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Demurring on demurrage: Court of Appeal renders Owner's bliss as to scope of demurrage far from eternal

By James Brown and Trainee Solicitor Jack Spence

Demurrage constitutes the liquidated damages payable by a charterer to a shipowner when loading/unloading operations exceed permitted laytime. In *K-Line v Priminds*[1] the Court of Appeal was asked to define the scope of the damages that are liquidated by demurrage, in order to decide when damages beyond demurrage can be recovered (as, for example, in this case, damage to cargo caused by an extended period in the ship's hold). The Commercial Court had decided that all that needed to be shown was a separate head of loss (i.e. other than the loss of freight earning capacity), such that damage to cargo following an extended stint in a cargo hold due to exceeding laytime for loading/unloading operations would likely be recoverable. The Court of Appeal, however, found that there *also* needed to be a breach of a separate obligation to the obligation to load/unload within laytime (for example, failure to provide a full cargo) before additional damages could be recoverable.

Background

In July 2014 K Line PTE Ltd (the "Owners") and Priminds Shipping (HK) Co., Ltd (the "Charterers") entered into a charterparty for 9 voyages, subsequently extended to 12 through an addendum in July 2015, on a Norgrain form contract, subject to amendments agreed between the parties (none of which are of particular relevance for the present dispute) (the "Contract").

Clause 19 of the Contract provided that "*Demurrage at loading and/or discharging ports, if incurred, to be declared by Owners upon vessel nomination but maximum USD 20,000 per day or pro rata/despatch half demurrage laytime saved at both ends*".

The Eternal Bliss (the "Vessel") was nominated by the Owners for the June 2015 laycan and subsequently completed loading of over 70,000 tonnes of soybeans (the "Cargo") at Tubarao on 11 June 2015. Following good sailing the Vessel arrived at the destination anchorage on 29 July 2015, but was unable to proceed to unloading for 31 days, due to congestion and a lack of availability of space for discharged cargo at the port. It was therefore not until the end of August that discharge of the cargo commenced and, due to this delay (or at least assumed for the purposes of this case), the Cargo had begun to cake and develop significant growths of mould.

The Vessel sailed away on 11 September, having provided the cargo receivers with a substantial letter of undertaking from China Reinsurance (Group) Corp, in order to prevent the receivers from arresting the ship. Subsequently the Owners settled a claim brought by the receivers for damage to the Cargo for US$1.1 million and commenced arbitration proceedings against the Charterer seeking recovery of this sum (either as damages or indemnity).

The Owners and the Charterer subsequently agreed to bring a preliminary question of law to the Court, under *s45 Arbitration Act 1996* as to whether, to recover their loss (being the sum paid to the receivers), it was sufficient to show that the damage sustained was of a different type to the mere loss of freight earning capacity

[1] *K Line PTE Ltd v Priminds Shipping (HK) Co Ltd ("Eternal Bliss") [2021] EWCA Civ 1712*

due to the detention of the Vessel, or whether the Owners also needed to show that the damage to the Cargo arose from a separate breach of the Contract than the detention of the Vessel beyond laydays.

The Commercial Court decision

Mr Justice Baker, sitting in the Commercial Court, held that a separate breach did not need to be shown (such that, assuming the delay did cause the damage and the Charterers were responsible for the delay, the Owners would be able to recover the sum paid to the Receivers). Reviewing a long list of authorities he found that, while not all supported this, the "*preponderance of views evident in dicta… is that… [demurrage] serves to liquidate loss of earnings resulting from delay to the ship*". This meant that damages other than for loss of earnings, such as for damage to cargo consequential to the detention of the Vessel, would be recoverable without needing to show that the Charterer *also* breached a separate obligation than that to complete loading/unloading operations within laydays.

While *The Bonde*[2] was accepted to be an authority contrary to this position (requiring both a separate breach and type of loss), Baker J determined that he was able to find that the case was wrongly decided. He found that it had proceeded from the (valid) position that the majority of the dicta in *Reidar v Arcos* [3]were that there were two breaches in that case to the point that two breaches were therefore required. While two breaches were shown by *Reidar* to be *sufficient* this did not mean that two were *necessary*. Baker J was bolstered in finding that he could depart from the *Bonde* by the fact that textbooks subsequent to *The Bonde* had cast upon its validity, such that practitioners would not be surprised that it had been overruled.

