Deep Sea Maritime Limited v Monjasa A/S

Hague Rules; Time Bar; Misdelivery; Commencement of Proceedings

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INTRODUCTION

This recent decision of the High Court raises two discrete and important issues relating to the scope and operation of the time bar imposed by Article III Rule 6 of the Hague Rules (**"the Time Bar"**). This provides (as relevant):

> *"In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered."*

The factual background was somewhat convoluted, but the material facts may be summarised as follows. The Claimants (**"DSM")** owned and operated an oil product tanker, the Alhani. By a Bill of Lading dated 12 November 2011, DSM acknowledged shipment on board of 4,844.901 MT of bunker fuel. 499 MT was bunker fuel for the vessel, the remainder constituted the subject cargo. The Defendant (**"Monjasa"**) was the shipper. It appears that the cargo was carried from Cotonou, Benin. On 18 November 2011, DSM, claiming to act under instructions given pursuant to the Charterparty, but without production of the Bill, delivered the cargo to a party called Unitaes (which had bought the cargo from Monjasa on 28 October 2011) by ship-to-ship transfer off Lome, Togo. Just prior to this delivery, on 16 November 2011, Monjasa had bought the cargo back, apparently from an agent of Unitaes. Payment under the letter of credit supporting the original sale by Monjasa to Unitaes was eventually declined, and Monjasa, relying on a retention of title clause in its contract of sale with Unitaes, contended that it had "bought" the cargo back in circumstances where property had not in fact passed to Unitaes and that Unitaes could not have effected this purported sale if DSM had not delivered the cargo without production of the Bill.

By the time of the hearing, it was common ground that clause 1 of the Bill was sufficient to incorporate an exclusive jurisdiction clause in favour of the English courts — although Monjasa's case was that the Charterparty was not disclosed to it until late 2014 or early 2015. Clause 2 of the Bill incorporated the Hague Rules.

Monjasa commenced proceedings for the arrest of the vessel and a substantive claim in Tunisia in April 2012. DSM contested jurisdiction, but not on the basis of the exclusive jurisdiction clause. The vessel was released upon provision of a guarantee. In July 2015, the Tunisian court dismissed the substantive claim for lack of jurisdiction. An appeal against this decision is still pending.

Monjasa also commenced proceedings against DSM in China (in 2012) and in France (in 2017), as well as an arbitration (but it subsequently conceded that there was no arbitration clause). DSM commenced these proceedings, for negative declaratory relief, in February 2017. Monjasa commenced its own claim in England against DSM and Unitaes in March 2017.

DSM applied for summary judgment on its claim for declarations of non-liability, on the basis that any claims which Monjasa may have had against them had been discharged, pursuant to the Time Bar.

MISDELIVERY

The first issue goes to the scope of the Time Bar. Does it apply to claims for wrongful misdelivery — that is, delivery of the cargo to a third party who does not produce the original bill of lading? (As to such a claim generally, see *Scrutton on Charterparties and Bills of Lading* (23rd ed) at 13–010.)

The Court found that the Time Bar did apply, at least where misdelivery occurs during the Hague Rules "period of responsibility" (as defined in Article 1(e), from the time of loading to the time of discharge). In making that finding, the judgment offers a resolution to a long-running point of uncertainty in the scheme of both the Hague Rules and the Hague-Visby Rules. More generally, it is a further addition to the run of

cases favouring an expansive and harmonising interpretation of the Rules, and one that gives real weight to their historical and commercial roots.

As summarised in the judgment at [37]–[40] there were three limbs to Monjasa's attempt to circumvent the Time Bar in relation specifically to its claim that DSM misdelivered by discharging without production of the bill: first, the Time Bar "only applies to breaches of obligations created by the Hague Rules"; secondly, there was a "firm understanding" that the Time Bar did not apply to misdelivery claims; and thirdly, the authorities relied on by DSM for the contrary proposition did not assist them.

In essence, this is an issue of interpretation, which the Court approached in two stages: first, by considering whether the provision is *capable* of applying to misdelivery "purely by reference to its language and purpose"; and secondly by asking whether by reference to wider interpretative data the Time Bar applies only to "breaches of the Hague Rules obligations". The authorities, and some history, were then analysed in terms of any "settled understanding" contrary to the outcome of that interpretative exercise.

On the first point, the Court readily came to the conclusion that "the answer to this question is clearly yes" (at [42]): "[t]aken together, the words 'in any event' and 'all liability in respect of loss or damage' are clearly wide enough to encompass liability for delivering the goods to someone not entitled to take delivery of the same" (at [46]). Supporting that straightforward approach to the language, the judgment endorses a line of cases emphasising the unqualified nature of certain provisions of the Rules, encapsulated in *The Happy Ranger* [2002] EWCA Civ 694, [2002] 2 Lloyd's Rep 357 at [38] per Tuckey LJ: "I think the words 'in any event' mean what they say" (and see also, cited later in the judgment, *The New York Star* [1980] 2 Lloyd's Rep 317 at 322 per Lord Wilberforce: "'all liability' means what it says").

