Ferryways NV v. Associated British Ports
Case No: 2006 FOLIO 1092
High Court of Justice Queen's
Bench Division Commercial Court
14 February 2008

[2008] EWHC 225 (Comm)

2008 WL 370997

Before : Mr. Justice Teare
Date: 14/02/2008, Hearing
dates: 30–31 January 2008

Analysis

Representation

- Nigel Cooper (instructed by Mills and Co.) for the Claimant.
- Grahame Aldous (instructed by Hill Dickinson LLP) for the Defendant.

Approved Judgment
Mr. Justice Teare:

This is the judgment of the Court on six preliminary issues arising out of a claim brought by the Claimant, a Belgian ship owner or operator (now in receivership), against the Defendant, an English port owner or operator. The claim arises out of the death on 26 October 2005 at Immingham of Oleksiy Prutskoy, a Ukrainian, who was chief officer on board the vessel HUMBER WAY. He was supervising the loading and unloading operations when he was hit by a tugmaster vehicle driven by an employee of a sub-contractor of the Defendant. Sums were paid by the North of England P & I Club (in which the vessel was entered) in respect of his death and of the cost of repatriating his body. The Claimant, who was the demise charterer of the vessel and a member of the Club, seeks to recover those sums from the Defendant. The Defendant denies that the Claimant is entitled to recover those sums.

The sums were paid on the basis that the Claimant was the employer of the chief officer. The Defendant denies that the Claimant was the employer and avers that the employer was Ambra Shipmanagement Ltd. of Cyprus ("Ambra"). The Defendant therefore says that Claimant has not suffered any loss and cannot recover the sums paid. In addition it was said that the Defendant was protected by the terms of its stevedoring contract with the Claimant. Thus it is necessary to begin by referring to the essential terms of the relevant contracts.

The crew management agreement

The Claimant and Ambra entered into a Crew Management Agreement ("the CMA") dated 2 June 2003. The CMA was on the standard form of the BIMCO crew management agreement known as "Crewman A Cost Plus Fee". The Claimant was described as the Owner and Ambra was described as the Crew Manager. The CMA commenced on 30 June 2003. No termination date was specified.

"Vessel" and "crew" were defined. "Vessel" meant the vessel or vessels set out in Annex A and "crew" meant the master officers and ratings of the numbers rank and nationality specified in Annex B.

Annex A named the vessel as BEATRIXHAVEN. Annex B referred to the name of the vessel as BEATRIXHAVEN tbn [to be named] HUMBER WAY. It is common ground, or at any rate not disputed, that the vessel covered by the CMA was the vessel on which the chief officer suffered his accident, HUMBER WAY.

The flag of the vessel was stated in Part 1 box 7 of the CMA to be "Malta to be reflagged to Panama". By Part I box 12 and Part II clause 19.1 the CMA was governed by English law.

"Crew Management Services" were defined as the services agreed to be carried out by the Crew Managers in accordance with clause 3.1.

Part II Clause 3 of the CMA provided that:

> "… the Crew Managers shall carry out the Crew Management Services in respect of the Vessel as agents for and on behalf of the Owners."

Clause 3.1 provided as follows:

> "The Crew Managers shall provide suitably qualified Crew for the Vessel as required by the Owners in accordance with the STCW 95 requirements, provision of which includes but is not limited to the following functions:
>
> "(i) selecting and engaging the Vessel's Crew …"
>
> (v) instructing the Crew to obey all reasonable orders of the Owners and/or the Company, including, but not limited to orders in connection with safety and navigation, avoidance of pollution and protection of the environment."

The "Company" referred to in clause 3.1(v) was defined as

> "the Owner of the vessel or any other organisation or person who has assumed the responsibility for the operation of the vessel from the Owner and who, on assuming such responsibility, has agreed to take over all duties and responsibilities imposed by the ISM Code".

The Owner was obliged by clause 8 to provide funds to the Crew Manager so that it could pay Crew Costs (which would include such items as wages) and clause 8.5 provided:

> "8.5 Unless otherwise agreed, all discounts and commissions obtained by the Crew Managers in the course of the Crew Management of the Vessel shall be credited to the Owners."

Clause 12.4 provided that:

> "Indemnity. Except to the extent and solely for the amount therein set out that the Crew Managers would be liable under sub-clause 12.2 the Owners hereby undertake to keep the Crew Managers and their employees, agents and sub-contractors Indemnified and to hold them harmless against all actions, proceedings, claims, demands or liabilities whatsoever or howsoever arising which may be brought against them or incurred or suffered by them arising out of or in connection with the performance of the Agreement, and against and in respect of all costs, loss, damages and expenses (including legal costs and expenses on a full indemnity basis) which the Crew Managers may suffer or incur (either directly or indirectly) in the course of the performance of this Agreement."

There was an Addendum to the CMA which extended the CMA to the period 1 August 2004 until 31 January 2006.

The contract of employment

Ambra engaged crew on the terms of a document described as a Voyage Contract. Ambra did so with the assistance of a manning agency in the Ukraine known as Staff Centre, Odessa-Ukraine. The Chief Officer was first employed to serve on HUMBER WAY pursuant to such a contract dated 11 September 2003. The tour of duty was 2 months and so there were subsequent contracts dated 26 March 2004, 22 July 2004, 17 September 2004, 29 January 2005 and 17 June 2005. They were all in the same terms and identified the vessel on which he was to serve as HUMBER WAY.

