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Ref : Chans advice/204

To: Transport Industry Operators

Bunker dispute

The Hong Kong High Court issued a Decision on 20/12/2017 dealing with a dispute of US\$948,802.05 (as the price of bunkers supplied to a vessel) between a vessel charterer and a bunker supplier. [HCA2265/2016]

The background

The plaintiff Newocean Petroleum was a company incorporated in Hong Kong carrying on the business of sales and distribution of fuel products in Hong Kong.

The defendant Rio Tinto Shipping was a company incorporated in Singapore and was the time charterer of the Vessel MV *Star Big* (“**Vessel**”).

The application

On 1 September 2016, Newocean Petroleum issued the Writ in this Action (HCA 2265/2016), endorsed with a Statement of Claim, against Rio Tinto Shipping. By an affirmation affirmed on 1 September 2016, Pau Yin Ming of Newocean Petroleum applied *ex parte* for leave to issue and serve a concurrent writ on Rio Tinto Shipping out of the jurisdiction.

By Order dated 8 September 2016 made on the *ex parte* application of Newocean Petroleum (“**Leave Order**”), the Master granted leave for Newocean Petroleum to issue a Concurrent Writ and serve a copy of it on Rio Tinto Shipping out of jurisdiction in Singapore.

By a summons (“**Summons**”) issued on 10 January 2017, Rio Tinto Shipping applied under Order 12, rule 8(1) and Order 33, rule 7 of the Rules of the High Court, Cap 4A, for an Order that:

- “1. The Concurrent Writ of Summons issued on 22 September 2016 and service of the same on the defendant be set aside;
2. The Order of [the Master] dated 8 September 2016 granting leave to the plaintiff to issue the Concurrent Writ of Summons and serve the same on the defendant out of the jurisdiction in Singapore be discharged on the following grounds:-
 - (1) The plaintiff’s claim in this action does not fall within Order 11, rule 1(1)(f) of the Rules of the High Court and the Court had no jurisdiction to give leave for issuing and serving the Concurrent Writ of Summons on the defendant out of the jurisdiction; or
 - (2) Having regard to all the circumstances of the case it is not a proper case for service out of the jurisdiction within Order 11, rule 4 of the Rules of the High Court and the Court in its discretion should refuse to grant leave for such service; and/or
 - (3) The plaintiff failed to make full and frank disclosure in its *ex parte* application in respect of which [the Master] made the Order dated 8 September 2016;
3. The action and all claims against the defendant be wholly dismissed with costs (including the costs of this application) to the defendant, to be summarily assessed.”

Transaction between OWB Far East and Rio Tinto Shipping

- (1) By a Sales Order Confirmation dated 27 October 2014 issued by OW Bunker Far East (S) Pte Ltd (“**OWB Far East**”) to Rio Tinto Shipping, OWB Far East acknowledged receipt of Rio Tinto Shipping’s order for 2,100 MT of Fueloil 380-OST3.5% at US\$479.00 per MT, with “New Oceaniow BDN” as “supplier” for delivery to the Vessel on terms that “the sale and delivery of marine fuels described above are subject to the OW Bunker Group’s Terms and Conditions of sale(s) for Marine Bunkers” (“**OWB Terms and Conditions**”).
- (2) There was no mention in the Sales Order Confirmation dated 27 October 2014 issued by OWB Far East to Rio Tinto Shipping of Newocean Petroleum’s “General Terms and Conditions for Sales and Delivery of Marine Fuel” (“**Plaintiff’s Terms and Conditions**”).
- (3) On the contrary, the Sales Order Confirmation dated 27 October 2014 issued by OWB Far East to Rio Tinto Shipping expressly stated that the sale and delivery of marine fuels were subject to the OWB Terms and Conditions.

Transaction between OWB Far East and OWB China

It was alleged in §7.1 of the Statement of Claim that OWB Far East contracted with its affiliate, OWB China to “deliver or arrange for the delivery of the Bunkers to the Vessel on the standard terms of the OW Bunker Group (Edition 2013)”.

