Payment of Kidnap & Ransom Insurance Premium by Charterer and Relief for Cargo of General Average Contribution Liability: *The "Polar"* [2021] EWCA Civ 1828

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Does an obligation of the charterer to pay for the additional War Risks and K&R insurance premiums exempt the charterers from the liability to contribute in general average for ransom payment? If so, does the exception extend to the holders of bills of lading that incorporates the charterparty?

1. Summary of the facts and the judgment

The Polar was given by the owners on a voyage charter to Clearlake Shipping Pte Ltd. ("charterer"). The charterparty was for a voyage from one or two safe port(s) in the Tallin/St Petersburg range to one safe port Fujairah or to one or two safe port(s)/STS transfers in the Singapore area. Maximum two grades of fuel oil were permitted to be loaded. The charterparty was concluded by a fixture recap that incorporated the BPVOY 4 form with amendments. The shipowner's original war risks insurance covered piracy risk, but coverage in the area of the Gulf of Aden was subject to an additional premium. The charterparty required the charterer to pay the premium for the additional war risks insurance and kidnap and ransom (K&R) insurance to a limit of USD40,000 for coving the risk of piracy in the Gulf of Aden. The insurances cost less than USD40,000, which the charterer duly paid. The K&R insurance covered USD5 million, while in effect the additional war risks insurance covered any ransom paid in excess of the USD5 million.

The vessel loaded about 70,000 mt at St Petersburg between 29 September 2010 and 2 October 2010 and proceeded to Singapore. Six bills of lading were issued by the shipowner to the order of PNB Paribas (Suisse) SA. The first five of them were in one format, while the sixth was in a different format. The bills incorporated the voyage charterparty by a wide incorporation clause, the wording of which differed between the five bills and the sixth bill, but which difference was not material for the purpose of this case. The first five bills incorporated the York Antwerp Rules 1974, while the sixth bill incorporated the York Antwerp Rules 1994. The ultimate lawful holder of all the six bills was Gunvor International BV. Seemingly, Gunvor was a company related to the charterer. On the voyage, while transiting the Gulf of Aden, the vessel was kidnapped by Somali pirates on 30 October 2021. She was held by the pirates for about 10 months and then released on 26 August 2021 upon a ransom payment of USD7.7 million. This was paid on behalf of the shipowner by the K&R insurers (USD5 million) and the additional war risks insurers (USD2.7 million). Upon release, the vessel diverted for repairs, supplies and re-crewing, and then proceeded to Singapore. Most of the cargo was intact, although some were abstracted during the seizure. The shipowner declared general average. The cargo insurers gave a general average guarantee dated 16 September 2021, followed by a general average bond from Gunvor dated 28 September 2021. Upon the bond and the guarantee, the cargo was delivered to Gunvor. Both the bond and the guarantee provided for arbitration in London. The average adjustors came out with an adjustment pursuant to which the contribution payable by the cargo interest to the shipowner was about USD4.8 million. This was not paid by Gunvor/cargo insurers. Hence, two arbitrations were instituted, one against Gunvor under the bond and another against the cargo insurers under the guarantee. Both arbitrations were heard together by the same arbitrations.

The defence of Gunvor and cargo insurers, together referred to as the cargo interest, was that the provision in the charterparty as to the payment of the additional war risks and K&R insurance premium exempted the charterer from liability to contribute in general average in the event of piracy and that this exception was extended to holders of the bills of lading which incorporated the charterparty. Arbitrators agreed with the cargo interest and found for the cargo interest. The cargo interest secured

leave to appeal to the High Court under s 69 of the Arbitration Act 1996. On the appeal, Sir Nigel Teare reversed the decision of the arbitrators and found for the shipowner. However, Sir Nigel Teare gave leave to appeal. The cargo interest appealed to the Court of Appeal. On 1 December 2021, Males LJ delivering the judgment of the Court of Appeal, upheld the High Court decision in favour of the shipowner and dismissed the cargo interest's appeal with costs of £95,000 to be paid within fourteen days. Sir Patrick Elias and Peter Jackson LJ agreed with Males LJ. The Court of Appeal also refused leave to appeal to the Supreme Court.

