DAVIES BATTERSBY SOLICITORS

Newsletter

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It has been another interesting year in the commercial, shipping and commodity worlds. We have, yet again, been fully involved in dealing with disputes in all these fields throughout 2010-2011. We set out below some interesting or important decisions we have come across during this period either involving this firm directly or which we consider of interest to our commercial clients.

THE PERILS OF A C & F PURCHASE!

You have purchased and paid for a cargo of soya bean meal on a C & F basis, loaded from Argentina. The cargo was placed aboard a supposedly first-class vessel. Three months later, it is somewhere off Brazil, the vessel has declared general average, the sellers have told you it is your problem (they have fulfilled their contractual obligations), the ship owners want you to contribute to a general average bond and your insurers say the terms of your insurance do not cover this problem. There is a real risk your multi-million dollar cargo will perish. What do you do? Call in the experts! In fact, this is exactly the problem one of our clients faced recently and asked us to assist.

First of all, we told the sellers that they had not shipped aboard a first-class vessel and to make all efforts to resolve the problem otherwise we would hold them liable. Secondly, we told the owners that the vessel had been unseaworthy at the commencement of the voyage and they were not entitled to declare general average (we knew this because we had flown an engineering expert to the vessel whose advice was that she was unseaworthy), a fact the owners never seriously challenged. Consequently, we rejected general average and told the owners we would arrest the vessel for our client's potentially massive losses if the owners did not make efforts promptly to get the vessel sailing to the discharge port. We then backed up this threat by appointing good, hard-hitting local shipping lawyers in Brazil.

On a without prejudice basis we then succeeded to get sellers, owners and their respective experts working together to solve the vessel's problems. Owners flew in mini generators which they urgently installed and their vessel finally proceeded to the discharge port. The cargo was delivered many months late but fortunately it had not perished. What had been a nightmare scenario with a real risk that the buyer's multi-million dollar cargo might perish (and for which insurers would not have covered them) was resolved. It was a difficult case to resolve, taking months of effort but it demonstrates that with a hands-on, co-ordinated effort even potentially disastrous situations can be avoided.

NEWSFLASH! LIABILITY OF CLASSIFICATION SOCIETY FOR THEIR VESSEL INSPECTION

The Court of Genoa recently addressed the problematic issue of the liability of classification societies, holding Lloyd's Register liable for damages caused to time charterers as a result of the detention of the vessel. The detention was on the basis of deficiencies discovered by the Hamburg Port Authority during a port state inspection.

Decision

The Court held that the vessel had been in extremely poor condition, both when it was inspected by Lloyd's Register in India in 2001 and at the time of the intermediate class inspections between 2001 and 2003. The vessel should not have been accorded the highest classification; nor should it have been granted a clean class certificate, valid for the purpose of the International Convention for the Safety of Life at Sea (SOLAS) and in accordance with the Rules of Lloyd's Register and Internal Guideline 3 of the International Association of Classification Societies.

Therefore, the behaviour of the Lloyd's Register inspectors in India in November 2001 amounted to gross negligence. The court upheld the claim and ordered Lloyds's Register to pay damages in respect of discharge, reloading and carriage.


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INVESTORS IN PEOPLE

AN ENFORCEMENT REMEDY TO REPLACE 'RULE B' IN NEW YORK ?

The New York Courts have extended the scope of what are now known under the Civil Procedure Rules as 'Third Party Debt Orders', previously known as 'Garnishee Proceedings'. Following the decision in **Koehler v Bank of Bermuda (New York) Ltd**, a party which has an arbitration award in their favour can enforce this by seeking an order against a bank with a presence in New York that possesses assets or property on behalf of the award/judgment debtor, although the property may be outside the jurisdiction of the New York Court.

In the so-called 'Koehler' case, the property in question was shares held outside the United States by the Bank of Bermuda. However, the New York Court still made the Garnishee Order despite the Bank of Bermuda not having a branch in New York. The New York Court held that the Bank of Bermuda (New York) Ltd was the subsidiary or agent of the Bank of Bermuda and this was sufficient to make the Garnishee Order. Although there are a number of caveats, the same principle can apply to funds in bank accounts in the name of debtors held by parent or subsidiary banks outside New York.

For award or judgment creditors, the 'Koehler' decision is potentially a powerful tool for enforcing awards or judgments. However, banks are exposed to the very real risk of being placed in a double jeopardy situation. For these reasons, English courts have refused to extend the scope of their party debt orders to cover these situations, see **Société Eram Shipping Co Ltd v Compagnie Internationale de Navigation (2003) UKHL 30.**

Guy Davies

IMPORTANT DECISION ON SECTION 44 OF THE COMPANIES ACT
COURT OF APPEAL SUCCESS

The case of **Roger Williams & Ors v Redcard Ltd & Ors** establishes a very important principle in relation to how a company can execute a contract under Section 44(4) of the Companies Act 2006.