The Court of Appeal decision

Lord Justice Males, delivering the sole decision of the Court of Appeal, held that Baker J had acted in error and that *The Bonde* was correct (and that a separate breach, as well as a separate head of damage, must be shown to recover damages beyond demurrage).

In perhaps a somewhat frustrated tone, Males LJ held that it was wrong to say that *Reidar* was a "two breach case" as, "*the ratio of the case on this issue is obscure. [And] it is better to recognise that fact than to continue to search for a clarity which does not exist*".

Considering the remainder of the cases, the Court rejected Baker J's finding that the *"preponderance*" of dicta supported the Owners' position and held that "*the cases do not provide a decisive answer and there is no clear consensus in the textbooks*". With that in mind the Court was able to proceed to "*approach the issue as one of principle*". There were then seven reasons that caused the court to conclude that demurrage liquidated all damages from the detention of the vessel, such that a separate breach (as well as a separate head of loss) must be shown to recover damages beyond demurrage.

Firstly, it would be "*unusual and surprising*" for contracting parties to agree that a liquidated damages clause would liquidate only some of the damages arising out of a breach, and that it could be expected for parties to make this clear.

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[2] *The Bonde [1991] 1 Lloyd's Rep 136*

[3] *AS Reidar v Arcos Ltd [1927] 1 KB 352*

Secondly, it was not correct to say that demurrage is the Owner's estimate of loss of income they will suffer due to a loss of freight arising from the detention of the vessel. Cases have shown that demurrage rates will vary, either side of this line, and that "*freight earnings is likely to be one factor, but is by no means the only factor*".

Thirdly Males LJ noted that, if only a separate "type of loss" was required, there would likely be many disputes as to whether a particular head of loss was a different "type" (giving the example of extra fuel costs caused by fouling of the hull caused by extra time in tropical conditions). It would be desirable to remove such uncertainties by providing that a separate breach must also be required.

Fourthly, the fact that a shipowner is best placed to hold the losses incurred in cargo claims (typically holding insurance while the charterer will not). While Males LJ founded this justification on the fact that holding otherwise would involve the Court "*disturb[ing] the balance of risk inherent in the parties' contract*", the stronger argument would seem to come from a Posner/Rosenfield-ian analysis[4]. If the Owner is the "superior risk bearer" then the risk should, by default at least, lie with them.

Fifthly, *The Bonde* was said to have stood without causing any evident "*dissatisfaction in the market*". Particularly, the only two (public) decisions (two arbitration hearings) which referred to it had accepted its conclusion.

Sixthly, Males LJ rejected that *The Bonde* was "*clearly faulty*" or that "*a non sequitur lies at its heart*" without (perhaps somewhat unhelpfully) providing reasoning.

Finally, the fact that parties could contract for a different definition of demurrage (if the Court's definition proved unsatisfactory) cemented the Court's decision.

Commentary

On balance it perhaps does not matter tremendously which way the scales tip on the question of what demurrage liquidates. So long as there is certainty as to the default position, parties can negotiate their charterparties, taking into account the default allocation of risks, accordingly. The Gordion knot can be cut by even an unprincipled and arbitrary position (provided that it is authoritative) and the approach taken by Males LJ, although not without some shortcomings, provides a far from arbitrary stance. It may still take an appeal to the Supreme Court for a definitive interpretation, and it seems likely that the Owners will make such an application, but, for now, the Court of Appeal has provided some much-desired certainty.

What is perhaps more surprising than the decision itself is the fact that draftsmen have not taken it upon themselves to obviate the need for such a decision. Academic debate as to the scope of demurrage has been brewing (with the highpoint of the *Gay* article[5] cited within both the High Court and Court of Appeal decisions) and it is somewhat surprising that the same draftsmen who are cautious enough to unnecessarily ensure that exclusion clauses explicitly do not cover fraud or death/personal injury have failed to make an explicit choice (which both Baker J and Males LJ were at pains to emphasise that the court would respect).

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[4] R.A. Posner and A.M. Rosenfield, 'Impossibility and Related Doctrines in Contract Law: An Economic Analysis' (1977) 6 JLS 83. (By analogy with their position on the doctrine of frustration)

[5] Damages in Addition to Demurrage' [2004] LMCLQ 72

At any rate, and subject to an appeal to the Supreme Court, the period of bliss experienced by the Owners, between the Commercial Court and Court of Appeal decisions, has proved to be anything but eternal.