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Cover Story

To what extent evidence is required to claim third party liability?

Introduction

While it is not uncommon for a shipowner to sue a party that caused the sinking of a vessel, it may be difficult for a shipowner who is a defendant in the legal proceedings to raise a defence that the wrongdoing should be attributed to an unknown third party. In *Administrator of the Ship-Source Oil Pollution Fund v Beasse*, 2018 FC 39, the Canadian Court was invited to determine whether the shipowner should be liable for the expenses incurred in cleaning up the pollution caused by the sinking of its vessel under the relevant statute. The Court considered that the bare allegation of the shipowner that there was a third party involved was entirely unattractive.

Facts

In that case, the tugboat, "Elf" (the "**Tug**"), sank on January 2014 and caused pollution. The Canadian Coast Guard ("**CCG**") responded to deal with the cleaning-up of the oil spill. While it is beyond dispute that the pollution was caused by the sinking of the Tug, the defendant, owner of the Tug, raised the defence that the small aft door (the "**Aft Door**") to the superstructure on the Tug was torn off and thus there must be a third party broke into the Tug causing the sinking. However, the owner also admitted that the mere removal of the Aft Door by itself would not have caused the sinking of the Tug.

Both CCG's and the owner's agents had inspected the hull of the Tug before and after the Tug was raised but could not find any reason causing the sinking of the Tug. The Aft Door was also undamaged except for one hinge.

The legal issues

The plaintiff, who incurred expenses in cleaning-up the pollution, submitted that the case was appropriate for summary trial, i.e.

there is no genuine issue for trial or there is sufficient evidence to decide the matter(s) immediately without going through further civil procedures in the Court. Given that the Marine Liability Act, SC 2001 of Canada imposes strict liability in such a scenario, the only way the owner could escape from liability was to establish that the sinking was caused by the deliberate action of a third party. More importantly, the onus is on the owner of the Tug to prove his defence of third-party responsibility.

However, the only evidence which the owner of the Tug could provide was the fact that when the Tug was raised, the Aft Door was torn off its hinges and a pad lock was allegedly missing, and thus there must have been sabotage by a third party. The owner also alleged that if he was allowed to inspect the Tug in a proper manner, he would be able to discover the evidence showing that the sinking was caused by third party and thus the sinking of the Tug was not spontaneous as alleged by the CCG. For the purpose of resisting the plaintiff from seeking a summary judgment and determination of the liability at the early stage of the proceedings, Counsel acting for the owner also tactically contended that any remedy available to the plaintiff must be determined after a full trial, so that the trial judge would have the opportunity to consider all of the facts and fashion the most appropriate response.

The Court disagreed with the owner's submissions. In particular, it was found that none of the parties involving in the cleaning-up process had discovered any evidence of any deliberate act by any third party causing damage to the Tug. In respect of the Aft Door, it was further found that the superstructure around the Aft Door opening was severely rotted and the Aft Door was not locked at the time of the sinking. Further, expert opinion reveals that the Aft Door was broken off during the sinking itself, either by the air pressure being forced out of the superstructure, or the water rushing into the superstructure.

In view of the circumstances and the lack of evidence submitted by the owner of the Tug, the Court held that the owner was liable for the pollution clean-up as there was no evidence whatsoever to support a finding of third-party involvement to justify a defence of third party liability. A summary judgment was therefore given against the owner.

Conclusion

Under the law, seeking a summary trial does impose a relatively high hurdle for a plaintiff. In the case discussed above, we can see that the Court would not accept a bare allegation of an involvement of an unknown third party and it would not have sufficient bearing on the determination of the liability of a shipowner who is alleged to have caused pollution to the sea. In order to raise a defence of third party liability, shipowners have the burden to provide sufficient evidence to support their defence, and they cannot simply adopt an entirely speculative approach and invite the Court to accept their defence based on their speculation.

China International Marine Containers issues shares in Hong Kong

After giving up a private placement plan to raise US$950 million in Shenzhen in 2016, the Shenzhen and Hong Kong listed state conglomerate, China International Marine Containers (Group) Co., Ltd, plans to issue a maximum of 343.3 million new shares on the Hong Kong Stock Exchange. According to an exchange filing record, the proposed new shares would represent no more than 20% of the total number of the H shares in issue and 11.5% of its existing total issued share capital.

Though, the conglomerate is now in the course of restructuring its airport logistics business, the company is expected to record a 345% increase in net profit for 2017 due to the recovery in demand for container and the compensations received from the government. In respect of the funds raised by issuing the new shares in Hong Kong, the company revealed that the funds would be used for general corporate purposes.

