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Implicit Misrepresentations and Reservation of Rights

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The recent case of ***SK Shipping Europe plc v (3) Capital VLCC 3 Corp (5) Capital Maritime Trading Corp*** [2020] EWHC 3448 (Comm) concerned the time charter of a very large crude carrier (the “C Challenger”). The charterer claimed that it had been induced to enter the charter by pre-contractual misrepresentations made by the owner. By way of a brief reminder, English law generally provides a party to a contract with a right to extricate itself from the contract if the other party had induced it to enter the contract by means of an untrue statement of fact or law. The judgment considered a number of issues in respect of misrepresentation, however this briefing will focus on one issue concerning misrepresentation that is of particular interest as well looking at another issue that arose, namely:

1. does a party who offers to enter into a contract on certain terms make any implicit representations relating to those terms (such as could give rise to a misrepresentation claim); and
2. what is the effect of an “express reservation of rights” communicated by one party to the other following a misrepresentation or upon a repudiatory breach of contract by the other.

The background

In the course of negotiations leading to the fixing of the charter, the owner had, through the broker, provided the charterer with a document which detailed the vessel’s speed and fuel consumption. This was expressed as being derived from the vessel’s last three voyages, but it subsequently transpired that the figures provided reflected different voyages. The information provided by the owner was used as the basis for the warranty provision within the charterparty. Once on charter, the vessel’s performance proved not to meet the stated performance detailed in the information provided in the negotiations nor the warranty provisions. The charterer after some time declared the charterparty to be rescinded due to misrepresentation, which it contended had been fraudulent in nature, and sought to claim damages. The charterer also claimed that the owner was in repudiatory breach of the charterparty and relied on this to bring it to an end.

Does a party implicitly make any representation(s) when it offers to contract on a certain term?

The judgment refers to the small number of authorities that had previously touched on the question of whether a party that offers to contract on certain terms is to be treated as making any implicit representations in so doing.

In *Kingscroft Insurance Co Ltd v Nissan Fire & Marine Ins Co Ltd* [1999] 1 Lloyds Rep IR 603, Moore-Bick J had noted that:

- i. unless an offer made by a party contains terms that are intended to be included within the contract as representations, usually when a party offers to contract on certain terms it is not treated as making any representation about the subject matter of those terms;
- ii. however, this is subject to it being the case that a party who offers to contract on certain terms will usually by implication represent that it *intends* to perform a contract made on the terms it is offering, *as it understands those terms*, and believes that it is, or will be, able to do so.

The only previous case that had considered the specific question of whether an offer to include a speed and consumption warranty in a charterparty involved the making of any implicit representations was *The Larissa* [1983] 2 Lloyd's Rep. 325. In that case, the owner's broker in pre-contractual communications had stated to the charterer:

"Performance: Owners to guarantee 14.6 knots in moderate weather but max Beaufort scale No. 5 which inclusive, consumption of 42 L tons HVF (max 1500 redwood No1.) plus 2 L Tons D.O"

An arbitrator had agreed with the charterer that this constituted a representation as to the vessel's *actual* speed and consumption on which the charterer had relied in entering the charter (such that it was entitled to treat the charter as rescinded).

However, the award was set aside on appeal to Hobhouse J, who held that the relevant words were words of contractual offer that related to a contractual term and so were words of *obligation* rather than words of representation. As such, they did not give rise to any representation that had induced the charterer to enter the contract.

