April 2024

CIF Weekly – issue 72

Cargo claims: how to mitigate your losses

Overview

In AMS Ameropa Marketing Sales AG & Anor v Ocean Unity Navigation Inc [2023] EWHC 3264, a case relating to damage to a cargo of yellow soybeans, the High Court of England and Wales (the "**Court**"), held that the Claimants' mitigation efforts in concluding a salvage sale were reasonable, emphasising the high evidential threshold that needs to be met to show that a claimant was unreasonable in mitigating its losses.

Facts

- A cargo of 50,000MT of soybeans was loaded onto the vessel in apparent good order.
- The receivers / lawful owner of the bill of lading at discharge was International Oil Multiseed Extraction Co (the "**Receivers**").
- When the Vessel's holds were unsealed at the discharge port, damage was found on the surface of the cargo in one of the holds (hold 4). The soybeans in the other four holds were found to be sound. A joint survey was carried out which concluded from a visual inspection that the cargo surface inside hold 4 was lumpy, caked, rotten, discoloured, with bad smell and at high temperature.
- The damage on the surface of the hold was indicative of "ship's sweat", which is the result of condensation forming on the underside of the metal hatch covers and dripping onto the cargo. As well as this, a proportion of the cargo was heat damaged.
- The surveyors could not conclude from a visual inspection the exact quantity of damaged cargo but decided that the damaged cargo should be segregated manually and immediately. 15.95 MT of damaged cargo that was in hold 4 was segregated manually from the sound cargo.
- Following further segregation by grabs, a total of 3,631.790 MT of both damaged and sound cargo was discharged from hold 4, and this was rejected in its entirety by the Receivers (the "**Rejected Cargo**").
- A joint inspection of the damaged cargo took place which concluded that further segregation of the damaged cargo was not feasible and that a salvage sale should take place.
- The Rejected Cargo was sold via salvage sale at a price of USD 355/MT and the Receivers received USD 1,289,286.45.
- Further samples of the damaged cargo were taken. The results concluded that the Rejected Cargo was on specification, save for the 15.95MT that was manually segregated.
- The Receivers presented a claim to the First Claimant for USD 375,315 based on the difference between the salvage sale price of USD 355/MT and the sold price being USD 438.75 plus local fees of USD 19.59/MT. The First Claimant gave the Receivers a credit note for the sum of USD 284,015 based on the difference between the salvage sale price of USD 355/MT and the sold price at USD 433.20/MT.
- The Claimant, as assignee of the Receivers' rights, pursued a claim against the registered owners of the vessel for a sum of approximately USD 400,000 on the basis that the Receivers refused to accept the Rejected Cargo and in

reasonable mitigation of loss, the Claimants sold the Rejected Cargo in a salvage sale.

The parties' positions

The Court was asked to consider whether the Claimant had acted reasonably in mitigating its losses.

Owners' position was that Claimant had failed to mitigate its loss in a number of ways, namely by:

1. Refusing to allow manual segregation to take place on board the vessel;
2. Failing to carry out further segregation by grab;
3. Failing to carry out a proper segregation exercise post-discharge notwithstanding SGS's indication that this would be carried out (Owners maintained that all these measures would have limited the contaminated cargo to around 300MT); and
4. Failing to obtain proper bids when seeking alternative buyers and concluding the salvage sale.

The Claimants disputed this, but ultimately the burden of proof was on Owners to show that Claimants had acted unreasonably in relation to each of the points above.

Principles of mitigation

There are three key rules of mitigation, which are described by Chitty on Contracts (at 29-096) as follows:

1. *"First, the claimant cannot recover damages for any part of his loss consequent upon the defendant's breach of contract that the claimant could have avoided by taking reasonable steps.*
2. *Secondly, if the claimant in fact avoids or mitigates his loss consequent upon the defendant's breach, he cannot recover for such avoided loss, even though the steps he took were more than could be reasonably required of him under the first rule.*
3. *Thirdly, where the claimant incurs loss or expense in the course of taking reasonable steps to mitigate the loss resulting from the defendant's breach, the claimant may recover this further loss or expense from the defendant."*

In this case, the Court acknowledged that as the owners were alleging that the cargo interests had failed to mitigate loss then the burden lay on the owner to prove an unreasonable failure. The Court said that the threshold to be applied is a high one since the defendant is the wrongdoer in this case and its breach may have placed the innocent party (the Claimant) in a difficult position (for example, when seeking alternative buyers of the rejected cargo and concluding the salvage sale).

