Ashfords Solicitors

Marine

Quarterly Newsletter - Winter 2011

Marine

Welcome to this edition of the Ashfords Marine Newsletter.

The Christmas and New year are busy periods for mariners and we trust that all our clients have had a good and safe Christmas break. We also wish you all a prosperous New Year.

In this addition of our Newsletter we look at jurisdiction issues, VAT and a commercial construction of contracts. We also update you on arbitration and look at funding large commercial claims on a Conditional Fee basis - particularly important in these difficult economic times.

As a department this has been a busy period for us all and we continue to look at ways of improving our service to our clients from all our offices, particularly those in London, Exeter, Plymouth and Bristol.

Over the last quarter:

- Ashfords hosted a reception at the Waterfront restaurant during the recent Americas Cup racing, which was staged at Plymouth from 10-18 September. Marine clients of the firm attended. Charles Hattersley has since written an article on the legacy of this event;
- Jonathan Hadley Piggin and Rachel Stebbing attended the Monaco Boat Show from 21-24 September;
- Charles Hattersley and Brian Taylor attended the Southampton Boat Show on 22 September, where free legal consultation was provided by Brian;
- Charles Hattersley attended the Nautical Institute Command Seminar on 04/05 November at Bristol and the 4th Annual UK Ports Conference in London on 6th December.

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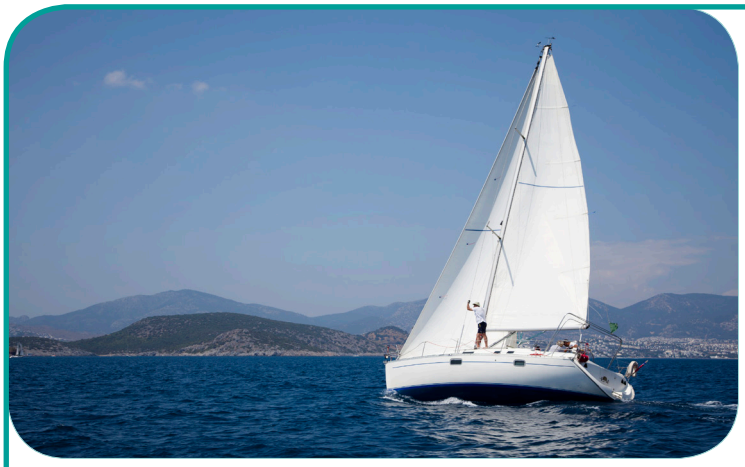

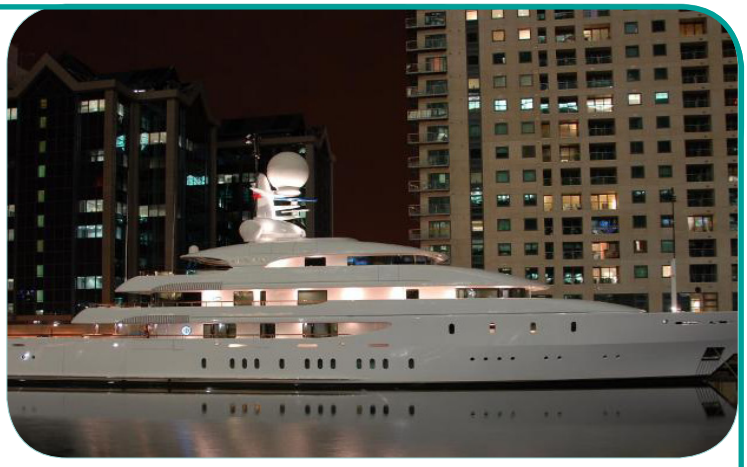

Sovarex SA -v- Romero Alvarez SA

[2011] EW8C1661 (Comm) - Queen's Bench Division Commercial Court - Hamblen J

Brian Taylor of Ashfords LLP acted for Romero Alvarez SA.

The Commercial Court held, in the context of enforcement of an arbitration award of a FOSFA Tribunal, that the Court has the power to direct that there be a determination of disputed issues of fact under the Arbitration Act 1996, and that there was no necessity for that to be done by way of action on the award.