2. Clauses in issue

The charterparty, by the BPVOY 4 form and the additional clauses, dealt with war risks (including piracy risk) and the Gulf of Aden. Clause 30.2 in effect required the bills of lading to have a war risks clause. Clause 39 was the war risks clause. This gave the liberty to the shipowner to cancel the charter if it was considered that the performance of the charter would expose the vessel to war risks. It also gave the liberty to the shipowner to terminate loading, refuse to sign bills of lading or terminate the voyage

If it appeared that the vessel might be exposed to war risks. In such an event, the cost of discharge of the cargo at a nominated or safe port was on the charterer. There was also liberty for the shipowner to take a longer route to avoid potential war risks and, if the additional distance was more than 100 miles, the additional costs and time involved was to be borne by the charterer. The shipowner was at liberty to comply with the orders of governmental authorities and war risks insurers. Anything done or not done pursuant to Clause 39 was not to be considered a deviation. By a specific Gulf of Aden clause, in addition to payment of the additional war risks and K&R insurance premiums, the charters were to pay the crew bonus for transiting the Gulf of Aden to a limit of USD20,000. By the same clause, half of the time spent on waiting for escort or protection team or other protective measures were to count as used laytime or demurrage, as applicable. Similarly, the additional costs by such measures were to be shared equally by the shipowner and the charterer.

The voyage charterparty incorporation clause in the first five bills read "*… pursuant and subject to all terms and conditions as per TANKER VOYAGE CHARTER PARTY indicated hereunder, including provisions overleaf.*"

The incorporation clause in the sixth bill read "*All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause are herein incorporated.*"

It was not disputed that the clauses were materially similar for the purpose of this case and that they were in wide terms.

Two questions arose for the court's determination. First, whether, by the clause requiring payment of the premiums by the charterer, the liability of the charterer to contribute in general average for piracy in the Gulf of Aden was excepted. Second, if so, whether the exception was so incorporated into the bills of lading that the holders of the bill of lading from their liability for the general average contribution for piracy. Each of the questions is dealt with in turn below.

3. First question: is the charterer relieved from liability to contribute in general average for the piracy?

The arbitrators answered this in positive. They found support for this in *The "Evia" (No. 2)* [1983] AC 736 where the payment of the premium for war risks insurance was on the time charterer. The House of Lords in that case held that this relieved the charterer from the liability to the shipowner for breach of a safe port warranty covered by the insurance. Lord Roskill described it as a 'remarkable result' if an insurer is paid the premium by the charterer and, when the insured peril happens, the insurer is able to claim the loss from the charterer by subrogation.

Sir Nigel Teare agreed with the arbitrators on this point. He also found support for it in *The "Ocean Victory"* [2017] UKSC 35 where the vessel was jointly insured in the names of the owner and the bareboat charterer. The Supreme Court in that case, by

a majority of three to two, held that the charterer's liability to the shipowner for breach of a safe port warranty was excluded by this.

Males LJ doubted the correctness of the position taken by the arbitrators and Sir Nigel Teare on this point. He pointed out that Lord Toulson in The Ocean Victory considered the question of whether the insurance provision created an exclusive fund for compensation to be one of construction in every case. Lord Toulson also recognised that, as a matter of construction, the insurance provision may co-exist with a right of action for the cause of the loss. Males LJ noted that the dissenting judgments of Lord Sumption and Lord Clarke in that case demonstrates the difficulty in construing such a clause. Males LJ did not favour any proposition that an insurance provision is prima facie a complete code of indemnification. Males LJ was of the view that the significant basis of The Ocean Victory decision was that both parties were co-insured and, as Lord Mance said in that case, it was a well-established principle that "where it is agreed that insurance shall insure to the benefit of both parties to a venture, the parties cannot claim against each other in respect of an insured loss". Coming to *The "Evia" (No. 2)*, Males LJ was of the view that the agreement as to the payment of premium by the charterer was not the sole ground for the decision, but there were other elements such as that the vessel was to be on hire for any time lost by the master's refusal to proceed to a war zone or to be exposed to war risks. Thus, Males LJ discounted both *The "Ocean Victory"* and *The "Evia" (No. 2)* in deciding the question before him.

Males LJ also made an important observation that in the case before him the agreement was not that the charterer would pay the entire premiums for additional war risks and K&R insurance, but only that the charterer would pay to a limit of USD40,000 (which might or might not cover the entire cost of the premiums). Having said that, Males LJ did not decide the question but proceeded to the next question on an assumption that it was implicit in the Gulf of Aden clause that the charterer was relieved from general average liability.

4. Second question: is the exception from general average liability so incorporated into the bills of lading that the holder of the bills was relieved from the liability?