It appears that the contract in force at the time of the incident on 26 October 2005 was dated 5 October 2005. Like its predecessors it is described as

> "a contract of employment between Ambra Shipmanagement Ltd., … as the Employer (hereinafter called the Company) and Prutskoy Oleksiy as the seafarer (hereinafter called the Employee)".

The contract was to be governed by and construed in all respects in accordance with the laws of the vessel's flag state.

The contract was signed for the Company by Staff Centre as agents only.

Prior to the date of this final contract of employment the chief officer had served on HUMBERWAY for in excess of 14 months between September 2003 and August 2005. However, the vessel on which the chief officer was to serve was named in the final contract as mv HOBURGEN.

The reason that the contract dated 5 October 2005 referred to mv HOBURGEN and not to mv HUMBER WAY appears from an e-mail dated 29 September 2005 from Bill Davidson, the Claimant's fleet manager. HOBURGEN, which had been chartered by the Claimant and served as one of the "**Ferryways** ships", lacked a master with a pilotage exemption certificate ("PEC") for Immingham. Chief Officer Prutskoy had such a PEC and so he was placed temporarily on board that vessel. He served on HOBURGEN from 6 October 2005 until 15 October 2005 when, it would appear, the master returned having obtained the requisite PEC. Thereafter Chief Officer Prutskoy served on HUMBER WAY. Wages statements prepared by Ambra record his service on both vessels.

The contract of employment provided details of the employee's monthly wages and bonus payments. By clause 1 of the terms and conditions "the Company" was liable for payment of all wages. By clauses 15.2 and 15.2.1 "the Company" was liable to pay compensation "in the event that the Employee dies" and to "bear in full the cost of … return of the body to place or residence by the next-of-kin." The following clauses must also be noted:

> **Grievance Procedure**
>
> If the Employee has a grievance, he should make use of the following grievance procedure: The aim of the grievance procedure is to settle the grievance quickly and fairly, and as near to the point of origin as possible.
>
> • 12.1.1. The matter is first raised with the Employee's Superior Officer.
> • 12.1.2. If the grievance is not resolved within 48 hours, the matter will be referred to the Master by your Superior Officer who should furnish the Master an agreed note explaining how the matter has been processed so far.
> • 12.1.3. If the grievance is not settled between the Employee and the Master onboard, the Master will present the facts in writing to the Employer. The Company's decision will be final.

…

Code of Conduct

Introduction

Disciplinary procedures onboard a vessel are designed to uphold the standards as laid down in the Rules and Regulations of the Company.

…

Company Policy

Safety and Environmental Protection Policy.

The Company works on the basis of a structured and documented Safety Management System to contribute to a safe transport of goods and passengers at sea and to the protection of the maritime environment. The Safety Management System (SMS) is based on the requirements of the International Safety Management Code (ISM-Code IMO Resolution A.741(18)).

Our Safety and Environmental Protection Management System is based on the following principles:

> The primary objectives of our business activities are the prevention of human injury or loss of life and property, personal safety protection of the men and passengers at sea, the protection of the maritime environment and the avoidance of damage or loss of the ship, its cargo and other goods.
>
> Therefore, the respective compulsory rules and regulations have to be complied. In our daily work we always consider relevant guidelines and standards recommended by Authorities, Administrations and Classification Societies.
>
> Qualified and motivated personnel are a basic requirement for a safe operation of the ship. The continuous improvement of safety management

skills and of our personnel's abilities and skills guarantees our business success.

The clear instructions for the execution of key shipboard operations, as well as, for the maintenance of safe working conditions enable safe working practices. Our crew are able to operate the ship in a safe and appropriately way, using the available equipment on board at any time and to react immediately in an adequately way before potential emergency situations.

The Company has implemented safeguards against all identified risks to ensure that accidents and dangerous situations, as well as, environmental pollution shall be avoided from the beginning. Nevertheless, if such incidents appear, documented and implemented emergency plans enable an immediate and effective reaction.

The early recognition and analysis of weak points, non-conformities and risks and the analysis of (near miss) accidents and emergency cases assure the introduction and maintenance of reasonable and effective corrective measures in time.

The compliance of the Safety and Environmental Protection Management System with the requirements of the ISM-Code are checked by internal and external

> audits, as well as, by internal reviews at the management level. If weak points are detected, they will be analyzed, and corrective measures implemented, thus resulting in a continuous improvement of the system.
>
> Therefore, the Management herewith enforces the Safety and Environmental Protection Management System and instructs all the employees to use and accomplish this system consequently. Personnel's reports, opinions and proposals for improvement of the system are welcomed and explicitly desired."

It is convenient to refer at this stage to oral evidence given by Michelle Lough, a crew manager employed by Ambra. She did so by video link from Cyprus. She said that in October 2005 Ambra provided crew management services for 5 companies and sourced crew from 18 crew manning agencies. She said that Ambra currently employs 7 people in its office in Cyprus and always contracted with clients on the basis of the "Crewman A — Costs plus Fee" form of management agreement. One of the manning agencies used by Ambra was Staff Centre in Odessa. She said that the manning agency was briefed by Ambra as to the ship owner on whose ships the crew was to serve and the manning agency then briefed the crew to the same effect. She said that she dealt with the Claimant on a daily basis. Whilst the Claimant was content to allow Ambra to select ratings the Claimant got involved with the selection of junior officers and was responsible for the selection of the Master, Chief Officer, Chief Engineer and Second Engineer. She often discussed crewing issues with the Claimant's fleet manager, Bill Davison, several times a day. She was aware that he visited the Claimant's vessels on a daily basis.

