Maritime Bulletin – Argos Pereira Espana SL & anor v Athenian Marine Ltd (mv "Frio Dolphin")

Alexander Wright succeeds in first case establishing a right of equitable compensation against a subrogated insurer bringing foreign proceedings contrary to a forum clause.

The Commercial Court has today handed down its judgment in the important case of *Argos Pereira Espana SL & anor v Athenian Marine Ltd (mv "Frio Dolphin")* [2021] EWHC 554 (Comm). The full judgment can be found here. Alexander Wright, instructed by Kevin Sach of Sach Solicitors, was sole counsel for the successful Defendant ("Owners").

Owners had carried a cargo of frozen seafood aboard mv Frio Dolphin, pursuant to bills of lading governed by English law and subject to London arbitration. Following the discovery of damage to that cargo, the Second Claimant, the consignee's subrogated cargo insurer ("the Cargo Insurer"), commenced proceedings against Owners' managers Lavinia in Spain. Lavinia successfully defended the Spanish proceedings on jurisdictional grounds but incurred substantial irrecoverable costs which Owners sought to recover in arbitration on the basis of the doctrine of transferred loss.

Owners succeeded before a sole LMAA arbitrator and the Claimants sought leave to appeal under section 69 of Arbitration Act 1996. Waksman J refused leave against the arbitrator's finding that the Cargo Insurer was in breach of an "equivalent equitable obligation" to the First Claimant consignee's contractual obligation to arbitrate, following existing case law such as *Airbus SAS v Generali Italia* [2019] 2 Lloyd's Rep 59. However, Waksman J granted leave on *inter alia* two questions which he considered were of "*general public importance*".

The first of those was whether or not a breach of the "equivalent equitable obligation" gave rise to a monetary remedy, in circumstances where the party with derived rights was not a party to the index contract and thus could not be held liable in breach of contract. This was said by Henshaw J in *The Prestige (No 3)* [2020] 2 Lloyd's Rep 223 to be a "*complex and novel*" issue, on which there was no previous clear authority. However, Sir Michael Burton GBE, sitting as a Deputy Judge of the Commercial Court, accepted Mr Wright's "*powerful*" case and "*cogent and persuasive*" submissions, and found that a derived rights obligation of the kind discussed in *Airbus* was in the nature of a substantive equitable obligation, breach of which was capable of sounding in equitable compensation.

The second question that arose for determination was whether or not the arbitrator was right to find that Owners could recover for Lavinia's losses on the basis of transferred loss. He held that both limbs of the test laid down by the Supreme Court in *Swynson Ltd v Lowick Rose LLP* [2018] AC 313 were satisfied. The arbitrator had found that the arbitration agreement on its proper construction extended to claims brought Lavinia – a finding against which the Cargo Insurer had been refused permission to appeal – and as such it followed that the parties must have intended to confer a benefit on Lavinia. If equitable compensation were not available, then Lavinia's losses would disappear into a legal black hole. Lavinia would not have been able to recover damages as the derived rights obligation was one owed to Owners and not it, and any obligation owed to Lavinia not to sue in a manner inconsistent with the terms of the contract did not give rise to any monetary remedy.

Accordingly, the appeal was dismissed and the arbitrator's award was upheld.

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The case is important in that establishes, for the first time, that a party which derives rights from a contract, such as a subrogated insurer or assignee, may be held liable to pay equitable compensation where it brings a claim in a foreign jurisdiction contrary to a forum clause in that index contract. Such a claim might not only cover the costs incurred in fighting that foreign litigation, but the whole of any judgment debt in the impugned foreign proceedings. The right to compensation is a particularly valuable remedy where an injunction is (for whatever reason) not available or appropriate. It is therefore a highly significant decision in extending the range of remedies open to a party sued outside the contractual forum, even where such proceedings are brought in the name of a party with derived rights such as a subrogated insurer or assignee.

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