

Making Waves

THE NEWSLETTER FOR THE CLIENTS AND CONTACTS OF
SWINNERTON MOORE LLP

We're in... The Legal 500



The Legal 500 – “the clients guide to the best law firms”

Swinerton Moore LLP is very pleased to have been included in the 2009 rankings of shipping lawyers. Proposals for inclusion in Legal 500

are carefully researched and referenced before being accepted and the firm is delighted therefore to have been listed among the top shipping firms as it reflects the partners' drive to provide excellent cost effective services in the shipping market place.

Costs – The KRYSIA rises again

On 25 June the court handed down a liability decision in relation to a collision between the *ST. LOUIS EXPRESS* and a survey array being towed by *WESTERN NEPTUNE*. The claim is in the region of £25m and the quantum hearing has not yet taken place.

In a collision action, where there is liability on both sides, costs are usually split pro rata in the same proportions as liability. The question which the court had to consider was how the costs should be split in this matter.

The starting position was that set out in the *KRYSIA* [2008] EWHC 1880 (Admlty). In the *KRYSIA* there was no counterclaim and the defendant was found 70/30 liable. The defendant argued that the claimant's costs should be apportioned 70/30 on the basis that there was a long-standing practice in the Admiralty Court that costs should reflect the court's decision as regards liability. The claimant, unsurprisingly, argued that admiralty jurisdiction was no different from the general law, and the claimant should recover all its costs.

The court held that the claimant was right and there would have to be a good reason to reduce its costs. Just because the recovery was only 70% of the claim was not a sufficient reason. In addition the court held that there were no special cost apportionment rules in the Admiralty Court and the general principles should apply.

In this case the claimant was seeking substantial costs of over £1m for a 5-6 day trial. There was an oral hearing on liability, and in a reserved judgment the court made an apportioned order of costs.

In that judgment Steel J. stated that he agreed with the claimant's starting position that, in accordance with the *KRYSIA*, they should be entitled to recover all of their costs. He went on to say that the apportionment of liability could be relevant even though not decisive. If *ST. LOUIS EXPRESS* had been 90% successful he might have decided differently.

In exercising his discretion on costs the Judge considered the following:

- there was a significant degree of liability on the claimant;
- the defendant had offered 60/40 settlement terms a year before trial and by going to trial the claimant only achieved an improvement of 6.6%;
- the claimant's offer of 80/20 had been made just 5 weeks before trial after substantial costs had been incurred;
- the claimant had given late disclosure of a number of documents which undermined part of the claimant's case;
- the defendant showed that the streamers deployed by *WESTERN NEPTUNE* could have been dived to avoid the collision; this represented the bulk of expert evidence and occupied a significant proportion of the trial; and
- the claimant insisted on expert evidence in relation to the point of impact, a time consuming and costly exercise, which the Judge eventually found to be irrelevant in terms of the split of liability.

The court therefore ordered that the claimant should only recover 65% of its costs. This is not only a victory for common sense but it is also a significant victory for the defendant who was represented by Joe Atkinson of Swinerton Moore LLP.

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Swinerton 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 – Gone

On 16 October the Second Circuit held in *The Shipping Corporation of India Ltd v. Jaldhi Overseas Pte Ltd* that electronic fund transfers (“EFTs”) being processed by an intermediary bank are not subject to attachment under Rule B. Under the New York Uniform Commercial Code neither the originator nor the beneficiary of an EFT holds title to the funds while they are in the account at an intermediary bank. An EFT is not the property of either the originator or the beneficiary. It cannot therefore be the defendant’s property subject to a Rule B attachment.

It is clear from the decision that the effect of Rule B attachments on international US\$ transactions concerned the Court. The effect is to put an end to Rule B attachments of EFTs. No doubt the decision will cause joy in some circles and misery in others. It will undoubtedly not please the New York Maritime Bar.

Do not hesitate to contact us if you are concerned about a Rule B attachment and require advice.