Sovarex applied to the High Court for permission to enforce an arbitration award and to enter judgement in the terms of the award under Section 66 of the Arbitration Act 1996. The Defendant, Romero Alvarez contested the application on the grounds that:

1. The award was a nullity as no contract had been concluded between the parties and there was accordingly a real ground or doubt as to the validity of the award; and

2. Spanish Courts had been asked to consider the validity of the alleged contract prior to commencement of arbitration proceedings, and were therefore seized of the proceedings. The English proceedings should therefore be stayed.

As to point (i) Mr Justice Hamblen was asked to consider whether Romero Alvarez had lost the right to object to the enforcement of the award by participation in the arbitration. He held that the only way in which Romero Alvarez took part in the arbitration was to send a number of communications to the tribunal stating that there was no contract and informing the tribunal that it had commenced proceedings in Spain. Hamblen J held that the communications were no more than protestations as to the jurisdiction of the tribunal and it had not participated in the arbitration. It was therefore entitled to object to the award being enforced.

Mr Justice Hamblen went on to consider whether Romero Alvarez' contention that there was a real ground for doubting the award was valid. If so, summary enforcement procedures under Section 66 of the Act were inappropriate and Sovarex should be required to commence a separate action on the award. He held that although the present application under Section 66 of the Act involved disputed issues of fact, there was no reason why Section 66 of the Act did not prevent Sovarex seeking to enforce the award. He said that if a party was required to effectively start proceedings again by way of an action on the award, this would be a waste of time and costs and would be contrary to the CPR overriding objective.

As to the second issue, Hamblen J noted that the current position in relation to the Spanish proceedings was that the Spanish courts had dismissed Romero Alvarez's action, although it had since appealed. However, as things were, there could be no determination as to the validity of the contract in the Spanish courts. Accordingly, there was no duplication of proceedings and no issue under EC regulation 44/2001 on the Jurisdiction and Recognition and Enforcement of Judgements in Civil and Commercial Matters.

Comment
This judgement confirms for the first time that factual issues including issues relating to the existence of an arbitration agreement can be determined under Section 66 of the Arbitration Act 1996. Where the award debtor seeks to raise objections to the tribunal's jurisdiction at enforcement stage, this can be dealt with as part of a summary enforcement procedure and there is no need for the award creditor to proceed by way of an action on the award.

Mr Justice Hamblen's reasoning on the issues relating to the Spanish proceedings seems to have been influenced by the fact that the English court was the court of the seat of arbitration and was the proper court to determine the existence or otherwise of the arbitration agreement. This is in line with a proposal to amend the Brussels Regulation to require courts seized of a dispute to stay proceedings in favour of an arbitration tribunal or the courts of the member state. His reasoning also appears to be based on the New York Convention which dictates that there is no presumption in favour of the validity of the award with the burden of proof resting on the party resisting enforcement, and there is discretion to refuse enforcement in deference to competing proceedings at the seat of the arbitration.

Written by: Brian Taylor

VAT and Marine Leisure : Member State Discord in the European Union

There have been a number of changes to the tax and customs legislation relating to superyachts since the end of 2010. Most recently there have been rulings by the EU on the Spanish Matriculation Tax and the French Commercial Exemption.

Spanish Matriculation Tax
The EU Commission has dismissed the Spanish Matriculation tax as unlawful. However, there are indications that this is not the end of the matter.

Matriculation tax is levied at 12% of a yacht's value, and is applied to pleasure yachts registered in Spain or used in Spanish waters by residents.

It also affects commercial yachts with foreign flags but which have a base in Spain or are used temporarily by Spanish residents in territorial waters.

This practice has been criticised by the Spanish marine industry, arguing that it is preventing the development of charter activity in Spain and that it contravenes the EU principles of free movement of people and free movement of services.

In September 2011, the Commission issued a preliminary response to the question of whether the tax has breached EU legislation. It deemed the tax to be an unlawful infringement of the principle of free movement of the provision of marine services. The Commission recommended that future taxation should be proportional to the time that the yacht is available for charter in Spanish waters. The official response from the Commission is still awaited.

