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Smart Gain Shipping Co. Ltd v Langlois Enterprises Ltd [2023] EWHC 1683 (Comm)

On 5 July 2023 the High Court handed down its judgment in *Smart Gain Shipping Co. Ltd v Langlois Enterprises Ltd* [2023] EWHC 1683 (Comm). The LMAA tribunal found for Owners in the first instance and permission to appeal under section 69 of the Arbitration Act 1996 was given to Charterers in respect of the proper interpretation of a rider clause providing for the allocation of responsibility for hull cleaning. Specifically, the court was tasked with determining whether Owners were entitled to claim the hire rate (and expense) for the time used to clean the vessel's hull after redelivery or whether they were confined to a claim in damages for breach of the charterparty.

Facts

The case arose out of a time charter trip of a bulk carrier under an amended NYPE form between Langlois Enterprises Ltd, as Owners, and Smart Gain Shipping Co. Ltd, as Charterers. The charterparty was for a duration of about 40 to 50 days and the vessel was delivered to Charterers on 10 June 2021. The intended receivers rejected the cargo and the vessel remained idle in a laden state in tropical water ports in Brazil for at least 42 days. Consequently, clause 86 of the charterparty was engaged. It provided as follows:

"Owners not to be responsible for any decrease in speed/increase in consumption of the Vessel whether permanent or temporary cause [sic] by Charterers staying in ports exceeding 25 days trading in tropical and 30 days if in non-tropical waters. In such a case, underwater cleaning of hull including propeller etc. to be done at first workable opportunity and always at Charterers' time and expense. After hull cleaning vessel's performance warranties to be reinstated."

Notwithstanding Owners' requests, the vessel was redelivered at Acu, Brazil on 4 September without Charterers undertaking hull cleaning. The vessel's subsequent fixture required her to sail to Tubarao where she arrived on 9 September. Before delivery under her next employment, Owners undertook

underwater cleaning of the vessel's hull and propeller for a period of about 30 hours and claimed for the loss of time spent cleaning at the hire rate and related costs.

Charterers' Case

Charterers argued that clause 86 was intended to operate during the charterparty to give Owners a claim in debt for hire in respect of the time taken for underwater cleaning if hire was unpaid. This is because the underwater cleaning was to be carried out at Charterers' expense during the charterparty period while the vessel remained on hire. By contrast, Owners' claim is confined to damages for breach of Charterparty if the hull cleaning takes place after redelivery (and Owners are not entitled to claim hire at the hire rate for the time used for underwater cleaning) because the primary obligation to pay hire does not survive.

Charterers submitted that the tribunal was wrong to regard *The Nicki R* [1984] 2 Lloyd's LR 186 as of assistance because the clause under consideration in that case was materially different from clause 86. Specifically, the clause in *The Nicki R* referred to repairs "after completion of the voyage" and "in Owners' time" which readily applied to repairs after re-delivery.

Owners' Case

Owners' submission was simple. Clause 86 means what it says: cleaning is to be "*always on Charterers' time*" and that must mean that Charterers must always pay for the time associated with the underwater cleaning. Clause 86 provides for a circumstance in which the fouling of the vessel has been caused by Charterers' orders for it to remain idle and therefore they must pay for the time and cost of remedying it.

Decision of the High Court

The High Court dismissed Charterers' appeal. While acknowledging that clause 86 is not as straightforward as one might like, the Court found that the second sentence of this clause placed an obligation on Charterers to pay compensation at the rate of hire (but not hire itself) for the underwater cleaning of the hull.

In reaching this conclusion the Court applied the principles of contractual construction as encapsulated by Popplewell J in *The Ocean Neptune* [2018] 1 Lloyd's Rep 654, restated in *The Eleni P* [2019] 2 Lloyd's Rep 365, and helpfully set out again in the immediate judgment. These principles require the Court to:

- Ascertain the objective meaning of the language which the parties have chosen to express their agreement.
- Consider the language used and ascertain what a reasonable person, with all the background knowledge which would reasonably have been available to the parties at the time they entered into the contract, would have understood the parties to have meant.
- Consider the contract as a whole and, depending on the nature, formality and quality of drafting, give appropriate weight to elements of the wider context in reaching its view as to the objective meaning of the language used.
- Give preference to the construction which is consistent with business common sense.
- Approach interpretation as a unitary exercise and remain alive to the possibilities that one party may have agreed to something which with hindsight did not serve its interest, a provision may be a negotiated compromise, and that the negotiators may have been unable to agree more precise terms.

Applying the principles of construction, the Court made the following findings regarding the interpretation of clause 86:

The language of the clause

Clause 86 requires cleaning to be "*always on Charterers' time*". This must mean that Charterers must always pay for the time associated with underwater cleaning. If the parties had intended that Charterers would compensate Owners for "*any loss of time*" resulting from the cleaning the parties would have chosen different language. The Charterparty contains clauses featuring each of these two phrases and therefore the parties must have intended that a distinction should be drawn between them.

The phrase "*at the first workable opportunity*" covers both before and after the charterparty and, given that this charterparty was for a single trip, the first workable opportunity following a 25 or 30-day idle period would likely be once the charter had concluded and the vessel had been redelivered.

Business common sense

Clause 86 does not require Charterers to undertake the underwater cleaning themselves nor does it require the underwater cleaning to be undertaken before the vessel is redelivered to Owners. Therefore, as a matter of practice, the Court rejected Charterers' submission that clause 86 could not require them to arrange underwater cleaning at their time and expense after redelivery because upon conclusion of the charter they were in no position to give instructions and would not know when the first workable opportunity arose.

What the clause does require is that the cleaning be at Charterers' time and expense. If the vessel is returned uncleaned Owners will either (i) endeavour to clean the vessel before its new employment or, (ii) more likely in practice, postpone the vessel's next fixture until the vessel is cleaned to avoid a potential breach of warranty. In such circumstances, Charterers must compensate Owners at the hire rate for the time and cost of remedying the fouling caused by Charterers' orders.

The Nicki R

The Court considered the clause in *The Nicki R* to be analogous rather than identical to clause 86 (because the former clause divided the responsibility for remedial work between the parties depending on whether the damage affected the vessel's seaworthiness, whereas responsibility is always with Charterers under the latter) but nevertheless found that the tribunal was correct to derive support from this authority. Therefore, the *dicta* of Bingham J (as he then was), which provides that a clause requiring work to be done "*at charterer's expense*" has the

effect of making charterers liable to pay for the time spent at the charterparty hire rate, was held to be directly applicable to the instant case.

Comment

This case has further crystalised the proposition that owners are not required to demonstrate an actual loss of time to establish their claim where a clause allocates liability for that time to the charterer. Instead, owners are entitled to present their claim for hire at the charterparty rate as a claim in debt (as opposed to a claim in respect of lost time or damages) even if remedial work took place after redelivery of the vessel.

It also provides a helpful reminder of the approach the Court will take to issues of contractual construction, not least by restating of the principles set down in *The Ocean Neptune*.

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