Without or With Prejudice

Oceanbulk Shipping v TMT – Adding these words does not always prevent exchanges being considered by the court. If the material is not privileged it can be looked at.

Welding

Dolphin Tankers v China Shipbuilding – The buyer’s application to have welding tested on a newbuilding was refused because it was not specified in the contract.

Penalty Not Allowed

Lansat Shipping v Glencore – The sum payable in the event of a late redelivery under an illegitimate last voyage was held by arbitrators and the court to be a penalty and unenforceable. A realistic estimate of the loss is required.

Withdrawal expenses

Ene Kos v Petroleo Brasileiro SA – Shipowners who had withdrawn a time-chartered ship from the charterers because of unpaid hire recovered remuneration and expenses associated with the ship remaining at port to unload the cargo, because the owners as bailees were required to make the

cargo available to the charterers as bailors.

CTL Sale

Dornoch v Westminster International – Following the CTL of a mega hopper dredger, the sale of the vessel by the insured to a company in the same ownership at an under-value was set aside under the Insolvency Act 1986.

Time to Serve

FG Hawkes (Western) Ltd v Beli Shipping Co – An order extending time for service of the Claim Form was set aside because there had been neglect or oversight in leaving service until too late for reasons attributable to the claimant or its legal representatives. The claimant should not have assumed that the defendant’s Defence Club should or would assist.

A Case to Cross-examine

Compania Sud-Americana De Vapores Sa v Nippon Yusen Kaisha – There was an irregularity in arbitration proceedings where one party had not been given an opportunity to cross-examine the other party’s witnesses on a particular point, but the irregularity did not cause substantial injustice because cross-examination on the point would have made no difference.

Counting Time

Gold Shipping Navigation Co Sa v Lulu Maritime Ltd – The counterclaim in a collision action was subject to the two-year limitation period in the Merchant Shipping Act 1995 s.190(3).

How Safe

Mediterranean Salvage v Seamar Trading & Commerce – The Court of Appeal held that a voyage charterparty on an amended Gencon form, which did not contain an express warranty of safety in respect of the load port or berth, was not subject to an implied term that the charterer had to nominate a safe berth at the load port.

Quality

Bominflot Bunkergesellschaft v Petroplus Marketing AG – There was an implied term in an FOB contract that the goods would be of satisfactory quality, not only when they were delivered onto the vessel, but also for a reasonable time thereafter. The goods should also continue to comply with any contractual specification for a reasonable period.

Cancellation

Mansel Oil Ltd v Troon Storage Tankers – The charterers did not have to nominate a delivery port in order to cancel a time charter on the cancelling date.

Termination of Shipbuilding Contract

Stocznia Gdynia S.A. v Gearbulk Holdings Ltd – Gearbulk had entered into contracts for the construction of three vessels which were not delivered. The contracts provided for price reduction by way of liquidated damages for delay and deficiencies and permitted the purchaser to terminate if there was a major breach by the yard of its obligation to proceed with the construction of the vessels. The yard had to repay sums previously paid with interest where the contract was terminated.

The buyer terminated the contracts and claimed the first instalment of the purchase price under the bank guarantees which the yard had provided. The buyer also claimed damages for loss of bargain. The yard said the buyer had exercised a contractual right to terminate and was only entitled to recover the prepaid instalments.

The buyer was entitled to treat the contract as repudiated and recover the instalments as well as damages.

Free Pratique

AET Inc Ltd v. Arcadia Petroleum Ltd – The vessel was chartered on a Shellvoy 5 Form. NOR was invalid if free pratique was not obtained within six hours of tender of NOR, but valid where free pratique was not granted at the anchorage and the vessel was cleared when she berthed, unless delay in clearance of was caused by the vessel’s fault.

NOR was tendered and the vessel was required to wait at anchorage. The dispute was whether time began to count six hours after NOR.

The Court held that although free pratique had not been granted within the six hours it was granted when the vessel berthed and the NOR was valid.