

# shipping & transport news

HBJ Gateley Wareing

Summer 2010

## Shipbuilding contract

### Refund Guarantee wording did not cover builder's insolvency

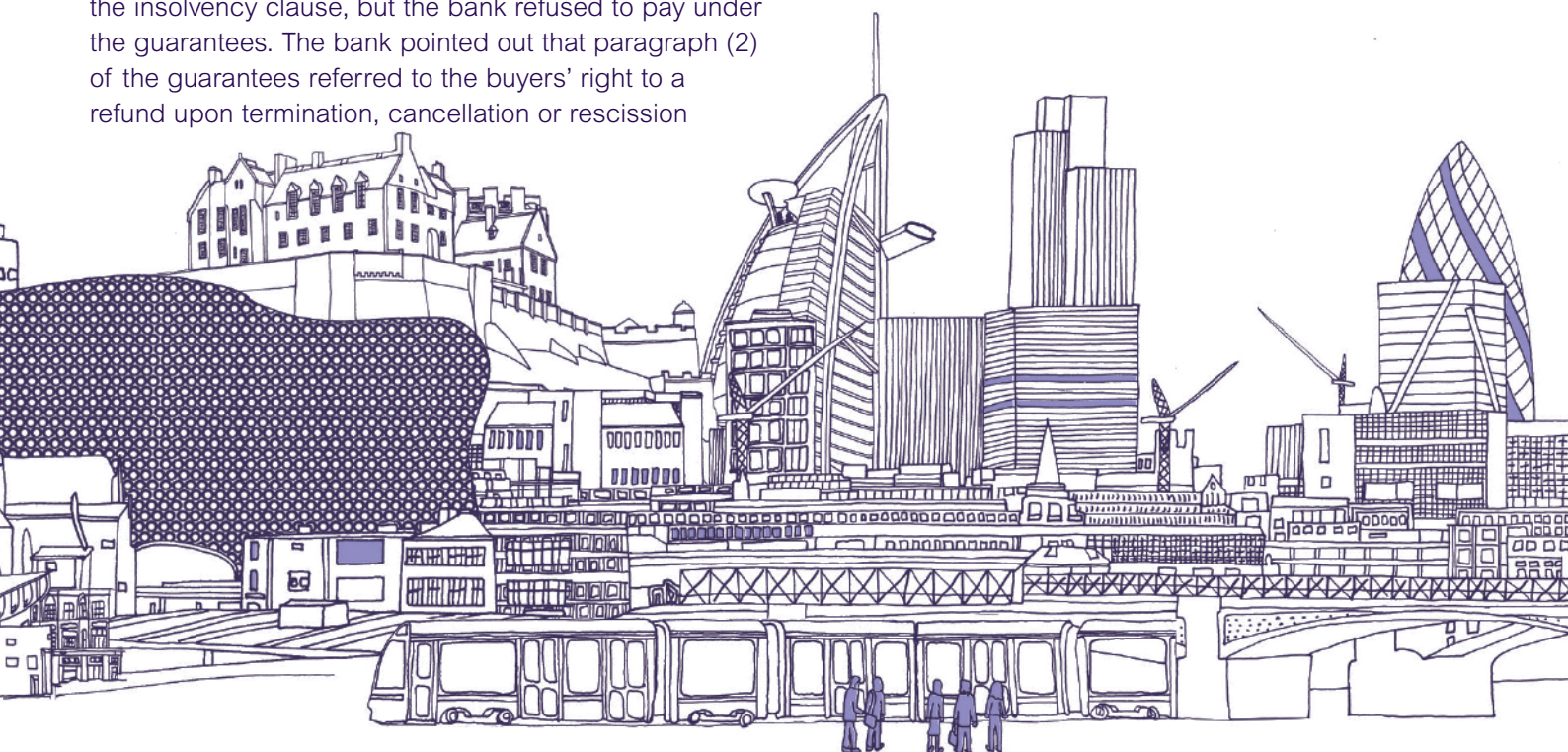
**Most shipbuilding contracts provide for the price to be paid by instalments during construction, subject to a bank guarantee for refund of the advance payments if the contract is terminated due to the builder's default. In the case of *Kookmin Bank v Rainy Sky SA* the Court of Appeal applied a strict interpretation to the wording of guarantees issued for a series of six vessels and rejected the buyers' claim against the bank for refunds of over US\$46 million.**

