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On Barratry and Exceptions of Owners Liability by John Harris & Yoav Harris, Harris & Co. (Israel)

Glencore Energy UK and Others V. Freeport holding Ltd, *The Lady M*

While either being under extreme emotional stress due to the illness of his mother or while suffering from an unknown and undiagnosed personality disorder or mental illness, or some other emotional disturbance, the chief engineer of the M/V Lady M deliberately started a fire inside the engine control room of the vessel which was in the course of a voyage from Taman, Russia to Houston, Texas, USA.

As a result, the Owners engaged salvors and the vessel was towed to Las Palmas, Spain where general average was declared. Messrs. Glencore Energy UK ("Glencore"), as owners of a cargo of 62,250 m.t. of fuel oil carried on board the vessel, brought proceedings in the Commercial Court claiming the sums it had incurred to the salvors, as well as the costs of defending the salvage arbitration proceedings.[1] The contracts of carriage were subject to the Hague-Visby Rules (the Rules) and the Owners relied upon defences under Article IV rule 2 (b) and/or (q) which provide that:

> *"2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from: …(b) Fire, unless caused by the actual fault or privity of the carrier…(q) any other cause arising without the actual fault of privity of the carrier, or without the fault or neglect of the agents or servants of the carrier…".*

The court decided on the preliminary issues of whether the conduct of the chief engineer constituted barratry and whether the Owners were exempt from liability under either the "fire" and/or the "any other cause" exceptions of the above-mentioned Rules 2 (b) and 2 (q).

Following the Supreme Court of New Zealand's judgment in the matter of Tasman Orient V. New Zealand China Clays[2] which dealt with the grounding of the M/V Tasman Pioneer– *"…given that, as in common ground Art 4.2 (a) does not apply in the event of barratry…"* (paragraph [20]), Glencore argued that the conduct of the chief engineer of the Lady M in starting the fire constituted barratry and that the defence of rule 2 (b) was not available where the fire was caused by the barratrous act of the master and crew.

What is Barratry?

As regards the concept of Barratry, in Glencore V. Freeport holdings, the Court used the definition of barratry stated in paragraph 11 of the schedule of the Marine Insurance Act 1906, "Rules for the Construction of Policy":

> *11. The term 'barratry' includes every wrongful act*

1 Glencore Energy Uk Ltd Vs. Freeport Holdings Ltd, The 'Lady M', [2019] EWCA Civ 318 Case No: A4/2018/223

2 Tasman Orient Line Cv Vs. New Zealand China Clays Limited and Others, SC 39/2009 [2010] NZSC 37.

willfully committed by master or crew to the prejudice of the owners, or, as the case may be, the charterer".

Carver's "Carriage by Sea"[3] describes "barratry" as

"any willful act of spoliation, or violence to the ship or goods, or any fraudulent or consciously illegal act which exposes the ships or goods to danger of damage, destruction or confiscation, done by the master or crew without the consent of the shipowner."

For example – if goods are lost or damaged by the master willfully running the ship upon rocks, or attempting to scuttle her, or through fraudulent delay or deviation upon the voyage, for the master's private purposes; or by the ship and cargo being fraudulently sold by the master. Also, according to Carver's "Carriage by Sea", Barratry implies an intention but an act *"need not to amount to a crime to constitute barratry … nor is it necessary that the person doing it should desire to injure the owners if in fact there is an intention to do an act which will cause injury, although its primary purpose is simply to benefit a person doing so. Therefore, the act of the crew of a ship in refusing to permit stevedores to discharge her until the balance of their wages was paid has been held to be barratrous".*

In the case of Tasman Orient V. New Zealand China Clays (*The Tasman Pioneer*) because the vessel was behind schedule, the master of the vessel took a risky shortcut and decided to pass through a narrow channel between Biro Shima Island and the mainland of southern Japan, rather than going around the island. In poor weather the *Tasman Pioneer* struck rocks on the island side of the channel while steaming at about 15 knots. Motivated by a concern for his own position if the truth emerged, the Master did not notify the nearby Japanese coastguard and the owners and instead, he steamed for some hours towards a point where he would have rejoined the course he would have taken had he gone outside the Biro Shima Island. Only at that point he called for assistance, while meanwhile the flooding of the vessel by sea water continued and was increased and the by the time salvage assistance was finally sought, the claimant's cargo was a total loss. The master also instructed the crew to lie and to cover up what had happened. The Supreme Court of New Zealand held that the carrier was exempt from liability under Article VI rule 2 (a) of the Rules, which provide that: *"*

2. Neither the carrier nor the ship shall be responsible for the loss or damage arising or resulting from- (a) Act, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship".