There was an express provision that the charterer would pay the premium subject to a certain limit. It was assumed for the purpose of answering the second question that from the express provision there an implicit provision arose that the charterer was relieved from the general average liability for a loss covered by the insurance. Males LJ observed that they were indeed two different questions, namely whether the express provision was incorporated and, if so, whether the implicit provision was incorporated. Seemingly, if the first question was answered in the negative, the second question did not arise. However, if the first question was answered in the positive, it does not automatically follow that the second question must be answered in the positive too. He observed that the incorporating words in the bills of lading were extremely wide and were sufficient to bring in the express provisions. However, he doubted if the same will be true of the assumed implicit provision.

Leaving the doubt aside, Males LJ dealt with the question of whether the express provision was in the first place incorporated. To answer this, he first considered whether the express provision was prima facie incorporated. Second, if so, whether it can so be manipulated that the holder of the bills would be substituted for the charterer to impose the liability to pay the premium on the holder of the bills. Third, if such manipulation could not be done, whether the provision served any useful purpose to justify incorporation. These three sub-questions would answer the big question of whether the provision was incorporated. Interestingly, a decision that the provision was incorporated did not mean that the holder of the bills would be liable to pay the premium. This is because even in the absence of manipulation, the provision may be incorporated because it served a useful purpose. Each of the three sub-questions is dealt with in order below.

Males LJ observed that a provision in a charterparty would be prima facie incorporated into the bill of lading if the provision was “directly relevant” (i.e. “germane”, a word that gained its popularity in the context of incorporation from the

speech of Lord Atkinson in *TW Thomas & Co Ltd v Portsea Steamship Co Ltd* [1912] AC 1 at 6) to the carriage or discharge of the cargo. Accordingly, certain parts, but not all parts, of the war risks and the Gulf of Aden clause were capable of being incorporated into the bills. For example, the terms applicable prior to completion of loading and those as to laytime and demurrage as well as expenses concerning the passage through the Gulf of Aden were, it was not disputed, outside the province of the bills. On the contrary, terms as to the route to be taken would prima facie be incorporated. Coming to the express provision as to the war risks and K&R insurances, Males LJ took the view that it was directly relevant to the carriage, hence prima facie incorporated. The prima facie incorporation does not mean the provision is incorporated but it merely means that the court has taken a provisional view that the provision is incorporated, which provisional view is subject to further consideration before coming to a conclusion as to incorporation. With this, he moved to the question, i.e. as to manipulation.

On the question of manipulation, Sir Nigel Teare thought that to impose an obligation on the holder of the bills to pay the premium would be inconsistent with the obligation of the holder of the bills to pay the freight only in return for the carriage. Hence, the express provision should not be incorporated. Males LJ came to the same conclusion but by a different route. While he disagreed that there was an inconsistency, he agreed that it was inappropriate to so manipulate taking into account the practical and legal difficulties. Some of the difficulties to which he referred were these. Apportionment of the obligation among the cargo owners – by volume or value? It did not matter that the six bills were in the hands of the same person, as they were capable of being negotiated to different persons. The question of whether the liability was joint or several. If it was joint, an added difficulty would be that one cargo owner may not know the identity of the other, who may be in different jurisdictions. Accordingly, Males LJ refused to so manipulate as to impose the liability to pay the premium on the holder of the bills. Having thus decided, he proceed to consider if nevertheless the express provision was incorporated because it served a useful purpose.

On the question of useful purpose, Males LJ decided that the clause served a useful purpose as it is connected to the route of the carriage under the bills of lading and explains the basis on which the shipowner agreed to carry the cargo via the Suez Canal and thus through the Gulf of Aden.

Hence, Males LJ concluded that the express provision about payment of the insurance premium was incorporated into the bills of lading, but its purpose was limited to the matter of route and not manipulated to impose the obligation to pay on the holder of the bills. Having thus decided, he moved on to the more important question of the assumed implicit exclusion of general average liability for ransom payment to pirates.

It cannot be doubted that the assumed implicit exclusion was directly relevant to the carriage and, if incorporated, would serve a useful purpose of excluding the cargo liability for the general average contribution for ransom payments. But the real question was whether the court was prepared to so manipulate it as to substitute 'charterer' with 'holder of the bills'. This turned on the intention of the parties. Males LJ could not find the intention of the parties to the effect that the shipowner agreed to abandon its right for general average contribution from the cargo in the event of ransom paid to pirates. This was indeed a difficult issue and a matter of construction.

