

Loss of Profit Calculation

THE ASTIPALAIA

September 2014

In the recent case of **Astipalaia v Owners and/or Demise Charterers of the Hanjin Shenzhen** [2014] EWHC 210 (Admlty), the Court considered how to quantify the loss of profits arising from a collision. Below we discuss the Court's assessment of the loss of profits recoverable.

Facts of the case

The claimants' VLCC, the Astipalaia, was approved by the oil majors and traded in the VLCC spot market. The vessel had loaded cargo at Kuwait and Abu Dhabi to be discharged at Singapore pursuant to a Chevron charterparty.

On 26 March 2008 the Astipalaia collided with the defendant's vessel (The Hanjin Shenzhen) when approaching Singapore to discharge, suffering damage to her hull, guard rails and mooring chock. The Astipalaia was able to berth and discharge her cargo on 27 to 29 March 2008 whilst she was being inspected, surveyed and temporary repair works were being carried out. The vessel set sail from Singapore on 30 March 2008 for a single voyage to Dubai in order to carry out permanent repairs. The vessel arrived at Dubai on 10 April and permanent repairs were completed on 21 April.

Prior to the collision the claimants had been negotiating the vessel's next employment but nothing had been finalised. As a result of the collision the vessel lost her oil major approvals and was placed on technical hold, which meant that she could not return to her normal employment. The vessel's Class also required her to undertake permanent repairs to enable her to resume trade. Whilst the claimants were carrying out arrangements to reinstate the vessel's oil major approvals, the vessel was fixed off Kharg Island as a floating storage tank for 55/65 days from 25 April to 29 June 2008. On completion, the vessel returned to spot trading as the technical hold had been lifted by the oil majors.

The parties agreed to apportion liability on the basis of 80:20 in favour of the claimants. The

claimants presented their claim for loss of profits but several items of the claim and quantum were disputed. The claim was referred to the Admiralty Registrar for determination.

The Admiralty Registrar

The claimants argued that their loss of profits should be based on either (a) what the vessel would have earned had she been fixed prior to the collision and then resumed trading on the VLCC spot market, or (b) in the scenario that she would not have secured the fixture, the earnings from two round voyages between Persian Gulf and the Far East. The claimants calculated their loss of profits from the period the vessel set sail from Singapore on 30 March until its arrival at Dubai on 10 April 2008 followed by the time the vessel received permanent repairs until the end of its fixture as a floating storage. The claimants deducted the earnings from this fixture which mitigated their losses. The claimants' calculation of the detention period was 91 ½ days.

On the other hand, the defendants rejected the voyage from Singapore to Dubai and the associated fuel costs on the basis that the vessel would have made the voyage to the Persian Gulf in any event for its next employment (they relied on the most likely trade pattern of the vessel and the fact that the largest loading area – around 72% of all VLCC cargoes- was in the PG). In addition, the defendants disputed the quantum of the loss of profits claim. The defendants argued that the vessel had not secured a fixture prior to the collision so the claimants had not suffered any loss. They also argued that the claimants' expert's method of calculating the loss was too speculative.

The Court considered the following matters:

- (i) the pre-collision fixture negotiations and whether the loss of the fixture arose from the collision;

- (ii) the detention period during which the vessel was thrown out of her employment; and
- (iii) what would have been the fair earnings of the vessel, or a vessel of this type, excluding profits which are uncertain or speculative.

(i) The pre-collision fixture

The Court examined the pre-collision fixture negotiations to determine if it was a loss arising from the collision. On consideration of the evidence, the Court found that it could not be said with certainty that in the absence of the collision the claimants would have secured this fixture.

(ii) The detention period

Firstly, looking at the voyage from Singapore to Dubai the Court held that this voyage could not be included in the calculation of loss of use. The vessel's employment history confirmed it was probable the vessel would have made this journey as her next employment would have been from the Persian Gulf region. Based on the evidence, it was not a loss arising directly as a consequence of the collision and as a result the claimants were not entitled to recover damages for the associated bunker costs.

The Court confirmed some of the delay (the inspection and the survey) at Singapore must have been caused by the collision but there is no clear analysis of how much time was lost as a result of the collision. The Court found that a period of about 12 hours at this point was attributable to the collision, i.e. from the time of anchoring until the point when the vessel received the interim seaworthiness certificate on 27 March. This is then followed by a further 15 minutes from completion of bunkering on 30 March until receiving the certificate to sail on the same day. However, what was not included in the detention period was the time the vessel received temporary repairs/surveyed due to the fact that at the same time the vessel was discharging its cargo and/or bunkering, which were operations being carried out for the owners' purposes. On this point the

Court concluded that the detention period in Singapore was 12 hours.

The Court found that the relevant period of detention included the time the vessel arrived at Dubai for permanent repairs until the date of redelivery to the claimants, i.e. from 10 April to 29 June 2008 a total of 80 ½ days detention.

(iii) The fair earnings to represent the claimants losses

The measure of damages for loss of time when a vessel has not been fixed under a particular charter is one of evidence. It is for the claimant to show what they would have earned during the relevant period of detention. In the absence of a charterparty the most accurate way of proving the earnings of the vessel would be by expert opinion with consideration of the circumstances of the vessel and its employment.

In this case each expert had provided their valuation of the likely earnings of the vessel over the relevant period but the Court found that, in the circumstances of the case, this was a complicated calculation. Instead a fair result would be achieved by taking the mean of the experts' calculations.

Conclusion

The Court held that the relevant period of detention was 80 ½ days of detention formed of the 12 hours delay in Singapore plus the period from the start of the repairs until the end of the vessel's floating storage fixture.

This was then reduced by the claimants' earnings from the floating storage fixture as well as a 20% reduction of the award to reflect the parties' agreement to share liability 80:20.

Our observations

It is not uncommon that the parties disagree on the quantum of damages, despite their earlier agreement to the apportionment of liability in collision matter. Both parties' experts accepted that VLCCs operated in a well defined market as to rates and fixtures. It was, therefore, a straightforward task for the Court to determine

the sort of business the vessel would most likely have achieved during the detention period. However, proving a claimant's losses (and calculating damages) may well be more difficult in other trades. While a VLCC's trade is predictable, that cannot equally be said for vessels with varied and less regular trading patterns.

Further information

If you would like further information please contact:

Sarah Mokhtari

Tel: +44 (0) 20 73750002

sarah.mokhtari@pacifics.co.uk

info@pacifics.co.uk

www.pacifics.co.uk