It was submitted by counsel on behalf of the Defendant that I should place little weight on the evidence of Michelle Lough as to what information was given to the crew by Staff Centre in Odessa because there was no evidence that she had any personal knowledge of what happened in Odessa. I agree that it did not appear that she had personal knowledge of such matters but my understanding of her evidence was that she was stating what the general practice was when Ambra used the services of a local manning agent. There was no reason to doubt her evidence as to Ambra's general practice.

The stevedoring agreement

The terms on which the Defendant supplied its stevedoring services were set out in an Agreement dated February 2005. The Claimant agreed to use the Defendant's Cargoflow Terminal in Immingham and the Defendant agreed to provide berthing, cargo handling and transit services for the Claimant's vessels and the cargo carried by them. The agreement incorporated the Defendant's "Standard Terminal Operator's and Stevedore's Conditions". Clause 4(a)(i) provided as follows:

> **"Rights and Obligations of the Company"**
>
> Subject to and in accordance with these Terms and Conditions:—
>
> i) the Company shall perform the Services with reasonable care and skill …"

Clauses 9 and 10 of those conditions provided as follows:

> **Exclusion and Limitations of Liability**
> …
>
> (c) Where the Company is in breach of its obligations in respect of the

Services or under any Contract or any duties it may have as bailee of the Goods it shall have no liability to the Customer in contract, tort, negligence, breach of statutory duty or otherwise for any loss, damage, costs or expenses of any nature whatsoever incurred or suffered by the Customer which is of an indirect or consequential nature including without limitation the following

i) loss or deferment of profit;

ii) loss or deferment of revenue;

iii) loss of goodwill;

iv) loss of business;

v) loss or deferment of production or increased costs of production;

vi) the liabilities of the Customer to any other party.

…

(e) Nothing in this Clause or Clause 10 shall exclude or limit the liability of the Company for death or personal injury resulting from the Company's negligence.

…

Time Bar for Claims and Notice of Loss

(a) Without prejudice to any exclusion or limitation of liability provided for by these Terms and Conditions, any claim by the Customer in respect of any alleged loss, damage, deviation, mis-delivery, delay, detention or other claim of any kind whatsoever shall be notified in writing to the Company within 14 days

…

(iii) from, in any other case, the date of the event giving rise to the claim."

The Club entry

The Claimant was entered with the Club as "the senior member". Ambra, along with the vessel's technical managers, ASP-Seascot Shipmanagement Ltd., and the registered owner, East West Mediterranean Ltd., were "joint members." The relevant year of entry was from 20 February 2005 until 20 February 2006 and a certificate of entry was issued in relation to HUMBER WAY. I infer from this, and was told by counsel, that there was a separate certificate of entry for each vessel in the Claimant's fleet. There was a deductible of Euro 3000 in respect of crew illness, injury or death.

The preliminary issues

On 14 June 2007 Andrew Smith J. ordered the trial of 5 preliminary issues as follows

- i) Would a failure by the driver of the tugmaster to exercise reasonable care and skill in driving the tugmaster on 26 October 2006 equate to a breach by ABP of clause 4(a)(i) of the Stevedoring Agreement ?
- ii) Has **Ferryways** suffered a loss as a result of the accident ?
- iii) Was **Ferryway** the employer of the deceased ?
- iv) If not was **Ferryways** obliged to indemnify Ambra Ship Management for the payment to the deceased's dependants pursuant to the contract of employment and did they ?
- v) Can ABP rely on the exclusion and limitation of liability found in paragraphs 9 and 10 of the Stevedoring Agreement ?
- vi) Did **Ferryways** give notice of loss to ABP pursuant to the Stevedoring Agreement ?

The first issue; would negligence by the driver of the tugmaster amount to a breach of duty by the Defendant ?

It is common ground that the answer to the first issue is Yes.

The second issue concerns the question whether the Claimant has suffered a loss. Since the Claimant's primary case is that it suffered a loss because, as employer of the chief officer, it incurred a liability to pay a death benefit and repatriation expenses to his next of kin it makes sense to consider the third issue next.

The third issue; was the Claimant the employer of the chief officer ?

The Claimant's pleaded case is that Ambra entered into the contract of employment as agent for the Claimant. Ambra's authority to do so was expressly provided by clause 3 of the CMA. It was submitted that the Claimant was the undisclosed principal of Ambra.

The Defendant's submission is that the wording of the Voyage Contract is clear; Ambra is the employer. Whilst Ambra had authority to engage crew on behalf of the Claimant pursuant to the CMA, Ambra did not purport to do so when engaging Chief Officer Prutskoy; it purported to engage him as employer.

Before considering the rival submissions it is necessary to note that both parties referred to and relied upon BIMCO's commentary on the two standard forms of crew management agreements published by BIMCO in 1999. The commentary stated that "the crew management industry has developed rapidly in the past few years and there is now a well-established practice within the industry of providing crew management services on an agency basis." It said that in Crewman A "the crew managers act as agents for and on behalf of the owners and in Crewman B the crew managers employ the crew and act in their own name."

In Siu v Eastern Insurance Co. Ltd. [1994] 2 AC 199 at p.206–207) Lord Lloyd of Berwick observed that

> "In the normal way, of course, it is the owners who employ the crew, not their agents. It is commonplace for the agents to *engage* the crew on behalf of the owners. … But it is very rare for the agents to *employ* the crew."

