Alexander Wright successful for charterers in Eternal Bliss appeal on exclusivity of demurrage as damages for delay in cargo operations

In an important judgment of the Court of Appeal handed down today, Alexander Wright (led by Christopher Hancock KC of 20 Essex Street) has successfully appealed the decision of Andrew Baker J in *The "Eternal Bliss"* [2020] 2 Lloyd's Rep 419. That decision concerned whether or not the payment of demurrage was an exclusive remedy for delays in cargo operations and was regarded by the Judge as an "*…opportunity to resolve a long-standing uncertainty on a point of law of significance…*" to the shipping industry. It has been widely remarked upon by industry commentators.

The "Eternal Bliss" came before the Courts as a preliminary issue of law for determination under section 45 of the Arbitration Act 1996. The assumed facts were (in summary) that charterers had delayed in discharging a cargo of soybeans, that such delay had led to deterioration of that cargo, and that as a result the owners were exposed to a claim by the cargo receivers which they had reasonably settled for c. US$1.1 million. The contract of affreightment under which the cargo had been carried contained a demurrage clause, and charterers had paid demurrage in full. The issue before the Court was whether or not owners could recover from charterers the sums paid to the cargo receivers, *in addition* to demurrage, on the basis that it was a different "type of loss", even though no breach was alleged against charterers apart from the mere failure to discharge within laytime.

At first instance, Andrew Baker J held that owners could recover such damages in principle, on the basis that demurrage only liquidates losses of freight or other earnings arising from delay to cargo operations, and not separate "types of loss" such as cargo claims. In doing so, the Judge departed from the earlier decision of Potter J (as he then was) in *The "Bonde"* [1991] 1 Lloyd's Rep 136 that established that it would be necessary for owners to demonstrate a breach separate to mere delay in order to recover unliquidated damages in addition to demurrage.

The Court of Appeal (Males LJ giving the judgment of the Court, the other members of which being Sir Geoffrey Vos MR and Newey LJ) reversed Andrew Baker J, restoring what many in the industry might regard as the orthodox position, and approving *The "Bonde"*. On appeal, the Court accepted that whilst (other than *The "Bonde"*) there was no case that had decided this issue as *ratio*, the balance of *dicta* bearing on the point supported charterers' position, and that as a matter of principle demurrage should cover all losses flowing from delay to cargo operations.

As the Court of Appeal itself made clear, this decision provides welcome "*…clarity and certainty…*" ([59]) for those operating within the shipping industry, whilst leaving it open for parties to agree express terms limiting demurrage to covering certain types of loss if so advised. The Judge's construction would be regarded as "*…unusual and surprising…*" given that a liquidated damages clause such as a demurrage provision "*…provides valuable certainty and avoids dispute…*" ([53]), and the lack of clarity that would result from the first instance judgment could be tested against common incidents of delay such as port expenses and hull fouling ([55]). There was, moreover, no evidence that commercial people in the market had been dissatisfied with the decision in *The "Bonde"*, which had stood without any prior judicial disapproval for 30 years, and had (albeit without detailed argument) been treated as correctly stating the law in *The "Luxmar"* [2006] 2 Lloyd's Rep 543 (Langley J); [2007] 2 Lloyd's Rep 542 (CA), and in London arbitrations ([57]).

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Owners are expected to petition for leave to appeal to the Supreme Court, so it is possible that there will yet be a further development in this interesting dispute, but for now at least, the decision of the Court of Appeal should provide a clear answer to this long-running debate.

Alexander Wright was instructed by Darryl Kennard and Andrew Hawkins of Penningtons Manches Cooper LLP.

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