French Commercial Exemption
Since May 2004, France has applied a VAT exemption for all commercial vessels (including commercial yachts) providing certain conditions were met.

It provided a number of advantages to EU and non-EU yachts, including enabling non-EU yachts to be customs cleared without paying VAT on import into the EU, duty free fuel supplies, a VAT exemption on supplies of goods and services to the yacht and on charters.

In March 2010, the EU Commission started infringement proceedings against France. It was subsequently decided that the French legislation was contrary to European Union VAT law. In particular, it did not include the condition that the vessel must be used "for navigation on the high seas" in order for the exemption to apply, thus widening the scope of the exemption.

Accordingly, in January 2011 the French legislation was amended, but as there was no definition in French Law of the "High Sea" the industry was unclear on how this would be interpreted. The French authorities issued an "administrative interpretation" in February 2011, effectively confirming it would apply if the previous criteria were met. Thus the French Commercial Exemption would continue to apply, unchanged.

The EU Commission has recently issued a press release announcing its decision to bring an action against France in the European Court of Justice. This will oblige France to give a clear interpretation of "navigation on the high seas." Although, this is likely to narrow the exemption considerably, the decision is not imminent and until then the exemption will continue to apply.

Summary
VAT exemption is interpreted differently from one Member State to another. However, it appears that the recent Commission rulings, together with other changes, show that it may become increasingly difficult for yacht owners to benefit from VAT exemptions.

Written by: Rachel Stebbing

The Rainy Sky S.A.

The Supreme Court has finally ruled in the long outstanding issue of Rainy Sky S.A and others -v- Kookmin Bank in favour of the Greece based ship owner Metrostar. Accordingly its claim for payment of just over US $46million plus interest under a refund guarantee issued by the Korean "Kookmin" Bank was upheld.

This very long running dispute related to the refund of pre-delivery instalments paid to a Korean shipbuilder under advance performance bonds (refund guarantees) following an application by the builder for protection from his creditors under the Korean Corporation Restructuring and Promotion Law 2007.

The case turned on the construction of the guarantees which contained two conflicting provisions. The first guaranteed repayment of "all sums due ….. under the contract" - which plainly included sums repayable in the event of insolvency. The second provided - albeit in a separate paragraph - that the refund could only be claimed from the Defendant bank in the event of rejection of the relevant vessel, total loss or "termination, cancellation or rescission of the contract".

The determination and construction of these clauses came in the first instance before Mr Justice Simon, who found that "all sums due … under the contract" was clear and unambiguous wording and that therefore the bank's construction had the surprising and uncommercial result that the buyers would not be able to call on the bond on the happening of an event which would be most likely to require first class security. That in his view was wrong.

Unsurprisingly the bank appealed this decision and although Sir Simon Tuckey in the Court of Appeal agreed with Mr Justice Simon and pointed out where there are two possible constructions of a contract the Court is entitled to reject the one which is unreasonable and, in a commercial context, the one which "flouts business sense", Pattern LJ, who delivered the majority judgment, allowed the appeal on the basis that unless the natural meaning of the words produced a result which is so extreme as to suggest that it was unintended, the Court has no alternative but to give effect to its term. On this basis he did not agree that the bank's construction of the bonds was uncommercial as there might have been any number of reasons why the builder was unable or unwilling to provide the bank cover in the event of its insolvency.

This decision was not received well in the market place and there was a sense of frustration that an uncommercial interpretation of the bonds earned favour with the Court.

However, when the matter arrived in the Supreme Court, Lord Philips (supporting the original order of Mr Justice Simon) stated that the Court was bound to follow the natural meaning of the words unless the result was "so extreme as to suggest that it was unintended". It followed therefore that the buyer's construction was to be preferred because it was consistent with the commercial purpose of the bonds in a way which the banks construction was not; accordingly it was possible, despite the insolvency provisions, to reclaim sums due under the refund guarantees.

