



High Court resolves long-standing uncertainty over the availability of damages in addition to demurrage

Patrick Dunn-Walsh

K Line Pte v Priminds Shipping (HK) Co Ltd (The Eternal Bliss) [2020] EWHC 2373 (Comm)

The recent decision of Mr Justice Andrew Baker in *The Eternal Bliss* provides a firm answer to a long-standing question concerning a shipowner's right to damages, over and above its right to demurrage, under a voyage charterparty when the charterer's allotted time for loading and discharging is exceeded.

One body of opinion (adopted by Voyage Charters, and by Mr Justice Potter in *The Bonde* [1991] 1 Lloyd's Rep 136) was that the demurrage regime provided an exhaustive remedy to the shipowner in respect of a charterer's failure, in breach of charter, to load or discharge cargo within its allowed time, such that damages over and above demurrage were only recoverable where charterers had also breached a further term of the charterparty. The rival view, adopted by, for example, *Scrutton on Charterparties*, was that damages

were in principle available in addition to demurrage, even where there was no additional breach, in circumstances where the owner had suffered a further type of loss in addition to its loss of use of the vessel as a freight-earning instrument.

Andrew Baker J, after a sustained and careful review of the authorities, academic literature, and underlying principles that "ought to drive the answer" ([5]), concluded that the latter view was correct, and therefore that *The Bonde* should not be followed.

The facts

The case arose from the carriage of a cargo of soybeans from Brazil to China under a voyage charterparty. At the discharge port, there was a 31-day delay as a result of congestion, and a lack of storage space for the cargo. Upon inspection after discharge, the cargo was said to have been damaged by mould and caking, and the receivers claimed against the Owners in respect of the loss. The Owners settled the

claim for a total of US\$1.1 million, and then sought to recover this cost from Charterers in arbitration proceedings.

The only breach that Owners alleged against Charterers was the failure to discharge the cargo within the time allowed. Consequently, Charterers said that the claim should be dismissed, on the basis that the demurrage regime provided an agreed, fixed monetary remedy for breach of this obligation. Both parties agreed to refer this issue of law to the High Court in London under s.45 of the Arbitration Act 1996.

The question of principle

Andrew Baker J described the main point of principle as being a question of "what it is that demurrage liquidates?"; i.e. does it fix (and therefore limit) a shipowner's recovery in respect of all losses arising from delay to the vessel, or merely those arising from the Owner's loss of use of the vessel to earn freight from further employment?

The Judge concluded that, from the

authorities and literature, the prevailing view is that “a demurrage rate gives an agreed quantification of the owner’s loss of use of the ship to earn freight by further employment in respect of delay to the ship after the expiry of laytime, nothing more” ([61]), and that “the nature of demurrage is that it serves to liquidate loss of earnings resulting from delay to the ship through failure to complete loading or discharging within the laytime allowed by the charter” ([88]). In principle, therefore, Andrew Baker J was of the view that Owners “had the better of the argument by a clear margin”; since Owners’ claim was for a type of loss other than loss of use of the vessel, as a matter of principle it ought to follow that a claim in damages should also lie.

Prior authority

However, the decision of Potter J in *The Bonde* was an authority that decided the issue in question in favour of Charterers. Andrew Baker J therefore had to consider whether *The Bonde* should be followed.

He ultimately declined to do so on the basis that that decision involved an inaccurate reading of an earlier decision, *Aktieselskabet Reidar v Arcos* [1927] 1 KB 352, and the comments in respect of that case in *Suisse Atlantique v d’Armement Maritime v N.V. Rotterdamsche Kolen Centrale* [1967] 1 AC 361.

In *Reidar v Arcos*, a vessel was chartered to carry a cargo of timber from the White Sea to Manchester. The charterers exceeded the laytime at the load port and the vessel went on demurrage. However, the delay also had the effect that the vessel could not complete her laden voyage by 1 November, with the effect that a winter deckload limit came into effect and consequently less cargo

than contracted for was shipped. The shipowner successfully claimed for deadfreight, i.e. the difference in freight between the winter load carried and the contracted-for summer load.

However, the Court of Appeal’s reasoning differed, with Lord Justice Bankes holding that there was a single breach of contract, Lord Justice Sargent holding that there were two, and there being uncertainty as to Lord Justice Atkin’s view.

In *The Bonde*, Potter J took the view, with which Andrew Baker J agreed, that Atkin LJ in *Reidar* was a ‘two-breach man’, i.e. his analysis was that there had been two breaches rather than one. However, it did not follow from this, as Potter J thought, that *Reidar* decided that an additional and different breach was in law required before damages for a separate and different head of loss may be recovered. That was a non-sequitur; as Andrew Baker J said at [37], “[d]isagreeing with Bankes LJ, as the majority did, that there was only one breach does not amount to or imply disagreement with his conclusion that the owner’s claim was sound if there were only one breach”. On the contrary, the reasoning of the majority in *Reidar* was consistent with Bankes LJ’s approach.

Consequently, Potter J’s decision was based on faulty reasoning, and Andrew Baker J decided not to follow Potter J on the point. Although it is “a strong thing for a judge of first instance to refuse to follow a prior decision at first instance that has stood without direct criticism in later case-law for a substantial period of time” ([142]), the decision was a specific narrow point that had not become settled wisdom or resulted in the question being treated as uncontroversial, and since the Judge came to the firm and clear view that *The Bonde* was wrongly decided, he

concluded that the right course was to say so in terms.

Conclusion

The legal position after *The Eternal Bliss* is clear; where, in consequence of a charterer’s failure to load or discharge cargo within its allowed time, an owner has suffered a further type of loss in addition to its loss of use of the vessel, it does not need to prove breach of a separate term of the Charterparty to recover that loss by way of damages.

This decision is both logically sound, having regard to the widely understood purpose of the demurrage regime, and provides a clear answer to a question that had previously provoked considerable uncertainty.

[Read the judgment](#)

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Patrick Dunn-Walsh

Patrick has a broad commercial practice, encompassing shipping, banking, company / insolvency law, insurance, and civil fraud / asset recovery.

He is frequently instructed in shipping disputes, both as sole counsel and as part of a team.

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