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SHIPPING, LOGISTICS & TRANSPORT BULLETIN

FALL EDITION | OCTOBER 2020

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MIS-DELIVERY, RULE B ATTACHMENTS, ALTER-EGO CLAIMS AND A SHAM TRANSACTION

Written by Edward W. Floyd, Luke Zadkovich, Timothy S. McGovern, Eva-Maria Mayer & Calum Cheyne

On May 21, 2020, in the United States District Court, Southern District of Texas, Corpus Christi Division, Magistrate Judge Hampton denied Defendant's motion to vacate a Rule B attachment and its motion to dismiss in the matter of F v D, 2020 WL 3519159 (S.D. Tex. May 21, 2020). The Plaintiff had successfully obtained a Rule B attachment on the sister Vessel after it alleged that Defendant, an ocean carrier who employed the Vessel, mis-delivered shipments of grain causing it losses of over USD $4m. In order to obtain the attachment to the sister Vessel, which was not the vessel that allegedly mis-delivered the cargo, Plaintiff asserted alter ego claims against various related defendants. Magistrate Judge Hampton's decision to deny D1's motion confirmed that these allegations were made on reasonable grounds on the available evidence and therefore proved a major win for the Plaintiff.

THE BACKGROUND FACTS

In its complaint, Plaintiff alleged that it provided banking facilities to A and A1 (collectively "A") to finance the purchase of presold grain for shipment to Egypt. In March 2018, A sought to finance the purchase of 51,300 metric tons of wheat to be shipped on the Vessel, at the time owned by Defendant. The bank sent Plaintiff 61 bills of lading regarding the financed wheat, and Plaintiff remitted $10,593,156 on behalf of A. Plaintiff retained the bills of lading as security for the advance.

The Vessel carried the wheat to Egypt, where it was discharged. Plaintiff sent sets of bills of lading to the various buyers and financial institutions for collection. In June 2018, Plaintiff was informed that all of the wheat had been collected from the warehouse, but it was still awaiting payment on 17,300 metric tons of wheat. One financial institution returned the bills of lading for all 17,300 missing metric tons. Plaintiff alleges that the missing wheat was mis-delivered by the Vessel and that Defendant is liable for the resulting loss.

In February 2019, Plaintiff contacted Defendant to inform it that Plaintiff was the lawful holder of the bills of lading and that it understood the wheat to have been discharged to a third-party without proper presentation of the bills of lading. In March 2019, Plaintiff and Defendant entered a standstill agreement in effect until June 21, 2019, in which they agreed that: (1) Defendant would not sell or transfer the Vessel; (2) Plaintiff would not seek to attach the Vessel or any sister vessels; (3) any time limits were extended until July 1, 2019; and (4) the bills of lading were "governed by English law and claims thereunder [were] to be pursued in arbitration in London."

On June 26, 2019, Plaintiff sent a notice of arbitration to Defendant and, the following day, requested security for its claims in the amount of $4,900,000. Defendant did not respond to the request for security, so Plaintiff investigated the Vessel's status and found that it had been renamed and that ownership had changed. This transaction took place only shortly after the expiration of the standstill agreement, showing that preparations for the sale were ongoing during the period in which the standstill agreement was in place. Plaintiff alleged that the Vessel's sale and re-emergence under another name was a sham transaction intended only to frustrate the interests of Plaintiff as creditor. Plaintiff further contended that Defendant, and other entities used to effect the transaction - should be treated as alter ego entities because they have blurred the lines between separate existences and have abused the corporate form in order to perpetrate a fraud.

Taking a hard-line approach, Plaintiff brought a motion to obtain an attachment against the sister Vessel under Rule B of the Supplemental Rules for Admiralty or Maritime Claims. While the sister Vessel was not owned by Defendant, it was owned by an entity alleged to perpetuate the wrongful transaction and part of the group of entities abusing the corporate form. Following an ex parte hearing on September 13, 2019, Magistrate Judge Ellington issued an order for writ of attachment against the sister vessel.

In response, D1 filed a Motion to Vacate the Attachment under Admiralty Rule E(4)(f) and a Motion to Dismiss under Fed. R. Civ. P. 12(b)(6).

THE ISSUES IN CONTEST AND THE ARGUMENTS PRESENTED

Although numerous legal and factual issues arose in the matter, two key issues permeated the dispute:

1. Was there a Prima Facie Maritime Claim?

D1 contended that Plaintiff failed to state a valid prima facie maritime claim for the purposes of Rule E(4)(f) because the real claim was against A for failing to perform under the applicable credit facility – which it alleged was not a maritime contract. Although D1 acknowledged that an ocean carrier

has a duty to properly deliver cargo, it argued that the sister Vessel did not carry the grain at issue here and therefore the claim made against it was inappropriate. Finally, it was alleged that there are no facts proving the mis-delivery beyond counsel's subjective understanding that the cargo was mis-delivered.

In response, Plaintiff asserted that D1 had mischaracterised the underlying dispute. It contended that the dispute is clearly a maritime claim because it is between the holder of the bills of lading for ocean carriage (Plaintiff) and the ocean carrier under those bills (Defendant). Plaintiff tended numerous pieces of evidence supporting the contention that mis-delivery of the grain had occurred, in breach of the contract of carriage evidenced by the bills of lading.

2. Was there a Reasonable Evidentiary Foundation for the Alter Ego Allegations?

The second issue in contest concerned the legitimacy of Plaintiff's alter ego allegations. A federal court sitting in admiralty may pierce the corporate veil of a corporation in order to reach the alter egos of the corporate defendant directly involved. However, on current circuit authority (which is disputed in the United States Court of Appeals for the Second Circuit and was not conceded here) this requires a factual analysis and a plaintiff must demonstrate on the evidence: (1) that an abuse of the corporate form occurred; and (2) that this abuse promoted a fraud or injustice that injured the plaintiff. This is known as the conjunctive test. This contrasts with the disjunctive test applied in some other circuits where the attaching/arresting party only needs to establish (1) or (2) for an alter ego allegation.