The issue arose out of a contract for the sale between Redcard Ltd (as owner of the freehold in a substantial building in Barnes) and the owners of the five leasehold flats in the building (as Vendors) and Mr and Mrs Williams (as purchasers) who wished to convert the building into a single residence. Each of the leaseholders were directors and shareholders of Redcard. Having exchanged contracts and a supplementary agreement, the purchasers failed to complete the purchase and in proceedings argued that the contract was not binding as it had not been executed by Redcard at all.

This second appeal to the Court of Appeal turned on the proper construction of Section 44(4) of the Companies Act 2006 which seeks to allow the execution of documents by a company by informal methods as well as by seal. The agreement and supplementary agreement were actually signed by more than two authorised signatories of Redcard.

The purchasers argued that clear words were needed to show that the agreement was executed by Redcard and that clear words were also necessary before one signature is to be taken as execution in more than one capacity. The Court of Appeal unanimously held that where the signatures were under the word 'seller' and that was defined to include all of the vendors and the signatures included at least two authorised signatories the document was validly executed simultaneously by Redcard and those individuals.

For more information please contact ***Mark Clark.***

The full judgment is expected to be reported and is already available at www.bailii.org/ew/cases/EWCA/Civ/2011/466.html.

SCOTT V AVERY CLAUSES - PREVENTING INTERIM RELIEF APPLICATIONS?

This article by ***Henry Ellis*** first appeared in *Lloyd's List* on 20 April 2011

Abridged Version

The recent decision of Mr Justice Flaux in **B v S** (of 23 March 2011) will be of considerable importance for the commodities markets that utilise FOSFA/GAFTA standard form contracts that incorporate Scott v Avery clauses.

Scott v Avery clauses are arbitration clauses that provide that no action, or other legal proceedings, shall be brought (in an alternative jurisdiction to that provided for by the clause) until an arbitration has been concluded and an award published.

However, prior to this decision, it had been thought that such clauses did not preclude a party from seeking and obtaining interim relief from the English High Court at an earlier stage.

B v S is the first High Court case to consider whether parties to a contract incorporating a Scott v Avery clause are unable to obtain interim relief, in the form of a Freezing Injunction, under the 'new law', being Section 44 of the Arbitration Act 1996 ('the 1996 Act').

The Facts of the Case

B v S concerned defendant sellers ('S') and claimant buyers ('B') under two contracts made in July 2010 for the sale of consignments of sunflower seed oil, which in each case were on the terms of the FOSFA 54. Disputes having arisen as a result of the alleged default by S under those contracts, B commenced two arbitrations under clause 29 of FOSFA 54, which were Scott v Avery clauses of the sort described above

On 8 February 2011, B sought and obtained from Gloster J, on a without notice application, a worldwide Freezing Injunction over S's assets up to US $3,400,00 in support of its claims against S in the FOSFA arbitrations ('the Freezing Injunction'). The application was made pursuant to Section 44 of the 1996 Act.

The hearing in front of Flaux J was therefore S's application to set aside the Freezing Injunction on two grounds: (i) that the Freezing Injunction was obtained in breach of clause 29 of FOSFA 54 (the Scott v Avery clause) which on its true construction prohibits the taking of action or any other legal proceedings, including the issue of a claim form to obtain a Freezing Injunction in the jurisdiction; and (ii) there was no jurisdiction for the Freezing Injunction to be granted, as by clause 29 the parties had agreed that the powers under Section 44 of the 1996 Act would not apply.

The Judge's Decision

The Judge decided that ancillary and/or supportive proceedings in England which invited the court to exercise its powers under Section 44 of the 1996 Act were in breach of a Scott v Avery clause of the sort in clause 29 of the contracts in this case. Accordingly, the Judge discharged the Freezing Injunction.

The Judge made it clear that, untrammelled by authority on the construction of the clause in question, he would have been emphatically of the view that the words therein were clearly wide enough and did, on their true construction, exclude all proceedings in England, whether substantive, ancillary or supportive of the arbitration. Further, it appears from his judgment that the Judge's primary reason for finding that the clause should now be taken to preclude ancillary and/or supportive proceedings, was the 1996 Act, and the policy change that it represented.

For more information contact henry.ellis@stonechambers.com

For full details of our business please visit our website:
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