OW BUNKER BANKRUPTCY - CANADIAN UPDATE

By Peter Swanson of Bernard LLP (Vancouver)

Ottawa, Canada, September 23, 2015: Justice Russell of the Federal Court (Canada's admiralty court) issued a recent judgment addressing the propriety of a charterer interpleading funds to court in the context of two competing claims (one on behalf of OW and the other on behalf of the actual bunker supplier) and determining which entity is entitled to payment of the interpleaded funds, all arising from the filing for bankruptcy by the OW Bunker group.

The facts are fairly typical in the context of the OW bankruptcy. A Canadian based charterer (the "Charterer") of two foreign vessels had ordered bunkers through an OW subsidiary for delivery in Vancouver, Canada. The bunkers were actually supplied by a Canadian bunker supplier (the "Canadian supplier"), not an OW related company. The Charterer was facing claims for payment from both the OW subsidiary (and their receiver) and the Canadian supplier.

BY PETER SWANSON

Given the competing claims the Charterer sought to interplead funds into court, rather than run the risk of paying the wrong party. Various issues arose, including the propriety of interpleading funds in the circumstances, and ultimately whether the receiver or the Canadian supplier was entitled to the funds.

The case was argued under the summary judgment rules of the court. Justice Russell in a detailed and comprehensive set of reasons concluded that the Charterer had properly interpleaded the funds despite the fact that the claims being pursued were not for the exact same amounts. He further held that the Canadian supplier was entitled to payment, based in large measure on a direct contractual link created by the contract documents used in the transaction. The OW subsidiary (represented by the receiver) was only entitled to payment of the mark-up on the sale of the bunkers, after deducting costs of the proceeding.

Justice Russell made some significant findings including the following:

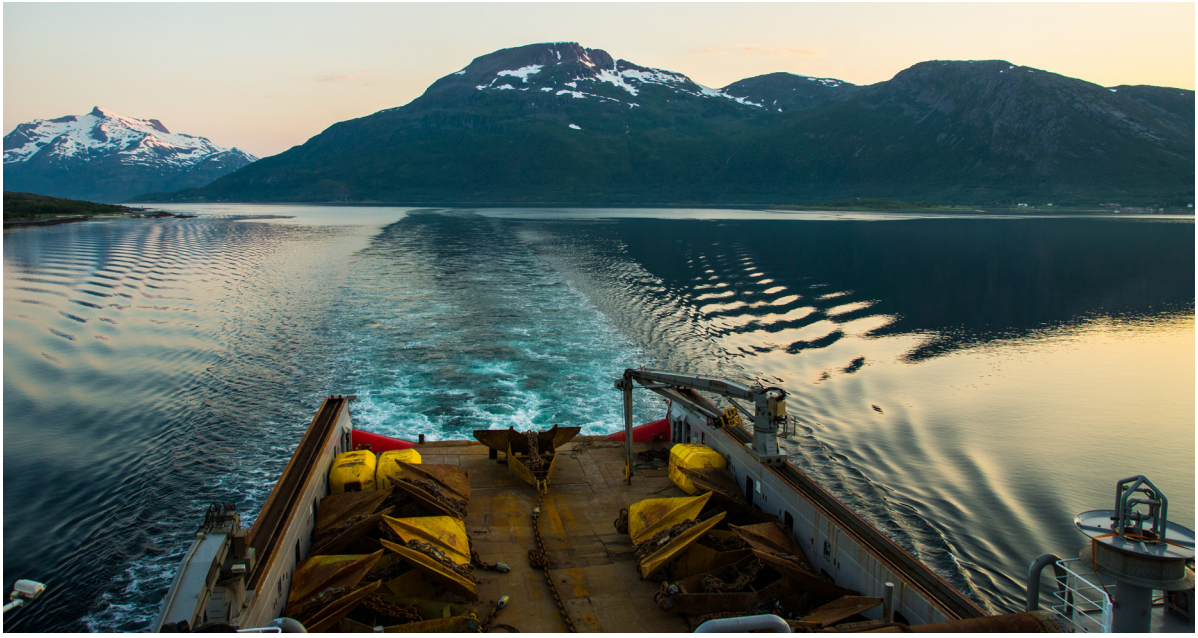
- The OW subsidiary did not have a mari time lien under Canadian law.

- The OW subsidiary did not have a statutory right of arrest, as it had not paid the Canadian supplier for the bunkers.
- The terms of sale for the bunkers were the Canadian supplier's terms, not the OW terms.
- The Canadian supplier had both a contractual and maritime lien against the vessels in issue under Canadian law. This would necessarily include a right to arrest the subject vessels.
- The Canadian supplier had a direct contractual link with the Charterer as "customer" under the Canadian supplier's terms of sale. As such, given the specific terms of sale, both OW and the Charterer were jointly and severally liable to the Canadian supplier for the price of the bunkers as delivered.
- Once payment is made out of the inter pleaded funds to the Canadian supplier, any liability the Charterer had to OW will be extinguished at least to the amount of the payment.
- Until payment is made to the Canadian supplier, their maritime lien will not be extinguished.

This appears to be the first reported case in which a Canadian necessary supplier has successfully asserted a maritime lien created in 2009 by s. 139 of the Marine Liability Act. The receivers have filed a Notice of Appeal.

The Reasons for Judgment are available on-line at: http://canlii.ca/t/glcxf.

