MV Smart update - Shipowners unfettered right to collect freight under the bill of lading

In the recent judgment of *Alpha Marine Corp v. Minmetals Logistics Zhejiang Co.Ltd (The M/V Smart)* [*2021] EWHC 1157*, the Court recognised the right of the vessel's owner/contractual carrier under the bill of lading to ask for freight to be paid to them under bill of lading, even where the vessel has been time chartered.

This judgment should be seen positively by Members, as it confirms for the first time that shipowners can collect freight due under bills of lading, even when there is no default on their time charterers' part, subject only to an obligation to account for any surplus. The significance of this right for shipowners is undoubted, as it now offers a separate and straightforward course of action against a defaulting charterer, in addition to the traditional exercise of a lien on freight.

Facts

Alpha Marine Corp ("Owners") time chartered their vessel *M/V Smart* to Minmentals Logistics Zhejang Co Ltd ("Charterers") on an amended New York Produce Exchange (NYPE) form. Charterers sub-chartered the vessel to General Nice Resources (Hong Kong) Ltd ("GNR") on voyage charter terms ("the Charterparty"). The vessel proceeded to load a cargo of coal at Richards Bay in South Africa and Owners' bills were issued, according to which freight was payable "*as per charterparty".*

On 19 August 2013, upon the vessel's departure from the port of Richards Bay, she ran aground just outside the channel and later broke her back. As a result, both the vessel and her cargo were lost.

Shortly after, the Charterers issued a freight invoice to GNR in the sum of US$ 1,860,390. Under the Charterparty, the freight was deemed to be earned "*whatever vessel/cargo lost or not*", and it was provided that "*100% of the freight payment was to be effected by GNR on or before 45 days of the vessel sailing from the load port and after receipt of the freight invoice".* Therefore, based on the above, GNR were required to make the payment of the freight invoice by 3 October 2013.

On 12 September 2013, the Owners issued invoices to GNR for freight due under the bills of lading and directed that it is paid to them, instead of Charterers (the "First Notice"). They also commenced arbitration against the Charterers in respect of their claim from the casualty.

On 2 March 2015, Owners gave notice to GNR, copying Charterers, suggesting that they were entitled to exercise a lien over the voyage charter freight pursuant to the terms of the

Charterparty on the basis that Charterers were liable to Owners for breach of the safe port warranty included in the Charterparty (the “Second Notice”).

On 6 May 2016, the Owners, the Charterers and GNR entered into a tri-partite escrow agreement in respect of the competing freight claims.

The Tribunal found that Charterers had in fact provided a safe port warranty, but the incident was caused due to the Master’s negligent handling of the vessel. Also, the Tribunal accepted Charterers’ argument that there was an implied obligation for the Owners under the Charterparty not to revoke Charterers’ right to collect freight under the bill of lading unless hire and/or other sums were due under the Charterparty. Therefore, as there was no breach of charter and no other sums due to the Owners, Charterers were entitled to recover as damages from the Owners the freight amount which was not paid by GNR less any amount held in escrow as well as the amount of overpaid hire. However, the Tribunal accepted that the Owners were still able to recover the bunker costs incurred under the Charterparty terms, as these were unrelated to the issue of safe port warranty.

Following the Tribunal’s decision in relation to freight, the Owners were given permission to appeal pursuant to section 69 of the Arbitration Act.

Parties’ submissions on Appeal

The Owners contended that the Tribunal was wrong to find that there was an implied obligation on them not to revoke the Charterers’ authority to collect freight. They also submitted that it was not necessary or obvious for such a term to be implied for business efficacy reasons. Therefore, they enjoyed an “unfettered right” to revoke Charterers’ authority to collect freight with a duty to account to Charterers.

The Charterers argued that the Tribunal’s decision was correct on the grounds of the below three formulations:

1. **All-Freight Implied Term**: Owners would be entitled to collect the entirety of the freight if Charterers were in breach of their obligations under the Charterparty, even if it exceeded the amount of Owners’ claim against Charterers arising from the breach, but no such sum was due at the time of Owners’ first Notice.
2. **All-Freight (Sum Identified) Implied Term:** Owners were not entitled to revoke the Charterers’ authority to collect freight unless a sum was due to them under the Charterparty which was identified at the time of the revocation of Charterers’ authority. However, here, it was apparent that the Owners’ first Notice was served to secure their unsafe port claims, whereas there was no suggestion that they had identified any sum in respect of bunkers which was due from Charterers.
3. **Dollar-for-Dollar Implied Term:** Owners would be entitled to revoke Charterers’ authority to collect freight in the event of a default by Charterers but only in respect to an amount up to (but no more than) the amount due from Charterers under the Charterparty. Therefore, given that the Owners had revoked Charterers’ authority to

collect freight of a greater value than the amount due to them under the Charterparty in respect of bunkers, they were in breach of the above term.

Judgment

Mr Justice Butcher accepted the Owners' submission that the implication of such term did not meet the test of obviousness and necessity as described by the Supreme Court in *Marks and Spencer v. BNP Paribas Securities Services Trust Company (Jersey) Ltd [2016] AC 742.* His conclusion relied on the fact that Owners' obligation to account to Charterers for any excess sum in the amount of freight collected over the amount due under the Charterparty is undisputed and therefore, it would be maintained. Consequently, the Charterparty in question would not lack commercial or practical coherence without an implied term restricting Owner's right to intervene.

The judge further rejected Charterers' argument that the Owners' right to collect freight under the bills of lading would interfere with their employment of the vessel, given that by the time the Owners issued their First Notice, the vessel had already suffered a casualty, following which, the Charterparty came to an end.

He also considered the formulations of the implied terms suggested by the Charterer but did not accept any of them on the basis that they all create uncertainties in the way they are interpretated.

Last, he accepted that it would be commercially sensible if the above right of the Owners would apply even in case where a charterer in a charterparty chain is likely to become insolvent, without being necessary that a sum is due under the time charter.

Comments

As previously pointed out, this is a positive outcome for Members because it expressly recognises the shipowners' right to collect freight due under the bills of lading, even when there is no default on the charterers' part. As this right now is added to the shipowners' right to exercise a lien on freight, it will be interesting to see not only whether a decrease in disputes regarding the validity of the exercise of a lien will be noticed, but also whether charterers will try limit the application of this right by inserting into their charterparties express terms providing that this right will be exercised only in case where the charterer is in default.