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To: Transport Industry Operators

Indemnity claims vis-à-vis in rem proceedings

The Hong Kong Court of Appeal's Judgment dated 11/4/2008 explained some legal principles relating to whether indemnity claims are allowed by in rem legal actions against vessels. [CACV 257/2007]

Introduction

The "ASIAN ATLAS" ("the Ship") was arrested by the Plaintiff (Northrop Grumman Ship Systems Inc) on 11 April 2007. Two affidavits in support were filed. The endorsement on the Writ in rem pleaded two heads of claim : -

"(a) Damages and/or an indemnity and/or contribution against any and all liability, loss, damage and/or expense suffered and/or to be suffered by the Plaintiffs in connection with the collision between the vessel, 'M/V ASIAN ATLAS', when it was named 'M/V AMERICAN CORMORANT' ('the Vessel'), and a subsurface launchway owned by the Plaintiff as the Vessel entered the harbour in Pascagoula, Mississippi on 15 August 2004, and/or in consequence of claims made and/or to be made against the Plaintiffs arising out of and/or in connection with the aforesaid collision, insofar as the collision was caused or contributed to by the negligence of the compulsory pilot of the Vessel at the material time;

(b) Damages for damage caused by the Vessel to the Plaintiff's subsurface launchway as the Vessel entered the harbour in Pascagoula, Mississippi on 15 August 2004;"

For convenience, these two claims were referred to as, respectively, the Indemnity Claim and the Damage Claim.

Following arrest, a Notice of Motion dated 13 April 2007 was taken out by the Defendant, the owners of the Ship, seeking an order setting aside the Warrant of Arrest issued by the Court on the ground that (a) the Indemnity Claim did not give rise to a statutory right in rem under section 12A(2)(e) of the HCO; and (b) insofar as the Damage Claim was concerned, there had been a material non-disclosure of a relevant fact and there was no evidence that any damage had been suffered.

On 2 May 2007, the Ship was released from arrest upon payment into court by the Defendant ("the shipowner") of US$4.5 million. The amount of US$4 million of this was attributable to the Indemnity Claim, and that the balance of US$500,000 was referable to the Damage Claim.

The setting aside motion was heard by the High Court on 31 July 2007. An *ex tempore* judgment was delivered the same day, in which the High Court dismissed the shipowner's application. On 11 April 2008, the Court of Appeal allowed the appeal with costs, set aside the Warrant of Arrest and ordered the payment out to the shipowner of the monies paid into court as security for the Plaintiff's claim.

Facts

On 15 August 2004, the Ship (then named "AMERICAN CORMORANT"), while navigating the

Pascagoula River in Mississippi, collided with a submerged submarine launchway belonging to the Plaintiff ("the launchway owner"), as a result of which, damage was caused to the Ship.

Proceedings were instituted in 2006 in the US District Court for the Southern District of Mississippi (Southern Division) by the then owners and operators of the Ship against, among others, the launchway owner and the compulsory pilots who had been on board the Ship (the compulsory pilots were provided by the Pascagoula Bar Pilots Association). The former owners and operators of the Ship were Cormorant Shipholding Corp ("Cormorant") and Osprey Ship Management Inc ("Osprey").

There was a change of ownership in the Ship in February 2005 when she was sold to a company called Master View Co Ltd. Master View in turn sold the Ship in June 2005 to Asian Atlas Ltd (the Defendant). The claim made in the US proceedings by Cormorant and Osprey was for damages for the repairs that were carried out to the Ship, and also the loss of hire and earnings (she was on charter) for the period she was undergoing repairs and therefore out of service.

In October 2006, the launchway owner filed an in rem claim in the US proceedings against the Ship, claiming an indemnity in the event it were to be held liable in the main action to Cormorant and Osprey. The basis of the claim for an indemnity was that it was alleged the casualty was caused by the fault of the compulsory pilots on board the Ship (for which casualty, the launchway owner alleged, under US law, responsibility therefor lay with the Ship).

The indemnity sought to cover the situation where the launchway owner might have to pay for the pilots' share of liability to Cormorant and Osprey. In other words, where, for example, it was to be held in the main action in the US that both the launchway owner and the pilots were liable to Cormorant and Osprey and that their respective contributions were, say, 40% and 60%, Cormorant and Osprey might then look to the launchway owner to pay the entirety of the damages awarded if, for any reason, they could not obtain any satisfaction from the pilots. In such a situation, the launchway owner would have to pay the damages awarded to the full extent, even though its blameworthiness was only 40%. This was effectively the Indemnity Claim as made in the proceedings in Hong Kong.

Service on the Ship was not possible in the US proceedings. Then came the usual worldwide search for the Ship. It was only when she came to Hong Kong that service in rem could be effected, and the arrest consequently made.