Transaction between OWB China and Newocean Petroleum

- (1) By a Bunker Sales Confirmation dated 27 October 2014 issued by Newocean Petroleum to OWB China, Newocean Petroleum confirmed the sale of 2,000 to 2,500 MT of IF 380 at US\$477.50/MT for delivery to the Vessel.
- (2) There was no mention of or reference to in the Bunker Sales Confirmation dated 27 October 2014 issued by Newocean Petroleum to OWB China of Newocean Petroleum’s Terms and Conditions.
- (3) By a Purchase Order Confirmation dated 28 October 2014 issued by OWB China to Newocean Petroleum, OWB China confirmed the purchase of 2,100.00 MT of Fueloil 380-OST 3.5% at US\$477.50/MT for delivery to the Vessel.
- (4) There was no mention of or reference in the Purchase Order Confirmation dated 28 October 2014 issued by OWB China to Newocean Petroleum of Newocean Petroleum’s Terms and Conditions.
- (5) There was also no mention of or reference in the Purchase Order Confirmation dated 28 October 2014 issued by OWB China to Newocean Petroleum of the OWB Terms and Conditions.
- (6) It was alleged in §§9, 10 and 11 of the Statement of claim that:
 - “9. The Plaintiff expressly contracted with [OWB China] that the Plaintiff was to retain title to the Bunkers pending payment, and that pending payment in full for the Bunkers, such Bunkers would be clearly identified as product supplied by the Plaintiff and kept separate from any other fuel or lubricant. In the premises, the Plaintiff did not authorise, permit or license the use of the Bunkers pending payment for, or the passing of property in, such Bunkers.
 10. In support of the matters pleaded in Paragraph 9 above the Plaintiff will rely on its General Terms and Conditions for Sales and Delivery of the Marine Fuel dated March 2014 (the ‘[**Plaintiff’s Terms and Conditions**]’) to which the Plaintiff will refer for their full terms, true meaning and effect. [The Plaintiff’s Terms and Conditions] provide inter alia as follow:-
[The pleader went on to quote clauses 1(a), (b) & (c); 2(c); 3(a); 4(a); 5(a) & (b); 11(a), (b) & (c); and 15.]
 11. The [Plaintiff’s Terms and Conditions] formed part of the [plaintiff-OWB China] Contract notwithstanding the fact that the Bunker Sales Confirmation did not expressly incorporate the [Plaintiff’s Terms and Conditions]:
 - 11.1 It is standard industry practice that each bunker supplier will have its own terms and conditions which apply to orders placed with each bunker supplier and [OWB China] was aware of this practice.
 - 11.2 It was agreed orally or by conduct in around 2014 on more than one occasion between Mr Alvin Wong (on behalf of [OWB China] and Mr Cheung Ting Pong

(on behalf of the Plaintiff), that the [Plaintiff's Terms and Conditions] would apply to all future sales. The Plaintiff sold and [OWB China] purchased bunkers upon the understanding the [Plaintiff's Terms and Conditions] applied to each of the Plaintiff's contracts of sale."

The OWB Terms and Conditions

Clause "H" on "Title" of the OWB Terms and Conditions, Edition 2013, provided as follows:

- "H-1 Title in and to the Bunkers delivered and/or property rights in and such Bunkers shall remain vested in the Seller until full payment has been received by the Seller of all amounts due in connection with the respective delivery. The provisions in this section are without prejudice to such other rights as the Seller may have under the laws of the governing jurisdiction against the Buyer or the Vessel in the event of non-payment.
- H-2 Until full payment of the full amount due to the Seller has been made and subject to Article G.14 hereof, the Buyer agreed that it is in possession of the Bunkers solely as Bailee for the Seller, and shall not be entitled to use the Bunkers other than for the propulsion of the Vessel, nor mix, blend, sell, encumber, pledge, alienate, or surrender the Bunkers to any third party or other Vessel."