The expansion plan of Cosco

While Cosco Shipping Holdings, a Shanghai and Hong Kong listed company and the port arm of China Cosco Shipping Group, is still in the course of acquiring one of its Hong Kong listed competitors, Orient Overseas (International) Limited, Mr. Xu Lirong, the Chairman of China Cosco Shipping Group, revealed during the China's National People's Congress that the Group would consider further investing and acquiring other assets such as port businesses in Europe, Asia and the Middle East.

The portfolio of Cosco Shipping Ports, the port arm of the Group, has been rapidly expanding with the One Belt, One Road initiative of the Chinese government. In total, the company currently has interest in 42 container terminals in 9 overseas ports. If the US$6.3 billion takeover of Orient Overseas (International) Limited could obtain the green light from China's Ministry of Commerce and China's National Development and Reform Commission as well as the approval of other overseas anti-trust regulators, Cosco Shipping would also in turn own the interest in Long Beach Container Terminal in California, USA.

Investigation on the potential breach of North Korea sanctions

A Japanese maritime Self-Defence Force surveillance plane reported a ship-to-ship transfer between a North Korean-flagged tanker alongside a smaller ship on 16 February 2018 near Shanghai, China. The tanker was identified as “Yu Jong 2”, whereas the bow of the other vessel was marked “Min Ning De You 078” (written in Chinese). The Japanese authorities have reported the matter to the UN Security Council as the transfer may have violated the UN sanctions on North Korea

While North Korea’s biggest trading partner remains to be China, the recent denuclearisation issues around North Korea have made the relationship between the two countries complicated and created some pressures from the international society on China. In response to the enquiry about the said ship-to-ship transfer which may have breached the UN sanction, the foreign ministry spokesman of China, Mr. Geng Shuang, stated that China is in the course of the investigation and stressed that China fully and strictly enforces the sanction against North Korea passed by the UN.

Photo Source: Website of the Ministry of Foreign Affairs of Japan (http://www.mofa.go.jp/fp/nsp/page4e_000772.html)

Impact of the appreciation of Chinese RMB on shipbuilders

The profitability of the shipbuilders in China has been facing a difficult moment due to the appreciation of the Chinese currency and the rising costs of raw material. Mr. Liu Xunliang, the China Newbuilding Price Index managing director also considered that the situation has become more serious when most of the Chinese players are not used to managing this kind of risk with derivatives and only some individual types of vessels could manage the exchange rate fluctuation.

For example, recent annual results posted by Singapore listed and China based Yangzijiang Shipbuilding reveal that gross profit rate in the company’s shipbuilding business, fell to 17% in 2017 from the year-ago level of 25%, despite a 17% increase in the segment’s revenue to RMB 12.3 billion. As such, Chinese builders might need to charge an “exchange rate premium” on the ship price.

Sea Tank Shipping AS v Vinnlustodin HF

[2018] EWCA Civ 276

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Sea Tank Shipping AS ("**Sea Tank**"), a shipping company, had carried a cargo of fish oil from Iceland to Norway for the respondent pursuant to a charterparty based on the "London Form". The form incorporated Article IV of the Schedule to the Carriage of Goods by Sea Act 1924, which in turn contained the Hague Rules.

On arrival at the discharge port, most of the cargos were damaged, and thus the respondent claimed damages in the sum of US$367,836 for the loss against Sea Tank. Sea Tank did not seek to dispute its liability of causing damages to the cargos, but it nevertheless sought to contend that, as a result of the operation of Article IV rule 5 (the "**Rule**"), its liability should be limited to only £54,730.90 (£100 per metric tonne of cargo damaged), being a sum substantively lower than the claim of the respondent.

The Rule provides the following:-

> *"… Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding £100 per package or unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading …"*

Sea Tank's major argument was that because the London Form was only for use with bulk or liquid cargoes and thus the Rule must be intended to apply to a bulk cargo as well. On the contrary, the respondent contended that the word "unit" could only refer to a physical item of cargo.

Encountering the different interpretations advanced by the parties, the judge of the Commercial Court was of the view that the language of international Conventions should be given a purposive construction. As a matter of ordinary language, the word "unit" could mean either an individual physical item or a unit of measurement. Nevertheless, after considering the relevant English and Commonwealth authorities as well as the textbooks and commentaries, it was held that the word "unit" in the Rule could only mean a physical unit for shipment but not a unit of measurement or customary freight unit. Accordingly, it was declared by the Court that the word "unit" did not apply to bulk cargoes, and Sea Tank's liability would not have been limited under the Rule. Sea Tank appealed against the decision.