The core of the dispute between the parties was whether the sister Vessel and the Vessel merely shared the commercial manager, or whether the commercial manager in reality operated both vessels as its own property for the benefit of the same ultimate beneficial owner(s).

D1 conceded that the Vessel was commercially managed by the managers. However, it disputed that they share the same ultimate beneficial owner, instead contending that Defendant was the 100% owner of the Vessel and that another person was the 100% owner of Defendant. The general manager of the managers and other related companies testified in a deposition that the UBO did not make decisions regarding the Vessel, and the other individual did not make decisions regarding the sister Vessel or other vessels.

Plaintiff contended that both the sister Vessel and Vessel shared common ownership and operated under a single company. It alleged that the evidence indicated that multiple companies involved with the ownership and management of various vessels are owned by the same ultimate beneficial owner. The evidence used to prove this was: (1) Defendant did not have its own bank account; (2) All deposits were made into an account for the commercial managers; (3) Neither D1 nor Defendant had any employees as they contracted with their respective UBO-owned commercial management companies to pay operating expenses, including crew; and (4) Neither D1 nor Defendant had its own operational address, but were both operated out of the same office.

THE FINDINGS OF THE COURT

As to the first issue, Magistrate Judge Hampton found that Plaintiff had shown reasonable grounds that it had a prima facie maritime claim based on the mis-delivery of grain by the Vessel. Her Honour reasoned that it was apparent on the evidence that there was a prima facie maritime claim. Her Honour identified that Plaintiff had submitted evidence indicating that it is the holder of the bills of lading for a cargo shipment of wheat aboard the Vessel, that the bills of lading, along with the incorporated charterparty, defined the condition of carriage for the duration of the voyage, and that there was significant evidence to suggest that a mis-delivery occurred. Furthermore, her Honour stated that Defendant and Plaintiff had clearly entered into an agreement to arbitrate the underlying dispute under the LMAA rules, which indicated that the parties knew that the contracts were maritime in nature. Thus, Magistrate Judge Hampton was of the view that the evidence presented culminated in reasonable grounds demonstrating a prima facie maritime claim for the purposes of Rule E(4)(f).

As to the second issue, Magistrate Judge Hampton was satisfied that Plaintiff alleged a facially plausible alter ego claim and had shown reasonable grounds to believe that the defendants operate as alter egos of each other. Her Honour reasoned that on the evidence, there are reasonable grounds to believe that the companies have common ultimate beneficial owners, the companies share common business departments, both the sister Vessel and the Vessel receive no business other than that arranged by the commercial managers, the management of the daily operations is not kept separate, and the manager is able to use the vessels as its own. Thus, her Honour concluded that Plaintiff had sufficiently demonstrated that there were reasonable grounds to suggest that there was an abuse of the corporate form. Furthermore, in her view this abuse was used to affect an injustice on Plaintiff by way of Defendant wrongfully 'selling' the vessel such that Defendant has no assets. The consequence of the transaction was that it left no potential recovery should Plaintiff prevail in its substantive claim. Therefore, Plaintiff had clearly had a fraud and an injustice inflicted upon it by Defendant, and the other entities, employing their abuse of the corporate form for their own calculated benefit.

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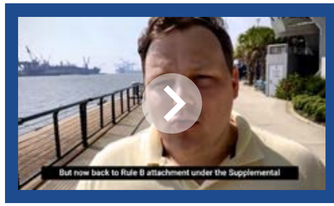
Magistrate Judge Hampton's final recommendation was adopted in full by the District Court Judge Ramos in P v D, 2020 3504179 (S.D. Tex. Jun. 29, 2020).

CONCLUSION

This case demonstrates that US Courts will act accordingly, where allegations of abuse of the corporate form, with an element of wrongdoing, is sufficiently alleged to have reasonable grounds on the available evidence. In certain courts only one of those factors is necessary. Although the test for holding such attachments is a challenge, this case exemplifies that it is possible. Plaintiff successfully defended its attachment of the vessel.

A team comprising Edward Floyd, Luke Zadkovich, Timothy McGovern, Eva-Maria Mayer and Calum Cheyne represented the Plaintiff in this matter.

Additional Content on this topic:



VIDEO **Length 12 Min.**

Asset Attachments - Rule B

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How to Deal with an Economic Crisis as an International Business **20 Min.**

Ep. 10: Defending Vessel Arrests

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DELICATE SUBJECTS

The "Leonidas" – A helpful explainer on what is meant by "on subjects" in Charterparty negotiations.

Written by Damon Thompson & Calum Cheyne

Charterparties are routinely concluded on the back of frenetic discussions between owners, charterers and brokers. Often terms are agreed and the parties appear to conclude an agreement "on subjects".

In a number of cases, particularly in relation to the flashpoints in the market due to COVID earlier this year, the use of "on subjects" has been found to be a legally unsatisfactory and uncertain approach to concluding a contract.

The thorough and careful judgment of the "Leonidas" (Nautica Marine Limited v Trafigura Trading LLC [2020] EWHC 1986 (Comm)) helpfully sets out the position. It is a judgment that market participants, particularly those at the coal face of charterparty negotiations, should follow closely. It summarises neatly decades of legal thought, and clarifies the nature and role of "subjects" under English law.

When parties seek to enter into a contract, the most helpful thing they can have is certainty. When, precisely, are they bound to perform their end of the bargain? When can they back out of the agreement if markets shift and business priorities change?

