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Offer to pay the equivalent sum plus conversion charges in a different currency.

Lord Hamblen and Lord Burrows (with whom Lord Hodge, Lord Lloyd-Jones and Lord Richards agreed) held:

·A party invoking a "force majeure" clause must show the subject event was beyond its control and could not be avoided or mitigated by using reasonable endeavours.

·That means the use of "reasonable endeavours" to overcome or avoid the force majeure event and not to overcome or mitigate the "effects" or "consequences" of the force majeure event.

·The obligation to use "reasonable endeavours" to overcome the force majeure event does not require the party invoking the force majeure clause to accept a non-contractual performance in mitigation of the force majeure event.

·Hence, when a contract requires payment in US dollars and the paying party is sanctioned by US such that it could not make any payment in the US dollars, a force majeure event occurs.

·The receiving party is entitled to invoke the force majeure clause, and it is not open to the paying party to say that it offered, in mitigation of the force majeure event, payment of the equivalent sum in another currency and the costs of converting the payment from that currency to the US dollars so that there will no detriment to the receiving party if it accepts the offer.

·The receiving party has a right to insist of the contractual performance and to refuse the offer of a non-contractual performance.

·The principles of "certainty" and "predictability" are important in English commercial law.

·The "freedom of contract" includes the freedom not to contract and to refuse non-contractual performance.

·A contractual right is not foregone absent very clear words.

Background facts

The Appellant was the shipowner and the Respondent was the charterer. A contract of affreightment based on an amended BIMCO GENCON form of voyage charterparty executed between the parties. The contract provided for the carriage of about 280,000 tonnes per month, 15% more or less in respondent's option, of bauxite in bulk in lots of 30,000 tonnes up to 40,000 tonnes, 10% more or less in shipowner's option, from Conakry in Guinea to Dneprobugsky in Ukraine, between 1 July 2016 and 30 June 2018. It was agreed between the parties that there would be a continuous flow of vessels loading at Conakry, and a corresponding flow of freight payments from the charterer to the owner. It was also agreed that the freight payments would be made in US dollars.

The contract consisted a force majeure clause (cl. 36), which suspended the obligation of each party during the operation of the force majeure event. A "force majeure event" was, materially, defined to be "outside the immediate control of the party giving the [force majeure notice]" and was expressed to include "any rules or regulations of governments or any interference or any acts or directions of governments, restrictions on monetary transfers and exchanges".

The definition also contained a proviso that "[it] cannot be overcome by reasonable endeavours from the [party] affected". Accordingly, an event outside the control of a party would be a force majeure event only if it could not be overcome by reasonable endeavours of the party.

On 6 April 2018, the US OFAC imposed sanction on charterer's parent company. Due to the sanction, the owner claimed that the charterer was unable to make freight payment in US dollars, thereby invoked force majeure clause and stopped performing its obligations under the contract.

The charterer refused owner's claim and offered to make freight payments in euros along with all the extra costs required in converting euros to US dollars. The owners refused this.

On 23 April 2018, the OFAC gave permission for the parties to carry out activities necessary to wind down the operations halted by the sanction until 23 October 2018. On 25 April 2018, the owner accepted freight payment in euros from the charterer and also resumed nomination of vessels under the contract.

Although the sanction did not prohibit payments in US dollars, it was highly likely that charterer's payment in US dollars to the owner would be delayed in passing through US banks.

Arbitral award

The charterer commenced arbitration, pursuant to the arbitration clause in the contract, against the owner, claiming damages for the cost of replacement vessels engaged by the charterer during the suspended period of service. The owner argued that it had a right to suspend the services under the contract.

The decision of the arbitral tribunal was that the owner was in breach of the contract, hence the charterer was entitled to damages. The reason for the decision was that, although the sanction on the charterer's parent company would have delayed the charterer's transmission of payments to the owner in US dollars, which would usually qualify as a force majeure event, the owner could not rely on in this case because that could be overcome by the owner accepting the charterer's offer to pay in euros along with the conversion charges.

Owners took this to an appeal under s 69 Arbitration Act 1996 (appeal on a point of law) and obtained the leave of the High Court for the appeal.

At the High Court

At the High Court, the owner argued that the provision for reasonable endeavour only applied in a situation where the impediment could be overcome, thereby allowing the original contract to be carried out and not otherwise. The provision was not intended for varying the contractual terms as to the currency of the payment. To support this argument, owner relied on Bulman & Dickson v Fenwick & Co [1894] 1 QB 179 and Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food [1963] AC 691 ("the Vancouver Strikes case").

