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

28 January 2022
Ref : Chans advice/249

To: Transport Industry Operators

Well founded claims

The Hong Kong Court of Appeal on 1 December 2021 allowed a charterer's appeal against a High Court's Decision dated 13 April 2021 (which disallowed the charterer's charter hire claims of US$234,955 against the shipowner because the High Court was not satisfied the claims were well founded). [CACV 294/2021] [2021 HKCA 1865]

Introduction

On 12 November 2020, the charterer issued a writ of summons in rem with an indorsement of claim. The claims against the shipowner were for: (1) a declaration that the ship "Angelic Glory" chartered to the charterer under a charterparty dated 7 March 2019 ("**Angelic Glory Charterparty**") was off-hired as set out in the charterer's final statement of account and that the sum of US$365,410.50 remained due and owing to the charterer; (2) rectification of the Angelic Glory Charterparty to give effect to the common intention of the parties to that charterparty that sugar should be a permitted cargo under it; (3) US$365,410.50 being the balance of account due and owing to the charterer under the Angelic Glory Charterparty; (4) further or alternatively, damages for breach of the Angelic Glory Charterparty; (5) interest; and (6) costs.

On 2 March 2021, the charterer filed a statement of claim. In addition to the claims set out in the indorsement of claim, the charterer claimed £32,256 being its recoverable costs against the shipowner in an arbitration commenced by the shipowner against the charterer in London in May 2020 ("**the Arbitration**"), in which the shipowner claimed the alleged balance of hire due to it under the Angelic Glory Charterparty and the charterer counterclaimed for the balance of account due and owing to it under the same charterparty.

On 3 March 2021, the charterer filed a notice of motion for an order that judgment in default of acknowledgment of service be given for the balance of account due and owing to it under the Angelic Glory Charterparty; rectification of that charterparty to give effect to the common intention of parties that sugar should be a permitted cargo under that charterparty; a declaration that the Angelic Glory was off-hired as set out in the charterer's final hire statement and that the sum of US$343,430.75 remained due and owing to the charterer; further or alternatively, damages for breach of the Angelic Glory Charterparty; £32,256 being its recoverable costs against the shipowner in the Arbitration; interest and costs.

The notice of motion was made under Order 75 rule 21 of the Rules of the High Court, the relevant provisions of which read as follows:

> "(3) Where a defendant to an action in rem fails to acknowledge service of the writ within the time limited for doing so, then, on the expiration of 14 days after service of the writ and upon filing an affidavit proving due service of the writ, an affidavit verifying the facts on which the action is based and, if a statement of claim was not indorsed on the writ, a copy of the statement of claim, the plaintiff may apply to the Court for judgment by default. …"
>
> "(7) An application to the Court under this rule must be made by motion and if, on the hearing of the motion, *the Court is satisfied that the applicant's claim is well founded* it may give

> judgment for the claim with or without a reference to the Registrar and may at the same time order the property against which the action or, as the case may be, counterclaim is brought to be appraised and sold and the proceeds to be paid into court or may make such other order as it thinks just."

By the Decision dated 13 April 2021, the High Court allowed all of the claims set out in the statement of claim except for these two claims, on the basis that the High Court was not satisfied they were "well founded". These two claims were: (1) US$234,955, being the difference in the hire rate between the Angelic Glory Charterparty (i.e. US$9,500/day) and an addendum (i.e. US$12,000/day) signed in September 2019 ("**the Addendum**") ("**Claim 1**"); and (2) £32,256 being the recoverable costs of the Arbitration ("**Claim 2**").

The charterer lodged an appeal to challenge the High Court's decision in disallowing the above two claims. There were two broad grounds of appeal. First, it was contended that the High Court erred in law in applying the "well founded" threshold in Order 75 rule 21(7). Second, the High Court was wrong in failing to hold that the charterer's evidence met the "well founded" threshold.

The "well founded" threshold

Before judgment in default can be obtained for an action in rem, the threshold requirement in Order 75 rule 21(7) is that "the Court is satisfied that the applicant's claim is well founded". This is not materially different from the English equivalent in the Civil Procedure Rules being rule 61.9(3)(a)(iii), which provides that there must be "evidence proving the claim to the satisfaction of the court".