The issues

There were essentially two issues : -

(1) In relation to the Indemnity Claim, it was contended by the shipowner that this claim did not fall within any of the established heads of claim attracting the in rem admiralty jurisdiction of the Court. Specifically, it did not fall within section 12A(2)(e) of the HCO. The relevant damage was damage *to* the Ship herself. This simply did not constitute, in the words of the section, "damage done *by* a ship". The relevant damage was the potential liability of the launchway owner in the US proceedings (for which the indemnity was sought), and this was not caused by the Ship either.

(2) In relation to the Damage Claim, this element did fall within section 12A(2)(e). However, there was no evidence that any loss had been caused to the launchway owner, certainly no loss that had been quantified. Moreover, at the *ex parte* stage (when the Warrant of Arrest was sought by the launchway owner) there had been a material non-disclosure of the fact that the launchway owner's submerged submarine launchway had not been used for a period of 36 years prior to the incident. This, the shipowner argued, ought to result in the Warrant of Arrest being set aside, or at the very least in the amount of security ordered in relation to the claim (US$500,000) being reduced.

The High Court rejected both arguments. The High Court was of the view that the Indemnity Claim did come within the ambit of section 12A(2)(e) and that, in relation to the Damage Claim, there was no material non-disclosure, and that there was evidence that the sum of US$500,000 was not excessive. Hence the appeal.

The First Issue : Ambit of Section 12A(2)(e) of the HCO

The section 12A(2)(e) type of claim is a statutory right in rem. If the Indemnity Claim came within this definition, it also would give rise to a maritime lien on the Ship (in the classic sense and not just a statutory right in rem). This was important in view of the requirements of section 12B(3) of the HCO, which allows an action in rem to be brought against the relevant ship where a maritime lien is involved notwithstanding the absence of the coincidence of ownership both at the time of arrest and the time when the cause of action arose as required for other maritime claims giving rise to mere statutory rights in rem (the section 12B(4) requirement).

Section 12A of the HCO sets out the "Admiralty Jurisdiction of the Court". In it are enumerated the specific types of claims, questions and proceedings which would engage this jurisdiction of the Court of First Instance. This is a jurisdiction that has unique facets (perhaps the principal one being the action in rem carrying with it the right to arrest ships); among the types of claims covered include claims concerning ships in relation to ownership, mortgages, damage received by ships, cargo claims, necessaries provided to a ship. All these claims, questions and proceedings are in connection with ships, but rather than merely use a wide, general phrase such as 'claims, questions or proceedings in connection with ships', the Ordinance sets out specific types of claims, questions or proceedings.

Section 12A(2)(e) states that one of the claims that will attract the admiralty jurisdiction of the Court is " any claim for damage done by a ship". The type of claim referred to in this subsection is in respect of "damage caused by a ship". Of course, a ship can only cause damage through the wrongful acts or omissions of persons (such as her master and crew), but nevertheless the essence of the type of claim is that the relevant damage must be caused by something done physically or directly by the ship herself in the course of her navigation or management. By definition, such damage must be caused to persons or objects external to the Ship.

A brief reference to the relevant authorities may also assist : -

(1) In *Currie v M'Knight* [1897] AC 97 (House of Lords), at 101, Lord Halsbury LC referred to the ship against which a maritime lien was claimed having to be the

> "…instrument of mischief, and that in order to establish the liability of the ship itself to the maritime lien claimed some act of navigation of the ship itself should either mediately or immediately be the cause of the damage."

(2) Lord Watson in the same case said this at 106 : -

> "I think it is of the essence of the rule that the damage in respect of which a maritime lien is admitted must be either the direct result or the natural consequence of a wrongful act or manoeuvre of the ship to which it attaches. Such an act or manoeuvre is necessarily due to the want of skill or negligence of the persons by whom the vessel is navigated; but it is, in the language of maritime law, attributed to the ship because the ship in their negligent or unskilful hands is the instrument which causes the damage."

(3) In *The Eschersheim* [1976] 1 WLR 430 (House of Lords), Lord Diplock said at 438 F-H (in an obiter passage but one with has consistently been applied) : -

> "The figurative phrase 'damage done by a ship' is a term of art in maritime law whose meaning is well settled by authority. (*The Vera Cruz (No.2)* (1884) 9 P.D. 96; *Currie v M'Knight* [1897] A.C. 97.) To fall within the phrase not only must the damage be the direct result or natural consequence of something done by those engaged in the navigation of the ship but the ship itself must be the actual instrument by which the damage was done. The commonest case is that of collision, which is specifically mentioned in the Convention: but physical contact between the ship and whatever object

sustains the damage is not essential – a ship may negligently cause a wash by which some other vessel or some property on shore is damaged."