Charterer put forward two arguments. First, what "reasonable endeavours" are in a case is a factual question to be determined by the arbitrators. Second, "reasonable endeavours" to overcome a force majeure event could extend to accepting non-contractual provision save as to loading and unloading.

Jacobs J rejected both arguments. As to the first one, the judge considered that authorities such as Bulman and the Vancouver Strikes case appeared to accept the legal principle that "reasonable endeavours" did not require acceptance of a non-contractual performance. As to the second argument, the judge found no reason to distinguish, for this purpose, between obligations relating to loading/unloading and other obligations.

Jacobs J further held that exercise of "reasonable endeavours" must be to perform the contractual bargain, that is payment monies in US dollars, and not to perform an alternative, and that contractual bargain could not be modified purely on what is reasonable performance in the circumstances. Such modification would introduce uncertainty which must generally be avoided in commercial transactions. Hence, he allowed the appeal against the award of the tribunal.

The charters appealed this to the Court of Appeal.

At the Court of Appeal

Males LJ, with whom Newey LJ agreed, held that the "force majeure" clause in this case must be applied in a common-sense way. They considered that the question was whether the charterer's offer to pay in euros would overcome the state of affairs created by the sanction in a "practical way such that all its adverse consequences would be avoided". They answered this in the affirmative based on a wording of the clause in this case. They did not consider Bulman or Vancouver Strikes case to be relevant here as neither had a "force majeure" similar to that in the present case.

Arnould J dissented and considered that a party relying on a force majeure clause was entitled to insist on contractual performance by the other party as bargained. He also considered that if a force majeure clause had to have the effect of requiring a party to accept non-contractual performance, only clear express words to that effect could achieve this result.

However, the majority decision was for the charterer, reversing the decision of Jacobs J. The owner appealed to the Supreme Court.

At the Supreme Court

Lord Hamblen and Lord Burrows, with whom Lord Hodge, Lord Lloyd-Jones and Lord Richards agreed, delivered the judgment of the Supreme Court.

Their Lordships considered that "reasonable endeavour" clauses are common and often imply that party invoking the "force majeure clause" must show the event was beyond their control and could not be avoided or mitigated by using reasonable endeavours. They found support for this view from Chitty on Contracts, Benjamin's Sale of Goods, and The Law of Contract by Treitel.

They considered that the word "overcome" in the subject clause meant "avoiding" or "mitigating" the force majeure as opposed to overcoming the effects the force majeure event. They reiterated that the purpose of reasonable endeavours provision was for the party relying on the force majeure clause to take steps towards fulfilling its contractual obligations and not offering or accepting a non-contractual performance.

They pointed out that the principle of "freedom of contract" extends to the freedom not to contract. This includes the freedom to reject an offer of non-contractual nature and the right to insist on contractual performance as per contractual agreement.

They emphasised that it was a contractual right of the owner to ask for payment in USD. To forego that right, clear words to that effect would be required, which was not present in the present case. They found support for this principle in Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd [1974] AC 689.

They considered that the owner's case was straightforward in that, in the absence of clear words, a "reasonable endeavours" clause did not receipt the acceptance of "non-contractual" performance. To the contrary, the charterer's case was not anchored on the contract. Instead, it required inquiries into whether acceptance of a non-contractual performance would cause any prejudice to the party so accepting the non-contractual performance. They considered such inquiries would only introduce uncertainty and unpredictability in commercial contracts, more so with the meaning of "detriment" and the degree of "detriment" required being unclear. They pointed out that such inquiries would be contrary to the principles of English commercial law, in which certainty and predictability are of particular importance. In support of the significance of certainty and predictability in English commercial law, they referred to numerous authorities including JTI Polska sp z oo v Jakubowski [2023] UKSC 19 and Golden Strait Corpn v Nippon Yusen Kubishika Kaisha (The "Golden Victory") [2007] 2 UKHL 12.

Accordingly, their Lordships' decision was in favour of strict interpretation of contract and for the owner, reversing the decision of the Court of Appeal, with the result that is the owner was entitled to suspend performance in reliance on the force majeure clause and was not liable in damages for that.