The building contracts provided for the advance payments to be refunded in various circumstances, including termination of the contract by the buyer, total loss of the vessel, or insolvency of the builder. The refund due upon insolvency arose under a separate clause which did not expressly give the buyer the right to terminate the contract. The builder got into financial difficulties and the buyers demanded a refund under the insolvency clause, but the bank refused to pay under the guarantees. The bank pointed out that paragraph (2) of the guarantees referred to the buyers' right to a refund upon termination, cancellation or rescission

of the contract but not upon the builder's insolvency. The buyers relied on paragraph (3) where the bank undertook to pay "all such sums due to you under the contract", which they argued must have been intended to mean "all pre-delivery instalments" regardless of the circumstances in which they became refundable.

The Commercial Court judge held that to interpret the guarantee as excluding insolvency would be a "surprising and uncommercial result" as this was the very situation in which the security of the refund guarantee was most likely to be needed. He therefore upheld the buyers' claim. The Court of Appeal, by a majority, accepted the bank's interpretation.

The starting point must always be the meaning of the words that the parties have used in the contract; a court may disregard that meaning if it leads to an absurd or irrational result, but this should only arise in extreme cases. In this case the natural meaning of the wording was that "such sums" in paragraph (3) referred back to the refunds specified in paragraph (2), and the court could not substitute its own view of the commerciality of that provision for the view of the parties themselves.



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# Insurance

## Business interruption claim for losses arising from hurricanes

In the case of **Orient-Express Hotels Ltd v Assicurazioni General SpA (UK) (t/a Generali Global Risk)** the owner of a premier hotel in New Orleans (OEH) claimed an indemnity from its insurers under a combined property damage and business interruption policy following damage to the hotel caused by Hurricanes Katrina and Rita.

One of the issues to be decided was whether the policy provided cover for loss concurrently caused by physical damage to the hotel and damage to or consequent loss of attraction of the surrounding area. The policy covered business interruption losses suffered in consequence of physical damage to the hotel, and also provided separate cover for "Prevention of Access" and "Loss of Attraction" but the amount recoverable under these clauses was subject to lower limits and OEH wished to claim additional losses under the business interruption cover. It was established that the City of New Orleans was 'closed' for the whole of September 2005, the month in which OEH was claiming for business interruption loss. Whilst no one could visit the hotel because it was damaged, no one could visit it anyway because New Orleans was effectively closed due to a mandatory evacuation. Therefore if the hotel had been left undamaged but all other effects of Hurricanes Katrina and Rita are assumed to have occurred, the business interruption loss for that month would have been the same.

Arbitrators found in favour of the insurers, and on appeal the judge held that the tribunal had been right to adopt the "but for" approach to the cause of loss of revenue; the consequences of applying the "but for" test of causation does not mean there is no cause and no recoverable loss, but a different recoverable loss. The policy would cover physical loss and damage to or consequent loss of attraction of the surrounding area unless the loss claimed was not caused by physical damage to the insured property. He rejected the idea of a comparison with an "undamaged hotel in an undamaged city" scenario because that would measure the gross operating profit which would have been made by OEH if the hurricanes had not struck at all and would compensate them for all business interruption losses, whether or not caused by physical damage to the hotel. OEH's losses would therefore be recoverable only under the Loss of Attraction and Prevention of Access extensions. That was what OEH paid premium for and was all it was entitled to recover under the policy.