(4) In *The Rama* [1996] 2 LL. L. Rep. 281, Clarke J referred to the foregoing and other authorities, and summarized the position in the following way at 293(2) : -

"In my judgment, the cases show that to be 'damage done by a ship' and thus to qualify as giving rise to a maritime lien three criteria must be satisfied: 1. the damage must be caused by something done by those engaged in the navigation or management of the ship in a physical sense; 2. the ship must be the actual or noxious instrument by which the damage is done; and 3. the damage must be sustained by a person or property external to the ship."

(5) Clarke J also said that the relevant damage must be caused by some physical act of the ship resulting from her negligent navigation or management : at 294(2) and 295(2).

While a physical act on the part of the ship - "the actual or noxious instrument by which the damage is done" - is required, the damage or loss that is caused need not be purely physical. Economic loss may come within section 12A(2)(e). Where a ship, having been navigated in a dangerous manner, drove away another ship from fishing grounds with the result that financial loss was caused to that other ship, this would fall within the provision : - see *The Dagmara and Ama Antxine* [1988] 1 LL. L. Rep. 431.

Nor must it be that the damage or loss claimed is directly caused by the act of the ship, in that consequential loss (that is, loss consequent on the damage actually caused by the ship) may be claimed. For example, where Ship A collides with Ship B as a result of faulty navigation on the part of Ship A, a claim can be made not only for the actual damage sustained by Ship B (say, the cost of repairs), but a claim may also be made for an indemnity in respect of a liability sustained by the owners of Ship B to third party interests (say, a claim made in respect of cargo on board Ship B which had been damaged or delivered late as a result of Ship B being out of service consequent on the collision).

A further example of where an indemnity for consequential damage can be claimed is provided by the facts of *The Beatanavis*, unreported, 13 October 1999, Queen's Bench Division (Admiralty Court). That case involved an indemnity sought by the owners of Ship A against Ship B (which had collided with Ship A) in terms of the potential liability of Ship A to Ship C (with which Ship A had in turn collided). David Steel J held that this situation came within the equivalent English provision to our section 12A(2)(e).

In principle therefore, there is no reason why a claim for an indemnity to third parties or other consequential damage cannot be included for the purposes of section 12A(2)(e), but it remains essential that such a claim be consequent upon some damage that has been actually caused by the relevant ship as the instrument of such damage. It will not suffice for there to be loss or damage caused merely through negligent navigation if the ship herself was not the actual instrument of the damage. In *The Rama*, Clarke J proffered two examples where the equivalent of section 12A(2)(e) was not engaged : where injury to a person on board a ship was caused through negligent management of that ship (hatchway covered only by tarpaulin) : see 293(2) referring to *The Theta* [1894] P 280; damage to cargo on board a ship is not damage done by the carrying ship : at 294(1) referring to *The Victoria* (1887) 12 PD 105. See also : - *Thomas : Maritime Liens* at paragraph 178 and *Meeson : Admiralty Jurisdiction and Practice* (3rd edition) at paragraph 2.55-2.59.

The Indemnity Claim was a claim for an indemnity that would arise in the event that the launchway owner became liable in the US proceedings to Cormorant and Osprey in respect of the negligence of the compulsory pilots. However, the loss giving rise to the claim for an indemnity would not have been caused by the Ship as the actual or noxious instrument. Nor would such loss be consequent upon any loss or damage caused by the Ship as the actual or noxious instrument of damage. The loss to the launchway owner in such a situation would have been caused by, and be directly

attributable to, the negligence or fault of the pilots alone. The Ship would have caused no loss or damage; indeed the loss or damage suffered by the launchway owner would originate from the damage to the Ship herself. Accordingly, it seemed extremely odd to suggest that the damage suffered by the Ship was caused by the Ship herself.

The Indemnity Claim might also be analyzed by reference to the three requirements set out in *The Rama* : -

(1) The first requirement was satisfied in that the relevant damage could be said to have been caused by the compulsory pilots (for whose acts or omissions, according to the launchway owner, the Ship was responsible).
(2) The second requirement was not satisfied. The damage was not caused directly or indirectly by the Ship as the actual or noxious instrument. It would have been caused by the fault of the compulsory pilots.
(3) Nor was the third requirement satisfied. The damage was sustained by the Ship herself. It was this damage that led to the possible situation where the launchway owner might have to be liable to the former owner and operator of the Ship (and for which the launchway owner claimed an indemnity).

The launchway owner sought to argue that all three requirements were satisfied. The launchway owner submitted that the relevant damage was the loss (or potential loss) of the launchway owner in particularly having to be responsible to Cormorant and Osprey for the liability of the pilots, rather than damage to the Ship herself. Therefore, the launchway owner argued, the third requirement was satisfied : the damage had been suffered by a person (viz, the launchway owner) external to the Ship. The Court of Appeal doubted this was correct. The relevant damage was the damage to the Ship, and it was this damage that would lead to the indemnity claimed by the launchway owner. Even if the Court of Appeal was wrong, and the relevant damage was the loss to the launchway owner, the second requirement certainly was not satisfied; it could not be said that the Ship herself was the actual or noxious instrument which had physically caused this damage. The cause of the damage would only be the fault or neglect of the pilots, not the Ship.