Counsel for the charterers in the present case had urged the judge to distinguish or to not follow the decision in *The Larissa*, and to find that an offer of a speed and consumption warranty did involve an implied representation that the figures are an accurate reflection of the vessel's actual consumption. However, Mr Justice Foxton declined to do so holding that there were very good reasons indeed why the mere offer of a speed and consumption warranty should not be held to impart any implicit representation as to the vessel's actual performance as follows:

1. the language of such an undertaking – a warranty – is inherently promissory, and is expressed in relation to the future (performance during the chartered service);
2. there is an inherent difficulty in the notion that an offer to provide a warranty as to speed and fuel consumption gives rise to any implied representation, given that the performance of a vessel will change over time depending on matters such as hull fouling and the efficiency of the engine, and also what would be the point in time in respect of which the representation is made?
3. Warranties as to speed and fuel consumption within a charterparty will typically be negotiated (the warranty will typically be expressed with reference to the weather conditions in which the warranted performance is guaranteed, a degree of margin will often be agreed etc). This is inconsistent with an offer to warrant these matters involving any implicit representations to the vessel's actual consumption.
4. The wording of most tanker time charterparties provide for some setting-off of over-consumption and under-consumption over a set period. As such, the warranty takes effect not so much as a warranty as to the vessel's performance at any particular point in time, but as to its average performance over a longer period. The intricacies of such a warranty make it difficult to spell out an implied representation from the fact of the promise alone.

As such, statements as to the contractual terms on which a party is prepared to contract are generally unlikely to involve implicit representations as to the subject matter of those terms sufficient to found a misrepresentation claim.

That being the case, if a contracting party is concerned about any particular matters relating to the subject matter of the contract, such that they are fundamental to a decision to enter into the relevant contract, that party should seek to ensure that such matters are *expressly* represented prior to its entering into the contract as well as, if

possible, ensuring that they are expressly addressed within the concluded contract as conditions of the contract (such that a breach of the term will allow the innocent party to treat the contract as at an end for repudiatory breach).

What is the effect of an express “reservation of rights”?

A further issue of interest considered in the judgment is the effect of an expressly communicated “reservation of rights” by a party.

The interest arises because of the frequency with which commercial parties employ the expression in the event of potentially very serious disputes arising concerning significant contractual rights (including rights to treat contracts at an end due to rescission or repudiatory breach) whilst seeking further information or determining what to do. However, as Mr Justice Foxton highlighted, there has not been extensive consideration of the effects of such a communication, nor the juridical basis of it. The judgment serves as an important warning against assuming that a party’s rights are preserved for so long as they are communicating with the other contractual party subject to such an express reservation of rights.

The judge reviewed the authorities and found that there were various approaches in the case law. Identifying the question for consideration as *“Are there some acts, however, which are so intrinsically affirmatory that performing them will cause the contract to be affirmed, even if they take place under a reservation of rights?”* Mr Justice Foxton’s conclusions on this issue were as follows:

- i. A reservation of rights will often be effective to prevent subsequent conduct from constituting an election between a right to treat the contract as at an end versus it still subsisting, but this is not an invariable rule.
- ii. In the final analysis of whether there has been an election, the court should have regard to all the material, including any reservation of rights that has been communicated.
- iii. Where conduct is consistent with the reservation of a right to rescind, but also consistent with the continuation of the contract (so, for example, if a party reserves its rights whilst at the same time relying on its contractual rights to obtain certain information from the other party, or where a party performs its own contractual obligations whilst assessing its position), then an express reservation will preclude the making of an election.
- iv. However, where a party makes an unconditional demand of the other party to perform the contract in a substantial way which will lead the other party and/or third parties to alter their positions in significant respects, even if the party demanding performance at the same time reserves its rights, this is unlikely to be effective to avoid a court from holding that there has been an election that the contract should continue.
- v. Ultimately, whether a “reservation of rights” is effective to avoid an election between the right to treat a contract as at an end versus continuing will depend on a legal characterization of the actions of the party in question, rather than a question of what label the party has attached to its own conduct.

As such, answering the question for consideration as it had been expressed in an alternative way by the judge, Mr Justice Foxton determined that there certainly are some occasions *“when a man who eats his cake will find it gone, nonetheless so because he ate it without prejudice”!*

That being the case, parties should be alert to the fact that, whilst a reservation of rights can be effective to provide a party with time to assess its rights and work out what to do, even when that party continues to perform the contract, there is likely to be a limit to that and so care should be taken to avoid an inadvertent affirmation of a contract and so irrevocable waiver by election of a contractual right to walk away from a contract.