Supporting its textual analysis, the Court referred to the range of the Time Bar's policy objectives, summarised by His Honour Judge Diamond QC in *The Leni* [1992] 2 Lloyd's Rep 48 at 53: encouraging speedy settlements and protecting from stale claims; achieving international uniformity; and eliminating overly owner-friendly

notice and time provisions. The exclusion of misdelivery claims from the scope of Article III Rule 6 "would undermine each of [those] objectives" (at [48]). And although in this case it would allow the cargo interests' claim to proceed, the Court was alert to the potential of upsetting the wider rebalancing between owners and cargo that the Rules were designed to achieve: "while the Article III Rule 6 time bar has come to be seen as a provision benefiting the shipowner, this was not the position when the Hague Rules were agreed. ... [T]he time of suit provisions were 'the cargo interests' other big victory' at the Hague Conference, their effect being seen as 'guaranteeing a cargo claimant a full year in which to bring suit'" (at [48]).

On the second point, the Court readily dismissed (at [51]) Monjasa's contention that the Time Bar "only applies to claims for breach of the duties imposed by the Hague Rules, and that the obligation only to deliver against production of an original bill of lading is not such a duty".

The reasoning was twofold. First, the territory of the Hague Rules is delineated by substance, not by form: the Court referred to the "well-established" principle "that a cargo claimant cannot circumvent the limitations and exclusions in the Rules by suing the shipowner for the torts of negligence or conversion, or indeed for breach of bailment", and therefore refined the issue to whether misdelivery was "*capable* of being pleaded as a breach of the Hague Rules" (at [61]). Secondly, an expansive and purpose-driven view was taken of the scope of the Rules, leading to the conclusion that "in the overwhelming majority of cases" misdelivery claims will fall within the Article III Rule 2 obligation "properly and carefully [to] load, handle, stow, carry, keep, care for, and discharge the goods carried" (at [61]).

However, the Court went further, and in *obiter* comments suggested that even where a misdelivery claim does *not* implicate the Rules themselves (for example, delivery is made on production of a convincingly forged bill), the Time Bar would still bite. On this view, the touchstone is whether a claim involves "breaches of the shipowners' obligations which occur during the period of Hague Rules responsibility, and which have a sufficient nexus with identifiable goods carried or to be carried" (at [65]). And again, the impetus was towards certainty and international harmony: "The one year time bar under the Hague (and Hague-Visby) Rules is an internationally accepted and

universally understood condition of claims against carriers for damage to goods during sea transit. The clarity of that position would be substantially undermined if its application turned on such fine distinctions" (at [66]).

Indeed, such was the imperative to avoid those fine distinctions, the Court was prepared to adopt a "pragmatic and teleological construction" of Article III Rule 8's prohibition on contracting out: to accommodate the expansive application of the Time Bar to claims for breaches of obligations outside the Rules themselves, the words "provided for in this Article" in Article III Rule 8 were construed as meaning "as provided for". That might be considered something of a departure from *The Happy Ranger's* plea for words in the Rules to "mean what they say", but it is nevertheless a sound conclusion on what the words said by the drafters *should* mean.

The second aspect of the Court's reasoning on the application of Article III Rule 6 was the rejection of any "settled understanding" that misdelivery claims are not subject to the Time Bar. None of the authorities traversed was directly on point (although *The New York Star* comes close, supporting DSM's position). Of more interest was an attempt by Monjasa to call in aid the *travaux préparatoires* of the Hague-Visby Rules. Those amendments to the Hague Rules inserted the word "whatsoever" into Article III Rule 6, so that it now reads "... shall in any event be discharged from all liability *whatsoever* in respect of the goods ...". From that, and suggestions in the *travaux* that the drafters had in mind making clear that misdelivery claims were caught, Monjasa sought to draw the inference that it was understood in a settled fashion that such claims were *not* caught by the un-amended provision. After reviewing the *travaux* and associated commentary, the Court was not convinced that a precautionary or clarificatory amendment by way of a later convention entailed a particular understanding of the earlier convention (at [75]):

> *"This oft-cited commentary is largely concerned with the period of application of Article III Rule 6, and while it acknowledges (as is undoubtedly the case) that one aim of the amendment was to ensure Article III Rule 6 applied to misdelivery cases, it does not shed any light on the key issue of whether this was because there was a settled understanding that, pre-amendment, it did not so apply even within the Hague Rules period of responsibility, or simply*

address doubt as to whether (on prevailing principles of construction) it did so."

Among those "prevailing principles of construction" was detected the doctrine of fundamental breach which (its now-heretical status aside) was dismissed as a mere "rule of English law" and therefore an insufficient foundation for a supposed settled understanding of an international convention. Again, the tendency towards harmony — this time, perhaps, as between the Hague Rules and the Visby amendments — can be identified in the Court's reasoning.

