PRESS SUMMARY

17 January 2024

Herculito Maritime Ltd and others (Respondents) v Gunvor International BV and others (Appellants)

[2024] UKSC 2

On Appeal From: [2021] EWCA Civ 1828

JUSTICES: Lord Hodge, Lord Hamblen, Lord Leggatt, Lady Rose, Lord Richards

BACKGROUND TO THE APPEAL

By a voyage charterparty dated 20 September 2010 ("the charter"), MT Polar ("the vessel") was chartered to Clearlake Shipping Ltd ("the charterer") for a voyage from St Petersburg to Fujairah or, in charterer's option, Singapore ("the voyage").

The vessel's master issued six bills of lading ("the bills of lading") dated between 29 and 30 September 2010 and 2 October 2010 recording shipment of a total cargo of 69,493.28 mts of fuel oil ("the cargo").

On 30 October 2010, the vessel was seized by Somali pirates whilst she was transiting the designated "High Risk Area" in the Gulf of Aden. The vessel was held captive for 10 months before release on 26 August 2011, following the payment of a ransom of USD $7,700,000 by or on behalf of the vessel's owner ("the shipowner" or Respondent).

General average, which requires parties to apportion extraordinary expenses incurred for the preservation of ship and cargo, was declared by the shipowner and in due course a general average adjustment concluded that US$5,914,560 was due to the shipowner from the respective cargo interests ("the cargo interests").

The cargo interests contend that they have no liability in general average in respect of the ransom payment. They submit that, on the true construction of their contract with the shipowner under the bills of lading the shipowner's only remedy was to recover the

ransom payment under the terms of additional insurance cover which had been taken out in relation to such risks pursuant to the terms of the governing voyage charterparty, the premium for which was payable by the charterer.

On 8 January 2020, the arbitration tribunal upheld the cargo interests' case. On appeal, Sir Nigel Teare allowed the shipowner's appeal. The Court of Appeal upheld Sir Nigel Teare's decision.

The cargo interests now appeal to the Supreme Court.

JUDGMENT

The Supreme Court dismisses the appeal.

Lord Hamblen gives the judgment, with which all the other Justices agree.

REASONS FOR THE JUDGMENT

Four issues arise for decision.

Issue (1) - Whether on the proper interpretation of the charter and/or by implication the shipowner was precluded from claiming against the charterer in respect of losses arising out of risks for which additional insurance had been obtained.

It is established that contractual parties may agree that specified loss or damage is to be covered by insurance and that in the event of such loss or damage occurring the parties will seek recourse against insurers rather than their contractual counterparty [**29**]. If so, the parties may have intended to create an 'insurance fund' or 'insurance code' where recourse to insurers is the sole avenue for making good the relevant loss or damage.

In the shipping context, an insurance code or fund has been held to exist under a demise charter and under a time charter. This is the first case in which it has been necessary to consider whether there is an insurance code or fund in a voyage charter, and, if so, bills of lading which incorporated the voyage terms [**30**].

The charter incorporated the BPVOY 4 form, including clause 39 'War Risks' as amended in the fixture recap ("clause 39"), and various additional clauses, including the 'War Risk' clause ("the War Risk clause") and the 'Gulf of Aden' clause ("the Gulf of Aden clause") (collectively "the War Risk clauses"). The War Risks clauses provided that any additional premia payable in respect of war risks, including piracy, incurred by reason of the vessel trading to excluded areas not covered by the shipowner's basic war risk insurance were to be for charterer's account subject to a US$40,000 limit.

The direct geographical route for the contractual voyage from St Petersburg to both Fujairah and Singapore was via Suez and the Gulf of Aden. The Gulf of Aden was designated a 'High Risk Area' for the purposes of marine insurance. To accommodate this increased risk, before the vessel entered the Gulf of Aden the shipowner took out Kidnap and Ransom insurance and paid an additional premium to extend their annual Hull & Machinery and War Risk insurance.

The cargo interests contend that the charterer's obligation to pay additional war risk premia for transit through the Gulf of Aden means that the parties agreed to look to insurers rather than to each other in the event of loss or damage covered by the insurance. Cargo interests rely on the decision in *Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes (The Evia (No 2))* [1983] 1 AC 736 in which an insurance code was held to have been agreed in a time charterparty [**59**]. A critical question is whether the charter is materially different or distinguishable from the time charter in that case [**58**].

