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SELLER BEWARE: COURT OF APPEAL CLARIFIES BUYERS' RIGHTS UNDER THE NORWEGIAN SALEFORM 2012

In an important development in the ship sale and purchase arena, the Court of Appeal has recently held that clause 14 of the Norwegian Saleform 2012 ("NSF 2012") entitles buyers to wider "loss of bargain" damages in circumstances where they exercise their right to cancel due to the seller's proven negligence.

BACKGROUND

The dispute arose out of a memorandum of agreement (the "**MOA**") based on the NSF 2012 for the sale of the "LILA LISBON" a Capesize bulk carrier (the "**Vessel**"). Buyers agreed to extend the cancelling date without prejudice to their right to claim damages under clause 14 of the MOA.

Clause 14(B) stated:

"14. *Sellers' default*

...

[B] Should the Sellers fail to give Notice of Readiness by the Cancelling Date or fail to be ready to validly complete a legal transfer as aforesaid they shall make due compensation to the Buyers for their loss and for all expenses together with interest if their failure is due to proven negligence and whether or not the Buyers cancel this Agreement."

Sellers failed to give notice of readiness ("**NOR**") by the extended cancelling date, so Buyers cancelled the MOA and commenced arbitration.

THE AWARD

The Tribunal held that Sellers' failure to be ready in time was due to their "proven negligence" in failing to arrange for the timely disembarkation of the crew, and clause 14 therefore applied. The Tribunal also held that Buyers were entitled to the difference between the contract price and market price of the Vessel (i.e. loss of bargain damages), even though Sellers were not in repudiatory breach of the MOA.

THE HIGH COURT DECISION

Sellers appealed to the High Court on the following question:

"*If a Memorandum of Agreement on the* SALEFORM *2012 form is lawfully cancelled by a buyer under clause 14 because the vessel is not delivered by the cancelling date as a result of the seller's "proven negligence", is that buyer entitled to recover loss of bargain damages absent an accepted repudiatory breach of contract?*"

Dias J (the "**Judge**") held that no provision in the MOA imposed any positive obligation on Sellers to deliver the Vessel, or give NOR, by the cancelling date. Even if the Judge had concluded that Sellers were under a positive obligation to tender NOR by the Cancelling Date, she would not have construed it as a condition conferring a right to loss of bargain damages.

In considering whether Buyers could recover loss of bargain damages under clause 14, the Judge held that: (i) it was first necessary to identify the particular breach for which damages were recoverable; (ii) the breach was Sellers' failure to give NOR by the cancelling date; and (iii) only losses caused by this failure were recoverable under clause 14. Buyers' decision to exercise their right to terminate did not make the case equivalent to one of non-delivery.

In addition, the Judge held that the question put to her was incorrectly formulated in that it defined the breach as a failure to *deliver* the Vessel by the cancelling date. The Judge held that the breach should instead be defined as failure to: (i) give NOR or; (ii) be ready to validly complete a legal transfer by the cancelling date as a result of the Sellers' proven negligence. The answer to the question, as amended, was No.

COURT OF APPEAL DECISION

The Court, overturning the Commercial Court's decision, found that Sellers were under an obligation to exercise reasonable or due diligence to tender NOR by the cancelling date, as supported by: (i) the reference in clause 14 to Sellers' "default"; (ii) the way in which a separate provision entitling Sellers to seek an extension to the cancelling date is stated to be without prejudice to the damages available to Buyers under clause 14; and (iii) the analogous obligation to meet a laycan in the context of time charters, as considered in *The Democritos* [1976] 2 Lloyd's Rep 149.

The Court held that the reference to "due compensation" for Buyers' loss in clause 14(B) included loss of bargain damages. The situation was akin to that of non-delivery. If the Vessel had been delivered in accordance with the MOA, Buyers would have received a ship with a market value of USD16.85m, for which they were due to pay only USD15m. The natural and ordinary meaning of 'loss' in this context therefore extended to Buyers' loss of bargain.

The Court also rejected the Judge's finding that only losses which had accrued prior to Buyers' cancellation were recoverable. Clause 13 gave corresponding cancellation and compensation rights to Sellers in the event of Buyers' non-performance, which the Court held included loss of bargain damages, following *The Griffon* [2013] EWCA Civ 1567. The Court held that the virtually parallel nature of clauses 13 and 14 indicated that they are intended to operate in a similar fashion.

The Court further noted that there is a principle that a party exercising a contractual right of termination for breach is not entitled to loss of bargain damages unless the breach was repudiatory.[1] However, it is open to contracting parties to make express provision regarding the consequences of termination, in which case the only question is the true construction of that provision. The MOA contained such a provision in the form of clause 14(B), and the Court had found that it entitled Buyers to loss of bargain damages.

Finally, the Court referred to several previous authorities supporting its finding. Of particular relevance was *The Solholt* [1981] 2 Ll Rep 574, a case concerning the interpretation of the 1966 revision of the NSF (albeit involving different wording), in which Staughton J held that the equivalent clause entitled Buyers to loss of bargain damages.

COMMENT

That the Court of Appeal has reached a different view to the Commercial Court is, perhaps, unsurprising for the reasons given. The industry is highly likely to see it the same way given the long-held understanding that the buyer of a ship under NSF 2012 can recover loss of bargain (i.e. market) damages for breach of clause 14.

In practice, if a seller wants to protect against the risk of a buyer cancelling and claiming loss of bargain damages in a strong market, they will need to agree an express clause in NSF 2012 stipulating that "loss of bargain" damages are only payable if a buyer cancels in repudiatory breach, and in no other circumstances. That is not obviously something a buyer will readily agree to, especially if the law is on their side, as it now is.

[1] Following *Financings Ltd v Baldock* [1963] 2 QB 104 and subsequent cases including *The Kos* [2012] UKSC 17.