The charterer, submitted that the appropriate standard of evidence required in this context was "prima facie evidence" to substantiate the allegations in the statement of claim, and that such supporting evidence needed not be definitive or conclusive. The charterer contended that the High Court erred in law in requiring the charterer to prove its allegations by a standard higher than *prima facie* evidence.

The Court of Appeal did not think it was appropriate or necessary to put a gloss over the words "well founded" as submitted by the charterer, as the meaning of these words in this particular context was quite clear.

The specific purpose of requiring the applicant to satisfy the court that the claim is well founded and accurate is to ensure that the default judgment does not compromise the rights of any other party who may have an in rem claim against the arrested vessel which is to be sold and the proceeds paid into court. Hence the court should endeavour to ensure that on this ex parte application in which the court would read evidence and hear submissions only from one side, the applicant's claim is properly proved and its decision based on evidence which it considers satisfactory (*The Carmania II* [1963] 2 Lloyd's Rep 152 at 153; *The Kuzma Minin* [2020] 2 Lloyd's Rep 617 at §44; *Hong Kong Civil Procedure 2021*, vol 1, §75/21/5).

In construing an equivalent provision, the Federal Court of Malaysia in *The Fordeco Nos 12 and 17* [2000] 1 MLJ 449 at 463 referred to the meaning of "well founded" in the *Oxford Concise Dictionary* as "based on good evidence; having a foundation in fact or reason". This seems to be a good working definition.

For the court to be satisfied that the claim is well founded, the verifying affidavit must state "such facts as are necessary to substantiate the claims in the statement of claim" (*Roscoe's Admiralty Jurisdiction and Practice* (5th ed) p 286).

Claim 1: whether the charterer's evidence met the "well founded" threshold

The charterer's case in respect of Claim 1 pleaded in the statement of claim could be summarised as follows:

(1) The Angelic Glory Charterparty was contained in a fixture recap of 7 March 2019 ("**the Angelic Glory Recap**") which incorporated into the Angelic Glory Charterparty the terms of a charterparty previously agreed between the parties on 31 January 2019 for a sister vessel "Angelic Peace" ("**the Angelic Peace Charterparty**").

(2) The Angelic Peace Charterparty was contained in a fixture recap dated 31 January 2019 ("**the Angelic Peace Recap**") which provided that the Angelic Peace Charterparty was on the same terms as a previous Angelic Glory charterparty entered into between the parties in April 2015 ("**the 2015 Charterparty**"), save for the alterations set out in the Angelic Peace Recap. Among the alterations was a modification to clause 63 of the 2015 Charterparty, which was to the effect that Group C cargoes were allowed. Sugar is a Group C cargo.

(3) No working copy of the Angelic Peace Charterparty (by which the Angelic Peace Recap and the 2015 Charterparty were merged to produce one proforma contract with accompanying rider clauses) was collated by the brokers involved and, by mistake, an unamended 2015 Charterparty was attached to the Angelic Glory Recap.

(4) The common intention of the parties was that the Angelic Glory Charterparty incorporated the Angelic Peace Charterparty, including the provision in the Angelic Peace Recap which made sugar a permitted cargo under the Angelic Glory Charterparty. The charterer claimed rectification of the Angelic Glory Charterparty to give effect to this common intention of the parties.

(5) In breach of the Angelic Glory Charterparty, the shipowner declared in August 2019 that sugar was not a permitted cargo and alleged that carriage of sugar cargo would require an enhanced rate of hire. The charterer was left with no alternative but to sign the Addendum which provided for an enhanced rate.

(6) The Addendum was unenforceable for want of consideration. Further or alternatively, it was unenforceable for economic duress.