The launchway owner also suggested that it was enough that the claim arose because it was in connection with the Ship. In other words, but for the Ship, there would be no loss. Plainly this was insufficient. The admiralty jurisdiction of the Court is engaged when one of the specific situations set out in section 12A applies and not otherwise. It is not engaged simply because there is a claim in connection with a ship.

The launchway owner finally relied upon "the sympathy factor". In the scenario envisaged, wherein the launchway owner might have to become liable to the former owners and operators of the acts or omissions of the pilots, it would, the launchway owner submitted, be manifestly unfair if an innocent party like the launchway owner should have to shoulder the loss. In the Court of Appeal's view, this was irrelevant when construing the meaning and ambit of a jurisdictional provision such as section 12A(2)(e). In a nutshell, jurisdiction is jurisdiction : it either exists or it does not. In any event, insofar as sympathy might come into it, the position of the shipowner (the new owners) merited equal consideration.

There is no dispute that as a matter of principle, a claim for an indemnity or consequential loss is possible. However, the critical question to be addressed was whether the Indemnity Claim, when tested against the requirements of section 12A(2)(e), came within it.
For these reasons, the Court of Appeal was of the view that there was no jurisdiction to arrest the Ship in relation to the Indemnity Claim.

The second Issue : the Damage Claim
There was no dispute that this claim did come within section 12A(2)(e) : the alleged damage was to

the submerged submarine launchway, and this was as a direct result of a physical act of the Ship herself.

The problem that faced the launchway owner, however, was whether it had suffered any damage at all. US$500,000 of the amount paid into court was said to reflect the quantum of this claim. However, there was no evidence whatsoever in support of this figure or any other figure. The affidavits leading to the arrest of the Ship stated that full particulars of the damages in relation to this claim would be provided when available. They never were. The Court of Appeal accepted that in cases where there had been a recent casualty or where other good reasons existed, it might not always be practicable to provide a ready and immediate assessment of the quantum of loss at the arrest stage, but in the case in question, the casualty occurred in August 2004, and legal proceedings in the US had been afoot since at least 2006. Yet the best that the launchway owner had been able to do was for its US attorney to depose in an affidavit that he had been informed by the launchway owner's engineer that the cost of repairing the launchway would exceed US$100,000. No sources or basis were provided in support of this bland statement (as required by RHC O.41, r.5(2)) and no explanation was given as to why more details could not have been provided.

Moreover, on the facts, it would appear that prior to the casualty, the launchway had not been in use for 36 years. The affidavit evidence of the shipowner referred to the testimony that was given by a Sector Director of the launchway owner in the US proceedings. The relevant part of the testimony was as follows : -

> " Q : Right. Now, when I think of marine ways I think of like a railway.
> A : Uh-huh.
> Q : With cross ties and something in the middle to support the keel of a vessel. Is that what these marine ways look like on land?
> A : You've got me. I don't know.
> Q : You don't know?
> A : No. Let me just clarify that. By the time I had come to work at Northrop Grumman they were not using these anymore. We don't use them. We don't launch ships that way, we haven't since probably 1970.
> Q : So for 36 years these marine ways have been obsolete?"

It was this fact (namely that the launchway had not been in use for 36 years) that led the shipowner to allege in the application in question that there had been material non-disclosure in the application for a warrant of arrest. The Court of Appeal accepted that in the context of an application for a warrant of arrest, the requisite disclosure of material facts relate primarily to questions of jurisdiction and not to merits : see *The Tat Yau 8* [1998] 4 HKC 108, at 114H-115E (Stone J); *Hong Kong Civil Procedure 2008* Vol.1 at paragraph 75/5/11. In the case in question, however, given the inability of the launchway owner to quantify any damage, if the Court had been informed at the *ex parte* stage that in fact the launchway had not been in use for 36 years, it may well have taken the view that no real claim existed in the first place.

In the Court of Appeal's view, there was material non-disclosure in the case in question. The admiralty jurisdiction of the Court is often regarded as draconian; the arrest of a ship carries with it considerable inconvenience, if not financial loss, for which redress is not always easy, and it is precisely for this reason that considerable care must be taken to ensure that the affidavit leading the warrant of arrest must properly depose to all material facts which are said to justify the exercise of this particular jurisdiction.
For these reasons, the Court of Appeal was of the view that in relation to the Damage Claim, the admiralty jurisdiction of the Court should not have been engaged.

Conclusion
It was for the above reasons that the appeal was allowed.

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

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