Newocean Petroleum's Terms and Conditions

Clause 11 of Newocean Petroleum's Terms and Conditions, March 2014 version, provided that:

- "11. **Passing of risk and retention of title**
Subject to any provision to the contract [sic] in the Sales Contract and/or the Bunker Requisition Form:
- (a) The Seller shall retain the legal and equitable title to the Marine Fuel which shall only pass to the Buyer when the seller [sic] has received in full the price and all amounts due in connection with the respective delivery.
 - (b) Prior to the Seller receiving the price and all amounts due referred to in subparagraph (a) hereof, the Buyer shall hold the Marine Fuel and/or the price and/or any proceeds of sale as bailee and/or trustee for the Seller without prejudice to the Seller's right to assert a maritime lien, attachment or claim against the Vessel more particularly set out in Clause 5 hereof.
 - (c) The Seller has accepted the order for delivery on the Buyer's undertaking to authorize the Seller to give notice to the receivers and/or the Vessel, to which the Marine Fuel has been delivered, of the Seller's right and title to the Marine Fuel and/or the price and/or sale proceeds as the Principal and/or Beneficiary."

Clause 5(a) of Newocean Petroleum's Terms and Conditions was a provision conferring on Newocean Petroleum the right to assert a maritime lien against the vessel and was expressed to be binding upon the buyer as well as the owner. Sub-clause (b) reads:

- "(b) Without affecting the generality of item (a) above, the Buyer and the owner of the Vessel (if not being the Buyer) warrants that the Marine Fuel to which the Vessel is supplied shall:
- (i) be for the operation of the Vessel and the Vessel only; and
 - (ii) before payment of the price of the Marine Fuel has been made in full, the Marine Fuel shall be clearly identified as products supplied by the Seller and shall not be mixed with any other fuel or lubricant from any third party...."

Winding up of OWB China

OWB China was a company incorporated in Hong Kong. On OWB China's own petition, Master M Wong ordered it to be wound up by order dated 25 February 2015.

Payment for the Bunkers

It was alleged in §13 of the Statement of Claim in this Action (HCA 2265/2016) that Newocean Petroleum:

- "has never received payment for the Bunkers. [OWB China] went into liquidation without

paying for the Bunkers.”

Conversion claim under Order 11 rule 1(1)(f)

In its application for leave to serve out of the jurisdiction, Newocean Petroleum relied on Order 11, rule 1(1)(f) of the Rules of the High Court, Cap 4A, which provides that:

“(1) Provided that the writ is not a writ to which paragraph (2) of this rule applies, service of a writ out of the jurisdiction is permissible with the leave of the Court if in the action begun by the writ –

...

(f) the claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction;”

Rio Tinto Shipping stressed that, for Newocean Petroleum to succeed, Newocean Petroleum must establish that the (tortious) damage:

- (1) was sustained; or
- (2) resulted from an act committed;

within the jurisdiction.

Rio Tinto Shipping sought by the Summons to dismiss Newocean Petroleum’s claim summarily.

Retention of title and prohibition against mixing

There was a reason why Rio Tinto Shipping’s attempt to summarily dismiss the conversion claim failed.

Both Newocean Petroleum’s Terms and Conditions and OWB Terms and Conditions prohibited mixing of the bunkers:

- (1) Clause 5(b)(ii) of Newocean Petroleum’s Terms and Conditions provided that the “Marine Fuel shall be clearly identified as products supplied by the Seller and shall not be mixed with any other fuel or lubricant from any third party”; and
- (2) Clause H-2 of the OWB Terms and Conditions provided that “... the Buyer agreed that it ... shall not be entitled to ... mix ... the Bunkers ...”.

By §15.1, §§15.3 – 15.4 and §16 of the Statement of Claim, Newocean Petroleum complained that:

“15. The Defendant asserted rights inconsistent with the Plaintiff’s rights as owner of the Bunkers, by impliedly or expressly, by itself or through its agents or servants:

...

15.3 Permitting and facilitating the Owner and its agents or servants, in those circumstances, to mix the Bunkers with other fuel on board the Vessel;

15.4 Undertaking that it had the right to grant such permission; and

15.5 Failing to procure the Owner and its agents or servants to segregate the Bunkers on board the Vessel.

16. In the premises, the Defendant converted the Bunkers to its own use.”

It was plain that Newocean Petroleum was also relying on “mixing” in its conversion claim. Newocean Petroleum was not relying solely on consumption of the fuel.