The case is important because it confirms that English Courts will generally have appropriate regard to commercial matters and where there are two arguable constructions of a clause it is much more appropriate to adopt the more, rather than less, commercial construction. Of course, the main lesson to be drawn from this important case is that clear and unambiguous drafting in refund guarantees (and other contractual obligations) should prevent such protracted litigation that took place in this case.

Written by: Charles Hattersley, a Partner in the Marine Department of Ashfords' LLP.

Arbitration Service

The costs of attending Court to resolve disputes continue to rise notwithstanding the time it takes for a reasonably straightforward matter to be listed.

Sending papers out to be dealt with by arbitration (particularly for insurers' claims teams, especially when one insurer covers both sides, an increasingly common occurrence with the consolidation in yacht insurance in recent years) can be cost effective and less time consuming than spending weeks arguing over a claim and then sending papers to solicitors for advice/action.

Ashfords LLP's marine department can offer a cost-effective and speedy way of resolving disputes. Jonathan Hadley-Piggin specialises in the yachting sector, is a qualified arbitrator and has arbitrated a number of yacht related disputes such as collision, damage claims, negligence and contractual issues.

This service is particularly suitable for lower value, more straightforward matters where the use of solicitors would soon outweigh the amounts in dispute.
The arbitration service would be based on a full and legally binding arbitration award based on papers alone, without the need for a hearing or lengthy correspondence, and the Award would be published within 14 days of receipt of papers.

Our fee for providing this service is £1000 plus VAT for claims under £6,000 (split between the parties or according to liability) and for claims above this an agreed figure based on the amount of evidence provided.

Written by: Jonathan Hadley Piggin, a partner in the Marine Department of Ashfords' LLP

Ashfords LLP offers Conditional Fee Arrangements for Marine Litigation

It is becoming more and more common in the marine market to find that, following a major contractual dispute or a disastrous fixture, a shipowner or charterer has a good claim that is frustrated by lack of funds and aggressive threats of security for costs from his opponent. In addition to these problems, clients have often had difficulty in obtaining access to justice. In the event a lawyer is appointed it is very common that, having set out the detailed merits in a letter of claim, it is summarily dismissed by the opponent's lawyers without any consideration of the merits. The claim is met with a simple denial and threat of an application for security for costs in huge and unjustifiable sums if litigation or arbitration is commenced. If the matter is to proceed the injured party is then asked to find huge sums to cover his own and the other side's legal costs. This is often enough to stifle the claim.

In order to meet this we are pleased to announce that we have negotiated a delegated authority scheme with a major After the Event broker, and are now in a position to offer a quick and speedy service on a Conditional Fee basis to appropriate marine clients. In addition it is also possible to offer Third Party Litigation Funding through a major funder (usually for claims in excess of £1Million).

For those not familiar, CFA is a funding arrangement whereby the fees payable to your solicitor are lower, or more often nothing, if the case is lost. If the case is won, a success fee is payable in addition to normal fees by the losing party. It is not a percentage of the sum awarded and the uplift is paid by the paying party. This applies to arbitration as well as court proceedings.

After The Event insurance ("ATE") provides cover if a case is lost, as the policy will normally repay the other side's costs and disbursements together with your own solicitor's disbursements up to the limit of indemnity.

Very importantly, The ATE Insurance policy often insures its own premium, meaning the client may have has nothing to pay if their case is lost.

Third Party Litigation Funding may provide for disbursements such as counsel, foreign lawyers, experts, court fees, investigation of assets, arrest or freezing applications and payment of arbitrators interim and final fees.

If you are in the unfortunate position of having a significant claim or unable to have access to lawyers because of funding issues and are interested in such an arrangement please contact Charles Hattersley or Brian Taylor. We will then look at the prospects of success, assess the risk and advise you whether we are willing to act on this basis.

The firm is highly regarded for its superyacht practice, which represents builders, designers, owners and lenders.
Chambers Guide to the Legal Profession, 2012 Edition

"I wouldn't hesitate to call on the services of Ashfords again, and have indeed recommended them to various other marine contacts."
Client testimonial
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