COMMENCEMENT OF PROCEEDINGS

The second issue relates to the application of the Time Bar: were the proceedings which were commenced in Tunisia within the one-year period, but in breach of the exclusive jurisdiction clause, sufficient to stop time running for the purposes of Article III Rule 6 of the Hague Rules?

On its face, this provision appears straightforward, but the difficulty of applying it when multiple proceedings have been commenced is readily apparent. Is it sufficient that proceedings have been commenced in any competent court within one year or must timely proceedings have been commenced in the court in which the issue of limitation arises? What happens if there is a jurisdictional challenge in the foreign proceedings? Can the English court determine whether the foreign court is competent before the foreign court has conclusively determined that issue?

The Judge identified two broad categories of cases. The first category comprises cases in which there has been an "enforced substitution" of the first set of proceedings. In *The Kapetan Markos* [1986] 1 Lloyd's Rep 211, Parker LJ indicated that, if proceedings were commenced in a competent court but were subsequently stayed on the grounds of *forum non conveniens*, the first proceedings would be capable of defeating the Time Bar. Similarly, in *The Amazonia and the Yayamaria* [1989] 2 Lloyd's Rep 130, the bill of lading gave the parties the right to elect in favour of arbitration. The claimant commenced valid court proceedings in time, but the defendant subsequently exercised their right of election after the expiry of the one

year period. Parker LJ held that the defendant could not rely on the Time Bar in these circumstances.

Where, however, the enforced substitution of proceedings is a consequence of the claimant's own conduct in bringing a claim in breach of an exclusive jurisdiction or arbitration clause, it is now clear that the first claim will not defeat the application of the Time Bar in the second: *The Havhelt* [1993] 1 Lloyd's Rep 523. The same is true when the first proceedings are struck out by reason of some procedural default on the claimant's part: *The Finnrose* [1994] 1 Lloyd's Rep 559.

The second category of cases identified by the Judge comprise those where the claimant has chosen to pursue parallel claims. This situation is perhaps most likely to arise when the claimant commences substantive proceedings but also brings an action *in rem* to secure the claim. In *The Nordglimt* [1987] 2 Lloyd's Rep 470, Hobhouse J held that the substantive claim was sufficient to stop time running for the later arrest proceedings, the relevant question being *"…whether the cargo-owner has done something within the year sufficient to prevent the liability of the carrier from being discharged at the end of the year."* This approach is clearly consistent with the purposes of the Time Bar (to prevent stale claims and give a measure of certainty to owners) but, as the Judge noted at [106], it raises two obvious questions: (1) whether the termination of the first action on the basis of, for instance, strike out or procedural default, prevents the first action from defeating the Time Bar in the second action; and (2) at what point in time should this issue be assessed in the second action?

The Judge held, following the "pragmatic approach" applied in *The Finnrose* and in *Thyssen Inc v Calypso Shipping Corporation SA* [2000] 2 Lloyd's Rep 243, that: (i) the first action must not only be brought in a competent court but must remain an "effective action"; (ii) the issue should be tested at least at the date when the time bar issue in the second action is finally determined and not at some earlier date [112]-[113]; and (iii) where the effectiveness of the first action remains uncertain, the tribunal in the second action, the tribunal in the second action will need to determine the issue on the balance of probabilities on the evidence before it.

Applying this approach to the facts of the present case, the Judge held that:

(1) The Tunisian Proceedings, having been brought in breach of an exclusive jurisdiction clause, could not be relied upon by Monjasa as the "bringing of suit" for the purposes of the Time Bar in other proceedings commenced after the expiry of one year. The Judge had little sympathy with Monjasa' plea that it was unaware of the terms of existence of the exclusive jurisdiction clause, given that it was expressly referred to on the face of the Bill and that it was clear from the Tunisian arrest application that Monjasa was aware that there was a charterparty in existence.

(2) As to whether the Tunisian proceedings were commenced in time for the purposes of the Time Bar, it would not be appropriate for the English court to grant declaratory relief. To grant such a declaration would raise issues of comity and an issue of principle as to whether the commencement of proceedings in breach of an exclusive forum agreement has the same effect *vis-à-vis* the Time Bar in the first action and subsequent actions. The Judge noted that, if DSM's position was that the Tunisian proceedings should never have been commenced, they could have applied for an anti-suit injunction to stop them.

CONCLUSION

In relation to the misdelivery issue, the current edition of *Scrutton* notes the uncertainty regarding the application of Article III Rule 6 to misdelivery claims, and the editors "submit that it is at least doubtful whether the Rules apply at all to cases of this nature, or whether if they do, the words of the new [Hague-Visby] Rule are strong enough to cover such a claim" (at paragraph 14–061, note 150). Following the Court's decision in this case, whilst doubt can legitimately remain pending a judgment of the Court of Appeal, that submission now requires, at least, some qualification and refinement.

As to commencement of proceedings, the factual contexts in which these questions are likely to arise may be infinitely various. However, this judgment provides a cogent analysis both of the existing authorities but, perhaps more importantly, of the

relationship between the first and second actions and the precise questions which a tribunal in the second action must address.