In the light of the BIMCO commentary and the existence of the standard form Crewman B it may be that it is now more usual than it once was for agents to employ crew.

The commentary further stated:

> "The 'agency' nature of Crewman A implies that the owners are the employers of the crew. … However, the Sub-committee considered that a cost plus agreement could be more easily manipulated to change the employment status than a lump sum agreement. For this reason, Crewman A has been drafted to provide the flexibility for parties to agree on the identity of the employer of the crew, should local law or specific commercial circumstances dictate such a change."

Counsel for the Defendant relied upon this latter passage as showing that it did not inevitably follow that where an agent who has contracted under Crewman A enters into an employment contract he does so as agent.

I am not sure what part of Crewman A confers the suggested "flexibility" because clause 3 provides that

> "… the Crew Managers *shall* carry out the Crew Management Services in respect of the Vessel as agents for and on behalf of the Owners." (emphasis added)

I accept the submission made by counsel for the Claimant that the CMA evidenced an intention on the part of the Claimant and Ambra that Ambra would engage crew as agent for and on behalf the Claimant. However, it does not follow that Ambra will always do so. That will depend upon the terms of the particular contract of employment. In the present case the Defendant says that the terms in which Ambra contracted made it clear that Ambra was the employer and no-one else.

There was no evidence that there was any "local law or specific commercial circumstances" which dictated that the Claimant should not be the employer. It was commented by counsel for the Defendant that when Mr. Bijvank of the Claimant wrote to the sister of the chief officer on 28 October 2005 expressing his sympathy and condolences he did not refer to the chief officer as having been employed by the Claimant. It was further stressed that Mr. Bijvank told Ambra and the Club on 2 November 2005 that he was worried that the Defendant

> "might say that we should not make direct payments to the family as there is no contract between **Ferryways** and the crew member. Bearing in mind that [the Defendant] appointed Hill Taylor London they will use all the tricks in the book to escape liability."

However, although these passages were stressed more than once, the Defendant did not advance a positive case that there was any local or specific circumstance which required the Claimant not to be party to the employment contract. Counsel for the Claimant observed that had the Claimant wished to avoid being the employer it could have used Crewman B.

It seems to me that I must approach the issue I have to decide on the basis that there was no local law or special circumstance which required the Claimant not to be the employer.

There was no evidence from Mr. Bijvank. It would not be appropriate for me to speculate as to whether, on 2 November 2005, he was making a statement of fact or expressing an opinion or as to the basis of what he said.

I should add that later on 2 November 2005 Martina Meinders of Ambra replied to Mr. Bijvank's e-mail saying

> "kindly advise, who should arrange the confirmation that we are the crew agents for the employer and **Ferryways** is the actual employer. Does this have to be written on Ambra or **Ferryways** letterhead and signed by both parties ? Otherwise a copy of the Management Agreement between Ambra and **Ferryways** would do ?"

There was debate as to what this e-mail meant. It is not necessary to decide what it meant but I prefer the view that the author considered that the Claimant was the employer and asked whether a copy of the CMA would suffice to establish that. Whatever views have been expressed by the Claimant or Ambra as to who was the employer the Court must determine that issue having regard to the terms of the relevant contracts.

There is no doubt that pursuant to clause 3 of the CMA the Claimant authorised Ambra to engage officers and crew as agent on behalf of the Claimant.

Counsel for the Defendant suggested that clauses 3.1(v) and 8.5 of the CMA would be unnecessary were Ambra always to engage crew on behalf of the Claimant. This is strictly true but neither clause is inconsistent with the intention of the parties being that Ambra would engage crew on behalf the Claimant. Both are consistent with that intention.

Counsel for the Defendant further submitted that the CMA authorised Ambra to engage crew for HUMBER WAY as agent for the Claimant but did not authorise Ambra to engage crew to serve on board HOBURGEN which was the vessel named in the contract dated 5

October 2005. I did not regard this as an obstacle to the Claimant's case. There is no suggestion that any further contract of employment was entered into in addition to that dated 5 October 2005. All parties, that is the Claimant, Ambra and the chief officer must have acted on the basis that the contract of employment dated 5 October 2005 applied to the chief officer's employment on board HUMBER WAY. Ambra had authority to engage the chief officer for service on board HUMBER WAY.

However, the Claimant was not stated to be the employer in the contract of employment or to be the principal of Ambra. If the Claimant is to take the benefit of the contract of employment as employer it must therefore be as an undisclosed principal, that is, a principal whose existence is not disclosed in the contract of employment. On the basis of Michelle Lough's evidence, which I accept, the practice was for crew to be informed of the identity of the ship owner or ship operator on whose vessels they were being engaged to serve. Thus it is likely that when the chief officer was first engaged to serve on HUMBER WAY in 2003 he was informed that the Claimant was the owner or operator of the vessels on which he was to serve. Of course, by 5 October 2005, when he signed his last contract of employment he had served on HUMBER WAY for many months and must have been very familiar with the Claimant's ships and the manner in which they operated. There is no reason to doubt, as at the date of his final contract, that he knew that the vessel on which he was to serve was owned or operated by the Claimant and that he was willing to serve on the Claimant's vessels. Nevertheless the Claimant was not disclosed in the contract of employment as the employer or as Ambra's principal.

