The Commercial Court recently allowed an appeal by charterers against owners from a decision by an arbitration tribunal on the issue of deadfreight in circumstances where it is apparent to both parties that, for reasons of safety, it is not possible to load a full cargo.

The Archimides was chartered on standard Asbatenkov form, incorporating charterer's standard terms, to load gasoil or unloaded mogas for 3 consecutive voyages and included the provisions that:

- a minimum quantity 90,000 metric tonnes would be loaded each voyage, and
- there was an option for charterers to load/discharge via lighter/ship-to-ship transfer.

In the event, the vessel arrived at the loadport Ventspils but it became apparent that due to earlier bad weather there was sitting of the channel.

This resulted in draught restrictions which lead to the master serving a Notice of Readiness stating that he did not expect to load a full cargo - rather a maximum of approximately 67,000mt. Charterers tendered for loading a quantity of 93,410mt. Both parties knew it was not possible to load such quantity at that time. The quantity actually loaded was 67,058mt.

Owners commenced arbitration proceedings against charterers, claiming deadfreight for the difference between the minimum quantity of 90,000mt and the 67,058mt actually loaded. The Tribunal found in favour of the owners and held that charterers were liable for deadfreight, despite the fact that they had tendered more than the minimum requirement of cargo, on the basis that all parties knew that it would not be possible to load such quantity at that time. The Commercial Court subsequently reversed the decision.

The issues for review were (i) whether charterers had failed to supply the minimum quantity as a matter of fact and (ii) whether the option to load by STS transfer was effectively an obligation on charterers to load the minimum amount of cargo.

On the first issue Gloster J stated that in formally tendering the 93,410mt of cargo, charterers had in fact fulfilled their obligation under the charterparty and even though both parties knew of the draft restrictions, this did not mean that the tender could be stripped of its legal significance:

"The mere fact that both parties knew that such a quantity could not be loaded does not, in the absence of some express contractual provision, mean that the tender of performance had no legal validity."

Further, it was the master who told charterers that he was prepared to load only 67,000mt and it was this refusal on the part of the master which was the reason why the charterer's tender of performance was not accepted. Gloster J went on to say that there was no obligation in the circumstances on charterers to pay deadfreight and that there should be no confusion between the requirement under the charterparty for the charterers to supply a full cargo and a supposed liability to pay deadfreight where, for whatever reason, a full cargo is not loaded on the vessel.

"The obligation [under the Charterparty] was only triggered in the event that the Charterers failed to supply a full cargo."

On the second issue the court held that the failure to exercise the option to load by STS transfer was not a breach of contract. On the facts, charterers had in any event supplied a full cargo and a refusal by the master to load the cargo tendered, did not oblige the charterers to load the cargo by any secondary means which may have been included in the charterparty as an option.

Charterers therefore won their appeal on the issue of deadfreight and owner's claim was rejected.

This recent decision, where the master decided to sail with part cargo on the grounds of safety, can be compared with the decision in The "Johnny K" - Fentontville Shipping Ltd v Transfield Shipping Inc (M V "Johnny K") [2005] EWHC 134 (Comm).

In that case, the Commercial Court also looked at a claim from owners for deadfreight. The vessel sailed without loading its full nominated cargo when it became apparent that if the vessel sailed to load the full cargo, she would miss the high tide and have to wait a further 3 weeks. (The issue of safe port/birth was not relevant because had the vessel completed loading within the laytime, there would not have been a problem sailing with the tide and with a full cargo).

The issue was: who gave the order to sail before the nominated cargo had been loaded and was it an order for which charterers were responsible - the order to sail having an impact on the charterer's duty to load a full cargo under the charter. Possible motivating factors for giving the order to sail might have included whether it was a commercial decision given by the shippers controlling the berth, or whether it was an order given by the Port Authority to avoid having the berth blocked or for reasons of safety.

The court remitted the decision back to the Tribunal to decide the validity of owner's claim on the facts but it may be taken from the judgement that where an order to sail is given by charterers, or by a third party on charterer's behalf, which prevents the loading of full nominated cargo, and the involvement of the Master ordering the vessel to sail on the grounds of safety is not an issue (as in The 'Archimides' above), then there may be grounds for the owners to pursure a valid claim for deadfreight against charterers.

See also Naming Of Ports and Safe Port Warranty - Recent Decisions

Update, May 2008

See Court of Appeal Decision reviewed in Named Ports, Safe Ports and Dead Freight