

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings,
Fetter Lane, London EC4A 1NL

Date: 25/01/2012

Before :

MR. JUSTICE TEARE

Between :

PACIFIC BASIN IHX LIMITED	<u>Claimant</u>
- and -	
BULKHANDLING HANDYMAX AS	<u>Defendant</u>

Michael Nolan (instructed by **Swinnerton Moore LLP**) for the **Claimant**
Julian Kenny (instructed by **Ince and Co. LLP**) for the **Defendant**

Hearing dates: 13 January 2012

Judgment

Mr. Justice Teare:

1. On 8 November 2011 I gave judgment in this matter; [2011] EWHC 2862 (Comm). I indicated that I was minded to remit the matter to the arbitrators but gave the parties, as they had requested, the opportunity to make further submissions as to the appropriate order to make. The parties decided to exercise that opportunity and the matter came back to me on 13 January 2012.
2. Before deciding whether to remit the award it is necessary to deal with a request by both parties that I clarify my judgment on one matter.
3. At the first hearing I did not understand there to be any significant dispute as to the meaning of “exposed to War Risks” in clause (2) of Conwartime 1993, War Risks being defined in clause (1) as including acts of piracy. In my judgment at paragraph 38 I said that “exposure to acts of piracy means that the vessel is subject to the risk of piracy or is laid open to the danger of piracy.” This followed (or attempted to follow) an extract from the OED which had been put before me and appeared to be an appropriate definition.
4. It was apparent on the second hearing that there was a dispute between the parties as to the meaning of the phrase “exposed to War Risks.” The existence of that dispute had not been made clear to me at the first hearing. The debate on that occasion had

focussed on the words “may be, or are likely to be” exposed to War Risks in clause (2).

5. The meaning that I attributed to the phrase “exposed to acts of piracy”, believing it to be common ground, is now clearly the subject of dispute. Mr. Nolan, on behalf of the Charterers, submitted that being “exposed to acts of piracy” means being exposed to the peril or danger of piracy, by which he meant “being in contact with pirates” or “being exposed to acts of piracy having an actual effect on the vessel” which would of course include an attack by pirates but would also include, by way of example, a failed attempt to pursue and attack the vessel. Mr. Kenny, on behalf of the Owners, submitted that being “exposed to acts of piracy” simply means being exposed to the risk of piracy.
6. In the light of this dispute the parties have asked me to clarify what I said in my earlier judgment as to the meaning of “exposed to acts of piracy”.
7. The OED defines the verb “expose” as *lay open* to something undesirable such as danger, or *subject* to risk. Mr. Nolan has pointed out that the definition of “expose” in the OED is *lay open* or *subject* and that neither danger nor risk are part of that definition but merely examples of matters to which a person might be exposed. Mr. Kenny did not challenge this but noted that in this context the phrase to be construed is “exposed to War Risks” so that it was consistent with the intention of the draftsman to construe “exposed” in terms of risk.
8. Having regard to my construction of the words “may be, or are likely to be” as requiring a real likelihood (see paragraph 40 of my judgment) Mr. Nolan submitted that it would be surprising if, given that the clause in question was to be implemented not by lawyers but by a master or owner, the question to be answered was, “is there a real *likelihood* of a *risk* of acts of piracy”. Mr. Kenny submitted that there was no difficulty in a master or owner answering the question, “is there a real likelihood that the vessel will be exposed, that is, subject or laid open to a risk or danger of attack by pirates.”
9. I consider that the dispute between the parties arising out of my explanation of the meaning of the phrase “exposed to War Risks” can and should be resolved by reference to the terms of clause (2) of Conwartime itself. The clause deals, first, with the circumstance where the vessel is ordered to proceed to a place where it appears that the vessel, cargo or crew “in the reasonable judgment of the Master and/or Owners, may be, or are likely to be exposed to War Risks” and, second, with the circumstance where the vessel is already within “any such place as aforesaid, which only becomes dangerous, or is likely to be or to become dangerous, after her entry into it.” The second part of the clause uses the word “dangerous” to describe a situation where the vessel, cargo or crew are or are likely to be “exposed to War Risks”.
10. I therefore consider that the phrase “exposed to War Risks” should properly be construed as referring to a situation which is “dangerous”. That is consistent with the OED definition which I sought to paraphrase in my judgment but, more importantly, flows naturally from the wording of the clause read as a whole and thereby gives effect to the parties’ intentions.¹

