Expert legal advice in uncertain waters

Written by legal experts, Clyde & Co’s Shipping Newsletter is a regular publication in which recent developments are reviewed: new case law, changing legislation and new areas of potential liability.

In this issue, we begin by reviewing a case which raised the question of whether piracy was considered an off-hire event under a charterparty. Here, Clyde & Co acted for the successful charterers.

Two further articles address issues raised under time charterparty disputes, the first one concerning owners’ remedies following charterers’ repudiation of the charter, and the second, offering clarification on the meaning of the words “all cargo tanks” whilst examining whether this included a vessel’s slop tanks.

We discuss the English court’s decision which held an exchange of emails to be a sufficient basis for a valid and binding guarantee, and we review the Supreme Court’s decision on the issue of causation in the context of a contractual indemnity claim in another time charter dispute.

A further article provides a concise summary of a matter in which the English court demonstrated its support of arbitration when considering the merits of a very late challenge to an arbitration award. In this case, Clyde & Co acted for the successful party.

We continue with the issue of jurisdiction under EU law, and analyse the latest Commercial Court decision in a long running case. We conclude our legal update with an article which considers the Court of Appeal’s position on the enforceability of a side letter which was drafted in parallel to a contract.

We hope that you find our newsletter informative.
If you would like to discuss any of the issues raised, please feel free to contact us on info@clydeco.com or alternatively, please liaise with your usual contact.

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Is piracy an off-hire event?

Dolly Brown

The Commercial Court has considered once again the wording of an additional clause on an amended form NYPE46 charterparty, in the context of a seizure by pirates, in order to determine whether a vessel was on or off-hire during a period of detention by pirates.

In Osmium Shipping Corporation v Cargill International SA (The “CAPTAIN STEFANOS”) [2012] the charterparty contained the following clause:

**Clause 56**

Should the vessel put back whilst on voyage by reason of any accident or breakdown, or in the event of loss of time either in port or at sea or deviation upon the course of the voyage caused by sickness of or accident to the crew or any person onboard the vessel (other than supercargo travelling by request of the Charterers) or by reason of the refusal of the Master or crew to perform their duties, or oil pollution even if alleged, or capture/seizure, or detention or threatened detention by any authority including arrest, the hire shall be suspended from the time of the inefficiency until the vessel is again efficient in the same or equidistant position in Charterers’ option, and voyage resumed therefrom. All extra directly related expenses incurred including bunkers consumed during period of suspended hire shall be for Owners’ account.

Owners said that any “capture/seizure” had to be by an authority, whereas Charterers argued that capture/seizure was an off-hire event distinct from “detention or threatened detention by any authority”, and that acts of piracy clearly fell within the meaning of “capture/seizure”.

Owners also argued that a proper reading of clause 56, alongside the rest of the clauses in the charterparty, including CONWARTIME 2004 (which was incorporated), had the effect of allocating the risk of piracy to Charterers.

Charterers submitted that the words in clause 56 should be given their plain and ordinary meanings, which were clear. Owners’ invocation of CONWARTIME as a risk allocation mechanism was misplaced, as CONWARTIME, and the “liberty” provisions within it were unrelated to the off-hire provisions in the charterparty.

The judge found in favour of Charterers, and held that clause 56 should be construed in accordance with the “plain and obvious meaning of the words used in the clause”. Piracy was an off-hire event, being a “capture/seizure” within the meaning of clause 56, as the relevant capture/seizure was not required to be by “an authority”. The finding was in contrast to the earlier case of Cosco Bulk Carrier Co. Ltd v Team-Up Owning Co, Ltd, The “SALDANHA” [2010] in which the Court considered a clause similar to clause 56, but different in some respects, resulting in the vessel in that case being on-hire for the duration of a detention by pirates.

The judge also held that CONWARTIME related to the performance of the charterparty and to breach, not to off-hire.

The case serves to underline, yet again, the importance of using clear words to allocate the risk of piratical events, to avoid the risk of subsequent disputes.

For a more detailed analysis of the case, please see our full update by clicking [here](#).