Broadly speaking, "on subjects" will mean one of two things:

1. The conclusion of a legally binding contract is subject to some event, the occurrence of which will mean that the contract crosses the line and becomes enforceable ("Pre-Conditions");

Or

2. A binding contract is in place, performance of which is required by the parties, subject to the occurrence of the stipulated event ("Performance Conditions").

If two parties have reached an agreement, but have stipulated "Pre-Conditions" to that contract being legally binding, then until those Pre-Conditions are satisfied there is no contract. The parties are free to pull out of the agreement for any reason, even if the reason bears no relation to the Pre-Condition. There is no contract, so the party can face no contractual liability for pulling out of the agreement.

However, if those parties have reached an agreement subject to "Performance Conditions", the parties have a legally binding contract. They will be likely to be held to an implied obligation to take reasonable steps to ensure that the required Performance Conditions are met. The parties cannot walk away from the agreement, simply because it is "on subjects".

Foxton J's analysis in the "Leonidas" helpfully shows market participants what is likely to be considered a "Pre-Condition" and what is likely to be a "Performance Condition".

COMMON PRE-CONDITIONS

"Subject to Contract" – We start with a well-known and widely understood phrase. If parties state that an agreement is subject to contract, they are unlikely to have been found to have entered into a binding contract, until they have drawn up and signed a contract.

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"Subject to Details" – Where the parties agree key terms "subject to details". They are not likely to be found to have entered into a legally enforceable agreement until all terms of the contract are finalised. See also: The Junior K (Star Steamship Society v Beogradska Plovidba (The Junior K) [1988] 2 Lloyd's Rep 583).

"Subject to Management Approval" – The effect of this "subject" is to postpone the formalisation of a contract until a time where management of one or both parties has signed off on the deal. See also: Goodwood v Thyssenkrupp (Goodwood Investments Holdings Inc v Thyssenkrupp Industrial Solutions AG [2018] EWHC 1056 (Comm)).

COMMON PERFORMANCE CONDITIONS

"Subject to obtaining import/export licence" – This will commonly be considered a performance condition. The parties do not control the receiving or otherwise of a licence. As it is out of their hands, they will likely be taken to have agreed the contract beforehand, with performance of their obligations subject to a receipt of a licence.

See, for example: Export licence - Brauer v James Clark [1952] 2 Lloyd's Rep 147; Import licence - Windschuegl (Charles H) Ltd v Pickering & Co Ltd (1950) 84 Ll L LR 89; or planning permission - Batten v White (No 2) (1960) 12 P&CR 66.

A GENERAL RULE?

The general rule is to ask whether or not the entry into contractual relations requires a decision (or series of decisions) by one or both parties. As Foxton J put it:

When the event on which the entry into contractual relations depends is a decision by one or both parties to undertake a legally binding commitment, there is no room for the argument that some form of preliminary agreement comes into existence imposing an obligation on one or both of the parties to seek to complete the bargain.

The mixed treatment of "Subject to Survey" is a good example of this. Where the "survey" in question is a survey made by the prospective buyer of goods, this is likely to be considered a "Pre-Condition" (see, for example: Graham and Scott (Southgate) Ltd v Oxlade [1950] 2 KB 257; Marks v Board (1930) 46 TLR 424; and Astra Trust Ltd v Adams and Williams [1969] 1 Lloyd's Rep 81). If it is the buyer himself/herself who has reserved the power to determine that the survey is unsatisfactory, then they are not bound to a contract until they are satisfied with the survey.

However, where there is a survey by a third party, simply to ascertain that the goods are as described, this is more likely to be a performance condition. The buyer cannot escape their contractual obligations once the agreement is signed (provided, of course, that the surveyor finds that the goods are as described).

TRAPS TO AVOID

The above represents the likely legal interpretation of an agreement "on subjects" at the moment that the agreement is made.

This is not set in stone. Parties' words can change a "Pre-Condition" to a "Performance Condition" (indeed, this was one of the key issues in the "Leonidas"). A party can lift subjects by their conduct earlier than they intended and can find itself bound to a contract that it did not consider binding.

The rules set out above represent the way the Court will normally determine these common "subjects". These are not hard and fast rules. In each case they will turn on the characteristic of the specific "subject", taken in the context of the agreement as a whole.

The Merak (Varverakis v Compagnia de Navegacion Artico SA (The Merak) [1976] 2 Lloyd's Rep 250) is a cautionary tale, which related to a vessel sale on the Norwegian Sale Form. The contract was agreed "subject to [the Buyer's] superficial inspection". Commonly, this would be considered a pre-condition entitling the parties to walk away until the subject was satisfied by the positive survey by the buyer. In that case, the seller sought to back out of the deal, but it was held to be binding and included a promise by the seller to offer the ship for inspection and a promise by the buyer to conduct a survey. This turned on the specific terms of the Norwegian Sale Form, which expressly impose an obligation on the buyer to inspect the ship and give the buyer (but not the seller) an express option to cancel the contract after the survey.

COMMENT

Parties should seek certainty in their contractual arrangements. The Leonidas is a very helpful judgment for practitioners, as it provides a helpful baseline for market participants to understand when a contract is contract and when the contract is instead contingent on other events.

Parties can take this further. Zeiler Floyd Zadkovich has advised on a number of high value charterparty negotiations,

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and has had success adding clarity into these negotiations by labelling the "subjects" as either "Pre-Conditions" or "Performance Conditions". We recommend this approach, which offers clarity in negotiations and security in knowing when agreement is reached between the parties.