In support of the case as pleaded, the charterer adduced the following evidence:

(1) The Angelic Glory Recap

(2) The Angelic Peace Recap

(3) Email exchanges between the charterer's broker Barry Rogliano Salles ("**BRS**") and the shipowner's broker 14 Knots SA on 30 January 2019
From BRS to 14 Knots SA at 15:53 hours: "cls 63 insert "3 cargoes of bauxite, 2 cargo of non-oily" add "sulphur. All other cargoes group C are allowed" "
From 14 Knots SA to BRS at 17:03 hours: "cls 63 insert "2 cargoes of bauxite" otherwise as per ows proforma cp ‖ All other cargoes group C are allowed ‖ OK"

(4) Skype exchanges between BRS and 14 Knots SA on 6 March 2019

(5) Witness statement of Mr Kompolias of BRS dated 21 January 2021
Mr Kompolias stated that after the Angelic Peace Recap was issued, due to a clerical mistake the sentence "All other cargoes group C are allowed" set out in the Angelic Peace Recap and email negotiations exchanges was not added to clause 63 of the working copy of the Angelic Peace Charterparty. Mr Kompolias was involved in the negotiations of the Angelic Glory Charterparty and the terms discussed were based on the terms of the Angelic Peace Charterparty.

(6) Email exchanges in August 2019 regarding the carriage of a cargo of sugar and the Addendum

The Court of Appeal was satisfied on the above evidence there was a well-founded claim it was the common intention of the parties that the Angelic Glory Charterparty incorporated the provision in the Angelic Peace Charterparty which made sugar a permitted cargo under the Angelic Glory Charterparty, and it was due to a clerical mistake that the unamended 2015 Charterparty was attached to the Angelic Glory Recap. There was a proper claim in law for rectification of the

Angelic Glory Charterparty and the Addendum would not be enforceable for want of consideration and/or economic duress.

The Court of Appeal differed from the High Court that Claim 1 did not meet the "well founded" threshold on the totality of the evidence before the court. The Court of Appeal ordered the shipowner to pay the charterer the difference in hire rate in the sum of US$234,955 with interest at prime rate up to the date of judgment and thereafter at judgment rate until payment and granted a declaration that the Angelic Glory Charterparty be rectified to give effect to the common intention of the parties that sugar should be a permitted cargo under it.

Claim 2: whether the charterer's evidence met the "well founded" threshold

Claim 2 related to the charterer's recoverable costs of £32,256 in the Arbitration, which was left in a state of suspension when the shipowner failed to serve a reply and defence to counterclaim. No formal stay of the Arbitration was put in place.

This claim was made on the premise that the shipowner had no merit in its dispute with the charterer. And as the High Court did not find for the charterer on Claim 1, the High Court was equally not satisfied that Claim 2 was "well founded".

Although the Court of Appeal allowed Claim 1, the Court of Appeal saw some difficulties about Claim 2. There is a clear distinction between damages and costs. Costs are recoverable by the exercise of a costs jurisdiction by the court or tribunal determining the proceedings in which the costs are incurred. In the case in question, no award of costs had been made in the Arbitration. The Court of Appeal had no jurisdiction to award costs to the charterer incurred in the Arbitration. If an award of costs had been made in the Arbitration, the charterer might claim as loss and damage in the action in question the amount of costs awarded in the Arbitration. The Court of Appeal did not think Claim 2 would meet the "well founded" threshold as things stood, but it might be possible for the threshold to be met if and when a costs award was made in the Arbitration. Rather than disallowing Claim 2, the Court of Appeal thought it would be appropriate to adjourn this part of the notice of motion sine die, with liberty to restore the same before the court.

Conclusion

For the reasons aforesaid, the Court of Appeal allowed the charterer's appeal to the extent as indicated above.

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

Simon Chan
Director
E-mail: simonchan@smicsl.com

Richard Chan
Director
E-mail: richardchan@smicsl.com

23/F, Excel Centre, 483A Castle Peak Road, Lai Chi Kok, Kowloon, Hong Kong
香港九龍荔枝角青山道 483A 卓匯中心 23 樓 Tel: 2299 5566 Fax: 2866 7096
E-mail: gm@smicsl.com Website: www.sun-mobility.com
CIB A MEMBER OF THE HONG KONG CONFEDERATION OF INSURANCE BROKERS
香 港 保 險 顧 問 聯 會 會 員