¹ On this hearing I was referred to the predecessor of CONWARTIME 1993, namely, the CONWARTIME issued on 1 August 1939. I note that it also used the word dangerous as in: “The vessel unless the consent of the Owners be first obtained not to be ordered nor continue to any place or on any voyage not be used on any service which will bring her within a zone which is *dangerous* as the result of any actual or threatenedacts of piracy.” However, the wording of CONWARTIME 1993

11. Thus the question to be addressed by an owner or master, when ordered to go to a place, is whether there is a real likelihood that the vessel will be exposed to acts of piracy in the sense that the place will be dangerous on account of acts of piracy. I do not consider that such a test is too complex for an owner or master to apply. The wording of the second part of clause (2) itself contemplates that the owner may have to address both likelihood and dangerousness: “Should the Vessel be within any such place as aforesaid, which only becomes dangerous, *or is likely to be or to become dangerous*, after her entry into it, she shall be at liberty to leave it” (emphasis added).
12. What is dangerous will depend upon the facts of the particular case. It will depend upon both the degree of likelihood that a particular peril might occur, in this case acts of piracy, and the gravity or otherwise of the consequences to the vessel, cargo and crew should that peril occur. That approach seems to me to be consistent with the overriding priorities set out by BIMCO in their Special Circular no.6 dated 28 July 1993 to which I referred in paragraph 32 of my judgment, in particular, that the master must be given the tools to enable him to keep the vessel cargo and crew out of harm’s way but that such tools must be no more than those which are reasonably necessary to allow the master to do his job. Thus, whether or not the Gulf of Aden was dangerous to *Triton Lark* on account of acts of piracy will depend upon the degree of likelihood that they will occur and the gravity of the consequences to the vessel, cargo and crew should they occur. That is a matter for the arbitrators to assess on the evidence before them.
13. However, Mr. Nolan submitted that remission would serve no useful purpose because, where the tribunal had recorded the Owners’ case that the risk of a vessel being hijacked by pirates was about 1 in 300, the arbitrators could not properly find that such a risk constituted a *real likelihood* that the vessel would be exposed to acts of piracy. Where the outcome of a remission is inevitable remission will be futile and therefore inappropriate; see *The Vakis T* [2004] 2 Lloyd’s Reports 465 para.16.
14. This submission mirrors the submission made by Mr. Nolan at the first hearing which I had indicated that I was minded to reject; see paragraphs 61-62 of my judgment where I noted that the arbitrators had evidence before them which may bear on this issue. I am very reluctant to step into the arena of fact finding based upon a simple statistic. Whilst a bare possibility is not a real likelihood (see paragraph 40 of my judgment) and whilst a statistic that the risk of hijacking is 1 in 300 gives rise to an argument that such a risk is merely a bare possibility I do not know how the statistic was assessed or how the experts related that statistic to the facts of this case. All I know is that it was said to be “derived from contemporary material and both experts’ reports”. In short, without knowing the evidence before the arbitrators, I am unable to say that the outcome of the remission is inevitable. Moreover, that same evidence will determine whether, if there is a real likelihood that the vessel would be exposed to acts of piracy in the Gulf of Aden, the degree of such likelihood and the gravity of the consequences to the vessel, cargo and crew were such as to render the Gulf of Aden dangerous for *Triton Lark*. It seems to me far more appropriate that the arbitrators, as the fact finding tribunal with the evidence before them, should decide these issues. Both counsel urged me to give further guidance to the arbitrators but I do not consider

is in other respects different. I have therefore based my decision on the wording of CONWARTIME 1993 alone. I was also shown a later clause (the BIMCO Piracy Clause 2009) which also used the word dangerous. But I do not consider that there is any proper basis upon which I can take later clauses into account and I have not done so.

that I can properly do so without trespassing upon their fact finding responsibility. I therefore consider that the award should be remitted to the arbitrators.

15. I shall order that the award be remitted to the arbitrators to reconsider, in the light of my judgment and having regard to the evidence adduced by the parties, whether, in the reasonable judgment of Bulkhandling, there was a real likelihood that the vessel would be exposed to acts of piracy in the Gulf of Aden. In shorthand the question is whether, in the reasonable judgment of Bulkhandling, there was a real likelihood that the Gulf of Aden would, on account of acts of piracy, be dangerous to *Triton Lark*.