# Sale of goods – freight forwarding

## Sellers are not responsible for loss of deck cargo

The firm were recently involved advising insurers in the case of **Geofizika DD v MMB International Ltd, Greenshields Cowie & Co Ltd** raising issues as to the obligations of Sellers and their freight forwarders in relation to carriage and insurance terms.

B bought three ambulances from M for shipment to Libya under a CIP contract. Under Incoterms 2000 this meant that M must arrange and pay for carriage on "usual terms" and insurance as agreed. M's freight forwarders (G) arranged shipment with a carrier (C) and sent M an insurance certificate containing a carriage under deck warranty. C's booking note stated that vehicles were shipped with "on deck option" which would be remarked on the bills of lading. The bill of lading contained a liberty clause allowing carriage on deck or under deck. The ambulances were shipped on deck and two were washed overboard during the voyage. Insurers refused to pay for the loss due to the breach of the under deck warranty. B sued M, who in turn claimed against G. At first instance the claims succeeded on the basis that (1) the contract of carriage was not on "usual terms" as the booking note did not exclude carriage on deck (2) G should not have given the under deck warranty without checking the true position (3) M was liable to B for failure to provide a valid contract of insurance, causing B's loss. M and G appealed.

The Court of Appeal held that C had no right to carry on deck. If goods were shipped on deck a statement to that effect would normally be found on the bill of lading. Whilst the booking note could have been clearer anyone in the trade would have understood it to mean that if the goods were to be carried on deck the bill of lading would have been so endorsed. Consequently, there was an agreement between G and C that there was no right to carry on deck. G should nevertheless have checked that the cargo was being carried under deck and was in breach of a duty of care by failing to do so. However, this had not caused B's loss. Under Incoterms 2000 M was only obliged to provide cover to the extent agreed which, on the facts, would not in any event have covered the loss. Under the terms of this contract there was no requirement on M to obtain insurance that matched the carriage actually performed. The appeal was therefore allowed.

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# Negligence

## Supreme Court ruling on oil rig supply vessel fire . . . and more to come

**As we reported in our Summer 2009 newsletter, our Edinburgh shipping team is acting for the Owners of an oil rig supply vessel which was seriously damaged by fire during tank cleaning operations carried out at Peterhead Harbour. In the ensuing litigation (Farstad Supply A/S v Enviroco Ltd and Asco UK Ltd) the Owners (F) sued the tank cleaning contractors (E) who were engaged by the vessel's charterers (A), in delict (tort) in Scotland. A preliminary issue in the case was recently the subject of one of the first appeals from the Scottish Courts to the new UK Supreme Court, in which our clients' appeal was upheld. Related issues are also being pursued in the English Courts, and a further appeal to the Supreme Court is pending in those proceedings.**

E claims that the fire was contributed to by A's negligence and argues that if it is found liable to F for damage caused to the vessel, it is entitled to a contribution from A as a third party. The relevant statutory provisions allow a claim for contribution against "any other person who, if sued, might also have been held liable in respect of the loss or damage". The Charterparty contained knock-for-knock indemnity provisions requiring F to indemnify A and hold it harmless from any liabilities resulting from loss of or damage to the vessel. The preliminary issue in dispute was whether A could be found liable to pay a contribution to E taking into account the terms of the indemnity clause.

The Scottish courts found in favour of F at first instance but in favour of E on appeal. A panel of five Supreme Court judges (three English and two Scottish) heard the final appeal and ruled in favour of F. The Court held that A could not be found jointly and severally liable with E for the damage caused to the vessel because it had a contractual defence under the Charterparty, so E could not be entitled to a contribution from A under the Act. The pre-requisite of a successful claim against A could not be met. It did not make any difference whether the relevant clause in the Charterparty was an indemnity clause or an exclusion, as the position was the same in both cases. The Court did not feel this was an unjust result, as E would have known that a Charterparty existed between A and F and could have asked to see the terms of this, or to incorporate a similar indemnity clause into its contract with A.

