charterers. Even these could be attacked by a liquidator if it is argued that they are "preferences" - *i.e.* are preferring one creditor over the general creditors where the assignor becomes insolvent. Therefore even assignees may not be totally protected.

- Where there are conflicting claims from two or more creditors, English law recognises a right to "interplead" - *i.e.* pay the money into Court and leave the persons interested in the funds to fight it out between themselves. Unfortunately, following the decision in *Cool Carriers*, it is not possible to serve interpleader proceedings out of the jurisdiction. For the future it may be useful for parties with a London arbitration clause to agree that there be a nominated service party in England. This provision is often seen in contracts where there is a foreign element in order to avoid expensive and time-consuming applications to the Court. It might well be sensible to have this in charterparties to avoid arguments as to whether or not arbitration or other proceedings have been properly served.

Anti-suit injunctions

The European Court has decided that the English Court cannot grant an anti-suit injunction where proceedings are brought in another European jurisdiction in breach of an English arbitration clause. A rider clause to charterparties should therefore be considered on the lines that should either party disregard the arbitration agreement in the charterparty all costs, losses and expenses arising will be treated as issues arising under the charterparty and that the arbitrators will have jurisdiction to make an award in relation to these items.

Max Factor

In the recent decision of *The Bremen Max*, the Court upheld a Letter of Undertaking given by charterers to a shipowner for delivery of cargo without production of the bills of lading. The Court in that case did make it clear that the wording of such letter required careful consideration, as otherwise shipowners could find themselves holding a letter which failed to achieve what they had intended. A timely warning of the importance of careful drafting.

Piracy

2008 saw a significant increase in the incidence of piracy. There are now a number of areas where this is a very real concern. Shipowners need up to date and appropriately worded provisions in their charterparties to refuse to transit areas because of the risk of piracy, or recover the increased costs involved. Consideration should be given to incorporating the new BIMCO piracy clause into all charterparties for clarity and the avoidance of disputes. Further, shipowners need to demonstrate that they have an appropriate security plan and a policy for transiting high risk areas.

The use of armed security guards requires careful consideration of many issues and the obtaining of all necessary consents. A shipowner will remain liable for the acts, omissions and consequences of armed guards it employs.

The risk of piracy gives rise to important insurance considerations. Is the risk of seizure covered by Hull & Machinery or by War Risk Underwriters? Any ransom paid is invariably a part of the overall costs of securing the successful release of a vessel, and therefore consideration must also be given to ransom insurance, something not covered by traditional marine policies.

If the vessel is laden, ransom payments have, in the past, been treated as a GA expense under Rule A of the York-Antwerp Rules. If the vessel is in ballast, the basis of recovery would be as a Sue and Labour expense.

Owners' P&I Underwriters remain on risk in respect of crew claims and oil pollution. There have been occasions recently when they have voluntarily contributed to a ransom paid by their Members.

Lexcel Accreditation

Swinnerton Moore LLP are delighted that they have again been awarded the Lexcel Accreditation by the Law Society. This demonstrates the firm's ongoing commitment to deliver quality and risk management.



Swinnerton Moore LLP is regulated by the Solicitors Regulation Authority. This Newsletter is not a substitute for legal advice. In case of doubt, consult a solicitor.