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Additional Content on this topic:

VIDEO **Length 10 Min.**

Contract Review: Levers and Measures

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PASSAGE PLANS AND UNSEAWORTHINESS

Written by Damon Thompson & Aiden Lerch

Note: Between drafting the below and publication, leave to appeal to the Supreme Court has been granted – a future bulletin will address the result of that hearing.

Preparing a defective sea passage plan can amount to vessel unseaworthiness pursuant to Article III Rule 1 of the Hague Visby Rules, The Court of Appeal has confirmed.

ALIZE 1954 V ALLIANZ ELEMENTAR VERSICHERUNGS AG (THE 'CMA CGM LIBRA') [2020] EWCA CIV 293

The Court of Appeal recently upheld the decision of Teare J, who dismissed a shipowner's claim for general average contributions. Cargo interests had resisted the contributions on the basis that the vessel was unseaworthy.

The CMA CGM LIBRA was a container ship. On 18 May 2011, the Vessel grounded whilst leaving Xiamen, China, where she had loaded cargo. She was in an area where there were charted depths of over 30 metres; however, the paper admiralty chart did not indicate the shoal on which the Vessel grounded.

The passage plan for the voyage was prepared by the Vessel's second officer and was made up by two documents. Unfortunately, however, neither document recorded the necessary warning derived from the Notice to Mariners 6274(P)/10 that depths shown on the chart outside the fairway on the approach to Xiamen were unreliable and waters were shallower than recorded on the chart.

Salvage services were rendered and subsequently the Owners declared general average. In due course, some of the cargo interests refused to pay general average contributions on the basis that the vessel was unseaworthy.

Teare J at first instance found that the defects with the passage plan rendered the vessel unseaworthy, and that the owners had failed to exercise due diligence. Thus, it was held that Owners were in breach of Article III rule 1, and because that breach was causative of the grounding of the Vessel, the claim in general average failed.

THE APPEAL

The Owners appealed the decision of the primary judge on two grounds:

1. The judge wrongly held that a one-off defective passage plan rendered the Vessel unseaworthy and failed properly to distinguish between matters of navigation and aspects of unseaworthiness; and

2. The judge wrongly held that the actions of the Vessel's master and crew which were carried out as a navigator could be treated as attempted performance by the carrier of its duty as a carrier to exercise due diligence to make the Vessel seaworthy.

Owners argued that placing the warning in the passage plan was an act of navigation and that an error in navigation of this kind did not render the vessel unseaworthy. It was submitted that seaworthiness was concerned with the attributes or inherent or intrinsic qualities of the vessel, which

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comprised the vessel herself, her crew and equipment, rather than the actual navigation of the vessel which was controlled by the crew.

Flaux LJ gave the leading judgment, with whom Males and Haddon-Cave LJ concurred.

As to the first ground of appeal, Flaux LJ rejected the argument that the fact that the defect was a one-off does not excuse it from resulting in the Vessel being unseaworthy. His Lordship, relying on Dobell v Passmore [1985] 2 QB 408, further went on to affirm that negligence in navigation is in fact sufficient to constitute unseaworthiness. Therefore, Teare J was correct to find that the defect in the passage plan, in that it did not contain the warning about the unreliability of charted depths outside the fairway contained in NM 6274(P)/10, rendered the vessel unseaworthy.

In addressing the second ground of appeal, his Lordship stated that the distinction that the Owners attempted to draw between acts of the master and crew as a carrier and acts as a navigator was misconceived. His Lordship rejected the Owners argument and stated that once the Owners had assumed responsibility for the cargo, 'all acts of the master and crew in preparing the vessel for the voyage are performed as a carrier', even if performed before and at the commencement of the voyage. The Owners were therefore responsible for these acts as a consequence of the non-delegable duty to provide a seaworthy vessel under Article III rule 1.

As such, both grounds of appeal were dismissed.

ZFZ COMMENT

The judgment serves as precedent for the principle that a sea passage plan is an attribute of a vessel and therefore any defects in such a plan will render a vessel unseaworthy. It is therefore very important for Owners to ensure that sea passages are fully up to date and prepared accurately and diligently by skilled members of the vessel's crew.

Additionally, the Court of Appeal's decision reiterates that shipowners' obligation to provide a seaworthy vessel under the Hague Visby Rules is a non-delegable one. In this sense, Owners are liable for a defective sea passage plan even if it is drafted by a skilled professional. Thus, it is essential that Owners employ competent crew with significant experience and skill in this area.

We await details of the Supreme Court appeal with interest.

Read more on the judgement here.

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Additional Content on this topic:

GUIDE **11 Pages**

Shipping Cases – A Year in Review: 2019-2020

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APPEALING PROSPECTS

Written by Edward W. Floyd & Shannen Trout

The Supreme Court has reiterated the difficulties in appealing a first-instance High Court judgment on findings of fact, in a case that also builds on the law regarding evidence possibly obtained by torture.

SHAGANG SHIPPING CO LTD (IN LIQUIDATION) V HNA GROUP CO LTD [2020] UKSC 34

The Supreme Court recently reversed a Court of Appeal decision and in doing so re-iterated the bars to raising a successful appeal in the English Courts on the grounds that the trial judge has made wrong findings on fact.

The underlying dispute related to a charterparty between the appellant and the respondent's subsidiary, dating back to 2008. The respondent had guaranteed its subsidiary's performance and the appellant commenced proceedings under the guarantee in 2012.

In defence, the respondent had alleged the contract was concluded after acts of bribery and relied on evidence in the form of three confession statements acquired during in a Chinese Public Security Bureau Investigation. In reply, the appellant argued the statements had been obtained by torture and were therefore inadmissible evidence. All of the relevant facts arose in the PRC and the trial judge, the Court of Appeal and the Lords all noted the considerably difficulty in unpicking the complex and distressing facts in the case.