The Court of Appeal agreed with the trial judge that the word "package" in the Rule clearly referred to a physical item and the use of the words "package" and "unit" together and in the same context would certainly suggest that both words were talking about physical items rather than units of measurement. The Court of Appeal also noted that there were decisions in Commonwealth jurisdictions which have concluded that "unit" meant a physical item of cargo, not a unit of measurement or a freight unit.

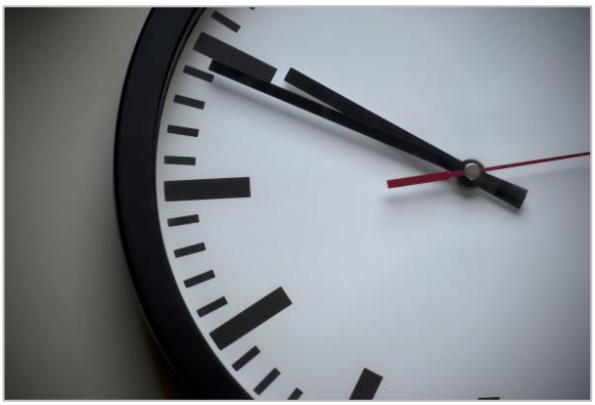
As such, the Court of Appeal held that on the proper construction of the Rule, the word "unit" would mean a physical item of cargo or shipping unit and not a unit of measurement or customary freight unit, and ruled that Sea Tank's attempt to limit its liability under the Rule must fail.

Sveriges Angfartygs Assurans Forening (The Swedish Club) v Connect Shipping Inc

[2018] EWCA Civ 230

The appellant of the case is a group of insurers, who appealed against a decision of the English Commercial Court concerning the amount which the respondent shipowners could claim under a hull and machinery insurance policy.

The vessel, "Renos", was on a laden voyage in the Red Sea in August 2012. A fire broke out in the engine room during the journey and the vessel sustained damage as a result. It was initially unclear whether the vessel was capable of being repaired or whether it was a constructive total loss such that the shipowners would be entitled to be indemnified under the insurance policy. The shipowner gave the notice of abandonment to the insurers only in February 2013, to which the insurers rejected on the ground that it was given "far too late". Nevertheless, the Commercial Court disagreed with the insurers and found that the shipowners had not lost the right to abandon the vessel and claim constructive total loss under the Marine Insurance Act 1906.



At the Court of Appeal, the insurers sought to argue that the shipowners had already acquired the reliable information of the loss in arising from or in connection with the fire as early as in December 2012 because by that time the surveyors employed by the shipowners had already spent more than 3 months investigating the damage to the vessel. The Court of Appeal noted that whether a shipowner could claim constructive total loss under the Marine Insurance Act 1906, it was necessary to consider the following issues:-

(1) whether the shipowners had received "reliable information of the loss";

(2) if so, whether the notice of abandonment had been given "with reasonable diligence" thereafter; and

(3) if not, and the information was of doubtful character, whether the owners had exceeded a "reasonable time to make inquiry".

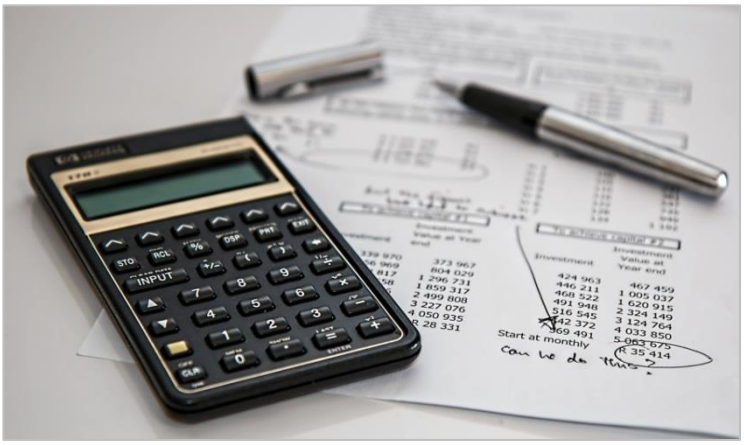
These three questions were fact sensitive and what could be considered to be "reliable information of the loss" would vary significantly according to the specific circumstances of each particular case.

To determine whether the shipowners had "reliable information of the loss", the Court of Appeal held that one should consider whether the shipowners have reliable information as to (i) the extent of the damage and the scope of repair, and (ii) the cost of such repair. In such case, shipyard quotations were certainly required in order to establish reliable information of the loss. As such, the Commercial Court was correct to conclude that there could be no reliable information of the loss until such quotations had been received. More importantly, one must take into account the fact that the shipowners had received two apparently reliable but starkly conflicting repair specifications which would affect the shipowners' ability to make the decision.