Clyde & Co acted for the successful Charterers in this case.
Charterers’ Letter of Indemnity enforceable by shipowners

Rob Collins

In the case of (1) Far East Chartering Ltd (Formerly Visa Comtrade Asia Ltd) (2) Binani Cement Ltd v Great Eastern Shipping Co Ltd [2012], the Court of Appeal had to examine whether a letter of indemnity issued in favour of one party (charterers) was enforceable by a different party (shipowners), on the strength of the Contracts (Rights of Third Parties) Act 1999.

The dispute in this matter arose out of the sale of a shipment of Indonesian coal where the Buyers, who were also the Charterers of the vessel, refused to pay the Indonesian Sellers the agreed full price, claiming the product was off-spec. In response, the Indonesian Sellers refused to release the bills of lading. Upon arrival at the discharge port in India, and in order to proceed with the discharge of the cargo without bills of lading, the Indian Receivers provided the Charterers with a letter of indemnity which was addressed to “The Owners/Disponent Owners/Charterers”. In it, the Indian Receivers agreed to indemnify Charterers for any loss caused by the discharge. Unaware of the underlying dispute, or of the existence of the letter of indemnity, the Owners of the vessel ordered to cease delivery to the Indian Receivers. The instructions were ignored and the discharge was completed.

The Indonesian Sellers pursued the vessel Owners for loss and damage, and the Owners, in turn, sought to rely on the existing letter of indemnity, under the Contracts (Rights of Third Parties) Act 1999, claiming to have acted as Charterers’ agents. At first instance, the court found in favour of the vessel Owners but the Indian Receivers sought to overturn, on appeal, the decision entitling Owners to enforce the letter of indemnity given by the Indian Receivers to the Charterers. However, the Court of Appeal rejected the Indian Receivers’ submissions.

The Court disagreed with the contention that, as the letter of indemnity was addressed to shipowners, it could not be accepted by the Owners acting as Charterers’ agents. The Court found that the proper meaning of the document was that it was addressed to both the Owners and the Charterers, so was capable of acceptance by the latter.

The Court also rejected the argument that because the Owners of the vessel had not transferred physical possession of the cargo to the Indian Receivers, they had not performed the request to deliver the cargo contained in the letter of indemnity. It was held that delivery involved the divesting or relinquishing of the power to compel any dealing in, or with, the cargo which could prevent the consignee from obtaining possession, and this the Owners of the vessel had done.

Finally, Charterers had argued that, as a matter of public policy, they would have been unable to enforce the letter of indemnity on the grounds that they were aware, at the time the document was issued, that the Indonesian Sellers were withholding the bills of lading as security for payment for the cargo. Under the 1999 Act, the Owners of the vessel could be in no better position than the Charterers. The Court rejected this argument on the basis that there was a bona fide dispute between the Indonesian Sellers and Charterers, and the bills of lading might well not have been available at the port of discharge, but public policy here was not engaged and did not prevent enforcement of the letter of indemnity.

Although the Far East Chartering case turns on its facts, it is nonetheless a welcome decision for shipowners who will be comforted to know that they can rely on a letter of indemnity given by the receivers to the charterers.
Owners’ remedies on repudiation of a time charter

Leon Alexander

In Isabella Shipowner SA v Shagang Shipping Co Ltd (The “AQUAFAITH”) [2012] the Court held that the rule in White & Carter (Councils) Ltd v McGregor [1962] does apply to time charters.

White & Carter established that:

If a party to a contract repudiates it (evinces an intention to no longer be bound by the terms of said contract), then the innocent party has a choice to:

(a) Accept the repudiation and claim damages for breach;

or

(b) Reject the repudiation and affirm the contract.

If the innocent party affirms and completes his side of the contract, then he is entitled to claim the amount due under the contract.

Accordingly, if a charterer redelivers a vessel early, the owner can reject the repudiation and instead continue to claim hire at the charterparty rate, even though the charterer has stated that it will not use the vessel and is not giving orders.

There are some limitations however. An owner cannot affirm the contract where:

(a) It requires a significant degree of cooperation (e.g. a bareboat charter where the charterer crews the vessel);

or

(b) The decision to do so is beyond all reason or “perverse”.