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The trial judge found in favour of the appellant. On the balance of probabilities, the judge found, there had been no bribery. Torture to obtain statements to the contrary could not be ruled out.

THE APPEAL

HNA applied for permission to appeal, which the Court of Appeal granted. The Court of Appeal considered the issue of whether the judge made an error of law in reaching his ultimate conclusion and/or whether it was a conclusion that no reasonable judge could have reached. The Court of Appeal found that the trial judge's decision was "unsustainable" as the judge failed:

(1) to address issues in a logical order,
(2) to assess the weight of the confession evidence,
(3) to take all appropriate matters into account regarding the bribery issue and
(4) to exclude irrelevant matters, namely his "lingering doubt" that torture was used to procure the confessions.

The appellant then appealed in turn to the Supreme Court seeking restoration of the trial judge's decision.

Despite some colourful criticisms of the High Court judgment, the Supreme Court did restore it. They found that there was no "one size fits all" approach to addressing the issues. The trial judge's approach was legitimate and consistent with the way Shagang had put forward its case at trial. Despite not setting it out separately, the trial judge had paid due regard to the weight of the confession evidence. The trial judge considered all three confessions and whilst he considered them compendiously rather than systematically, there was no error of law.

EVIDENCE OBTAINED BY TORTURE

Finally, there was an interesting section in the judgment dealing with the admissibility of evidence that may have been given under duress of torture, but on the balance of probabilities was not. The Court of Appeal's judgment was that the spectre of torture should essentially be ignored in such cases. If the judge had found that torture was probably not used, then the small prospect that confessions were made by torture should be discounted.

The Supreme Court disagreed. In a brief but succinct passage, the Supreme Court found that historically certain categories of evidence (including hearsay) have been discounted. Gradually, as the legal system moved from juries making findings of fact to judges, the categories of inadmissible evidence in civil proceedings have been narrowed. Almost all evidence is admissible.

Evidence obtained by torture remains an important exception. There is a legal basis for this, which is rightly rooted in public policy and basic morality (A v Secretary of State for the Home Department (No 2) [2005] UKHL 71; [2006] 2 AC 221). It is also required by the UN Convention Against Torture (Article 15). In the case of A v Secretary of State for the Home Department, the House of Lords confirmed the same in the common law. In that case, a very narrow minority further suggested that in circumstances where there was a "real risk" evidence was obtained by torture, it should be excluded. The narrow majority held that torture should be proven on the higher standard of the balance of probabilities, but that the evidence of the torture should be taken into account when considering the strength of the evidence (i.e. the evidence is admissible, but the judge can afford it less weight due to the possibility that it was obtained by torture.)

The Supreme Court re-iterated that principle. If it is not proven that evidence was obtained by torture, the evidence is admissible. But the judge can also assess the reliability of the evidence in the light of any grounds for suspecting that it was obtained by torture.

ZFZ COMMENT

In the English Court system, appeals do not simply re-litigate issues determined by the lower Courts. Appeals have a high threshold to pass to prove that the lower Court's decision ought to be overturned. While we note a slight irony in the Supreme Court reinforcing this principle by granting an appeal against the Court of Appeal's decision, this is the effect of the decision.

The Court of Appeal's task is not simply to find that the trial judge was wrong, they had to find that no reasonable judge could have reached High Court judge's conclusion. The Supreme Court was very clear that the High Court's judgment did not meet this negative standard.

Separately, the judgment builds on the law relating to admissibility of evidence, with a common sense decision on the law relating to evidence potentially obtained by torture, which is consistent with prior House of Lords authority on the topic.

Read more on the judgement here.

For additional information and queries, please contact ed.floyd@zeilerfloydzad.com or shannen.trout@zeilerfloydzad.com

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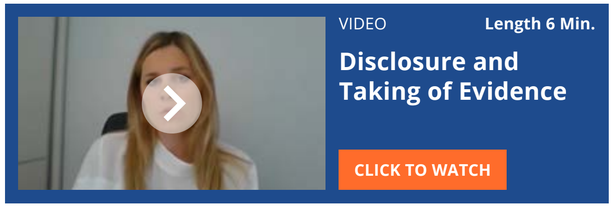

HIGH STANDARDS? – THE BURDEN OF PROOF IN CIVIL CASES

Written by Luke Zadkovich, Calum Cheyne & Charlotte Larkinson (law clerk)

Standing on the Viaduc de la Jonction in Geneva, you can see the confluence of the Rhone and the Arve. The fresh turquoise water of the Rhone, running straight from Lac Leman, makes a striking contrast to the grey and silty water of the Arve, which has washed down from alpine glacial melts.

In their own way, the confluence of the civil and criminal standards of proof at English law - for ostensibly the same 'wrong' - can be similarly jarring. In 2012, John Terry was famously found not guilty of racist abuse (in criminal proceedings), and yet at the same time was liable in a civil action. Effectively, it was not beyond all doubt that he used racist abuse, but he probably did.

Johnny Depp's well publicised recent libel case treads a similar line. Depp argues that The Sun must show beyond reasonable doubt that he is a "wife beater", because the allegedly libellous accusation is criminal in nature. The Sun argues that this is a civil claim, and they were not libellous if, on the balance of probabilities, they can show that Depp attacked his (ex)wife. Judgment is awaited.