Great Lakes Reinsurance (UK) Plc v RAV Bahamas Ltd [2024] UKPC 11

21st May 2024

Theft of vessel from marina

Whether operator of marina owed a duty of care in tort to prevent theft

Whether operator under a contractual duty of care

Lord Burrows held:

- *"it has become well-established that, for a duty of care to arise grounding liability for a failure to confer a benefit, restrictive principles going beyond foreseeability and proximity must be applied"*

- *"To establish liability for a failure to confer a benefit, which is the exception rather than the rule in the common law, one of the recognised exceptional principles must be established".*

- *"just as there was no assumption of responsibility for the purposes of the tort of negligence, we agree with the Court of Appeal that there was no contractual duty of care to prevent theft of the vessel. There was no express duty of care on RAV to prevent theft of a vessel in the lease agreement and there is no basis for implying such a term"*

Introduction

The case was an appeal from the Court of Appeal of the Commonwealth of The Bahamas to the Judicial Committee of the Privy Council. Lord Burrows gave the advice of the Board, comprising of himself, Lord Briggs, Lord Hamblen, Lord Leggatt and Lord Stephens. The central question in the appeal was whether the owner and operator of a marina owed a duty of care in the tort of negligence (or in contract) to the lessee of a dock in the marina to prevent the theft of the lessee's motor yacht ("the vessel").

The lessee of the dock, and the owner of the vessel, was Modrono's Bimini Place Ltd ("MBP"), a company incorporated in the USA. The owners and officers of MBP were Manuel Modrono and his father. Two other members of the family, one of whom was Anthony Modrono, Manuel Modrono's cousin, also had a financial interest in the vessel. The marina was the Bimini Bay Marina on the island of Bimini in the Commonwealth of The Bahamas. RAV Bahamas Ltd ("RAV"), a company incorporated in The Bahamas, was the owner and operator of the marina.

The vessel in question, "Rum N' Coke", a 41-foot Luhrs motor yacht, was insured by MBP against theft with Great Lakes Reinsurance (UK) plc ("Great Lakes"). On or around 19 July 2009, two unknown individuals stole the vessel from the marina. Great Lakes paid out US$579,721.15 to MBP (US dollars and Bahamian dollars were at all relevant times of equal value), in settlement of an insurance claim brought by MBP for the theft. In the proceedings, Great Lakes sought to recover that sum (plus the costs of its investigation into the theft) by way of a subrogated claim or negligence against RAV.

Factual Background

Many of the agreed facts emerged not only from the evidence at trial but also from an investigation carried out by Lazaro Alfonso of Nautilus Investigations, who was engaged by Great Lakes to investigate the circumstances of the theft. He interviewed several people, including Manuel Modrono and Anthony Modrono, O'Neil Rolle, who was employed as a porter at the marina, and Douglas Black, who was the director of operations at the marina.

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On 9 June 2009, the vessel was sailed from Miami, Florida to The Bahamas by Anthony Modrono, along with other individuals. On 12 July 2009, Anthony Modrono left The Bahamas for Miami, leaving the vessel docked at Boat Slip Dolphin #16. His evidence at trial, which was accepted by the judge, was that he had left the cabin locked. The Court of Appeal found (see paras 42 and 45 of the judgment of Isaacs JA) that, while keys could be left with the marina, and there was then a system for releasing the keys (by a sign-out form and visual or phone call verification to check that the release of the keys was allowed), the marina was not asked to, and did not, retain the keys for this vessel. In respect of this vessel, therefore, an owner could board the vessel moored at the marina unchallenged and, without providing any documentation, sail it away.

On or around 18 July 2009, while the vessel was docked at the marina, O'Neil Rolle was contacted by an unknown individual. According to O'Neil Rolle, this individual, who claimed to be Anthony Modrono, told him that he would be sending his captain to collect the vessel and instructed him to enter the vessel, whose door he said would be "open", to prepare the vessel for departure, by turning on the air conditioning and the water pump (so that the pump ran overnight), and to arrange for the cleaning of the waterline. According to O'Neil Rolle, he prepared the vessel as the caller had instructed, and hired a third party to clean the waterline. On or around 19 July 2009, he met two unknown individuals on board the vessel. One of them paid him $400 for his services, $180 of which was paid to the young man who had cleaned the waterline, before the two unknown individuals sailed the vessel away. O'Neil Rolle did not seek to obtain any verification of the individuals' identities, nor did he seek to confirm that they had any right to board or access the vessel. According to Douglas Black, this did not violate existing procedures in place at the marina. There was no vessel release form unless an owner chose to leave a key with the marina; and no key for the vessel had been left with the marina.

The Court of Appeal drew attention to the interview of Douglas Black by Lazaro Alfonso, in which Douglas Black indicated that the resort and marina had 24-hour security, by three shifts of guards who secured the marina, patrolling by foot and in golf carts. He also revealed that there had been no theft of a vessel in the three and a half years since the marina had been open. The Court of Appeal also drew attention to the interview of Manuel Modrono by Lazaro Alfonso, in which Manuel Modrono explained that no-one was allowed onto the marina's premises unless they had a wristband. The wristband indicated that the person was checked into the resort and was an owner (he presumably meant an owner of an apartment at the marina) or a guest.

