SUN MOBILITY
Insurance and Claims Services Limited
新移動保賠顧問有限公司

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To: Transport Industry Operators

2 lawyers for 1 party

The High Court of Hong Kong issued a Decision on 23 May 2018 allowing a shipowner to be represented by 2 different firms of solicitors (one appointed by its hull underwriters and the other appointed by its P&I Club). [HCAJ84/2017] [2018HKCFI1136]

Introduction

This was the same collision case we reported in our last issue of Chans advice/211 dated 13 August 2018. The **Rainbow** collided with the **Calandra**. The Rainbow sank with cargo, fuel and effects on board but with no loss of life. The Calandra was damaged but later repaired.

Arising from the collision were different sets of proceedings *in rem* and *personam*:

(a) HCAJ 109/2011 – action *in personam* by the Calandra's owner against the Rainbow's owner. There had been no progress between 2011 and 2017. It had since been "superseded" by the Calandra's owner's claim in a reference in the action in question (HCAJ 84/2017).
(b) HCAJ 123/2013 – action *in rem* by the Rainbow's owner against Calandra. It had not been progressed but the related action *in personam* (ie HCAJ 84/2017) was.
(c) HCA 1260/2013 (subsequently became HCAJ 84/2017) – action *in personam* by the Rainbow's owner against the owner of the Calandra. In view of the Settlement Agreement on liability, this action was proceeding by way of respective claims in a reference confined to matters of quantum. The claim and cross-claim were the main active proceedings.

The writ in the action in question (originally HCA 1260/2013) was filed by the law firm HG on behalf of the Rainbow's owner on 11 July 2013, on the instructions of the hull and machinery underwriters. On 19 July 2017, a Settlement Agreement was signed by the law firm HFW on behalf of the Calandra's owner and HG on behalf of the Rainbow's owner. It apportioned liability at 1/3 Calandra : 2/3 Rainbow. The Settlement Agreement provided for claims for damages to be referred to the Registrar. On 9 October 2017, the Calandra's owner filed its cross-claim.

On 10 November 2017, the parties went before a Master for directions. HG informed the Master that they had limited instructions, did not represent the Rainbow's owner in respect of the cross-claim and declined to make submissions therefor. On 30 November 2017, the law firm RSRB filed a notice of change of solicitors to replace HG. RSRB purported to act on behalf of the NOE P&I Club ("**the P&I Club**"), ie liability underwriters for the Rainbow's owner, to defend the cross-claim.

On 13 February 2018, notwithstanding the agreement of HG and RSRB to co-counselling, the Master ordered that RSRB be removed from the record and that HG did remain on record as solicitors for the Rainbow's owner ("**the February Order**").

Anxious to protect the P&I Club's position, RSRB filed a defence for the P&I Club, a Notice to Act restricting the representation to defend the Calandra's owner's "counterclaim", and a "co-counselling" summons for HG to remain on record for the Rainbow's owner's claim and RSRB for the Rainbow's owner's defence to the Calandra's owner's "counterclaim".

On 1 March 2018, the Master dismissed the co-counselling summons ("**the March Decision**"). This was RSRB's appeal against it.

Legal principles on legal representation

The primary rule is that there should be no separate representation for co-plaintiffs: *Lewis v Daily Telegraph Ltd (No.2)* [1964] 2 QB 601, 621, Pearson LJ.

The general rule is that the insured and the insurer cannot have separate representation even if there are "insured" and "uninsured" elements to the claim; or where commercially speaking, a nominated party is a person behind whom different insurers stand or who is involved in more than one capacity: *Elphick v Westfield Shopping Centre Management Company Property Ltd* [2011] NSWCA 356, §§8 and 10, Young JA.

If there is a difference in view or conflict of interest between the 2 teams of lawyers for the plaintiff, the difference or conflict could be reflected in the pleadings. *Secker v Oxfordshire County Council* 1992 WL 12678895, p 4, Stuart-Smith LJ (dissenting).

The rationale, as set out in the dissenting judgment of Stuart-Smith LJ in *Secker*, p 4, is that there may be all sorts of practical problems arising in dual representation.

> "Are they to be allowed two speeches? Can they cross-examine each other's witnesses? Can they both cross-examine the other party's witnesses? If there is to be a settlement, who has authority to negotiate? Mrs Secker may be subjected to conflicting advice from her two sets of lawyers. Which advice is she to take? It may be that some of these problems can be resolved by the trial judge, but I think he is placed in a very difficult position. He must not allow inconsistent cases to be advanced by Mrs Secker's different counsel; yet, if they are not to be inconsistent I can see no point in separate representation.

However, the court has inherent power to give leave for separate representation but leave is not likely to be granted and full evidence must be submitted as to why an exceptional order should be made: *Elphick*, §10.