An example of this may be if the charterer redelivers one month into a 5 year time charter - although it is worth noting that owners were allowed to maintain the charter for 8 months in The “ODENFELD” (Gator Shipping Corporation v Trans-Asiatic Oil Ltd SA [1978])

The “AQUAFAITH” judgment is clearly an owner friendly decision. It gives an owner the option to hold the charterer to the contract, appoint an arbitrator and claim interim final awards in respect of unpaid hire instalments as they fall due. This is a much simpler process than having to prove a claim for damages which requires evidence of mitigation, and of the prevailing market rates.

An owner does, therefore, have a choice where a time charterer has repudiated the charterparty. However, in reality, it will only be in an owner’s interest to affirm the contract, if the charterer won’t pay. If the charterer can’t pay, then an owner would be better off cutting its losses, looking to re-fix the ship and claiming damages.
Court clarifies reference to “all cargo tanks” in a charterparty

Trudy Grey

Does a reference in a charterparty to “all cargo tanks” include a vessel’s slop tanks? Not according to Hamblen J in the recent decision of VTC v PVS [2012].

The Facts

The case involved a 10 year charterparty on an amended Shelltime 4 form. Five years into the period, Charterers entered into a sub-charter for the carriage of a cargo of gasoline from Rotterdam. It was Charterers’ intention to bunker at Falmouth, before proceeding to Rotterdam for loading. However, before arriving at Falmouth, oil was found on the surface of the ballast water in one of the ballast tanks.

Investigations revealed a 12mm crack in the port side slop tank. Owners assured Charterers that permanent repairs would be carried out at Rotterdam. Repairs could not be completed before the sub-charterparty cancelling date. Sub-Charterers cancelled the sub-charter.

Charterers subsequently deducted US$455,432 from hire, on the basis that Owners were in breach of Rider Clause 64 of the Charterparty, which provided that:

“64) Tanks, Lines and Pumps Suitability

Owners warrants (sic) that vessel will arrive at each load port with all cargo tanks, pumps and lines suitably to load the intended cargo as per Charterers’ representative and/or independent surveyor’s satisfaction…”

The Charterparty also contained a general maintenance obligation (Clause 3(i)). Charterers claimed that Owners breached Clause 64 when they informed Charterers that the vessel would not meet her cancelling date under the Sub-Charter due to the required repairs. Owners brought arbitration proceedings in order to recover the sums Charterers had deducted.

The Tribunal’s Decision

The Tribunal found that Owners were not in breach of Clause 64 and awarded them US$455,432, interest and costs. Charterers appealed that decision to the High Court, arguing that “all cargo tanks” included the vessel’s slop tanks, and Owners were in breach of Clause 64 because of the crack in the port side slop tank.

The Commercial Court’s Decision

Hamblen J, in finding in favour of the Owners, agreed that there was no breach of Clause 64. In his judgment, he made it clear that “the natural reading of Clause 64 is… that it is referring to cargo tanks in contradistinction to other ship’s tanks”. Accordingly, the wording “cargo tanks” did not encompass ballast tanks or slop tanks.

Comment

This case highlights the importance of precise drafting, as well as consistency of terms within a Charterparty. Had Charterers wanted Clause 64 to cover slop tanks as well as cargo tanks, “it would have been the easiest thing to delete the word cargo” or include the wording “and slop tanks”, as in Clause 110 of the Charterparty where a distinction was drawn between the vessel’s “cargo tanks” and “slop tanks”. Clause 64 could have been worded similarly.

It is a salutary lesson to all involved in charterparty negotiation to remember how essential it is carefully to record the precise terms the parties have agreed during the negotiation process and allocate risk accordingly.
Binding guarantees by exchange of email

Simon Jackson

Owners are often faced with charterers who insist that the contracting party to a charterparty is one of their associated companies. That may leave the shipowner without redress if the charterer defaults and the associated company has no assets against which to enforce any judgment.

To guard against this, owners may insist on a parent company guarantee to ensure that, if the charterparty is not performed, they have some financial redress against the charterer. However, where such “guarantees” are never formalised, that may cause difficulties with enforcement.

