UK DEFENCE CLUB

Soundings

Eternal Bliss – damages and demurrage

The English High Court has recently handed down judgment in the "Eternal Bliss," providing a firm answer to a long-standing question concerning the availability of damages where a ship is on demurrage.

It has previously been suggested that the demurrage regime provided an exhaustive remedy to the shipowner in respect of a charterer's failure to load or discharge cargo within its allowed time, such that damages over and above demurrage were only recoverable where a charterer had breached a separate term of the charterparty. The contrary view was that damages in principle were available in addition to demurrage where the shipowner had suffered a separate loss in addition to its loss of use of the ship as a freight-earning instrument.

The judge presiding over the "Eternal Bliss" case, Mr Justice Andrew Baker, concluded that the latter view was correct, and that all an owner needed to do was to prove a separate type of loss, unrelated to the loss of the use of the ship as a freight-earning ship; no separate breach was necessary.

The facts

The "Eternal Bliss" case arose from the carriage of a cargo of soybeans from Brazil to China under a voyage charterparty. There was a 31 day delay in discharging as a result of congestion, and a lack of storage space for the cargo. Upon inspection after discharge, the owner faced a cargo claim from the receivers in respect of alleged damage to the cargo. The owner settled the claim for in excess of US$1m, and then claimed this cost from the charterer.

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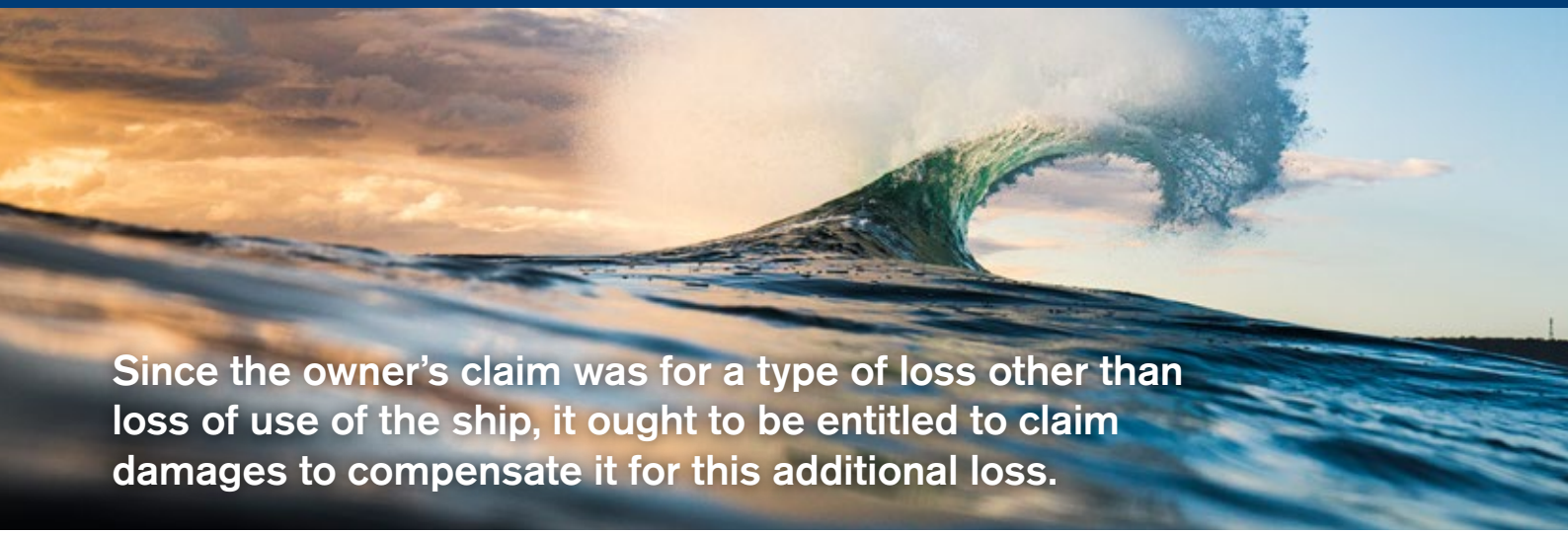

Since the owner's claim was for a type of loss other than loss of use of the ship, it ought to be entitled to claim damages to compensate it for this additional loss.

The breach that the owner alleged against the charterer was the failure to discharge the cargo within the laytime allowed under the charter. Consequently, the charterer said that the claim should be dismissed, on the basis that the demurrage regime provided an agreed, fixed monetary remedy for breach of this obligation. The question of law raised by the rival arguments was referred, on assumed facts, to the High Court in London.

The question of principle

The judge noted that the main point of principle concerned the identification of the loss for which an owner is compensated by via liquidated damages known as demurrage. The judge stated that "[i]t is well-established that demurrage is by nature liquidated damages, but in respect of what does demurrage, calculated in accordance with the voyage charter, fix (and therefore limit) the owner's recovery?"

The judge noted that the preponderance of views evident in cases and literature discussing the nature of demurrage is that "it serves to liquidate loss of earnings resulting from delay to the ship through failure to complete loading or discharging within the laytime allowed by the charter". In principle, therefore, the judge was of the view that the owners "had the better of the argument by a clear margin"; since the owner's claim was for a type of loss other than loss of use of the ship, it ought to be entitled to claim damages to compensate it for this additional loss.

Prior authority

However, the charterer had on its side the decision in the "Bonde" [1991] 1 Lloyd's Rep 136, that decided the relevant issue in favour of the charterer. Unsurprisingly, the owner did not shy away from saying that the "Bonde" was wrongly decided and so should not be followed.

The judge ultimately concluded that that decision involved an inaccurate reading of an earlier decision. In Reidar v Arcos [1926] 25 Lloyd's Rep 513, the ship was chartered to carry a cargo of timber from Russia to England. The charterer exceeded the laytime at the load port and, as a result, the ship could not complete her laden voyage by 1st November. Consequently, a winter deck load limit came into effect and, therefore, less cargo than contracted for was shipped. The owner successfully claimed for deadfreight, i.e. the difference in freight between the winter load carried and the contracted-for summer load.

However, there has been some uncertainty as to the core of the Court of Appeal's decision. One judge on the panel held that there was a single breach of contract, while another held that there were two and opinions have differed as to what the view of the third was. Mr Justice Baker, reviewing that case in light of the "Eternal Bliss" case took the view that there was only one breach. He therefore concluded that the "Bonde" had been wrongly decided and should not be followed.

Conclusion

The decision is to be welcomed, in that it potentially brings clarity to a question that had perhaps become overly complicated. It is also logically coherent, in light of what the market had generally understood to be the purpose of the demurrage regime, namely to provide a fixed and agreed remedy in respect of an owner's loss of use of the ship. In circumstances where a different type of loss has been recovered, it is hard to see the justification for leaving the owner without a remedy.

However, it is understood that the case is being appealed and we await with interest to see if the Court of Appeal takes the same the view.

If Members have any questions in relation to the above issues, they are invited to contact the Association for further information.

The UK Defence Club
Thomas Miller Defence Ltd, 90 Fenchurch Street, London, EC3M 4ST
tel: +44 207 283 4646 fax: +44 207 204 2131
email: tmdefence@thomasmiller.com web: ukdefence.com