The Supreme Court also held that *"It follows that, unless the respondents are able to establish barratry, their claims are defeated by art 4.2 (a)*". The Supreme Court further held, that, the claimants did not plead that the actions of the master amounted to barratry and that the intention of the master as described by the claimants in their pleadings was "*an intention to derive personal benefit, which cannot possibly be construed as intention to cause damage to the cargo or as recklessness with knowledge that damage to it will probably result.*" and therefore, the Supreme Court added, "*where an essential element of barratry not having been pleaded, the respondents cannot now argue that the Master's actions constituted barratry*".

In the matter of Glencore V Freeport (*The Lady M*) both the Commercial Court and the Court of Appeal found the conclusion in the matter of Tasman Orient V. New Zealand China Clays (The *Tasman Pioneer*) as if the exception in favor of the carrier under article 4 2 (a) applies provided the conduct did not amount to barratry, as not persuasive and unfounded. The Court of Appeal held that in cases of barratry the carrier's agents are acting contrary to the carrier's interests and in breach of the trust reposed in them and *"it is in such a situation that the rationale for the existence of the exclusion of liability might on one view appear more applicable".*

In the Commercial Court, the judge went on to examine the 'travaux preparatories" in order to determine the meaning of the wording of the fire exception of Article

3 Carver's, Carriage By Sea, Thirteenth Edition, Volume 1, pages 237-239

IV rule 2 (b) of the Rules. The Commercial Court concluded that the 'travaux preparatories" showed that the participants of the 1921 Hague Conference proceeded on the basis that 'fire' meant fire even if deliberately caused by the shipowner's servants or agents, or resulting from their negligence; and not that they only contemplated fires which were caused accidently or without negligence. It followed, that the travaux preparatoires support the plain meaning of the text of Article IV 2 (b). The Court of Appeal held that the Commercial Court judge was right in his analysis. However, the Court of Appeal was doubtful whether the threshold for (even) consideration of the travaux preparatoires came close to being met and that the proper approach to interpretation was to ascertain the ordinary meaning of the words in Article IV 2 (b) in their context. Glencore's argument necessarily implies an additional wording to the wording of clause – *'Fire, unless caused by the actual fault or privity of the carrier, or the fault or neglect of the crew*' [emphasis added] and the court did not see any proper basis for implying such words into the clause.

The Court of Appeal held that due to the fact that the fire was caused deliberately by the chief engineer, the issue of whether the conduct of the chief engineer in starting the fire constituted barratry is not determinative of whether the Owners are exempt from liability under Article IV 2 (b).

Article IV 2 (b) exempts the Owner from liability if the fire were caused deliberately or barratrously, subject only to (i) a causative breach of article III. 1, or (ii) the actual fault or privity of the Owners.

This decision opened a path for Glencore to argue and prove that the Owners were in breach of their duties to exercise due diligence to make the vessel seaworthy and to properly man and equip the vessel at the beginning of the voyage according to Article III rule 1, or to properly and carefully handle, stow, carry, keep and care for the goods carried during the voyage itself- according to Article III rule 2, as the circumstances may be and according to the specific facts and circumstances of the matter.

Overview

On a broader view, considering the fact that most cases deal with Barratry in view of insurance liability and insurance claims, the Commercial Court and the Court of Appeal provide a comprehensive judgment on the role an act of barratry plays, or does not play, when dealing with Owners and Carriers exceptions from liabilities. The clear deviation from the attitude of the Supreme Court of New Zealand strengthens the legal position that an act of barratry occurs without the actual fault or privity of the carrier, not only under the meaning of the fire exception but also within the meaning of the general exception of Article VI rule 2 (q).

This development should be considered when either arresting or defending an arrest on the causes of 'loss of or damage to goods',[4] especially in jurisdictions where owner's personal liability is required for the claim in rem and the arrest.

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4 International Convention for The Unification Of Certain Rules Relating To The Arrest of Sea-Going Ships, Brussels, 10 May 1952, Article 1 (f).