It is a principle of the law of agency that where intervention by the undisclosed principal would be inconsistent with the terms of the contract he cannot take the benefit of the contract as an undisclosed principal; see *Bowstead & Reynolds on* Agency 18th.ed. Article 76 rule 4 and para.8–081. The relevant principle was described by Lord Lloyd of Berwick in Siu v Eastern Insurance Co. Ltd. at p.207 as follows:

> "The terms of the contract may, expressly or by implication, exclude the principal's right to sue, and his liability to be sued. The contract itself, or the circumstances surrounding the contract, may show that the agent is the true and only principal."

The question to be answered therefore is whether the terms of the contract of employment are inconsistent with the intervention of the Claimant as principal. This type of question has been approached in the past by enquiring whether there are words in the contract which designate the agent as "the real and only principal" and as "the only person" who is to have the rights and obligations arising under the contract; see Fred. Drughorn Limited v Rederiaktiebolaget Trans-Atlantic [1919] AC 203 at p.209 per Lord Sumner. Thus the mere description of the agent as "charterer" in a charterparty did not prevent the undisclosed principal from intervening because

> "it does not say that he is not chartering for others, and if that is what he has done in fact the law allows them to prove it." (per Lord Sumner at p.209)

The decision in Fred. Drughorn Limited v Rederiaktiebolaget Trans-Atlantic was approved by the House of Lords in Siu v Eastern Insurance Co. Ltd. (per Lord Lloyd at p.208).

Since the contract of employment described Ambra as entering into the contract "as the Employer" reference should also be made to Rederiaktiebolaget Argonaut v Hani [1918] 2 KB 247 in which it was held that where a limited company had entered into a charterparty "as charterers" a person who claimed to be the undisclosed principal of the limited company could not intervene in the charterparty as principal. Rowlatt J posed the question of construction in these terms at p.249:

> "It seems to me that in these cases it is always necessary to look at

> the document as a whole in order to ascertain whether such words as "as charterers" appearing after a person's name are merely words of description of the parties to the contract, in the same way as the words "of the first part" or "of the second part" or are used for the purposes of describing an essential part to be performed by the party in the transaction which the contract is dealing with."

The latter part of that sentence, the alternative construction, is not perhaps as clearly expressed as one would expect in a judgment of Rowlatt J. but the sense he intended to convey is clearly set out in the next paragraph when he expressed his conclusion that

> "the words "as charterers" are not merely the equivalent of such words as "of the one part" or "of the other part", but that they are words indicating that it is a term of the contract that the persons who are to fill the position of charterers and to have the rights of charterers are Hansen Brothers and no one else.""

In Siu v Eastern Insurance Co. Ltd. the House of Lords also recognised that there was a class of personal contract where the burden could not be performed vicariously. The example was given of a contract to paint a portrait. Such a contract could not be enforced by an undisclosed principal since his intervention would be a breach of the very contract in which he seeks to intervene (per Lord Lloyd at p.210). But it did not follow that intervention by an undisclosed principal was precluded because a contract could not be assigned (per Lord Lloyd at p.210).

The following statement of principle by Diplock LJ (approved by Lord Lloyd in Siu v Eastern Insurance) in Teheran-Europe Co. Ltd. V S.T.Belton (Tractors) Ltd. [1968] 2 QB 545 at p.555 should also be noted:

> "Where an agent has … actual authority and enters into a contract with another party intending to do so on behalf of his principal, it matters not whether he discloses to the other party the identity of his principal, or even that he is contracting on behalf of a principal at all, if the other party is willing or lead the agent to believe that he is willing to treat as a party to the contract anyone on whose behalf the agent may have been authorised to contract."

I therefore approach the question to be answered, that is whether the terms of the contract of employment are inconsistent with the intervention of the Claimant as principal, by having regard to the guidance given by the authorities to which I have referred.

Although Ambra is described as the employer there is no express provision that Ambra is the *only* person to have the rights and obligations of an employer under the contract of employment. This is a pointer in favour of the Claimant being able to intervene as undisclosed principal.

Another pointer in that direction is that the applicable law of the contract of employment depends upon the flag of the vessel upon which the crew member serves. That is more suggestive of the ship owner or operator being entitled to the rights and obligations of the employer than of Ambra, a Cypriot company, being the only entity entitled to those rights and obligations.

However, the contract of employment is between Captain Prutskoy and Ambra, "as the Employer". That, at the very least, is consistent with an intention to prevent any person other than Ambra from having the rights and obligations of the employer. Moreover, the identity of the employer will ordinarily be of great importance to the employee. For this reason the right

to employ a person under a contract of employment is not assignable; see *Chitty on* Contracts 29th.ed.Vol.1 para.19–054. But although the description of Ambra is clear and the chief officer will always have received his wages from Ambra, it is necessary to consider the whole of the contract of employment in order to see whether the parties intended that only Ambra could take the benefit of the rights and obligations of the employer.

In that regard one is immediately struck by at least three clauses which one would not expect to apply to a small crewing agency dealing with several ship owners or operators.

Clause 12 (Grievance Procedure) provides, in the event that the grievance cannot be settled between the employee and the master, that "the master will present the facts in writing to the Employer. The Company's decision will be final." Clause 14 (Code of Conduct) refers to "the standards laid down in the Rules and Regulations of the Company" and Clause 16 (Company Policy) provides that "the Company works on the basis of a structured and documented Safety Management System to contribute to a safe transport of goods and passengers at sea and in the protection of the environment." The clause sets out certain principles one of which states that "the Company has implemented safeguards against all identified risks to ensure that accidents and dangerous situations, as well as environmental pollution shall be avoided from the beginning."

