HILL DICKINSON

Marine, trade and energy update

CIP contracts of sale and freight forwarders – whose liability is it anyway?

In CIP sales, sellers often engage expert freight forwarders to procure the contracts of carriage and insurance which this Incoterm requires the seller to obtain for the buyer. We review the Court of Appeal decision of Geofizika dd (respondent) –v- MMB International Ltd and Greenshields Cowie & Co Ltd (appellants) [2010] EWCA Civ 459, in which Hill Dickinson acted for the successful appellant MMB International Ltd (the seller).

Background law

In October 2006, Geofizika dd (the buyer) purchased three ambulances from the seller on CIP Tripoli terms. The seller engaged the expert services of Greenshields Cowie & Co Ltd (the freight forwarder) to arrange the carriage and insurance. It was accepted by all the parties that the ambulances, which were brand new and uncontainerised, would need to be shipped below deck. The freight forwarder made arrangements with a shipping line (the carrier) that they had not used before, but who advertised as operating a RoRo service out of Libya.

The carrier issued a booking note to the freight forwarder which stated "ALL VEHICLES WILL BE SHIPPED WITH "ON DECK" OPTION this will be remarked on your original bills of lading". The reverse of the bill of lading contained a liberty clause which stated "Goods, whether or not packed in containers, may be carried on deck or under deck without notice to the merchant..."

The freight forwarder procured cover on an all risks/Institute Cargo Clauses (ICC) (A) basis, and gave a warranty to insurers that the ambulances would be shipped below deck

Unfortunately, the ambulances were carried on deck, uncontainerised and unprotected, on the general cargo vessel MV Green Island, and two of the ambulances were washed overboard. Insurers refused to pay the claim. The buyer obtained compensation from the carrier, and pursued the seller for the balance of the value of the vehicles and for substantial hire charges for replacement ambulances. The seller, in turn, sought an indemnity from its freight forwarder, who denied liability, inter alia on the bases that:

- there was an antecedent agreement with the carrier that the ambulances would not be carried on deck, unless the face of the bill of lading was so claused; and
- the level of cover required in a CIP sale is minimum cover/ICC(C), which does not cover washing overboard.

High Court decision

HH Judge Mackie QC first heard the case in 2009 in the London Mercantile Court. He found there was not enough evidence to show that the freight forwarder had unequivocally instructed the carrier to carry the ambulances below deck, or that they had carried out sufficient checks to

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ensure that the vehicles would be so carried. This not only placed the freight forwarder, and thus the seller, in breach of its duties in terms of procuring the contract of carriage; it also rendered both parties liable as the warranty that the ambulances would be shipped below deck was void. It was irrelevant that the seller/ freight forwarder were only obliged to procure cover on ICC(C) terms, as this was not what had been done.

The seller was thus liable to the buyer (albeit the quantum of the buyer's claim was reduced significantly) but was entitled to a full indemnity from its freight forwarder. CIP contracts of sale and freight forwarders – whose liability is it anyway? 11 Marine, trade and energy September 2010 The freight forwarder appealed.

Court of Appeal – contract of carriage

On appeal, the freight forwarder maintained that the booking confirmation amounted to an antecedent agreement that goods would only be carried on deck if the face of the bill of lading was claused accordingly. This argument had been rejected at first instance. However, the Court of Appeal held that it is longstanding practice that if goods are shipped on deck, a statement to that effect will ordinarily be found on the face of the bill of lading. On that basis, even though the booking note was not clearly worded, anyone in the trade would have understood it to mean that the face of the bill of lading would be claused if the goods were to be carried on deck. Since it was not, it followed that it was the carrier, and not the freight forwarder/ seller, who had been in breach.

Court of Appeal – contract of insurance

The Court of Appeal agreed with HH Judge Mackie QC that the freight forwarder had been negligent in giving a warranty that the ambulances had been shipped below deck without checking that the facts it was warranting were in fact true. Dealing as it was with a carrier whom it had not used before, the freight forwarder should have taken due care to check that the ambulances were indeed carried below deck. It did not, and was therefore in breach of its duties to the seller, and placed the seller in breach of its obligations to the buyer.

However – and crucially – the Court of Appeal found that this negligence could not sound in damages, as the obligation on the CIP seller was only to provide cover on ICC(C) terms, which did not cover washing overboard in any event. It followed that the freight forwarder's negligent warranty was not causative of the buyer's loss. The Court of Appeal did not accept the buyer's contention that there was an obligation on the seller to procure insurance that matched the carriage actually performed, especially as the seller/freight forwarder had not known that the ambulances had not been shipped under deck.

Conclusion

Whilst all three judges unanimously found the freight forwarder to have been negligent, the net effect of the decision was that the freight forwarder (and thus the seller) escaped liability in circumstances where the freight forwarder's negligence was not causative of the buyer's loss. The judgment acknowledged the oddness of the expert freight forwarder being allowed to escape the consequences of their negligence. Indeed, strikingly, all three judges expressed their regret at the decision reached. As the seller argued to the Court of Appeal, the whole sorry saga could have been avoided if the freight forwarder had exercised more care.

This case highlights an unusual predicament for CIP buyers and sellers. The buyer was left with an uninsured loss with, it seems, no cause of action, either directly or indirectly, against the responsible freight forwarder. The innocent CIP seller, entirely reliant on its freight forwarder, has found itself caught up in a long and costly dispute despite having no positive claim of its own. Moreover, the negligent freight forwarder, whilst successful on appeal, was hardly exonerated - even though it was ultimately able to escape liability in damages, it had to go to the Court of Appeal to get this finding. Whilst permission to appeal to the Supreme Court has been refused by the Court of Appeal, it remains to be seen whether the Supreme Court will entertain a further appeal from the buyer.

