

As she was - *Dalmare SpA v Union Maritime Limited and Valor Shipping Limited (the "UNION POWER")* [2012] EWHC 3537 (Comm)

By Damien Magee & Tom Burdass

In the recent Commercial Court decision of Mr Justice Flaux in *Dalmare SpA v Union Maritime Limited and Valor Shipping Limited* (the "UNION POWER"), the Court found that the standard wording in the first sentence of clause 11 of a memorandum of agreement ("MOA") on the Norwegian Saleform 1993 did not exclude the implied term as to satisfactory quality implied by section 14(2) of the Sale of Goods Act 1979 (as amended) (the "SOGA").

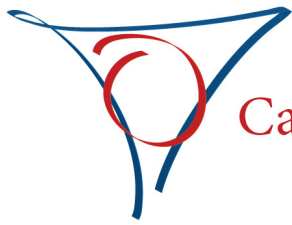
The facts

Pursuant to an MOA dated 4 September 2009 Dalmare SpA (the "Sellers") agreed to sell and Union Maritime Limited and Valor Shipping Limited (the "Buyers") agreed to buy the "UNION POWER" (the "Vessel") and clause 11 of the MOA provided, in the standard form, that the "*Vessel shall be delivered and taken over as she was at the time of inspection, fair wear and tear excepted.*"

The Buyers inspected the Vessel and she passed an underwater survey. The class records were also inspected by the Buyers and reference to damage to the no.1 crankpin of the main engine was missed. Following delivery, the Vessel was drydocked and a special survey was undertaken, as the Vessel was changing class. The no.1 crankpin was not inspected, and subsequently the vessel was found to be of satisfactory quality. However, when on a ballast voyage from Turkey to Malta the main engine broke down and it was found that the no.1 crankpin bearing had failed. Factual and expert evidence before the tribunal led to the conclusion that the failure of the no.1 crankpin was the cause of the main engine breakdown and that, at the time of delivery of the Vessel, the no.1 crankpin bearing was likely to fail within a short time period under normal operating conditions. The Buyers contended, amongst other things, that the Sellers were in breach of an implied term as to satisfactory quality, implied by section 14(2) of the SOGA. The tribunal found in favour of the Buyers in this regard. The Sellers appealed. The appeal, on a question of law, was as follows: "*Whether a term as to satisfactory quality is implied into the Contract/MOA by Section 14 of the Sale of Goods Act 1979?*"

Discussion

Much turned on the phrase "*as she was at the time of inspection, fair wear and tear excepted*", the Sellers contending this meant the sale was on an "*as is, where is basis*" meaning the purchaser takes the vessel as found and the terms of the SOGA would be excluded as being inconsistent, and the Buyers contending that this did not amount to an "*as is, where is*" sale and that there had been no contracting out of the implied terms of the SOGA in the MOA. The Sellers did not challenge the principle asserted by the Buyers that, with regard to terms implied by operation of law pursuant to the SOGA, these are valuable and basic rights which, it should be assumed, would not be given up lightly (as was held in *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm)).



There was much debate and discussion about the fact that the Vessel may have had to be delivered in a better state of repair than that as at the time of inspection, noting the obligation on the part of the Seller in the second sentence of clause 11 of the MOA to deliver the Vessel without class condition/recommendation. The Sellers contended this was as the Vessel was sold subject to class standard and not a standard as to satisfactory quality. The tribunal and the Commercial Court found against such an argument, citing Goldrein (page 42) "*Classification does not constitute a guarantee that proper technical standards are maintained at all times, or that the ship in question is seaworthy, or even that the ship is free of significant defects*", concluding that "*class does not tell you the quality of the vessel, which is why the independent implied term as to satisfactory quality is required*" and that "*the correct starting point is that the section 14 implied terms will apply to this English law contract of sale as to any other, unless the parties have contracted out of section 14 by one or other of the two routes he [Mr Simon Rainey QC] identified.*"

The Court was not willing to apply Canadian rulings on the implications of "*as is*" on the basis that the Canadian case law was in relation to implied warranties and not implied conditions. In addition, the Court also concluded that the first sentence of clause 11 of the MOA was not an "*as is*" provision. Rather the Court found that the Sellers had failed to satisfy the strict test of construction with regard to the words "*as she was*" that the only meaning the words were intended to have were sufficiently clear "*that the vessel is to be delivered in the same condition as when inspected..... even on the sellers' best case the words must have more than one meaning is fatal to the sellers' case that these words exclude the statutory implied terms*".

In an obiter statement the Court concluded that they may, if they had had to determine the issue, have found that the "*as is*" provisions would exclude the Buyers' rights to reject the Vessel, but not to claim damages for breach of obligation of satisfactory quality implied by the SOGA. However, given the Court found that the first sentence of clause 11 of the MOA was not an "*as is*" provision, this is an issue that will have to be determined at a later date.

It is also noteworthy that the issue as to whether or not the inspection of the Vessel's classification documents prior to sale constituted an exclusion of the implied terms as to satisfactory quality pursuant to Section 14(2C)(a) of the SOGA was not discussed, and as a result this issue has yet to be determined.

In light of this ruling it is recommended that buyers and sellers consider whether they wish those terms implied by operation of law pursuant to the SOGA to apply to their dealings. We would recommend that sellers give careful consideration to expressly exclude the terms of the SOGA.

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