It would be surprising if a small crewing agency with several clients had the personnel to resolve grievance issues which the master of any of the ships of its clients had reported to it. It would also be surprising if a small crewing agency had its own Rules and Regulations relating to conduct on board the ships of its clients. Finally, it would be surprising (even astonishing) if such an agency had the expertise to produce and operate a structured and documented SMS for each of the ships of its clients. One would expect all of these matters to be dealt with by the ship owner or operator.

Indeed, Michelle Lough said that if the master of one of the Claimant's ships could not resolve a grievance he would discuss it with Bill Davison, the Claimant's fleet manager. Although the master would advise Ambra of the grievance Ambra would discuss it with the Claimant. Michelle Lough said that her understanding was that the Claimant's decision would be final. As to the Rules and Regulations Michelle Lough said that these would have been set out in the Safety Management System ("SMS") which would have been placed on board the Claimant's ships by the Claimant's technical managers.

These clauses therefore suggest that it was envisaged that an entity other than Ambra would have the rights and obligations of the employer under the contract of employment. The obvious contender is the owner or operator of the ship on which the employee agrees to serve. It is to be expected that the ship owner or operator would ensure that its ships had on board a SMS and Rules and Regulations (which may or may not have been designed and drafted by a technical manager). These clauses are therefore a cogent indication that the Claimant is able to intervene in the contract of employment as an undisclosed principal.

Further, by reason of the briefing given by the manning agent to the crew and the crew's subsequent acceptance of the employment contract, it can fairly be said (picking up the language used by Diplock LJ in Teheran-Europe Co. Ltd. V S.T.Belton (Tractors) Ltd.) that a crew engaged by Ambra would be willing, or would lead Ambra to believe that they were willing, to treat as a party to the employment contract the ship owners or operators on whose behalf Ambra has been authorised to contract. That must certainly be true of Chief Officer Prutskoy when he entered into the contract dated 5 October 2005. By that time he had been serving on the Claimant's vessels since September 2003 and would have been familiar with the Rules and Regulations and SMS on board the vessel. He would have known that Ambra had neither Rules or Regulations or an SMS. It follows that Ambra would have had no reason to believe that the chief officer would be unwilling to contract with anyone but Ambra.

For the same reason I do not consider that the chief officer's contract of employment, although a personal contract, was within that class of personal contracts where the obligations of the employer could not be performed vicariously. It would not have been a breach of the terms of the contract of employment for the Claimant to intervene as employer. In my judgment such intervention is contemplated by clauses 12, 14 and

16. Nor would it come as a surprise to the chief officer that the Claimant would do so.

Counsel on behalf of the Defendant submitted that clauses 12, 14 and 16 should be understood as contemplating that Ambra will delegate the matters there mentioned to others but that Ambra would retain responsibility for them. I was not persuaded that that was how they should be viewed. No express mention is made of delegation and it would be unrealistic to view a small crewing agency as assuming responsibility for matters such as the SMS.

Counsel drew attention to clause 1 of the CMA which defined company (in the CMA) as "the Owner of the vessel or any other organisation or person who has assumed responsibility for the operation of the vessel from the Owner and who has agreed to take over all duties and responsibilities imposed by the ISM Code ." He suggested that the circumstances contemplated by this definition assisted his suggested interpretation of clauses 12, 14 and 16 of the contract of employment. I do not accept that they do. A ship manager may assume responsibility for the operation of a vessel but such a manager would be a very different entity from a small crew manager. Clause 3.1(v) of the CMA provides that the crew manager, Ambra, shall instruct the crew to obey all reasonable orders of the "Owners and/or the Company including, but not limited to orders in connection with safety and navigation, avoidance of pollution and protection of the environment." That clause therefore makes provision for the case where the owner has delegated responsibility for the operation of the vessel to a ship manager. It does not assist in showing that Ambra was the only person intended to be able to exercise the rights and responsibilities of the employer under the contract of employment. (In the present case there was evidence that the Claimant had a technical manager who placed the SMS documentation and Rules and Regulations on board HUMBER WAY. But there was no evidence that the technical manager had taken over responsibility for the operation of HUMBER WAY from the Claimant or that the technical manager should be regarded as the employer of the crew. On the contrary, any such suggestion would sit unhappily with the evidence of Michelle Lough that the Claimant was responsible for the final selection of a vessel's senior officers, that the Claimant would allocate the crew to vessels operated by the Claimant and that Mr.Davison, the Claimant's fleet manager, visited the vessels on a daily basis.)

Counsel also relied upon the terms in which Staff Centre signed the contract of employment, namely, "for the Company". I consider those terms to be neutral. They do not touch upon the question whether the Company (Ambra) entered into the contract as principal or agent.

I have therefore reached the conclusion that the words "as the Employer" in the contract of employment do not amount to a term of the contract that *only* Ambra may have the rights and obligations of the employer. It follows that the contract of employment does not exclude the Claimant from being an undisclosed principal.

The Claimant was therefore entitled to intervene in the contract of employment as employer of the chief officer. Whether this was a case where both agent and principal had liabilities as employer or only the principal was not the subject of submissions. The answer to Issue 3 is Yes.

In his written submissions Counsel for the Claimant suggested that if the Claimant were not the employer under the contract of employment an implied contract of employment between the Claimant and the chief officer could be found and reference was made to Dacas v Brook Street Bureau (UK) Ltd. [2004] ICR 1437 and James v London Borough of Greenwich [2008] EWCA Civ 35 . However, such an implied contract was not pleaded and was not advanced with any enthusiasm in oral submissions. I shall say nothing further about the possibility because it is unnecessary to do so and because in the cases to which reference was made there was, I was told, no express agency such as exists in the present case in the CMA.

