SHIP SCRAPPING: WHO OWES A DUTY OF CARE?

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On Monday 13 July 2020, the UK High Court refused to strike out a claim for negligence brought by Hamida Begum (the Claimant) against Maran (UK) Limited (the Defendant) in relation to the death of her husband Mohammed Khalil Mollah (the Deceased)[1], which occurred while he was working on the demolition of an oil tanker.

In finding that Maran arguably owed a duty of care to the Deceased, the Court considered a number of related points including: (i) whether the Defendant had control to influence where a ship was eventually scrapped (i.e. through adjusting the sale price); (ii) whether companies that sell their vessels into Bangladesh should be liable to compensate workers who suffer injury or death as a result; and (iii) the robustness of contractual clauses stipulating demolition should take place "in an environmentally sound manner and in accordance with good health and safety working practices".

> "This decision is significant as it provides further confirmation that a shipowner's liability may not end at the point of sale for scrapping."

While the substantive hearing in relation to the negligence claim remains to be heard, this decision potentially has far-reaching implications for the shipping industry. Primarily, it reinforces the principle that when a ship reaches end of life, a shipowner's liability does not necessarily end upon sale.

SUMMARY OF FACTS

On 30 March 2018, Mr Mollah fell to his death while working on the demolition of the Maran Centaurus (the Vessel) in the Zuma Enterprise Shipyard (the Ship Yard) in Chittagong (now Chattogram), Bangladesh. On 11 April 2019, the Claimant issued proceedings claiming damages for negligence under the Law Reform (Miscellaneous Provisions) Act 1934 and the Fatal Accidents Act 1976 (and, alternatively, under Bangladeshi law). The Defendant is a company registered in the UK and the Claimant alleges that it is both factually and legally responsible for the vessel ending up in Bangladesh, where working conditions in relation to ship scrapping were known some of the lowest health and safety standards in the world.

In 2017, the Vessel had reached the end of her operational life and the Defendant made arrangements to sell her for demolition. The preferred bidder was Hsejar Maritime Inc (Hsejar) and the sale was to be made on an "as is" basis in Singapore. A Memorandum of Agreement (MoA) was entered into between Centaurus Special Maritime Enterprise (CSME)[2] and Hsejar; the purchase price being over $16m and the buyer's obligations to be guaranteed by Wirana Shipping Corp Pte Ltd. The Defendant was not a party to the MoA. On 5 September 2017, Hsejar took delivery of the Vessel which was reflagged from Greece to Palau, her name changed to EKTA and a new crew installed. From this point neither the Defendant nor any other entity within its shipping group had direct involvement with the Vessel. The Vessel left Singapore on 22 September 2017 and was beached at Chattogram on 30 September 2017.

The Defendant's application to strike the negligence claim out was made on the grounds that the Defendant was too removed (in time and space) from the Deceased's death to owe him a duty of care and that the accident was due to working conditions in the Ship Yard over which it had no control.

SUMMARY OF JUDGMENT

Ship scrapping practices

The Defendant accepted, for the purposes of the present application only, that the "beaching" method of demolition carried out in India, Pakistan and Bangladesh is an inherently dangerous practice. The witness evidence "demonstrates that this method has been the subject of international concern for years, and they say that the yards in Chattogram are particularly egregious"[3].

"The Court rejected the Defendant's submission that since most vessels ended up in South Asia, it followed the Defendant was merely following standard practice, on the straightforward basis that if standard practice was inherently dangerous, it cannot be condoned as sound and rational even though almost everybody does the same."

The Claimant invited the Court to draw the inference that the Defendant knew the Vessel would be scrapped in Bangladesh rather than anywhere else for two reasons:

- The price paid by Hsejar (a lower price would signify an onward sale to a more reputable ship recycling yard); and
- The quantity of fuel left on the vessel when it was delivered (which in itself would limit where the Vessel could be delivered for scrapping).

The Court noted that it was minded to draw this inference and counsel for the Defendant agreed that the application should be determined on the premise the Defendant was aware of the ultimate destination of the Vessel[4].

Evidence for the Claimant stated that over the "past ten years more than 70% of the approximately 800 vessels that reach the end of their operating lives annually – representing 80-90% of the tonnage – are broken up using the "beaching" method"[5].

The Court noted that this evidence weighed in favour of the Claimant's case on the issue of duty, however, the Defendant sought to use it in support of a submission on breach: since most vessels ended up in South Asia, it followed that the Defendant was merely following standard practice. The Court rejected that submission "on the straightforward basis that if standard practice was inherently dangerous, it cannot be condoned as sound and rational even though almost everybody does the same"[6].