For the detailed reasons given in the judgment, the terms of the charter are materially different to those of the charter in *The Evia (No 2)* which decision can and should be distinguished [**61-73]**. Given the carefully agreed contractual regime for the known piracy risks of transiting the Gulf of Aden it would not have been open to the shipowner to contend that such risks were "war risks" for the purposes of clause 39. In those circumstances, this is not a case in which the charterer would otherwise obtain no benefit from the payment of the additional premia. Nor is it one in which it was undertaking a significant additional burden [**72**].

The terms of the charter are therefore materially different to those of the charter in *The Evia (No 2)* [**73**]. Further, tribunals should be cautious before following the reasoning in that decision in relation to differently termed charters [**74**] because: (1) English commercial law recognises the importance of certainty and fosters it so far as possible; (2) the search for an insurance code introduces uncertainty; (3) if parties wish to provide that there can be no right of recovery or subrogation, in respect of loss or damage, they can easily do so expressly; and, (4) there are various practical difficulties which may arise [**74**].

There was therefore no insurance code or fund agreed in the charter [**75**]. The further issues which arise are addressed on the assumption that there was such a code and concern whether such a code was incorporated into the bills of lading.

Issue (2) - whether all material parts of those clauses were incorporated into the bills of lading

The shipowner contends that those parts of the War Risks clauses which concern the obligations for payment of insurance premia are not directly relevant to the loading, carriage, and discharge of the cargo, or the payment of freight, and therefore are not incorporated into the bills of lading [**88**].

In the judgment the leading cases on the incorporation of charter terms into bills of lading are considered and the relevant principles summarised [**77-87**]. Applying those principles, the Court agrees with the judge and Court of Appeal that this argument should be rejected on the grounds that the clauses relate to the route to be taken by the vessel and therefore are directly relevant to the carriage.

There is a prima facie incorporation of clause 39 of the charter and the liberties given to the shipowner thereunder [**89**]. These provide an important protection to the shipowner in relation to voyage war risks and are relevant to carriage. That being the case, it is equally important that charter provisions which limit or qualify the wide liberties given under clause 39, namely the Gulf of Aden clause and War Risks clause, are also incorporated. Therefore, all material parts of those clauses were incorporated into the bills of lading.

Issue (3) - Whether on the proper interpretation of those clauses in the bill of lading and/or by implication the shipowner was similarly precluded from claiming for its losses against the bill of lading holders

Once clauses of the charter are incorporated into the bills of lading, they are treated as being fully set out in the bill of lading contract. The clauses then must be interpreted in the context of that contract, and for the purposes of issue (3), it is assumed that this involves no manipulation of the wording [**91-92]**.

The cargo interests argue that the charterer should be regarded as paying the additional insurance premia on behalf of cargo interests as it is they rather than the charterer who would be most directly concerned in the event of kidnap and ransom and they who would bear the principal liability to contribute in general average [**94**].

There is, however, no term of the charter which supports this analysis [**96**]. The obligation is that of the charterer and it has its own interest in ensuring proper performance of the charter. Moreover, there is no insurance code or fund case which extends any understanding to that effect beyond the parties to the relevant contract.

Therefore on the proper interpretation of those clauses in the bill of lading the shipowner was not precluded from claiming for such losses against the bill of lading holders [**99**].

Issue (4) - If necessary, whether the wording of those clauses should be manipulated so as to substitute the words "the Charterers" with "the holders of the bill of lading" in the parts of those clauses allocating responsibility for the payment of the additional insurance premia.

Manipulation of charter clauses incorporated by general words of incorporation may be permissible if it is necessary to do so to make the wording fit the bill of lading.

There is no such need in this case because the allocation of responsibility for paying additional premia makes sense in the context of the bills of lading as a record of the terms upon which the shipowner has agreed to transit the Gulf of Aden [**97**]. Further, as held by both the judge and the Court of Appeal, there are positive reasons why there should be no manipulation such as the implausibility of bill of lading holders accepting a potential liability to pay unknown and unpredictable amounts [**98**].

References in square brackets are to paragraphs in the judgment

NOTE