The decision of the Court

The Court held in favour of Claimants and highlighted the reasons why Owners' arguments in relation to mitigation failed. The Court's reasons were as follows:

1) Manual segregation of cargo

Owners failed to show that the Receivers had acted unreasonably in stopping the manual segregation of the cargo. This is because:

- Manual segregation would have been a complex exercise because of the location of the heat damaged cargo (being below the wings and underneath the fuel oil tank);
- Segregating the cargo manually would have been a laborious process taking days or potentially weeks; and
- The crew may have been placed in a potentially dangerous situation when manually segregating the cargo on a steep stow.

2) Further segregation of the cargo

Owners failed to show that cargo interests had unreasonably insisted on discharge by grabs without consideration of further segregation being carried out by some other means. It was decided that once the sound and damaged soybeans were admixed, it was no longer practical to attempt to segregate them further. Whilst Owners' expert identified an alternative and possibly more effective method of segregation (by removing the sound cargo from the starboard side and removing the damaged cargo from the portside), the Court was not swayed by this argument given it had only arisen with the benefit of hindsight and the expertise of the expert. As such, the cargo interests could not be criticised for having not carried out further segregation of the cargo.

3) Alleged failure to obtain proper bids when seeking alternative buyers

Owners alleged that the Receivers had failed to mitigate its loss in concluding a salvage sale, in particular by way of a failure to obtain proper bids or wait until the sampling results were in hand. They argued that the sampling results showed that the Rejected Cargo was within its contractual specification and so could have been sold for a higher price than that obtained through the salvage sale. The Court rejected this argument for the following reasons:

- Though the Rejected Cargo appeared to be in a stable condition at the time of the salvage sale, there was no evidence to show that it would have remained in this state if it had been left in the warehouse for an extended period of time. The parties did not know whether the Rejected Cargo was susceptible to further deterioration and damage and so a salvage sale sooner rather than later seemed to be the best option to the Claimants.
- The Court rejected that obtaining a laboratory analysis was standard practice prior to making a salvage sale. The Court also highlighted that a trader's approach to the sale of a damaged cargo is a commercial decision rather than a matter of technical expertise and so the expert's view was disregarded by the Court.
- Several surveyors that inspected the Rejected Cargo expressed that a salvage sale would be the best course of action.
- There had been more than one bid for the Rejected Cargo and the highest bid was accepted.

The Court ultimately held that the cargo interests' conduct in concluding a salvage sale was a reasonable response to the damage discovered on discharge. The Court did not have the benefit of market evidence on salvage sales or sound market values, and whilst both sides could have obtained such evidence to support their positive case on mitigation, the Court's view was that such evidence was not essential to understand the nature of a salvage sale or decide whether it was reasonable for the Receivers to sell promptly without obtaining a certificate of analysis.

Comment

This case serves as a reminder of the principles of mitigation and the high threshold required to prove unreasonable conduct / failure to mitigate loss by a claimant. This case reinforces the need for claimants to provide supporting documentation to evidence their reasonable efforts made to mitigate their losses and highlights the Court's willingness to balance contractual obligations against practical commercial considerations, in particular having had regard to the commercial realities for commodity traders.

This case also highlights the potential issues that may arise when dealing with a contaminated cargo and in particular, the segregation of a contaminated cargo.

A link to the full judgment can be found here: AMS Ameropa Marketing Sales AG & Anor v Ocean Unity Navigation Inc [2023] EWHC 3264 (Comm) (19 December 2023) (bailii.org)

Authors

Margaux Harris
Associate, London

D: +44 20 7809 2558
E: margaux.harris@shlegal.com

Pammy Verde
Solicitor apprentice, London

D: +44 20 7809 2500
E: pammy.verde@shlegal.com

Contact us

We hope that you find this update both useful and interesting. If you have any comments or would like to learn more about this topic, please get in touch with either your usual SH contact or any member of our commodities team by clicking here.

STEPHENSON HARWOOD