In a recent case, the question of fraud resurfaced as one of these areas where the civil and criminal standards of proof can clash. This question was addressed a decade ago by Andrew Smith J in the mammoth judgment of Fiona Trust v Privalov [2010] EWHC 3199 (Comm). Following that judgment, and the earlier case of Jafari-Fini v Skillglass [2007] EWCA Civ 261, it had appeared to be the law that where fraud and dishonest were alleged in the civil context, the claimant had to show particularly strong evidence, and meet a heightened standard of proof. The Court's starting position is that parties are not thought to engage in deceitful and fraudulent conduct. Compelling and cogent evidence (in some cases, bordering on the criminal standard) is required to overturn this presumption.

A recent decision of the Court of Appeals appears to row back on the Fiona Trust judgment, and confirms that the correct standard of proof where issues of fraud and dishonesty arise in civil cases is the balance of probabilities, not a "heightened" standard.

BANK ST PETERSBURG PJSC V ARKHANGELSKY [2020] EWCA CIV 408

The claimant bank brought a claim for £16.5 million against the first Defendant, Dr Vitaly Arkhangelsky, under six personal guarantees and a loan. Dr Arkhangelsky, his wife, Julia Arkhangelskaya, and their company, Oslo Marine Group Ports LLC (together, the "Appellants") brought a counterclaim against the Bank and its Chairman, Alexander Savelyev (together, the "Respondents"), for damages of US$467 million arising from an alleged conspiracy to raid and seize the assets of two of their main businesses in Russia, which owned land at port terminals.

The counterclaim was specified as unlawfully causing the defendants harm under art. 1064 of the Russian Civil Code by selling the assets pledged to the bank to connected parties for less than their proper market value. Specifically, it

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was alleged that the Bank had colluded with a Russian private equity firm Renord-Invest to sell the Appellants' assets in auction as an undervalue.

THE FIRST INSTANCE DECISION

There was a 46-day trial and Hildyard J gave judgment 22 months later. He held that the bank's debt claims succeeded and dismissed the defendants' counterclaims. However, he declined to make negative declarations sought by the claimants as to the absence of any dishonesty or deceit on their part. He dismissed the counterclaims "*having regard to the strength of the evidence that was necessary to discharge the burden of proof*". He explained that the counterclaim *"always faced the difficulty that it relied on proof of the inherently improbable, and a burden of proof that could only be discharged by showing the facts to be incapable of innocent explanation such as to give rise to the inference of the conspiracy".*

In short: Hildyard J found that there was no evidence of fraud to the higher standard set out in the Fiona Trust case.

THE APPEAL

The Appellants appealed the decision of Hilyard J on two grounds:

1. The Judge applied the wrong standard of proof, in that he applied a standard beyond the balance of probabilities specifically because the claim involved one of fraud and dishonesty; and

2. The Judge adopted a narrow and piecemeal approach to the evidence which prevented him from assessing the alleged fraud as a whole.

The Court of Appeal allowed the appeal.

As to the first ground of appeal, in his leading judgment, the Chancellor of the High Court, Sir Geoffrey Vos, found that Hildyard J had erred in his application of the standard of proof when considering Appellants' claim of dishonesty against the Respondents' purported innocence. The correct standard was not "whether the [innocent] justification is a plausible one" but "what explanation was more probable than not, having taken account of the nature and gravity of the allegation". This is a clear reversion to a balance of probabilities test.

His Lordship's view was that the implication from the first instance decision was that Hildyard J considered that the alleged conspiracy probable, but he could not find conclusively that there was a conspiracy. Applying the higher (and, as it happened, wrong) standard of proof, the judge did not find conspiracy.

Males LJ summarised the correct approach that the Court should take in such circumstances as being one of the balance of probabilities. As to the Court's presumption of innocence, Males LJ noted:

> *"once other findings of dishonesty have been made against a party, or he is shown to have given dishonest evidence, the inherent improbability of his having acted dishonestly in the particular respect alleged may be much diminished and will need to be reassessed".*

The appeal also succeeded on the second ground, which was of narrower application to this case only.

ZFZ COMMENT

The Court of Appeal decision highlights the complexities faced when running complex civil fraud proceedings in which parties allege deceit and dishonesty and those allegations must be proven on the evidence.

Although the civil standard of proof does not change, different principles guide the exercise of proving fraud on the evidence and this decision provides useful guidance on how those principles are applied in certain circumstances. Specifically, the Court clarified that while dishonesty is inherently more improbable than an innocent explanation, compelling evidence of dishonesty will rebut this presumption.

It is therefore essential that when making a claim of fraud or deceit, cogent evidence is present to establish the allegations on the balance of probabilities. In the case of fraud, this is easier said than done. Fraud rarely happens in the open. The essence of a fraud is deception and deceit; the wrongful conduct is hidden and misrepresented. Succeeding on a fraud case requires careful and measured submissions, balancing evidence and inference to paint a clear picture for the Court.

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TREATMENT OF NON-PHYSICAL LOSS AND CARRIERS LIABILITY UNDER THE CMR

Written by Lukas Wieser, Lucy Noble (law clerk) & Katherine Georginis

Across ratifying European States, the compulsory application of the CMR Convention ('CMR') conveys the certainty and standardisation necessary for the expedient undertaking of international carriage by road. While the commercial advantage of this standardisation is without question, a recent Court of Amsterdam decision shed light on just how uniquely the courts are willing to interpret the Articles.

On 18 December 2019, the Court of Amsterdam ruled against the Claimants in an action that sought to hold the Defendant Carrier liable for the value of dairy goods destroyed by the Consignee when they were delivered in a container with a broken seal. Ruling on the definition of 'damage' under Article 17.1 of the CMR, the Court found that such circumstances were not encompassed. Consequently, the Court ruled select provisions of the framework contract void. These provisions, in apportioning liability in anticipation of the circumstances that eventuated, directly derogated from the apportionment of carrier's liability under the CMR.