Lazaro Alfonso also investigated subsequent sightings of the vessel. His report identified people who were known to have sailed it after the theft and the registered user of the telephone number from which O'Neil Rolle was called shortly before the theft. It appeared that the final destination of the vessel was Venezuela. Lazaro Alfonso's report did not conclude that the owners had been involved in the theft of the vessel. Subsequent to his report, on 14 January 2010, Great Lakes paid out the sum of US$579,721.15 in satisfaction of the insurance claim brought by MBP.

Discussion and Analysis

The Court of Appeal considered the judgments of the courts below. The essential reasoning of Winder J was as follows:

. although the case had been pleaded in both tort and contract, the primary claim was in the tort of negligence. Winder J cited the House of Lords negligence case of Caparo Industries plc v Dickman [1990] 2 AC 605, with its three-step approach to the duty of care: foreseeability, proximity and whether it was fair, just and reasonable for there to be a duty of care. He then held, without explanation, that there was a duty of care owed by RAV, as the owner and operator of the marina, to ensure that the vessel was kept "reasonably safe, and not susceptible to theft".

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· RAV was in breach of its duty of care resulting in the loss of the vessel. O'Neil Rolle, who was an employee of RAV, had "contributed to the theft" (para 12). By boarding the vessel and preparing it for sailing, without asking for identification, he had "facilitated the removal of the vessel by the unknown persons who stole it".

· As a matter of interpretation, clause 3(7) of the lease did not exclude the negligence alleged. That clause was concerned with negligence in relation to the services set out in clause 3(6). In any event, the provisions of the Consumer Protection Act 2006 meant that RAV would have to show that, to be valid, the exclusion was reasonable and RAV had failed to show this.

The Court of Appeal allowed the appeal and overturned Winder J's decision. Isaacs JA and Sir Michael Barnett P each gave a judgment, and Evans JA agreed with both. The Court of Appeal's essential reasoning was as follows:

· Contrary to the reasoning of Winder J, there was no duty of care in tort owed by RAV to prevent the theft of the vessel.

· Clause 17 of the Fourth Schedule of the lease, which was not mentioned by Winder J, was significant in clarifying that it was the vessel's owner who had responsibility for preventing the theft of the vessel. In the words of Sir Michael Barnett P, at para 113:

"By that clause the parties agreed that the duty of care to prevent a theft of the boat was imposed on the boat owner and not the marina. This is not surprising given that the marina did not have the keys to the vessel and had no control over the vessel whilst at the marina."

He added at para 120:

"The leasing of the boat slip is not like a bailment as the marina never had control of the vessel."

· That RAV's duty of care did not extend to preventing theft was consistent with the judgment of the Court of Appeal (of England and Wales) in Halbauer v Brighton Corp [1954] 1 WLR 1161 ("Halbauer"). In that case, a caravan had been stolen from a camping ground maintained by the defendant corporation; and the Court of Appeal explained that, while the defendant had a duty of care in its own sphere of operations (eg if their employee negligently crashed into the caravan), that duty of care did not extend to preventing theft of the caravan.

· There was no term, express or implied, in the lease imposing a contractual duty of care on RAV to prevent theft of the boat. Such a term could not be implied because it would be inconsistent with clause 17 of the Fourth Schedule of the lease.

The Court of Appeal considered the following issues:

1.Was there a relevant duty of care, and breach of duty, in the tort of negligence?
2.Was there a contractual duty of care to prevent the theft?

<u>Was there a relevant duty of care, and breach of duty, in the tort of negligence?</u>

On appeal, counsel for Great Lakes submitted that the Court of Appeal was incorrect to have set aside Winder J's decision that RAV owed a relevant duty of care to Great Lakes and was in breach of that duty. The primary focus was on the tort of negligence although the alternative claim for breach of a contractual duty of care also needed to be considered.

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The Board found that Winder J gave no reasons to explain how he arrived at the conclusion, at para 7, that RAV had a duty of care "to ensure that the vessel is kept reasonably safe and not susceptible to theft". It was not clear that the three-stage test in Caparo Industries plc v Dickman [1990] 2 AC 605, cited by Winder J, was of any assistance in this type of case and certainly it cannot be relied on without further careful analysis. This is because, and this cannot be overstated, this case primarily concerns liability for an omission. In other words, the Board was primarily considering an alleged failure by RAV to confer a benefit on MBP by preventing a third-party causing harm to MBP. The Board is not primarily dealing with acts by RAV which have harmed MBP (ie which have made MBP worse off).

