

Update

Causation divides Supreme Court in indemnity claim case

The recent Supreme Court decision in *Petroleo Brasileiro S.A. v. E.N.E. Kos 1 Limited* [2012], The “KOS”, demonstrates what an unpredictable battle-ground causation can be.

The KOS was chartered for three years at \$45,000 per day (“p/d”). The Owners had the right to withdraw the vessel upon late payment of hire. Two years into the charter, the Charterers failed to pay an instalment of hire on time. The Owners withdrew the vessel during loading and so terminated the contract. She sat off the loadport with cargo on board. The Owners offered to resume service, but for the then market rate of \$160,000 p/d. There followed a period of 2.64 days taken up with failed negotiations and then the cargo being off-loaded at the loadport.

The Owners brought a claim for 2.64 days of hire at the market rate, plus bunkers consumed. They framed the claim in two main ways: first, under the express indemnity in the charterparty, for the consequences of following Charterers’ orders; second, in bailment, for their services of caring for the cargo.

At first instance, the Court rejected the contractual indemnity claim; the vessel being ‘tied up’ was not caused by Charterers’ order to load but rather by Owners’ decision to withdraw the vessel. However, the bailment claim succeeded on the basis that the

Owners had conferred a benefit on the Charterers in looking after their goods following the termination of the charterparty, and so should be remunerated at market rates.

In the Court of Appeal, the contractual indemnity claim was again rejected because the causal link between the order and the loss was not satisfied. The bailment claim succeeded, but only in part. The Court was not attracted by the idea of an owner being rewarded to play ‘hardball’ with his charterer, and so only awarded the value of the bunkers consumed during discharge.

In the Supreme Court, all the judges agreed that the bailment claim should succeed in full. However, there was stark disagreement in relation to the indemnity claim and, specifically, the issue of causation. Lord Mance said the search was for the ‘proximate cause’ of the Owners’ loss. He failed to see how that loss was caused by following the Charterers’ orders; the Owners were doing the very opposite when they incurred the loss by withdrawing the ship. He feared that the majority decision would encourage unmeritorious claims.

The majority considered Lord Mance's approach to be too narrow. It was indisputable that at least one of the causes of the Owners' loss was their loading the cargo pursuant to Charterers' orders; once on board, the cargo had to be discharged somewhere. The Owners' decision to withdraw was not a new, independent cause of the need to discharge but simply determined where discharge had to take place. Therefore, the Charterers' order to load at all times operated as at least one of the

effective causes of the loss, and the indemnity was triggered.

This case is significant perhaps not so much for its clarification of the parameters of the law of bailment (which was, per Lord Mance a 'conventional' solution) but rather because on the same facts, four judges reached a firm conclusion on the well traversed question of causation and five judges reached the opposite conclusion.

Further information

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