

A "SHORT-LIVED" BLISS FOR OWNERS

19 NOVEMBER 2021 • ARTICLE



INTRODUCTION

The UK Court of Appeal yesterday handed down judgment in *The Eternal Bliss*¹, allowing the charterers' appeal.

"In the absence of a clear binding authority on the point, the Court approached the question as a matter of principle and held that if a shipowner seeks to recover damages in addition to demurrage arising from delay, it must prove a breach of a separate obligation."

Giving the judgment of the Court, Lord Justice Males overturned the earlier decision of the High Court and restored the widely held understanding that "*in the absence of any contrary indication in a particular charterparty, demurrage liquidates the whole of the damages arising from a charterer's breach of charter in failing to complete cargo operations within the laytime and not merely some of them*". In the absence of a clear binding authority on the point, the Court approached the question as a matter of principle and held that if a shipowner seeks to recover damages in addition to demurrage arising from delay, it must prove a breach of a separate obligation.

BACKGROUND

This case was an appeal by the charterers of *The Eternal Bliss* of Mr Justice Andrew Baker's decision in the Commercial Court² where he concluded that in circumstances where the charterers failed to discharge a cargo of soybeans within agreed laytime,

in addition to demurrage, the owners were entitled damages for losses arising. When deciding the point, Baker J. stated that the earlier decision in the case of *The Bonde*, upon which the owners had relied, had been "*clearly faulty*".

On appeal, the charterers argued that the purpose of providing for liquidated damages in the charter party was to provide certainty and avoid disputes as to whether the loss suffered was of "a different kind" than what is covered by demurrage. Whereas, the owners argued that demurrage was only intended to compensate the owners for daily running costs and the loss of opportunity to earn freight.

JUDGMENT

The Court of Appeal revisited the case law starting with *Reidar v Arcos*, which they considered to be of little assistance given the ambiguity of Lord Justice Atkin's judgment and observed there was little point in searching "*for a clarity which did not exist*". The court relied on (and upheld) the decision in *The Bonde*, which it observed was the only decision that decided, as a matter of *ratio*, whether unliquidated damages can be recovered *in addition to* demurrage when the only relevant breach is a failure by the charterer to load or discharge within agreed laytime. The *dicta* in the other cases considered was inconclusive but leant towards supporting the view that demurrage was the owners' *sole* remedy for breach of the agreed laytime provisions.

The Court of Appeal also acknowledged the divergent views which appear in the leading textbooks, such as *Scrutton on Charterparties* and *Cooke on Voyage Charters* but considered that "*little more can be said than that highly experienced shipping lawyers, some of who became distinguished judges, have taken different views about what Reidar v Arcos decided and what the right answer ought to be*". On the basis that "*the cases do not provide a decisive answer and there is no clear consensus in the textbooks*" the court "*approach[ed] the issue as one of principle*" and decided that demurrage liquidates all damages arising out of the charterers' failure to complete cargo operations. The court gave the following reasons:

1. Liquidated damages clauses provide certainty and, unless agreed otherwise, should cover all losses arising out of a single breach. It would be "*unusual and surprising*" for commercial people to agree that a liquidated damages clause should liquidate only some of the damages arising from a particular breach;
2. Whilst demurrage is intended to compensate the owners for loss of freight, this does not mean that this is the only loss in the parties' contemplation at the relevant time – i.e. it is likely to be one factor, but is by no means the only factor;
3. If demurrage were to be limited so as to compensate the owners only for loss of the opportunity to earn freight due to delay, such limitation would inevitably lead to disputes as to whether the loss incurred in any given case is "of the type" or "kind" covered by demurrage;
4. Whilst a shipowner will routinely have insurance, which covers claims from cargo interests in respect of cargo, a charterer will not typically have insurance against liability for unliquidated damages resulting solely from a failure to complete cargo operations within laytime. Charterers have protected themselves against this unlimited liability by means of the agreed demurrage provision. Owners' unsuccessful construction of the demurrage regime would have "*disturb[ed] the balance of risk inherent in the parties' contract*";
5. The principle set out in the case of *The Bonde* has been accepted in the commercial sector for over 30 years and to depart from that decision would likely cause uncertainty, especially given that it was not wrongly decided; and
6. Allowing the appeal will provide "*clarity and certainty*" but if commercial parties do not agree with the decision, they are free to stipulate what demurrage covers in the charter party.

CONCLUSION

The judgment of the Court of Appeal in *The Eternal Bliss* has been highly anticipated following the stir caused last year by the Commercial Court's decision.

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For now, the Court of Appeal has restored the previous position, but it has also highlighted a number of issues which may not have been in the contemplation of owners and charterers prior to *The Eternal Bliss*. In these circumstances, owners should review whether their pricing of demurrage adequately covers the risk of any loss arising out of charterers' failure to complete cargo operations within the permitted laytime and not only the loss of opportunity to earn freight and running costs. Alternatively, owners could consider defining in the charter party what losses are covered by demurrage.

[1] [2021] EWCA Civ 1712

[2] Please see the link to our previous briefing on the decision of the Commercial Court [here](#)

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