Issue 2; has the Claimant suffered a loss ?

The short answer to this question is Yes, because the Claimant incurred a liability under the contract of employment to pay a death benefit and repatriation expenses to the chief officer's next of kin. The fact that that liability was discharged by the Club, pursuant to insurance cover taken out by the Claimant, is not taken into account when assessing the Claimant's loss.

The written and oral submissions dealt with this issue at rather greater length. It was thought necessary to examine in some detail the negotiations between the Claimant, the Club and the chief officer's next of kin which led to the payment being made. On my approach to this issue this was not necessary. I shall therefore express my findings shortly on the basis of the documents and the oral evidence of Judith Burdus who is a senior executive claims handler at the Club. The payments made by the Club were to satisfy what was perceived to be a liability of the Claimant. The Claimant bore the deductible and its loss record was affected.

Issue 4; would the Claimant in any event be bound to indemnify Ambra against liability for the death benefit and for the repatriation costs ?

This issue strictly does not arise in view of my decision on issues and 2 and 3. I shall therefore deal with it shortly.

The Claimant said that if it did not have any liability to pay the death benefit and repatriations costs to the chief officer's next of kin and Ambra did, the Claimant was nevertheless obliged to indemnify Ambra in respect of that liability pursuant to clause 12.4 of the CMA. The Defendant's argument in reply was, in essence, that the Club, having discharged Ambra's liability, was subrogated to Ambra's claim to be indemnified by the Claimant but because Ambra and the Claimant were co-assureds such claim could not be enforced against the Claimant. If so, then the Claimant cannot claim to have suffered any loss by reason of clause 12.4 of the CMA.

In my judgment the position is as follows. If Ambra had been liable to pay the sums in question to the next of kin then the Claimant would have been obliged to indemnify Ambra in respect of that liability pursuant to clause 12.4 of the CMA. That obligation to indemnify is a loss. The Club did not in fact discharge Ambra's liability to the next of kin and so no question arises as to whether the Club, suing in the name of Ambra and pursuant to its subrogated rights, could enforce such liability against the Claimant, a co-assured.

The answer to Issue 4 is therefore Yes. The Claimant did not in fact indemnify Ambra because the Claimant had its own liability to the next of kin.

Issue 5; can the Defendant rely upon the exclusion and limitations provisions in the stevedoring contract ?

The loss claimed by the Claimant is a liability to the next of kin of the chief officer. Counsel on behalf of the Defendant therefore submitted that such loss is "a liability of the Customer to any other party" within clause 9(c) vi) of the stevedoring contract in respect of which the Defendant "shall have no liability".

On behalf of the Claimant it is said that in order that a loss may fall within the type of loss in respect of which liability is excluded the loss must be "of an indirect or consequential nature" as provided by clause 9(c) of the stevedoring contract. Further, it is said that such words have been consistently construed as referring to losses which are other than those which flow directly and naturally from the alleged breach of duty. In this regard reliance was placed on Deepak v ICI [1999] 1 Lloyds Rep. 387 . The liability to pay the death benefit and the repatriation expenses was a loss which flows directly and naturally from the Defendant's breach of duty.

In response it was said that, whatever meaning may have been given to similar phrases in other cases, in this contract the parties have in effect given their own definition of indirect or consequential losses, namely, such losses as include, without limitation, the named losses the last of which is "the liabilities of the Customer to any other party".

The words "consequential" or "indirect or consequential" when used in an exemption clause have been construed in a number of different contexts. In Deepak the clause in question stated that the supplier of certain technology and know-how for the construction of a methanol plant was not liable for "indirect or consequential damage." The Court of Appeal appear to have held that such phrase only excluded losses which were other than the direct and natural result of the breach; see [1999] 1 Lloyds Rep. 387 at p.403. The Court of Appeal considered itself bound by the decision of the Court of Appeal in an earlier case, Croudace v Cawoods [1978] 2 Lloyds Rep. 55 , which concerned the liability of a supplier of masonry blocks required for the construction of a school and where the phrase "consequential loss or damage" was held not to cover any loss which directly and naturally results

in the ordinary course of events from the breach. In Croudace the Court of Appeal had considered that the *ratio decidendi* of an earlier case in the Court of Appeal, Millars Machinery v David Way (1934) 40 Com.Cas 204 (which concerned the liability of the manufacturer of gravel washing plant for consequential loss), was binding on it. Mention should also be made of Saint Line v Richardsons [1940] 2 KB 99 , a decision of Atkinson J. concerning the ambit of a clause which protected an engine builder from "indirect or consequential damages". Atkinson J. held that the decision in Millar's Machinery provided guidance and that the words "indirect or consequential" do not exclude liability for damages which are the direct and natural result of the breaches complained of.

Although it can be seen from the above cases that the words "indirect or consequential" appear to have acquired a well-recognised meaning, the scope of the excepted losses in clause 9 must depend upon the true construction of that clause. Unless this clause has been the subject of decision (which it has not) previous decisions cannot bind this Court in construing the meaning of the particular words or phrases in clause 9.