THE BACKGROUND FACTS:

In the complaint, the framework contract concluded between the Consigner and the Carrier provided for the carriage of various dairy goods, departing from Germany and to be delivered in France. Pursuant to this contract, the goods were loaded onto the vehicle, the container was sealed, and the carriage commenced. That evening, during a break in transit, the driver heard a noise in close proximity to the vehicle. On inspecting the load, the driver did not find anyone or anything but identified that the container seal was broken.

On delivery, the goods were independently examined. The expert report dictated that no physical change to the goods was apparent and the temperature inside the container remained constant over the duration of the transport. Notwithstanding this report, the Consignee destroyed the goods pursuant to their contractual entitlement. The framework contract stipulated the consignee may destroy all goods where the presence of an individual in the trailer was suspected. It also provided that the carrier would consequently be held liable for the value of the goods and destruction costs.

The matter was referred to the Carrier's liability insurance however the claim was rejected for want of cargo damage. The Claimants (jointly the Consignor and Consignee et al) thereby commenced this claim for the value of the goods, the destruction costs, interests and costs.

THE ISSUES IN CONTEST AND THE ARGUMENTS PRESENTED:

The two key legal issues in contention in the complaint can be summarised as follows;

1. Does an assessment of damage under the CMR include 'fear of loss'?

Under the CMR, for the Defendant Carrier to be held liable for the value of the goods, the Claimants needed to convince the court that while in transit, the goods suffered damage.

The Claimants contended that although the expert report revealed that the goods were not physically damaged, the broken seal ensured that the quality of the goods could no longer be guaranteed. It was presented that as a result of this lack of guarantee, the profitability and tradability of the goods was meaningfully reduced, and this reduction must be regarded as 'damage.'

In response, the Defendant Carrier, relying on a chain of established precedent, contended that damage necessitates a physical change in condition. Absent a physical change, no liability could be transferred to the carrier under the application of the CMR.

2. The validity of the framework contract.

The dual ambit of the Claimant's assertion rested on the provisions of the framework contract. They contended the Defendant Carrier violated various obligations under the framework contract and should be held liable for compensatory damages under the Dutch Civil Code (Article 6:74(1) Requirements for a compensation for damages Dutch Civil Code). Pursuant to the framework contract, the carrier was contractually obliged to prevent unauthorised individuals from gaining access to the container. As this obligation was breached, the Defendant Carrier should be held liable for compensatory damages for the value of the goods and destruction costs.

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In answer, the Defendant Carrier disputed that the contractual obligations were breached as no negligence could be established.

THE FINDINGS OF THE COURT:

The Court ruled in favour of the defendants on the issue of damage. While the CMR itself is silent on the definition of 'damage,' the weight of authority requires a physical change in the condition of the goods (MA Clarke, International carriage of goods by road: CMR, London: Informa 2009 p. 193). The court conceded that while the Claimants had suffered damage, it did not satisfy the established interpretation of the word under the CMR. The goods were not destroyed because their physical condition had deteriorated, they were destroyed for a fear that some undistinguishable factor had impacted the quality and subsequent tradability of the goods. Such 'fear of loss' as classified by the Court, was not 'damage' under the CMR.

On the second issue, the Court accepted that the Defendant Carrier had acted in breach of their contractual obligations. This finding of liability, while ordinarily resulting in an award of damages, served to void the applicable provisions of the framework agreement. The Court applied Article 41 of the CMR, an Article that invalidates any contractual provision that directly or indirectly derogates from the CMR. The provisions of the framework contract, in increasing the carrier's liability beyond the compulsory carriers' liability under the CMR, were therefore void and could not serve as a basis for a finding of compensatory damages.

Accordingly, the claim was dismissed, and the Claimants were ordered to pay the costs of the proceedings.

COMMENT:

The Court's ruling on the definition of 'damage' can be directly contrasted with the US Carmack Amendment where, in comparable circumstances, the equivalent question was decided.

In the 2014 case, Oshkosh Storage Co. v. Kraze Trucking LLC 65 F.Supp.3d 634, 637 (E.D. Wis. 2014), the driver of a consignment of cheese broke the container seal before the trailer was backed into the loading dock. As a result of the broken seal, the consignee rejected the goods. The Plaintiff argued, in a similar line of reasoning to the Claimants in the Court of Amsterdam, that as a result of the broken seal, the cheese was damaged at the time of delivery.

The US Court, in ruling for the Plaintiff, found that food distributors have a duty to ensure they provide safe food to the public. It was held that notwithstanding the lack of physical damage, it was not unreasonable for a company to have a policy of rejecting shipments of food products when the seal has been broken before delivery. Damage had indeed occurred, and the court ruled accordingly.

This comparison illustrates that while European CMR interpretation is reluctant to apportion liability for damage of a non-physical nature, it is evident that the US courts, in applying the equivalent Carmack Amendment, are more concerned about apportioning liability in consideration of food safety and quality.

On the second finding, the Court of Amsterdam decision highlights a unique facet of the CMR's compulsory carrier's liability apportionment, comparable to other carriage regimes.

The Hague-Visby Rules for the carriage of goods by sea and its US enactment in the COGSA both operate to disallow carriers' from reducing their contractual liabilities from what is proscribed. This prerogative operates to offset the imbalance in contractual bargaining power between carriers and consignees, an important exercise of public policy.

On the other hand, the invalidating provision of the CMR is not confined to provisions in which the carrier's liability is reduced, but also encompasses situations where it is increased. The Court of Amsterdam's interpretation of the CMR thereby provides a comparatively greater encroachment on parties' freedom of contract.