In fact, Pearson LJ had made clear that he was not saying that it would be impossible ever in any case to have separate representation, wholly or partially, in a consolidated action. He referred to a case in which 8 actions were consolidated as to the issue of liability but separate representation was allowed as to the issue of damages: *Lewis*, p 620.

Separate representation of a plaintiff was upheld in *Secker* by a majority in the Court of Appeal. That case involved 2 actions arising out of one collision between a car and a van:

(i) One action by S, the administratrix of the car driver (without legal aid or insurance cover) against the Oxfordshire County Council as highway authority (insured); on advice, S did not sue the van driver M; and
(ii) The other by M (without insurance cover) against S and Brooklands Aviation Ltd alleged to be vicariously liable for the negligence of the car driver. Both defendants were covered by the insurer, Royal. Brooklands Aviation issued third party proceedings, causing Oxfordshire CC to become a defendant.

The trial judge allowed the administratrix to have separate representation in the 2 actions.

On appeal by the Oxfordshire CC, by a majority of 2 to 1, the Court of Appeal, upheld the exercise of the trial judge's discretion.

(a) Lord Donaldson MR held that the trial judge undoubtedly had power to restrict representation in an appropriate case.
(b) There was no consolidation although the 2 actions were ordered to be tried at the same time.
(c) "The basic problem" was that S as plaintiff in the 1st action was a quite different person from S, alias Royal, who was the defendant in the 2nd action. S was not willing to put forth Royal's primary defence lest she incurred irrecoverable costs. Royal was not willing for its defence to be handled by a legal team which did not really believe in it.
(d) There was no anticipated increase in time and expense at the trial
(e) Balcombe LJ knew of no power in the Court of Appeal to require S to discharge one or other of the solicitors who acted for her in the 2 actions.

Legal principles for appeal

An appeal against a master's decision operates by way of rehearing and the judge exercises the discretion afresh. It is not necessary to demonstrate an error of law on the part of the master. See *Hong Kong Civil Procedure 2018,* Vol 1, §58/1/2.

Application of the legal principles

The following factors are relevant.

Firstly, the Rainbow's owner no longer had interest in the action in question, it having been fully paid by the hull and machinery underwriters. The Rainbow's owner had been struck off the Register of International Business Companies of St Vincent and the Grenadines on 30 December 2016, but was only restored to the register for the purpose of litigation. So no one from the Rainbow's owner would be giving instructions at all. The hull and machinery underwriters and the P&I Club were the real entities having interest in the litigation in question.

Secondly, the hull and machinery underwriters and the P&I Club had different rights derived from different sources. The hull and machinery underwriters had a right of subrogation under section 79(1) of the Marine Insurance Ordinance, Cap 329 because of the total loss of the Rainbow. In addition, they had rights arising out of the Discharge Receipt and the Settlement Agreement. The P&I Club derived its right to represent the Rainbow's owner from rule 34(5) of the 2017 P&I Rules.

If the hull and machinery underwriters succeeded on their claim, the Calandra's owner or its insurer should pay damages. On the other hand, if the Calandra's owner was successful on the cross-claim, the P&I Club (not the Rainbow's owner or the hull and machinery underwriters) should pay.

This allocation of insurance among different insurers is entirely normal for shipowners, hull and machinery underwriters and P&I insurers in admiralty cases. Neither the hull and machinery underwriters nor the P&I Club disputed each other's non-overlapping authority to represent the Rainbow's owner.

Thirdly, the claim and cross-claim were commenced as separation actions and there was no formal order for "consolidation".

Fourthly, the Settlement Agreement was entered into without knowledge or instructions of the P&I Club. When the P&I Club learnt of it, it decided, for commercial reasons, not to overturn the settlement. Every party/insurer was thus willing to confine itself to assessment of damages. The P&I Club should not be punished for taking this sensible step and be forced to have a firm of solicitors not of its choice.

Fifthly, no conflict of interest was anticipated between the hull and machinery underwriters and the P&I Club as liability had already been apportioned and damages for assessment would be heard by a Master. The cross-claim was an independent claim. The facts relevant to establish the damages of each party did not overlap. HG/the hull and machinery underwriters and RSRB/P&I Club did not wish and had no right to make submission on each other's defence/claim. The assessments could be heard one after the other as a matter of case management.

Sixthly, the P&I Club was discontented with the way HG handled the litigation in question eg in not informing the P&I Club of the settlement or the Master's directions. It was not fair to force it to retain a firm of solicitors about whom it had reservations.

Considering all circumstances, the Judge found it proper to exercise her discretion to grant an exceptional order of co-counselling of the Rainbow's owner. The decision did not contradict the February Order, which was plainly right because RSRB/P&I Club had no right to replace HG.

Conclusion

The Judge allowed the appeal and set aside the March Decision. The Judge made an order in terms of the co-counselling summons.

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

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