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Orion Shipping and Trading Ltd v Great Asia Maritime Limited [2024] EWHC 2075 (Comm)

Executive Summary

The High Court has held that, where a Memorandum of Agreement on the NSF 2012 is lawfully cancelled by a buyer under Clause 14 in circumstances where (i) the seller has failed to give notice of readiness or failed to be ready to validly complete a legal transfer by the Cancelling Date, and (ii) such failure is due to the seller's "proven negligence," the buyer is not entitled to recover loss of bargain damages in the absence of an accepted repudiatory breach of contract.

Background

The dispute arose out of a Memorandum of Agreement (the "**MOA**") for the sale of a Capesize bulk carrier (the "**Vessel**") and was heard as an appeal under section 69 of the Arbitration Act 1996. The MOA provided for a cancelling date of 20 August 2021. Sellers became unable to deliver on 12-14 August as agreed, due to a dispute arising out of a recommendation by the Vessel's Class Society. Buyers agreed to extend the cancelling date to 15 October but reserved the right to claim damages on the basis that the failure to meet the original cancelling date was due to the Seller's "proven negligence".

The Vessel was not delivered by the extended cancelling date either. Buyers cancelled the MOA on 18 October 2021.

The Award

The Tribunal held that Sellers' failure to be ready in time was due to their "proven negligence" in failing to arrange for the timely disembarkation of the crew, and Clause 14 was therefore engaged. The Tribunal also held that Buyers were entitled to the difference between the contract price and market price of the Vessel, even though Sellers were not in repudiatory breach of the MOA.

High Court analysis

The Judge held that it was Clause 5, not Clause 14, which set out Sellers' obligations relating to the time of delivery. Clause 14 provided for the consequences of particular conduct but did not in fact contain any primary obligations. Instead, it referred back to Clause 5(b).

Even if there had been a positive obligation on Sellers to tender NOR by the cancelling date, the Judge said that she would still not have held it to be a condition of the contract because:

1. There was no clear wording indicating that tender of Notice of Readiness by the cancelling date should be a condition of the contract.
2. The fact that the MOA contained a cancelling clause at all indicated that, but for the cancelling clause, Buyers would not have had the right to bring the contract to an end for a breach of Clause 5.
3. There was no need to construe the obligation as a condition, as the cancelling clause expressly provided for the same consequences as breach of condition (i.e. it enabled the buyer to bring the contract to an end and provided them with some compensation).

The key question was therefore whether time was of the essence in relation to the Sellers' delivery obligation, and the Judge held that it was not. Clause 5 merely obliged the Sellers to give written NOR when the Vessel was at the place of delivery and physically ready for delivery, and Clause 14 gave Buyers the right to cancel if NOR was not tendered by the agreed cancelling date. The Judge drew a comparison between this situation and the situation under a time charter, where a charterer's right to cancel in the event of non-delivery will generally arise independently of any repudiatory breach by the owner. She also referred to The Griffon [2014], in which the Court of Appeal held that Sellers' right to cancel under Clause 13 of the NSF 2012 did not depend on establishing repudiatory breach, but was instead a contractual remedy in its own right.

As to damages, Buyers argued that Clause 14 contemplated a situation similar to non-delivery, and that Clause 14B therefore permitted recovery of the normal measure of damages stipulated in s. 51(3) of the Sale of Goods Act (i.e. the ordinary compensatory principle).

However, the Judge held that the overriding principle is that the measure of damages is "*the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract*". The starting point must be to identify the particular trigger in respect of which damages are recoverable under the contract. The Judge held that the relevant trigger was the failure to give NOR by the Cancelling Date, and only losses caused by that particular failure were recoverable under Clause 14B. The situation was not equivalent to non-delivery, as NOR could simply have been given later.

The loss and damage recoverable under Clause 14 was therefore limited to the Buyers' accrued losses (such as wasted expenses) which had crystallised at the point of cancellation. This did not include prospective losses caused by the Buyers' cancellation.

Comment

When it becomes necessary for a party to exercise a contractual right of cancellation, the commercial inconvenience to that party will often be the same whether its counterparty has committed a repudiatory breach or whether it has done (or not done) something which expressly allows the contract to be cancelled. It can therefore be tempting to think that "loss of bargain" (i.e. loss of profit) damages will be available in both circumstances. However, the Court found in this case that such damages would only be available if the affected party was able to establish that there had been an accepted repudiatory breach.

The Saleform is of course frequently used in the market, and buyers and sellers should have this decision well in mind – it is in our experience often assumed by a "wronged" party in circumstances such as these that loss of profit damages will always be available. That is not correct. However, an appeal is currently outstanding, and we wait to see whether the Court of Appeal will take a different view.

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