Inherent vice and perils of the sea in marine insurance

The Supreme Court has held that even though loss was very probable, and the weather in which the loss occurred was within the reasonable contemplation of the parties, that was insufficient to afford the insurers an inherent vice defence.

On 1 February 2011, in the rare event where permission to appeal was given in a commercial case, the Supreme Court delivered its judgment in Global Process Systems Inc and Another (Respondents) -v- Syarikat Takaful Malaysia Berhad (Appellant) [2011] UKSC 5. This concerned an appeal by insurers, on the scope of the exclusion in a marine insurance policy for loss caused by inherent vice. Lords Saville, Mance and Clarke delivered the main judgments of the Court.

The oil rig "Cendor Mopu", which had been laid up in Galveston, Texas, was purchased in May 2005 by the assured for conversion into a mobile offshore production unit for use off the coast of Malaysia. The assured had obtained insurance incorporating the Institute Cargo Clause (A) from the appellant insurers for carriage of the oil rig on a towed barge from Texas to Malaysia. The policy that covered "all risks of loss or damage to the subject matter insured except as provided in clause 4". Clause 4.4 excluded "loss, damage or expense caused by inherent vice or nature of the subject matter insured." Marine surveyors had approved the method of the tow. It was being carried on a barge round the Cape of Good Hope with its legs jacked up when fatigue cracking, caused by repeated bending of the legs by the motion of the barge as it was being towed, caused the legs to break and be lost.

The owners made a claim under the policy for the loss of the three legs. The insurers rejected the claim and the matter came for trial before the Commercial Court. The insurers said that the loss was inevitable, alternatively that it was proximately caused by inherent vice. The Commercial Court rejected the argument that the loss was inevitable. Although the loss was "very probable", it was not inevitable. The impact of a "leg breaking wave" was required to generate the final fracture. However, the defence of inherent vice succeeded. Following Mayban General Insurance Bhd v Alstom Power Plants Ltd [2004] 2 Lloyd's Rep 609, the judge held that the proximate cause of the loss was the fact that the legs were not capable of withstanding the normal incidents of the insured voyage, including the weather reasonably to be expected, and that therefore the cause was inherent vice. Accordingly, the insurers were not liable.

The assured appealed the first instance decision. The question for the Court of Appeal was whether the Commercial Court had applied the correct test in distinguishing between inherent vice and perils of the sea and what was the proximate cause of the loss.

The Court of Appeal reversed the decision of the Commercial Court, holding that the proximate cause of the loss was an insured peril in the form of the leg breaking wave and not inherent vice. The test for inherent vice applied by the Court of Appeal was whether the cause of damage was an inability to withstand wind and wave which would be bound to occur as the ordinary incident of any normal voyage of the kind being undertaken. In other words, if weather that had caused the loss was reasonably to be expected but not bound to occur, then this would give rise to loss by "perils of the sea" (which is covered) and not loss caused by inherent vice (which was excluded).

The insurers appealed to the Supreme Court on the basis that the Court of Appeal had applied an incorrect test and that if the correct legal test were to be applied, the risk which was the sole proximate cause was inherent vice. They argued the "bound to occur test" used by the Court of Appeal was a new uncertain test, inconsistent with authority and legal principle. The ordinary incidents of the voyage which acted as a trigger for loss by inherent vice were not a new intervening external cause breaking the chain of causation by inherent vice; they were what the rig had to be fit to encounter.

The assured in turn argued that inherent vice meant inherent i.e. the cause of loss had to come from within and in this case it was the external, fortuitous "leg breaking" wave that caused the loss. It followed that whenever there was weather involvement the loss could not be attributable to inherent vice. To accept the insurers' argument that the loss was caused by an inability

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of the legs to withstand weather and sea states that were within a reasonably contemplated range would be, the insured argued, equivalent to the introduction of a warranty of seaworthiness on cargo which was excluded by the Marine Insurance Act. The assured further argued that it had never been the law that an inability to withstand the ordinary perils of the seas is inherent vice, and that the Mayban case had been wrongly decided. The effect of the insurers' argument, the assured said, would be that in such circumstances, where the possibility of fatigue was uppermost in the minds of the parties, there would be no cover against ordinary perils of the sea and this would be against the parties' intentions.

The Supreme Court has held that the proximate cause was not inherent vice but perils of the sea. The loss was not the result of the natural behaviour of the rig in the ordinary course of the contemplated voyage. The breaking of the legs only occurred under the influence of a wave of a direction and strength catching the first leg right at the right moment, leading to increased stress on and collapse of the other two legs. The Supreme Court relied and expanded upon the definition of inherent vice by Lord Diplock in Soya v White [1983] 1 Lloyd's Reports 122, who said: "It means the risk of deterioration of the goods shipped as a result of their natural behaviour in the ordinary course of the contemplated voyage without the intervention of any fortuitous external accident or casualty." Lord Mance said that there was there was no apparent limitation in the qualification "without the intervention of any fortuitous external accident or casualty". Accordingly, anything that would otherwise count as a fortuitous external accident or casualty will suffice to prevent the loss being attributed to inherent vice. The fact that the legs were not capable of withstanding the normal incidents of the insured voyage, in particular the weather reasonably to be expected, did not make inherent vice the proximate cause. Accordingly, the insurers were liable under the policy.

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