Although English and Austrian Courts generally promote parties' freedom of contract, we believe that this disposition would not result in an alternate finding to the Court of Amsterdam. Fulfilling the overall purpose of the CMR, English and Austrian Courts have deliberately pursued a purposive approach to interpretation that is consistent with European Courts. This consistency includes a demonstrated willingness to rule in favour of Article 41, where parties are found to have contractually deviated from the CMR's compulsory provisions (see, for example with regard to English Courts: T Comedy (UK) Ltd v Easy Managed Transport Ltd [2007] EWHC 611 (Comm); and Dataec Electronic Holdings TTD and Another v United Parcels Service Ltd [2005] EWCA).

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NEW RANKINGS: 2020 & 2021

We are delighted to be recognised by The Legal 500 (UK) & (US) 2021 for our work in Shipping. This makes us a very rare breed: one of only two firms to be recognised by Legal 500 for our Shipping work on both sides of the Atlantic!

To all of our clients, who have given their valuable time to say some extremely kind words about our work, we are immensely grateful. Congratulations also to everyone in our global team, it is a great achievement and a special day in our continued growth.

"Created through the 2020 merger between legacy firms zeiler.partners and Floyd Zadkovich, Zeiler Floyd Zadkovich is now able to offer a seamless cross-border approach. Pre-merger, the firm was boosted in London in summer 2019 through the addition of Damon Thompson, a specialist in the energy sector, who has added to the team's capabilities in commodities shipping. Since Thompson joined the London office, the team has received instructions from a number of prominent companies to advise on LNG-related issues. In addition to Thompson, name partner Luke Zadkovich co-heads the team and offers experience across a range of shipping matters, splitting his time between London, the US and Sydney."

"In my experience, the team (led by Luke Zadkovich) have been able to appreciate the commercial objectives of our members very quickly, and to come up with legal solutions in order to meet those objectives. The focus is on obtaining the results our members want as efficiently as possible. I find the team's approach to be collaborative – they work with the Club and our Members, not as an advisor at arm's length, which is valued."

"Luke Zadkovich is very approachable and always willing to assist. Luke has come up with novel solutions on more than one occasion and has regularly delivered results exceeding our Members' expectations. His communication is clear and I have been very happy to recommend his services to colleagues and Members."

"They have expertise in the same time zone for both English law and US law expertise."

- LEGAL 500 (UK)

"Zeiler Floyd Zadkovich is a boutique law firm handling highly specialized maritime litigation and advisory work, for a client roster including multinational shipping companies and bulk carriers, freight forwarders, insurance companies and P&I clubs. From its base in New York, the team has expanded quickly over the past couple of years, having opened an office in Chicago with the hire of Timothy McGovern from Swanson, Martin & Bell; and then establishing an office in Houston in 2020. In addition to its expansion across the US, the team is noted for its ability to advise on US and UK law, working in conjunction with its counterpart in the firm's London office. The firm is led by name partners Luke Zadkovich and Edward Floyd: Zadkovich has previous experience working at a major P&I club, and Floyd (a graduate of the US Naval Academy) has experience of commodities and trade, in addition to maritime law."

- LEGAL 500 (US)

"A boutique firm with specialist expertise in maritime and admiralty law. Developing its strengths across a variety of shipping disputes including charter party, cargo damage and maritime collisions. Stands out in the market for its combined focus on English and US maritime logistics and trading cases."

"Ed Floyd has noteworthy experience advising clients on maritime and trading law. His broad practice covers cargo damage and loss, charter party disputes and sanctions advice."

"Luke Zadkovich is frequently engaged in complex cargo disputes as part of his broader shipping and maritime practice. He also provides strong guidance to clients on English maritime law."

- CHAMBERS & PARTNERS (USA)

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NEWS

TEAM

| New York

Philip Vagin joined our New York office as an Associate. Philip specializes in maritime disputes, transnational litigation and advisory work in the trasportation sector.

Philip obtained his LL.M. in Admiralty Law (with distinction) from Tulane University, where he received a prestigious Harry F. Stiles Scholarship and an Edward A. Dodd Award in Admiralty. Philip obtained his LL.B. from the Higher School of Economics University in Russia, is admitted to the Russian bar, and is due to sit the NY bar exam.

Philip is an associate member of the Chartered Institute of Arbitrators and an editor for the Russian Maritime Law Association (RUMLA).

Read more about Philip here.

APPOINTMENTS

| We are delighted to announce that our **Eva-Maria Mayer** was appointed Secretary of the new US Maritime Law Association committee “Our Oceans”.

Our Oceans aims to inform the maritime community of ongoing efforts around legislation, sustainability and other efforts by countries, entities and individuals in this important subject that impacts us all.

SPEAKING ENGAGEMENTS

| Luke Zadkovich presented to the Logistics community at Anova Marine Insurance’s Virtual Insurance Academy on Special Contracts in the Logistics Sector.

To watch Luke’s insightful talk, click here.

ZFZ PROGRAMS

| Over the summer, students from the UK and Australia have participated in a virtual scheme we held, where they took part in workshops focused on various legal sectors, tried their hand at drafting documents and undertaken charterparty reviews.

We are pleased to feature two candidates in this bulletin, **Charlotte Larkinson** and **Lucy Noble**, who are continuing to work with the firm as law clerks following the virtual work experience program.

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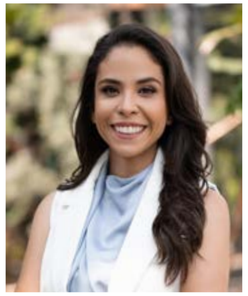

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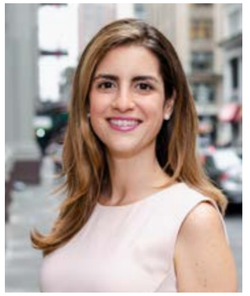

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