Golden Ocean Group Ltd v (1) Salgaocar Mining Industries Pvt Ltd (2) Anil v Salgaocar [2012] concerned an analogous situation. The Owners had entered into a charterparty which provided that the Charterers’ obligations were “fully guaranteed by” the Receivers. No separate document of guarantee was ever drawn up, and the Receivers denied that they were liable to pay the Owners because of the requirement of English law that a guarantee be in writing and signed by the guarantor.

The court was unimpressed by this argument, commenting that “the present case is not concerned with prescribing best or prudent practice. It is concerned with ensuring, so far as is possible, that the adoption of usual and accepted practice cannot be used as a vehicle for injustice by permitting parties to break promises”. The court held that the email communications between the parties created a valid and binding contract of guarantee.

While the Golden Ocean decision is encouraging, it was made on its own facts and so it should not be assumed that all email exchanges of this type will create binding guarantees. English law authority also may not assist where enforcement is to take place abroad, as the guarantor may resist enforcement and/or re-litigate the question of whether there is a binding guarantee under the local law.

While it may be possible to resolve these difficulties, they add to cost, delay and uncertainty. The Golden Ocean decision is a timely reminder, in difficult market conditions, that it is better to have a formal guarantee drawn up and signed at the outset, than to have to rely on the court for assistance later.
Causation divides Supreme Court in indemnity claim case

Leigh Williams

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 3 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 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.
Vessel sale upheld despite missing certificate

Tom Kelly

In the case of Polestar Maritime Limited v YHM Shipping Co Limited and another [2012] concerning the sale of the bulk carrier “REWA”, the Court of Appeal had to consider firstly, how far the obligations of a Seller extended, following agreement under the contract and the survey of the vessel, and secondly, the provisions in place for a Seller to correct any deficiencies in those obligations before the Buyer could cancel the agreement.

The Buyers had two survey reports stating that the vessel did not comply with Annex IV of MARPOL, specifically in that she did not have an ISPP certificate. The reports made clear that the vessel would require the ISPP certificate by 27 September 2008. On 23 July 2008, the parties signed a memorandum of agreement (“MOA”) for the purchase of the vessel. The MOA also attached a Lloyd’s Register extract which noted that a vessel of this type had to comply with Annex IV of MARPOL as from 27 September 2008.

Clause 11 of the MOA provided that “the vessel shall be delivered with... her national/international trading certificates, as well as all other certificates the vessel had at the time of her inspection...”. The MOA also provided that “the Sellers shall be granted a maximum of 3 banking days after notice of readiness has been given to make arrangements for the documentation as per Clause 8”.

Because of the lack of an ISPP certificate at the time of delivery, the vessel was detained by the Port Authorities in Hong Kong on 30 September 2008, putting Sellers in breach of a covenant in the Bill of Sale (despite the detention being lifted within a day).

On (i) the Court of Appeal found that “in the absence of any wording that imposes any duty to provide further certificates that the vessel did not have at the time of her inspection by the Buyers, no obligation to provide such further certificates can be eked out of the actual wording of Clause 11”. The Court of Appeal approved the certainty provided by this construction of the contract, pointing out that a seller could not possibly know where the vessel may trade in the future, and what national or international certificates may therefore be necessary.

On (ii) Lord Justice Aikens stated that, in his view, the wording of the MOA contemplated the Sellers being permitted to “make arrangements” in order to enable them to provide documentation, which included lifting any detention. The Buyers were therefore not entitled to cancel.

On both questions, therefore, and perhaps influenced by a suspicion that the Buyers were looking for ways to reject the vessel given the falling market, the Court adopted a common sense approach that effectively upheld the commercial expectations of the parties.
English court stands firm in defending arbitration

Miranda Karali

The recent case of Nestor Maritime SA v Sea Anchor Shipping Co. Ltd [2012] will be welcomed by users of London arbitration as it demonstrates once again the English court’s determination to ensure that arbitration awards are final and immediately enforceable unless there are compelling reasons why that should not be so.

