Charterers’ Obligation to Discharge Cargo - Frustration, Causation and Demurrage

The vessel ‘Andra’ was owned by Sea Metropolitan SA (‘owners’) and was chartered to DGM Commodities Corp (‘charterers’) under a voyage charterparty for the carriage of a cargo of frozen chicken from the United States to St Petersburg.

Due to a delay in berthing, laytime expired and the vessel went onto demurrage prior to the commencement of discharge. On 23 February 2008 cargo operations eventually commenced and on 6 April 2008 discharge of the cargo from hold no.2 began. Some of the cargo was found to be stained from gasoline which had leaked from an adjacent deep bunker tank. On 14 April 2008, other than the cargo in hold no.2, amongst which was the contaminated cargo, the discharge of the vessel was complete. Disputes as to the quantity of affected cargo ensued and on 15 April 2008 receivers demanded a cash settlement in the sum of US$ 2 million. Owners proposed security in the form of a P&I Club letter of undertaking. Receivers would not accept this security and instead persisted in demanding a cash settlement.

On 21 April 2008 the Russian Veterinary Service had levied a suspension prohibiting the movement of the contaminated cargo. The order was considered temporary to the extent that it would continue to prevent discharge until it was revoked or varied.

On 21 October 2008 owners and receivers finally concluded a settlement agreement to re-export the cargo on the vessel with owners paying the receivers US$ 2 million in order to secure the vessel’s release. On the 13 November 2008 the Veterinary Service granted permission for the re-export of the cargo, the vessel departed on 25 November 2008.

The Tribunal found that the contamination was caused by the unseaworthiness of the vessel, for which owners remained liable and, accordingly, held that the consequential delay in discharging that arose on 14 April 2008 was sufficient to interrupt charterers’ liability for demurrage. However, they also found that receivers’ subsequent (and continued) insistence on obtaining a cash settlement, as opposed to accepting a Club letter of undertaking, was not justified.

Accordingly, the Tribunal found that from 15 April 2008 until 25 April 2008 the cause of the delay was not charterers’ failure to discharge the cargo but instead the necessity for the terms of the LOU to be agreed. Time, therefore, did not run during this period.

Owners’ breach did not, however, cease to be causative of the delay after 25 April as it was reasonably foreseeable that the Veterinary Service would intervene and that this would have been the case whether or not security had been agreed. The Tribunal found, however, that it could reasonably have been expected that the Veterinary Service would have resolved the position by 19 May 2008 and thus from this point onwards the delay in discharging ceased to be linked to owners’ initial breach. The Tribunal awarded owners demurrage at the charterparty rate in respect of the period from 19 May 2008 until 25 November 2008 when the vessel sailed and concluded that the charterparty had not been frustrated because the real reason for the continued failure to discharge the cargo was the receivers’ desire to have a cash settlement of the cargo claim and their continued efforts to achieve one, to the exclusion of other, possibly, more normal forms of settlement (ie acceptance of a Club LOU).

Charterers appealed on the basis that the tribunal had made an error of law, that charterers are not liable for acts or omissions of receivers, save insofar as they constitute a receivers’ failure to discharge the cargo, and that in that case the relevant conduct - in pursuing their own commercial interests or preventing re-export of the cargo (as opposed to its discharge) - fell outside the ambit of something delegated by charterers to the receivers. As such, the charterparty was frustrated.

Charterers also argued that the Veterinary Service’s order was not a frustrating event when it was made but, instead, when it persisted and proved not to be temporary. They further alleged that performance of the charterparty was rendered impossible, or at least ‘radically different from that contemplated’.

In dismissing the appeal Mr Justice Popplewell concluded that the arbitrators had decided that the Veterinary Service order could have been successfully lifted earlier had receivers made any attempt to have it lifted. Thus, to his mind, it was not that the Veterinary Service order was not causative of the delay but, rather, that the delay was simply down to the receivers’ conduct in relation to the cargo claim, the Veterinary Service order prevented discharge while it was in place, but the cause of it remaining in place (and therefore preventing discharge) was the receivers’ conduct.

As Mr Justice Popplewell put it:

“...the Tribunal found that the Receivers’ conduct was ultimately the real reason for the cargo not being discharged, because it was the reason why the event which was relied upon as the frustrating event, namely the continued existence of the Veterinary Service’s order, was in place.”

Charterers’ argument that discharge had been delegated to the receivers and that they (charterers) were not liable for the receivers’ conduct resulting in delay that did not fall within the ambit of that authority was rejected. It was the conduct of the receivers that prevented the cargo being discharged which was charterers’ contractually agreed responsibility. Indeed, as Evans J said, in the in the ‘The Aewilda’ (1998) 2 LLR 466:

“...receivers’ Acts

The second submission is that the charterers are vicariously liable for the delay caused by the receivers and their various actions described above. This argument in my judgment is misconceived. The charterers having undertaken, subject to exceptions, that the cargo will be discharged within the agreed period, they will clearly be liable if this is not done, notwithstanding that the discharging operation has become the responsibility of the receiver or of some other party and the charterer plays no part in it himself. Even if this can properly be described as delegating the charterers’ contractual duty, it does not follow that the charterer becomes responsible, vicariously or otherwise, for the receivers and all that they do, or fail to do. The charterer can only be liable when there has been a failure to achieve what the charterers undertook to the shipowner would be done. There was, of course, a failure to discharge within the laytime, for which the charterers are liable in damages or demurrage. The vessel was detained by her arrest and the subsequent judgment. There is no undertaking in the charterparty, express or implied, that cargo receivers will not arrest the vessel, or seek to do so, at the discharging ports.”

Further, as found by the arbitrators:
"Clause 5 of the Charterparty provided for the cargo to be discharged by the Charterers or their agents and clause 18 provided that the Vessel was to be discharged by the Receivers' stevedores."

Accordingly, charterers were under a non-delegable duty to discharge and accordingly they retained responsibility. Charterers were unable to rely upon frustrating events as they were substantially brought on by the conduct of receivers for whom they remained responsible.

*DGM Commodities Corp v Sea Metropolitan SA [2012] 2 LLR 587*

Article by John Coccolatos (john.coccolatos@slmsl.com)