Company structure and duty of care

Between 2004 and August 2017, the Vessel was registered to CSME, a company incorporated in Liberia. All the shares in CSME are directly owned by another company within the same group, Maran Tankers Shipholdings Ltd (MTS), incorporated in the Cayman Islands. Pursuant to an Operating Agreement made on 9 February 2009 between CSME and Maran Tankers Management (MTM), a company incorporated in Liberia but with a place of business in Greece, MTM agreed as independent contractor and not as agent to operate and manage the Vessel. By an Agency Agreement made between MTM and the Defendant on 1 August 2013, the latter agreed to provide agency and shipbroking services to MTM in respect of a number of vessels. By clause 2 of that agreement, the Defendant agreed to carry out a number of functions on behalf of MTM including "to act as chartering broker, to collect…all proceeds realised from the employment of the Ships" and "to attend and deal with the insurance of the Ships". The Court noted that the "sale of vessels for the purposes of demolition or otherwise may not form part of the defendant's express agency responsibilities under the agreement, but in my view clause 2(k) is probably wide enough to encompass these. What is clear from the Agency Agreement read as a whole is that, as one might expect, the Defendant acts under the direction and instruction of MTM"[7].

In relation to the issue of whether a duty of care exists, counsel for the Claimant submitted that "'control' in this context can take a number of legally relevant forms, each of which may be sufficient to establish a duty of care, all of which are dependent on what the facts reveal. At its highest, it may be revealed…that the Defendant enjoyed literal control over the negotiations – setting the price, effectively selecting Chittagong, determining the terms of the agreement, giving approval etc…". For the purposes of this case, counsel for the Defendant proceeded on the basis that the Court take "control" at this highest level and assume the Defendant had autonomy over the sale.

> "The Court's finding is in line with an increasingly expansive attitude towards potential liability for operations in other jurisdictions that has been seen in various decisions including by the UK Supreme Court and the UK Court of Appeal."

Importantly, in making this concession, the Defendant accepted that it was at least arguable that the "commercial realities went further than the four corners of the Operating Agreement and the Agency Agreement…[and that, in fact] the position of the Defendant is legally indistinguishable for these purposes from that of MTM"[8].
The Court rejected the Defendant's alternative argument that the Defendant's obligations and functions "went no further than the black letter of the contracts…and its alleged duty of care should be analysed on that premise", in particular noting the "paucity of evidence emanating from the Defendant" in this regard and that there is a real prospect that an "examination of the complete evidential picture at any trial would support the high watermark of the Claimant's case on control"[9].

COMMENT

While the decision on the substantive negligence claim will have the final say on these matters, this decision is significant as it provides further confirmation that a shipowner's liability may not end at the point of sale for scrapping.

"The EU Ship Recycling Regulation was not in force at the time the Vessel was sold and the HKC is not yet in force, but the criteria for it to come into force has almost been met. As these standards are measurable and internationally recognised, adherence to them will offer some protection from this sort of claim."

The conditions of some scrapping yards in India, Pakistan, and Bangladesh are now well-known and the Court agreed that a duty of care exists at the time of sale to such an extent that should a vessel be scrapped without due consideration of these conditions, liability may be much harder to avoid. In our view, the Court's finding in this regard is in line with an increasingly expansive attitude towards potential liability for operations in other jurisdictions that has been seen in various decisions including by the UK Supreme Court in *Vedanta*[10] and the UK Court of Appeal in *Chandler v Cape*[11]. The Court may not be piercing the corporate veil in these cases, but it is proving increasingly willing to push it to one side where there is evidence of serious harm to human health and the environment.

The implications of this decision for the maritime sector are twofold. Firstly, the Court's comments indicate that intra-group contractual and management structures commonly used in the shipping industry with a view to containing liability could come under pressure or scrutiny in this context. Secondly, and as a corollary to the first, there is now a very real risk of legal liability attaching in circumstances where a company no longer has an interest in the vessel in question. This is in addition to the usual reputational risks that come with being associated (even at arms-length) with such an incident. As such, protections against such liability need to be considered now.

The direction of travel towards safer environmental and health and safety practices in the maritime sector and more robust regulation of the same has been clear for some time. We note that there are two standards that deal with ship recycling: the EU Ship Recycling Regulation[12] and the Hong Kong Convention[13]. The EU Ship Recycling Regulation was not in force at the time the Vessel was sold and the HKC is not yet in force, but the criteria for it to come into force has almost been met. As these standards are measurable and internationally recognised, adherence to them will offer some protection from this sort of claim; it may be prudent for those involved in the sale of end of life vessels to make explicit reference to meeting these standards in the relevant transaction documents.

Rachael Davidson, a former senior associate in our London office, also contributed to this article.

[1] Bergum (on behalf of Mollah) v Maran (UK) Limited [2020] EWHC 1846 (QB).

[2] Being the registered owner of the Vessel.

[3] Paragraph [13] of the decision.

[4] Paragraph [14] of the decision.

[5] Ibid.

[6] Paragraph [15] of the decision.

[7] Paragraph [7] and [8] of the decision.

[8] Paragraph [19] of the decision. The Court goes on to state that "on further reflection, I think that [the position of the Defendant] is probably legally indistinguishable from that of the owner".

[9] Ibid.

[10] *Vedanta Resources Plc & Anor v Lungowe and Ors* [2019] UKSC 20.

[11] *Chandler v Cape plc* [2012] EWCA Civ 525.

[12] Regulation (EU) No 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling and amending Regulation (EC) No 1013/2006 and Directive 2009/16/EC

[13] The Hong Kong International Convention for the safe and environmentally sound recycling of ships.

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