In Sea Anchor, the dispute concerned the sale of a Panamax tanker on the strength of a CAP1 rating that turned out to have been fraudulently procured by the Sellers. The resulting dispute was heard by an LMAA tribunal who unanimously found the Sellers guilty of fraud. The Sellers took objection to the finding that they had behaved dishonestly and sought to challenge the award. All of the Sellers’ initial challenges were summarily dismissed.

The arbitration rules state that parties wishing to contest an award must do so within 28 days of the publication of the award, unless the court gives permission otherwise. Exceptionally, the Sellers brought a s.68 challenge (on the grounds of “serious irregularity”) just before the hearing of their initial challenges.

This later challenge, accusing the Buyers of obtaining the award on the basis of fraudulent evidence, was brought over eight months after the award had been published. Where one party makes very serious allegations of fraud, the starting point for any court is that the witnesses are telling the truth, and so the allegations should not be dismissed on a procedural technicality, such as being submitted out of time. Permission is accordingly often given in these circumstances.

However, in this case, the judge refused to take that shortcut, dealing with the application in detail and dismissing it on four separate grounds. The Sea Anchor case demonstrates the English Commercial Court’s commitment to upholding arbitration awards, and the parties’ legitimate expectations that they should be final and enforceable unless something has gone seriously wrong.

For a more detailed analysis of the case, please see our full update by clicking here.

Clyde & Co acted for the successful buyers in this case.
Never a boring day – the long running West Tankers dispute generates yet another significant decision

Marcia Perucca

In West Tankers Inc v Allianz SpA and another [2012] the Commercial Court held that a tribunal was not deprived of jurisdiction by reason of EU law, to award equitable damages for breach of an obligation to arbitrate.

Background

The original dispute arose out of the collision of a West Tankers’ vessel, the “FRONT COMOR”, with a pier in Sicily belonging to Erg Petroli SpA, the Charterers. Pursuant to the arbitration clause contained in the charterparty, Charterers commenced arbitration in London against Owners. Later, in 2003, Charterers’ subrogated Insurers, Allianz SpA and Generali, both commenced proceedings against Owners, in an Italian Court, to recover the sums which they had paid Charterers.

Owners obtained an anti-suit injunction from the English Court, in 2005, restraining the Insurers from pursuing their claim, in Italy, in breach of the arbitration agreement. There was a “leap frog” appeal to the House of Lords which in turn referred to the European Court of Justice (“ECJ”), the question whether such an injunction was consistent with Council Regulation (EC) 44/2001 (“the Regulation”) under which the Italian court had jurisdiction.

While the ECJ decision was pending, the tribunal issued partial awards (including a declaration of non-liability), but two issues were stood over until after the ECJ judgment.

In 2009, the ECJ ruled that anti-suit injunctions were incompatible with the Regulation. Thereafter, the tribunal considered the two outstanding issues.

The tribunal’s decision

The issues were (1) whether the Insurers were liable to Owners in damages in respect of the legal fees incurred in the Italian proceedings, and (2) whether they were liable to indemnify Owners against any future award made in the Italian proceedings. The majority of the tribunal answered both issues in the negative.

The arbitrators recognised that an arbitral tribunal should not be bound by the constraints of the Regulation (as the EU national courts are) since arbitration is excluded from the Regulation. Nevertheless, in their view, the ECJ decision meant that the Insurers had the right, under Article 5(3) of the Regulation, to commence proceedings in tort in Italy, where the collision occurred. It followed that, if the tribunal were to award damages against the Insurers for failing to arbitrate, it would in effect be punishing the Insurers for exercising their right under the Regulation, such right being protected by the EU law principle of effective judicial protection.

(continued on page 11)
The Commercial Court decision

Owners were given permission to appeal under section 69 of the Arbitration Act 1996.

The Court had to consider three main issues:

1) Was the tribunal circumscribed by the principle of effective judicial protection, which protected the right conferred by Article 5(3) of the Regulation, in circumstances where the Regulation itself did not apply to arbitration?

2) If the answer to 1) was yes, was the tribunal right to find that an award of damages or an indemnity would interfere with the Insurers’ rights under EU law?