Males LJ rejected the cargo interests' argument, which he agreed to be a "forceful" one, that unless the exception covered the holder of the bills the exception would be meaningless as the one liable for general average contribution would be cargo rather than the charterer and that indeed the charterer agreed to pay the premium for the benefit of the holder of the bills. He was influenced by three factors in coming to this conclusion. First, "the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption" (*Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol)* Ltd [1974] AC 689 at 717). Secondly, the charterer's agreement was to pay the premium to a limit of USD40,000, which may or may not turn up to be sufficient to cover the entire premium. Thirdly, both the ship and the cargo were insured, which covered the general average contribution, and if the entire loss is

parked on the shipowner's insurance that would mean that the cargo insurance escapes liability for a peril that it had insured. Notably, the arbitrators, to the contrary, felt that the respective insurance backgrounds of the ship and cargo were, as a matter of law, irrelevant.

Accordingly, Males LJ, with whom Sir Patrick Elias and Peter Jackson LJ agreed, found for the shipowner and dismissed the appeal. However, their basis of the decision was different from that of Sir Nigel Teare in some significant respects.

5. Comments

This was an unusual case, as pointed out by Sir Nigel Teare, in that the holder of the bills of lading argued that the charterparty was incorporated into the bills with a view to benefiting from an implicit exception (if there was one) in the charterparty whereby from the liability to contribute in general average for a ransom payment. Usually, it is the shipowner who will argue that the terms of the charterparty is incorporated.

Although both the High Court and the Court of Appeal arrived at the same decision, the reasons for their respective decisions are materially different. Sir Nigel Teare as well as the arbitrators took the position that a provision in the charterparty that the charterer would pay the premium for certain insurance implicitly precluded a claim by the shipowner against the charterer for a loss covered by that insurance. They found support from *The "Ocean Victory"* and *The "Evia" (No. 2)*. Males LJ did not seem to favour this position but took the position that it was a matter of construction in every case. He attached some weight to the presumption that one does not abandon his legal rights in the absence of clear words to that effect. In the case before him, Males LJ pointed out that the agreement was not even that the charterer would pay the entire premium for the piracy risk on the Gulf of Aden as there was a cap of USD40,000. He distinguished *The "Ocean Victory"* and *The "Evia" (No. 2)*. However, he did not decide the question but proceeded, on an assumption that the shipowner was precluded from making a claim against the charterer for general average contribution for a ransom payment, to answer the ultimate question of whether the cargo interests were entitled to the benefit of the assumed exception.

To answer the ultimate question, both Sir Nigel Teare and Males LJ first asked if the obligation to pay the premium fell on the holder of the bills. Both of them decided this in the negative, however, somewhat for different reasons, while the arbitrators thought probably the obligation would fall on the holder of the bills. Sir Nigel Teare felt that to impose the obligation to pay the premium on the holder of the bills was inconsistent with the obligation of the holder to pay only the freight in return for the carriage. Males LJ did not agree with this but otherwise agreed with Sir Nigel Teare that it was inappropriate to impose the obligation on the holder of the bills because of practical and legal difficulties like apportionment of the obligation among the cargoes and the question of whether the liability was joint or several.

Coming to the ultimate question of whether any exception in the charterparty in favour of the charterer concerning the general average liability for ransom payment was extended to the holders of the bills, both the High Court and the Court of Appeal answered it in the negative again for different reasons, while the arbitrators answered it in the positive. Sir Nigel Teare, in deciding this point, was influenced by the fact the holder did not pay the premium and hence was not entitled to the benefit of the exception. However, Males LJ, in coming to the same decision, was rather influenced, among others, by the presumption that one does not abandon his rights in the absence of clear words as well as the fact that both the ship and the cargo were insured against piracy, and it would be unfair to allow the cargo insurers escape from liability for a peril that they have insured.

It must be noted that it was not considered in this case whether the charterer entered into the agreement as to the premium payments, which at least arguably carried with it the implicit agreement relieving the charterer from the general average liability for ransom payments, as “agents” for the holder of the bills. If this question was considered and answered in the affirmative, it might have afforded a ground to so manipulate the implicit exception as to cover the holder of the bills. In this context, the fact that the charterer and the holder of all the bills was ultimately related companies might add some force to the argument that an agency was intended,

despite the fact that technically the bills could have been negotiated to different persons.

It must be observed that had the charterparty been made in the name of the holders of the bills of lading (which was a related company to the charterer), then the cargo would have been entitled to the benefit of the terms of charterparty to the exclusion of the terms of the bills (*Rodocanachi, Sons & Co v Milburn Bros* (1886) 18 QBD 67). This case emphasises that if any party is to be absolved from liability for general average or other matters, the safe measure is to state the same expressly and clearly in the document between the parties.

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