The main action now continues before the Scottish Court, but before the case comes on for trial it is likely that the Supreme Court will have given its judgment on the appeal brought by E against a decision of the English Court of Appeal. This relates to the interpretation of the word "Affiliate" in the context of the knock-for-knock indemnity provisions in the Charterparty. E wants to be confirmed as an affiliate of the Charterer to claim the benefit of the indemnity clause, and claims that it and the charterer, A, are both subsidiaries of the same holding company (A plc). However, part of E's share capital was pledged by A plc to a Scottish bank as security, and in Scotland, security terms generally require the bank (or its nominee) to be entered on the register of members of the subsidiary company, rather than the pledgor of the shares. This peculiarity has caused problems for E.

At first instance the English judge found in favour of E and said that he felt compelled to reach this decision based on commercial common sense. However, the Court of Appeal allowed F's appeal, based on a strict interpretation of the provisions of the Companies Act 1985 which were expressly incorporated into the Charterparty. The Court pointed out that it did not have the power to revise the provisions of a statute simply because their operation might produce uncommercial results. The Court had no way of knowing whether the legislature had in mind the possibility of a change of registered membership of the subsidiary as between the pledgor and bank when it drafted the relevant sections of the Act. E obtained permission to appeal to the Supreme Court and the appeal is due to be heard in October 2010.



## Voyage charter

### Court of Appeal finds Notice of Readiness invalid and owners' alternative claim time-barred

In our Winter 2009/10 newsletter we reported the Commercial Court decision in the case of **AET v Arcadia Petroleum (the "Eagle Valencia")** on the interpretation of clauses in the Shellvoy 5 form of Charterparty relating to free pratique. The Court of Appeal has now reversed that decision and rejected the owners' demurrage claim.

The Charter provided for laytime to start counting six hours after notice of readiness (NOR) but an additional clause provided that the NOR was not valid if owners failed to obtain free pratique within the six hours period. The port health authorities granted free pratique whilst the vessel was at the anchorage. Although this was more than six hours after the NOR the judge held that it served no useful purpose to require free pratique to be obtained within that period when the vessel had in any event to wait a further three days for an available berth.

The Court of Appeal disagreed. The clause invalidated the original NOR but left the owners free to tender a fresh NOR which would start laytime running after a further six hours. This was an entirely understandable and workable scheme which reflected the intention of the parties. The question then arose as to whether a fresh NOR had in fact been tendered, and whether the owners could claim a lesser amount of demurrage based on that notice. The Court held that an email sent by the Master after free pratique was granted was a valid NOR, but it was too late for the owners to rely on this because the time bar clause required a "fully and correctly documented" demurrage claim to be submitted within 90 days after completion of discharge. An essential document in support of any demurrage claim is a valid NOR, and as the NOR submitted by owners was invalid the requirements of the clause had not been met.

## Time charter

### Vessel detained by pirates was not off-hire

The topical subject of piracy off the Somali coast has recently come before the court again in the case of **Cosco Bulk Carrier v Team-Up Owning Co.**

T's vessel "*Saldanha*" was chartered to C on an amended NYPE form, and was held by pirates in Somalia for over two months. C refused to pay hire for this period and the dispute was referred to arbitration. The arbitrators decided some preliminary issues as to interpretation, including the issue of whether C was entitled to put the vessel off-hire under clause 15 of the NYPE charter. They held that none of the events listed in the clause applied, and the vessel was not off-hire. On appeal to the High Court this was upheld by the judge. In particular, there had been no "detention by average accidents to ship or cargo": an "average accident" means an accident which causes damage to the ship, and in any event a deliberate attack by pirates could not properly be described as an "accident". There was also no "default and/or deficiency of men" even if (as C alleged) the ship's officers and crew had failed to take proper precautions to prevent the attack. The term "default" required something more than mere negligence.

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