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SOUNDINGS

The effect of “as is” and “as she was” terms in sale contracts

Two cases in the past few years have addressed the question of whether terms such as “as she was” and “as is, where is”, when used in a contract for the sale of goods, should exclude the terms as to quality and fitness for purpose that are to be implied into sale contracts by virtue of the Sale of Goods Act 1979 (“SOGA”). This issue is clearly of great significance to the shipping industry, primarily in the context of sale and purchase of ships, since clarity as to the expectations and rights of the buyer is key to avoiding disputes as to quality.

Commercial expectation

Until recently, despite being the subject of numerous London arbitrations, the issue had not been considered by the English High Court. It is probably the case that commercial expectation is that a buyer who agrees to purchase a ship “as is” is accepting the ship in the same condition that it is in at the time of his inspection or the date of the contract of sale, in return for a discount in the market price. In doing so, the buyer is agreeing to waive any right to complain if the ship later turns out to be defective.

Union Power

In Dalmare SpA v Union Maritime Limited and Valor Shipping Limited [2012] EWHC 3537 (Comm.) (“Union Power”), Mr Justice Flaux issued a judgment seemingly contrary to the above commercial expectation. The sale contract for the Union Power was based on the Norwegian Saleform 1993. The ship’s main engine broke down within five weeks of delivery as a result of an existing defect in the crank pin bearing. The buyer claimed damages from the seller, relying on a breach of the SOGA implied terms that the ship should be of satisfactory quality and fit for the intended purpose (section 14(2) and (3) SOGA). Mr Justice Flaux decided that the words “as she was” in the Norwegian Saleform 1993 do not exclude the SOGA implied terms and therefore he found in the buyer’s favour.

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He found that the implied terms as to quality and fitness for purpose in SOGA will only be excluded by express agreement or because an express term in the contract is inconsistent with a term implied by SOGA. Mr Justice Flaux's reasoning was that the words "as she was" say nothing about the quality of the ship so they cannot be said to be inconsistent. Consequently, the phrase did not exclude the implied terms as to quality and fitness. He also applied the same reasoning to the words "as is", although he did not need to decide this point and so his comments in this respect do not form part of his formal judgment.

However, he felt that to interpret such words as including the implied terms without modification would deprive those words of any real meaning. Therefore he expressed a provisional view that the phrase "as she was" would exclude the right to reject the ship but would still permit the buyer to claim damages for breach of the implied terms. This reasoning essentially reduces the implied terms for satisfactory quality and fitness for purpose from conditions to warranties.

The Hirtenstein judgment

The Union Power decision provoked some controversy, given that it seemed to run contrary to industry expectations. That sentiment has now been echoed by the comments of Mr Justice Legatt in Hirtenstein v Hill Dickinson LLP [2014] EWHC 2711 (Comm.) ("Hirtenstein"), a recent case involving the sale of a yacht on an "as is, where is" basis. Shortly after delivery, the yacht suffered an engine failure and the buyer sought to claim against the seller for his losses for breach of an implied term as to quality (and then from his solicitors on the grounds of negligence).

Although this was not one of the main points for his determination and the issues concerned in the Hirtenstein are largely irrelevant to this issue, Mr Justice Legatt expressed the view that "as is" clearly signified that the buyer would acquire the yacht in its existing condition, good or bad, with no subsequent recourse against the seller. He considered that the distinction drawn by Mr Justice Flaux between the right to reject and the right to damages was "unlikely to reflect the expectations of ordinary business people or to be an interpretation that would occur to anyone other than an ingenious lawyer".

Conclusion

The above Commercial Court cases set out two apparently contradictory viewpoints. Mr Justice Legatt has cast an element of doubt on Mr Justice Flaux's decision regarding the "as she was" wording of the Norwegian Saleform 1993. It is still the case that there is no binding decision on the interpretation of the words "as is". In the meantime, both buyers and sellers should exercise caution when entering into sale and purchase agreements. In the interests of certainty, it would be prudent to expressly exclude (assuming that is the parties' intention) section 14 of SOGA. The 2012 version of the Norwegian Saleform purports to do that by means of a general exclusion of all implied terms under clause 18. This clause confirms the "as is" nature of a sale in line with the above commercial expectation.

If Members have any questions concerning these judgments please contact your local Managers' office.