3) If the tribunal was right to conclude that it had no jurisdiction to award damages or an indemnity while the Italian proceedings were pending, was it right for the tribunal to dismiss Owners’ claim altogether given that the Italian court had yet to determine its own jurisdiction?

Allowing the appeal, Mr Justice Flaux decided that the tribunal had erred in law. His conclusions for each of the questions posed above were as follows:

1) He placed considerable importance on the Advocate General’s earlier view that since the Regulation did not apply to arbitration, the tribunal could reach decisions inconsistent with the decisions of the Italian court without breaching any principle enshrined in the Regulation. The principle of effective judicial protection is not free-standing (as the tribunal itself recognised) and only applies when a specific right is engaged. Since the Regulation did not apply to arbitration, Article 5(3) was not engaged and, as a result, the principle of effective judicial protection did not operate so as to circumscribe the tribunal’s jurisdiction;

2) Neither the Advocate General nor the ECJ contemplated that the tribunal should decline jurisdiction altogether until the Italian court had ruled. On the contrary, it was recognised that inconsistent decisions could occur;

3) On the third issue, Mr Justice Flaux concluded that the tribunal erred in law in not at the very least deferring a decision on the claim. If the Italian court decided in due course that it did not have jurisdiction, and the Insurers were obliged to arbitrate in London, then there would be a strong case for awarding damages for breach of the duty to arbitrate. By dismissing the claim, the tribunal had shut out what might be an arguable claim in the future.

Permission has been granted for Insurers to appeal to the Court of Appeal, so this may well not be the last decision in the West Tankers saga.
Side letter held unenforceable

Judith Pastrana

The Court of Appeal recently had to consider whether a side letter, drafted in parallel to a binding contract, and whose purpose was to confirm the parties’ agreement to enter, at a later date, into a separate secondary agreement, was itself legally binding. The case in question was Barbudev v Eurocom Cable Management Bulgaria Food & Ors [2012].

Mr Barbudev (“Mr B”) was the major shareholder of Bulgarian cable and internet company Eurocom Plovdiv EOOD (“Eurocom”). Eurocom was being sold to Warburg Pincus Group (“Pincus”), and Mr B expressed his strong desire to reinvest some, or all, of his share proceeds into the proposed new combined business. Mr B and Pincus agreed on an investment amount of 1,650,000 Euros and a figure of 10% of the shares.

A side letter was drafted by lawyers and signed by the parties. It contained a provision stating that: “…we shall offer you the opportunity to invest in the Purchaser on the terms to be agreed between us which shall be set out in the [investment and shareholder’s agreement (“ISA”)] and we agree to negotiate the [ISA] in good faith with you”.

The ISA was never completed and Mr B sued to enforce the terms of the side letter. In June 2011, the High Court held the side letter to be unenforceable. The decision was appealed, and the Court of Appeal had to determine whether the side letter constituted an enforceable agreement, or, on the contrary, a simple non-enforceable agreement to agree.

The Court of Appeal agreed with the High Court, taking the view that the side letter was simply an agreement to agree. However, it disagreed with the Court of first instance which had held that the parties had not intended to create legal relations. The appeal judges found that the parties had intended to create legal relations, on the basis that:

1) Lawyers had drafted the side letter
2) The wording used in the document was of a legal nature
3) There was a reference to the Contracts (Rights of Third Parties) Act 1999 and to English law
4) There was a clear intention that the confidentiality agreement was to be contractually enforceable, irrespective of the status of the other parts of the letter

However, the parties’ intention to create legal relations did not mean that the letter was legally enforceable. Aikens LJ expressed the view that the wording “the opportunity to invest in the Purchaser on the terms to be agreed between us” was not the language of a binding commitment, and no amount of taking account of the commercial context and Mr B’s concerns and aims could make it so. Finally, there remained many crucial matters that were not finalised in the side letter, and these needed to be agreed before it could be said that there was a sufficiently certain contract.

For parties wishing to rely on an enforceable side letter to assist them with their commercial objectives, the advice is to proceed with caution. Not only should such documents contain the characteristics necessary for creating legal relations between the parties, but they should also be drafted in such a manner to make them binding on the parties. Inclusion of all the essential terms to make the agreement work is necessary.
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