One of the objections to the Anns v Merton London Borough Council [1978] AC 728 approach to establishing a duty of care in the tort of negligence was that it had a tendency to blur the distinction between failing to confer a benefit/omissions and harming/acts. Since the demise of that approach, it had become well-established that, for a duty of care to arise grounding liability for a failure to confer a benefit, restrictive principles going beyond foreseeability and proximity must be applied.

To establish liability for a failure to confer a benefit, which is the exception rather than the rule in the common law, one of the recognised exceptional principles must be established. A summary was cited and approved in Robinson v ChiefConstable of West Yorkshire Police and then in N v Poole and HXA v Surrey County Council:

"In the tort of negligence, a person A is not under a duty to take care to prevent harm occurring to person B through a source of danger not created by A unless (i) A has assumed a responsibility to protect B from that danger, (ii) A has done something which prevents another from protecting B from that danger, (iii) A has a special level of control over that source of danger, or (iv) A's status creates an obligation to protect B from that danger."

In respect of those principles, Great Lakes accepted before the Board that, if it were to succeed on the facts of this case, it would need to show that there was a relevant assumption of responsibility by RAV. That is, it would need to show that RAV had assumed responsibility to MBP to take reasonable care to prevent theft of the vessel. Great Lakes submitted that RAV had relevantly assumed responsibility by leading MBP reasonably to expect security against the risk of theft of vessels by promising to provide, and providing, security guards, cameras, and a wristband system.

The Board rejected that submission. RAV did not assume responsibility to use reasonable care to guard against theft of MBP's vessel. In particular, in respect of MBP's vessel, RAV was not asked by MBP, or by any of those with a financial interest in the vessel, to take in and retain a key for the vessel. A vessel release form, and identification checks, were, therefore, not in play. It followed that, as the Court of Appeal made clear, in respect of this vessel, an owner (or a guest of the owner) could board the vessel moored at the marina unchallenged and, without providing any documentation, sail it away.

In relation to the existing and expected security system, with wristbands, cameras and security guards, whatever the precise responsibility to use reasonable care that RAV may thereby have been assuming, it did not extend to an assumption of responsibility to use reasonable care to prevent theft of boats. Lord Burrows held that even if it did, and such a duty of care was established by provision of the security system, there was no proved breach of such a duty of care and no proved causal connection between any breach of such a duty of care and the theft of this vessel.

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The Board held that there was no proved defect in the security at the marina and no proved causal link between any such defect and the theft of the vessel; and, which was more central to the submissions made in the instant case, there was no assumption of responsibility equivalent to that undertaken by the airport authority. In direct contrast to the facts of that case, RAV, the owners of the marina, had not assumed responsibility to take reasonable care to guard against the theft of the vessel. Rather, the responsibility fell on MBP, the owner of the vessel, as was clarified by clause 17 of the Fourth Schedule to the lease.

The Board concluded that viewed in terms of liability for failure to confer a benefit on MBP by preventing theft of the vessel, there was no duty of care owed by RAV.

The Board considered the acts of O'Neill Rolle and concluded that there was no breach of duty on his part. RAV was therefore not vicariously liable for a tort committed by its employee acting in the course of his employment. The Board considered that Winder J's apparent acceptance of this alternative submission (at paragraph 13 of his judgment) was incorrect as a matter of law. Even if there had been such a breach of duty, Great Lakes would have needed to prove that that breach of duty was a cause of the theft. However, applying the standard test for factual causation, there was no finding by Winder J that the claimant had proved that "but for" O'Neil Rolle's acts, the vessel would not have been stolen.

<u>Was there a contractual duty of care to prevent the theft?</u>

Although the submissions of counsel for Great Lakes were primarily focused on the tort of negligence, a contractual duty of care to keep the vessel safe from theft while docked in the marina was pleaded in the alternative.

The Board agreed with the Court of Appeal and found that just as there was no assumption of responsibility for the purposes of the tort of negligence, there was no contractual duty of care to prevent theft of the vessel. There was no express duty of care on RAV to prevent theft of a vessel in the lease agreement and there was no basis for implying such a term.

Decision

The Court of Appeal was correct, as a matter of law, in overturning the decision of Winder J. There was no duty of care owed by RAV to MBP to prevent the theft of MBP's vessel, whether in tort or contract. There was also no breach of the duty of care owed by O'Neil Rolle, and vicariously by RAV, not to harm MBP. The Board dismissed the appeal.

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