Pumping of the Bunkers commenced at 00:55 hours on 30 October 2014 and completed at 05:00 hours on the same date. The Vessel was within the jurisdiction throughout the pumping period. At the end of the period, the position in relation to Bunker P and Bunker S was as follows:

"Tank No(s)	Vessel remain on board quantity before bunkering (M/tons)	Vessel remain on board quantity after bunkering (M/Tons)
Bunker P	0.589	1,063.137
Bunker S	2.257	926.564 "

This meant that:

- (1) $1,063.137 \text{ M/Tons} - 0.589 \text{ M/Tons} = 1,062.548 \text{ M/Tons}$ of the Bunkers had been mixed with 0.589 M/Tons of (unknown) substance in Bunker P; and
- (2) $926.564 \text{ M/Tons} - 2.257 \text{ M/Tons} = 924.307 \text{ M/Tons}$ of the Bunkers had been mixed with 2.257 M/Tons of (unknown) substance in Bunker S.

The identity of the Bunkers had been lost upon mixing and it was not possible to identify, retrieve or return the Bunkers. The amount of Bunkers which had been mixed with unknown substance(s) or fuel totalled $1,062.548 \text{ M/Tons} + 924.307 \text{ M/Tons} = 1,986.855 \text{ M/Tons}$.

Rio Tinto Shipping argued that it was not possible to completely empty fuel oil from a tank. Assuming without deciding that it was so, mixing the Bunkers with what remained in Bunkers P and S before bunkering was still arguably in breach of Clause 5(b)(ii) of the Plaintiff's Terms and Conditions and Clause H-2 of the OWB Terms and Conditions, as both prohibited any form of mixing, with no allowance for what remained in containers before pumping. In any event, there was no evidence that what remained in Bunkers P and S before bunkering could not be emptied.

Thus, Newocean Petroleum had a good arguable case as pleaded in §§15 and 16 of the Statement of Claim. The Judge held that Newocean Petroleum had a good arguable case on conversion. Irrespective of whether consumption took place within the jurisdiction, Newocean Petroleum had a good arguable case of conversion based on mixing of the Bunkers with unknown substance(s) or fuel and this mixing took place within the jurisdiction.

Material non-disclosure of Newocean Petroleum's claim in contract in the ex parte application for leave

It is trite that the plaintiff must make full and frank disclosure in its *ex parte* application.

In the grounding affirmation for the *ex parte* application, Pau Yin Ming of Newocean Petroleum stated in §66 of his affirmation dated 1 September 2016 that:

"...the Plaintiff is not relying on Order 11 Rule 1(1)(d) or any claim in contract in the present proceedings."

What Pau Yin Man did not say was that prayer (1) in the Statement of Claim was a claim by Newocean Petroleum against Rio Tinto Shipping:

"(1) A declaration that by the terms of its contract with [OWB China] and/or (insofar as such terms were binding on the Defendant) with the Defendant, the Plaintiff did not authorize or grant a permission or licence to use the Bunkers for the purpose of propulsion of the Vessel pending payment for, and the payment for, and the passing of property in, such Bunkers:"

This claim, somewhat convoluted, was (at least arguably) a claim in contract. It sought:

A declaration "by the terms of its contract with [OWB China] and/or ... with the Defendant ..."

Such claim was premised on "the terms of its contract with [OWB China] ... (insofar as such terms were binding on the Defendant)." Newocean Petroleum went so far as to rely on "the terms of its contract ... with the Defendant".

In the Judge's judgment, it was at least arguably a claim in contract and prayer (1) should have been expressly drawn to the attention of the Master in the plaintiff's application for leave. There was material non-disclosure and the Judge set aside the Leave Order. The Judge declined to re-grant an order. Material non-disclosure is a serious breach of the duty of full and frank disclosure in applications where the court relies on the applicant to draw attention to all material matters. There was no explanation for the non-disclosure, Newocean Petroleum simply denying that there was no non-disclosure. This would not do.

Order

The Judge ordered that:

- (1) the Leave Order be discharged;
- (2) the Concurrent Writ of Summons issued on 22 September 2016 and service of the same on the defendant be set aside; and
- (3) the costs of the Summons be paid by Newocean Petroleum to Rio Tinto Shipping, to be taxed if not agreed.

Please feel free to contact us if you have any questions or you would like to have a copy of the Decision.

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