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To: Transport Industry Operators

Abuse of process

The Hong Kong High Court issued a Decision on 30 September 2021 holding a shipowner's Defences as an abuse of process in a case of unpaid crew wages. [HCA] 76/2020] [2021 HKCFI 2961] [HCA] 91/2020]

Legal actions in rem were instituted by the crew of the vessel "Starry Metropolis" ("Vessel") against the owner of the Vessel for unpaid wages.

The Vessel was kept in Hong Kong with its scheduled voyage cancelled due to the COVID-19 pandemic since March 2020. In October 2020, it was arrested by the crew who were owed their wages. On 3 February 2021, an order for sale *pendente lite* was made in respect of the Vessel. It was sold on 1 April 2021 and there was no distribution of the proceeds.

The crew made applications to strike out the shipowner's Defences on the grounds that the Defences disclosed no reasonable defence to the crew's claims for wages, or were scandalous, frivolous or vexatious, or they might prejudice, embarrass or delay the fair trial of the legal actions in question, or they were otherwise an abuse of process of the court.

There were only two substantive issues raised in the Defences, namely, (1) when the Vessel had arrived in Hong Kong as the earliest place of repatriation, the employment agreements with the crew had come to an end; and (2) the shipowner had requested the crew to leave the Vessel by 31 March 2020 and their failure to do so constituted a refusal to obey or follow the shipowner's instruction.

The Judge agreed with the crew that the two pleaded substantive issues were ill-conceived. In respect of issue (1), the relevant contractual provisions were:

Definition of Point of Hire:

"refers to the place indication (*sic*) the contract of employment which shall be the basis for determining commencement and termination of contract."

Section 2(A) under the heading "Commencement/Duration of Contract":

"The employment contract between the employer and the seafarer shall commence upon actual departure of the seafarer from the international airport or seaport in the point of hire. It shall be effective until the seafarer's date of arrival at the point of hire upon termination of his employment pursuant to Section 15 of this Contract."

Section 15(A) under "Termination of Employment":

"The employment of the seafarer shall cease when the seafarer completes his period of contractual service aboard the vessel, signs-off from the vessel and arrives at earliest place of repatriation."

Section 16(A) under "Repatriation":

"If the vessel is at inconvenient port upon the expiration of the contract, the seafarers shall continue his

service on board until the vessel's arrival at a convenient port and/or after arrival of the replacement crew provided that, in any case, the continuance of such service shall not exceed one month. The seafarer shall be entitled to earned wages and benefits as provided in his contract."

It was reasonably plain that pursuant to S.2(A) and the definition of point of hire, the contract should end upon the return of the crew to the point of hire (none of them was hired in Hong Kong).

The "place of repatriation" was not defined in the contract. It was introduced in S.15(A). Reading the contract as a consistent whole, the Judge believed that the term was introduced by reason of S.16(A) pursuant to which the crew might have to be repatriated from a convenient port where the contract had expired at an inconvenient port.

The Judge did not believe that the S.15(A) was intended to change the basic arrangement that the crew should be returned to the point of hire upon termination of contract as provided in S.2(A). Where the contract expired whilst the Vessel was at an inconvenient port, then the crew should continue their service (not exceeding 1 month) until the Vessel reached a convenient port (and/or after arrival of the replacement crew) and from which they could be repatriated, pursuant to S.16(A).

There was no basis to treat S.16(A) as giving rise to a right to the employer to terminate the contract of the crew as and when it suited them. There was no evidence that S.16(A) was applied in these cases because the conditions prescribed therein were met.

As regards issue (2), firstly, the alleged instruction was disputed by the crew. Apart from a bare assertion, the shipowner had produced nothing to substantiate its allegation. One would have expected that such instruction would have been recorded in some written form. Secondly, the Judge was unable to see the legal basis for the instruction to leave the Vessel. The contract did not allow the shipowner to ask the crew to leave without their wages paid and having any repatriation arrangement agreed whilst the Vessel was "stranded" in Hong Kong.

Having come to view that there was no merit in the two pleaded substantive issues, the only thing left of the Defences was putting the crew to prove their case. Evidence had been filed by the crew to verify their claims. The crew's factual evidence had not been answered by the shipowner.

The above circumstances demonstrated that there was no merit in the Defences. Instead, they were put forward for the sake of buying time. The process of the court should not be so used. Bringing a case knowing that it has no substance is frivolous and an abuse of process. The interests of justice would not be served by unwarranted delay and keeping the crew out of their wages. The Judge was satisfied that these were clear cases for strike out, and the Judge acceded to the crew's applications. The Defences filed in the legal proceedings in question were struck out. The crew be at liberty to apply to enter judgment against the shipowner.

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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