In relation to the question whether the notice of abandonment had been given "with reasonable diligence" thereafter, the Court of Appeal held that what reasonable diligence requires in any particular case would depend on the factual context and circumstances. In that case, it was found that it did not involve any

urgency, danger to the vessel or there was not any need for immediate decisions to be made. In addition, it was not a case where the shipowners had made a decision to abandon, but chose not to communicate the same to the Insurers. As such, the Court of Appeal ruled that notice of abandonment had been given with reasonable diligence thereafter.

In respect of whether, if the information was of doubtful character, the shipowners had exceeded a “reasonable time to make inquiry”, the Court of Appeal affirmed the finding of the Commercial Court that the nature of the casualty in the case would render the achievement of reliable information of the loss a complex task and it did take time for the shipowners to do so. In particular, the task could not begin in earnest before the cargo had been discharged in early October 2012. Thereafter, the shipowners had already taken reasonable steps to promptly produce a repair specification.



As such, the Court of Appeal held that the shipowners had not lost their right to abandon the vessel and the insurers’ appeal failed.

Lukoil Asia Pacific PTE Ltd v Ocean Tankers (PTE) Ltd

[2018] EWHC 163 (Comm)

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On 8 November 2013, the charterer voyage chartered the tanker "Ocean Neptune" (the "**Vessel**") from the shipowner for carriage of petroleum products from Taiwan to one to three safe ports in Australia.

The Vessel tendered notice of readiness at the load port of Mailiao, Taiwan, on 17 November 2013 and proceeded to the first discharge port, Gladstone, Australia, where she tendered notice of readiness on 2 December 2013 and remained at anchor until 15 January 2014. The Vessel waited there for six weeks because the receivers had refused to take delivery of the cargo. Thereafter, the Vessel tendered her notice of readiness at Botany Bay on 18 January 2014 and at Port Alma on 22 January 2014. Hoses were disconnected on 24 January 2014 after the final discharge of the cargo.

The shipowner claimed against the charterer for demurrage on the basis that the laytime used at the load port and three discharge ports exceeded 84 hours. The charterer raised the defence that the shipowner's claim was time barred because it failed to provide the necessary documents within 90 days of the completion of discharge as required under clause 2B of the Lukoil International Trading and Supply Company Exxonvoy 2005 clauses dated 30 May 2006 (the "**LITASCO**"), a term incorporated in the charterparty between the parties.

At the Arbitration Tribunal, it was held that the time-bar defence did not apply to the delay claim at Gladstone which shipowner had re-categorised as a claim for time lost waiting for orders which would fall within clause 4 of LITASCO.

"4 Waiting for Orders Clause

> *If charterers require vessel to interrupt her voyage awaiting at anchorage further orders, such delay to be for charterers' account and shall count as laytime or demurrage, if vessel on demurrage. Drifting clause shall apply if the ship drifts."*

The charterers appealed to the English Commercial Court and contended that clause 4 of LITASCO was in fact a claim for demurrage, which provided that delay waiting for orders should be counted as "laytime", and thus the requirement of submitting supporting documents under clause 2 of LITASCO should also apply to such a claim, failing which the shipowner should be considered time barred. In contrast, the shipowner maintained that there should be a distinction between claims for time lost waiting for orders and claims for demurrage in relation to operational delays at the loading and/or discharge ports. In particular, demurrage is considered to be liquidated damages for breach of charter for the "use" of the Vessel, while clause 4 of LITASCO only conferred a contractual liberty which required no breach on the part of the charterer. As such, the shipowner submitted that though clause 4 of LITASCO literally provided to "count as" demurrage for the purposes of computation, this did not automatically make it a claim for demurrage.

The Commercial Court considered that its task was to ascertain the objective meaning of the language which the shipowner and charterer chose in which to express their charterparty. It was held that the language of the charterparty as a whole clearly stipulated that a claim under clause 4 of LITASCO was a demurrage claim within clause 2B of LITASCO. There was no distinction between an ordinary demurrage claim, where the charterer had exceeded the allowed laytime for loading and discharging, and a claim for delay waiting for orders under clause 4 of LITASCO. As such, the appeal of the charterer was allowed and the claim of the shipowner was time barred.

What are the responsibilities of a port owner?