Where a party seeks to protect himself from liability for losses otherwise recoverable by law for breach of contract he must do so by clear and unambiguous language. Clause 9 (c) provides that liability for such losses as are "of an indirect or consequential nature" is excluded. In the light of the well-recognised meaning which has been accorded to such words in a variety of exemption clauses by the courts from 1934 to 1999 it would require very clear words indeed to indicate that the parties' intentions when using such words was to exclude losses which fall outside that well-recognised meaning. This is particularly so when "indirect" is used as well as "consequential". The use of "indirect" draws an implicit distinction with direct losses. The meaning which has been given to direct losses in the cases which I have mentioned is "loss which flows naturally from the breach without other intervening cause and independently of special circumstances" (per Atkinson J in Saint Line at p.103). By contrast, indirect or consequential losses are losses which are not the direct and natural result of the breach (per Atkinson J. in Saint Line at p.104).

The important question therefore is whether the words in clause 9 "including without the limitation the following" indicate clearly that the parties were giving their own definition of indirect or consequential losses so as to include the specified losses even if they are the direct and natural result of the breach in question. In my judgment those words do not provide the sort of clear indication which is necessary for the Defendant's argument. The parties are merely identifying the type of losses (without limitation) which can fall within the exemption clause so long as the losses meet the prior requirement that they "of an indirect or consequential nature." Had the parties intended that liability for losses which were the direct and natural result of the breach could be excluded they would have hardly have described such losses as "indirect or consequential".

The losses which are claimed in this case, liability for the death benefit and repatriation expenses, are losses which are the direct and natural result of the Defendant's (assumed) breach of contract which caused the death of the Claimant's employee. Indeed, no attempt was made to suggest the contrary. I therefore hold that liability for those losses has not been excluded by the terms of the stevedoring contract.

There was another construction argument relied upon by the Claimant, namely, that clause 9(e) provided that nothing in clause 9 excluded "liability of the Company for death or personal injury resulting from the Company's negligence." It was said that the Defendant's liability to compensate the Claimant for its liability to pay the death benefit and repatriation expenses to the next of kin of the chief officer was a liability "for death … resulting from the [Defendant's] negligence". It was submitted on behalf of the Defendant that the phrase only extended to a liability of the Defendant to pay damages to the estate of a person who has died as a result of the Defendant's negligence. The Claimant responded that that construction would mean that the clause would have no effect since the Claimant, being a corporate body, would not "die" and so would never have such a claim.

Since it is not necessary to decide this point I shall deal with it shortly.

Clause 9 is part of the Defendant's standard terms and conditions. They contemplate that the customer may be

a person, firm, company or statutory body. Thus clause 9(e) can have effect, on the Defendant's construction, when it forms part of a contract made between the defendant and a natural person.

I prefer the Defendant's construction of clause 9(e). It is the natural construction of the words and fits with the definition of customer in the standard terms. It is not uncommon that a particular clause in a set of standard terms and conditions is only applicable in only one of several envisaged contractual contexts.

I must also deal with the ambit of clause 10 which required notification of claims within 14 days . It was said that it only applied to claims concerning goods. The basis of this argument was that clause 10(c)(ii) required that legal proceedings had to be commenced within 12 months from when "the Goods the subject of the claim were or should have been delivered to the Terminal."

I do not accept this argument. The ambit of clause 10(a) is very wide. It is not restricted to claims concerning goods. The natural construction of clause 10(a) and clause 10(c)(i) is that any claim of any kind whatsoever must be notified in writing within 14 days of the event giving rise to the claim and if such notice is not given the claim shall be extinguished. Clause 10(c)(ii) imposes a requirement that legal proceedings be commenced within the stated 12 month period but it only applies where Goods are the subject of the claim.

The Claimant also advanced an argument based upon the Unfair Contract Terms Act which I will deal with shortly. I accept that this was a case in which the parties "dealt" on the Defendant's standard terms and conditions. Adopting the approach explained in Hadley Design **Associates** Ltd. v Westminster London Borough Council [2003] All ER (D) 164 at paragraphs 81–83 it seems to me that, although a large part of the final agreement was negotiated and was not part of the standard terms, the latter were untouched by the negotiation and remained a sufficiently significant and important part of the agreement to enable it fairly to be said that the parties dealt on the Defendant's standard terms and conditions.

However, I am persuaded that the standard terms and conditions were reasonable. The Defendant wished to attract the Claimant to its terminal and thus the stevedoring agreement was freely negotiated between the parties. The Claimant had a full opportunity to consider the standard terms and suggest amendments to them (though in the event chose not to do so). The fact that, in addition to the stevedoring agreement, a side letter was signed shows that there was a real negotiation between the parties. The Claimant had every opportunity to insure against losses in respect of which the Defendant did not accept liability and availed itself of that opportunity, at least to the extent that the Club provided cover.

The sixth issue: was timely notice of the claim given ?

Clause 10 required any claim to be notified in writing within 14 days. By a letter dated 27 October 2005 the Claimant held the Defendant responsible for all damages arising out of the incident in question.

In my judgment this was a sufficient notice for the purposes of clause 10. That clause cannot require a very detailed notice because the notice must be given within 14 days of the incident. The notice given was sufficient to inform the Defendant that the Claimant was to seek redress arising out of the incident on 26 October 2005 as a result of which the chief officer had died. The Defendant was therefore able to investigate the incident in order to be able to respond as and when a more detailed claim was later made. Its reply dated 3 November 2005 denied liability which indicated a recognition that a claim had been notified.

Conclusion

In summary the answers to the six issues are as follows:

- i) Yes
- ii) Yes
- iii) Yes
- iv) Yes; the Claimant did not in fact indemnify Ambra because the Claimant suffered the loss itself.
- v) No in relation to clause 9 and Yes in relation to clause 10
- vi) Yes

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