Peter Swanson and Megan Nicholls of Bernard LLP (Vancouver) were successful counsel for the Canadian supplier.



LAY-UP – TIME CHARTER PARTIES

By Anders Evje and Camilla Bråfelt

Due to the recent downturn in the shipping markets, and in the offshore sector in particular, lay-up issues are once again high on the agenda. Recently Nordisk have assisted a number of members with lay-up related issues. Here are some points to bear in mind:

In long-term time charter parties, it is common to agree that the charterers will have the option to lay up the chartered vessel. By way of illustration, the well-known charter party form Supplytime 2005 (as well as the previous 1989 version) provides that the charterers shall be entitled to lay up the vessel. The rationale is that the charterers should have the opportunity to reduce costs in a situation where there is no employment for the vessel. Clauses granting the charterers an option to lay up the vessel fall into two main categories:

BY ANDERS EVJE

1) clauses providing that the charterers during the period of lay-up shall pay a specific lay-up rate. The lay-up rate is agreed at the time of concluding the charter party. Under this type of clause, any reduction in operating costs will be for the owners' benefit, since the compensation during the lay-up period is pre-determined.

2) clauses providing that the charter hire rate during the period of lay-up shall be reduced either by the amount of savings actually made by the owners or by the amount of savings the owners reasonably ought to have made as a result of the vessel being laid up. In our experience, this type of lay-up clause is more likely to cause disagreement between the parties than the clauses described in 1) above.

An example of a lay-up clause falling into the second category is Clause 6(d) of *Supplytime 2005*: "*The Charterers shall have the option of laying up the Vessel at an agreed safe port or place for all or any portion of the Charter Period in which case the Hire hereunder shall continue to be paid but, if the period of such lay-up continues for more than 30 consecutive days, there shall be credited against such Hire the amount which the Owners shall reasonably have saved by way of reduction in expenses and overheads as a result of the lay-up of the Vessel.*"

Prior to deciding to lay up the vessel, the charterers will often want to know how much the charter

hire rate will be reduced and will ask the owners to advise as to what savings will be made. Whilst it would be advantageous for the parties to agree on the reduction (and thus the "lay-up rate") in advance, thereby avoiding any subsequent discussions as to what savings the owners should reasonably make as a result of the lay-up, the parties are under no obligation to sort this out in advance. The system set forth in *Supplytime 2005*, Clause 6 (d) is the opposite, namely that the charter hire rate after the initial lay-up period of 30 days shall be reduced by the amount which the owners shall reasonably have saved as a result of the lay-up.

Once the charterers have made the decision to lay up the vessel, a typical problem is determining the meaning of "*the amount which the Owners shall reasonably have saved by way of reduction in expenses and overheads*". Unsurprisingly, the parties often have differing opinions on this point. The extent of the owners' obligation to save costs must be considered on a case-by-case basis, taking into account in particular the duration of the lay-up period and/or the remaining period of the charter party; the owners' maintenance obligation, including the obligation to ensure that the vessel remains in class; and the costs involved in rendering the vessel in condition to resume operations upon redelivery.

In our experience, the more specific the clause is the better. In recent cases we have assisted in disputes relating to issues such as (i) whether redundancy costs should be included in the owners' costs; (ii) whether the clause provides for cold or warm lay-up; (iii) the timeframe within which the owners are obliged to present the vessel ready for trading after the lay-up period; and (iv) the due date for costs relating to making the vessel ready to trade again.

Lay-up clauses come in many different varieties, and the above is intended simply as an introduction to this topic. Please do not hesitate to contact us for assistance in drafting a suitable clause or to benefit from our opinion on the construction of a specific clause.

BY CAMILLA BRÅFELT

NEW BIMCO ANTI-CORRUPTION CLAUSE

By Magne Andersen

BIMCO has recently launched a new anti-corruption clause for charter parties. The aim of the drafting committee (which included Karl Even Rygh from Nordisk) has been to create a balanced and workable clause. One of the main features of the clause is that the owners shall issue a Letter of Protest upon receipt of a demand for a facilitation payment. If the demand causes subsequent delays, the vessel shall remain on hire (if on time charter) or time lost shall count as laytime/demurrage (if on voyage charter). The clause, together with helpful and detailed explanatory notes, can be found here:

https://www.bimco.org/Chartering/Clauses_and_Documents/Clauses/Anti_Corruption_Clause.aspx

BY MAGNE ANDERSEN

NEWS FROM NORDISK

We are pleased to announce that two new lawyers will be joining us next year:

Vicki Tarbet (an English solicitor) will join our team in Oslo on 22 February 2016. Vicki comes from a leading shipping firm and has been based in Piraeus for the last two years.

Eileen Lam will join our team in Singapore on 15 February 2016. Eileen is dual qualified (as an English and Singaporean solicitor) and also comes from a leading shipping firm.

Please note the following dates for our annual members' seminars:

Hamburg: Tuesday 12 January - Park Hyatt Hamburg
Grimstad: Tuesday 19 January - Scandic Grimstad
Copenhagen: Tuesday 26 January - Danish Shipowners' Association
Oslo: Tuesday 2 February - Høyres Hus
Bergen: Tuesday 16 February - Grand Terminus Hotel

We take this opportunity to wish all our members and contacts a Merry Christmas and all the best for 2016!