Due to the development of international trade, the ports sector becomes an essential part of the global economy. The UK, being a maritime nation, has over 300 ports to facilitate its trade, tourism and economic growth. In light of the importance of the port sector, the Department for Transport of the UK Government published the Ports Good Governance Guidance (the "**Guidance**") in March 2018 to set out the good governance guidance and the key principles of openness, accountability and fitness for the Statutory Harbour Authorities ("**SHAs**") England. Though the Guidance is designed for SHAs, its "Introduction" section specifically mentions that the principles therein are also relevant to all organisations that own or manage harbour and port facilities. As such, it is beneficial to see how a maritime nation would expect from port facilities owners and the relevant stakeholders.

What are the elements of corporate governance?

The purpose of corporate governance is to facilitate effective, entrepreneurial and prudent management that can deliver the long term success of a company. This is particularly relevant to the activities of port facilities owners, as corporate governance would also affect the long term success of the business and sustainability of the harbour.

The Guidance identifies four major aspects that a port owner should take into account, namely, leadership, board effectiveness, accountability and remuneration.

What is proper leadership?

The Guidance provides that all port business must be led by a board that is collectively responsible for the long-term success of the company. To effectively lead a port business, the board should clearly set out the organisation's strategic objectives and ensure that sufficient financial and human resources are ready to achieve the same. Importantly, the board should also regularly review the management performance in order to assess whether the targets are manageable and whether the same should be adjusted according to the circumstances.

The Guidance further considers that all directors of the board must act in the best interests of the port business pursuant to their relevant statutory duties. It is of utmost importance for a port business to have a clear division of responsibilities between the running of the board and the executive responsibility for the running of the business. In particular, the Guidance emphasises that no individual director should have the unfettered power to make decision over the business of the port.

In addition, the Guidance offers some insights in relation to the responsibilities of different board members. Firstly, the chairman of the board should be responsible for leading the board and ensuring its effectiveness. Part of his or her role is to set out an appropriate board agenda in order to allow adequate time for discussion of strategic issues or other

relevant items that are important to the business. The Guidance also recommends that the board should promote a culture of openness in order to encourage constructive debates in every board meeting. Secondly, the role of non-executive directors ("**NEDs**") in a board is to challenge constructively and assist in developing proposals on the company's strategy. NEDs should also be responsible to scrutinise the performance of management and to monitor the same.

How to establish an effective board?

In respect of how to establish an effective board, the Guidance provides that the board and its committees, if any, should possess the appropriate and sufficient skills, experience, independence and knowledge to allow them to discharge their respective duties and responsibilities effectively. The board should be comprised of sufficient number of persons such that the requirements of the business can be met. Any new directors should only be appointed by a formal and transparent procedure as well as only based on merit. Certain objective criteria should also be clearly set out.

In terms of the composition of the board, it is recommended that the composition should not create a situation allowing an individual or small group of individuals of the board to dominate the decision-making process of the board. For individual directors, it is important for them to contribute sufficient time to the company to discharge their responsibilities. The board members should receive updates and refresh their skills and knowledge regularly. All the relevant information should be supplied to the board in a timely manner so as to allow it to make the correct decision.

Individual directors of the board could consider undertaking formal and rigorous annual evaluations of their own performance such that the chairman of the board could make the relevant decision based on the results. All directors should be considered for re-appointment at regular intervals, and the performance evaluation could therefore be taken into account.

What is accountability?

The Guidance reveals that the board of a port business has a responsibility to present a fair, balanced and understandable assessment of its position and prospects. Such responsibility should at least cover the preparation of the annual reports and information required to meet the relevant legal requirements.

In terms of the operation of the business, the board of directors is responsible for determining the nature and extent of the risks that the port business is able to bear so as to achieve its strategic objectives. For that purpose, effective risk management and internal control systems should be put in place and reviewed regularly. Further, formal arrangements for considering how the board could apply the corporate reporting and risk management and internal control principles should be established in advance.

The Guidance further discusses that the board should maintain an appropriate relationship with the company's auditors. In this regard, an audit committee, being comprised of the NEDs, should be established.

How to make a remuneration package for the board?

The Guidance considers that the remuneration package for executive directors should be effectively designed to assist the port business in pursuing its

long-term success and its strategic objectives. If any performance-related elements are to be established, they should be made transparent and rigorously applied fairly. More importantly, individual directors should not be involved in any decision-making process of his or her own remuneration. Instead, the port company should consider establishing a remuneration committee for that purpose.

Concluding remarks

The above are only some aspects of the issues discussed in the Guidance to which the port facilities owner should pay attention. There are other issues in the Guidance which should be taken into account will be discussed in our next issue. In any event, readers should bear in mind that the Guidance itself does not constitute an exhaustive list of what should be done in order to establish an effective port business.

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