



25 October 2017

PRESS SUMMARY

Mitsui & Co Ltd and others (Respondents) v Beteiligungsgesellschaft LPG Tankerflotte MBH & Co KG and another (Appellants) [2017] UKSC 68
On appeal from [2016] EWCA Civ 708

JUSTICES: Lord Neuberger, Lord Mance, Lord Clarke, Lord Sumption, Lord Hodge

BACKGROUND TO THE APPEAL

On 29 January 2009, the chemical carrier mv LONGCHAMP (“the vessel”) was transiting the Gulf of Aden. Pirates boarded the vessel and ordered its course to be altered towards the Bay of Eyl, Somalia. After seven weeks of negotiations, the crisis management team formed by the vessel’s owners (“the Appellants”) agreed a ransom in the amount of US \$1.85m (the initial demand had been for US\$6m).

The cargo on the vessel was carried by the cargo interests (“the Respondents”) under a bill of lading which stated on its face that “General Average, if any, shall be “settled in accordance with the York-Antwerp Rules 1974” (“the Rules”). “General Average” refers to the system of maritime law by which sacrifices of property made, and loss and expenditure incurred, as a direct result of actions taken for preserving a common maritime adventure from peril, are rateably shared between all those whose property is at risk. The Rules are internationally agreed and derive legal force through contractual incorporation. They aim to achieve uniformity in ascertaining whether losses fall within the principle of general average, the method of calculating those losses and deciding how they are to be shared.

The essential issue in this appeal was whether the vessel operating expenses incurred during the period of negotiation (“the negotiation period expenses”) were allowable in general average under Rule F of the Rules which provides that “any extra expense incurred in place of another expense which would have been allowable as general average shall be deemed to be general average and so allowed without regard to the saving, if any, to other interests, but only up to the amount of the general average expense avoided.” An adjudicator found that the negotiation period expenses fell within Rule F. The Respondents’ challenge to the adjudicator’s decision was dismissed in the Commercial Court. The Court of Appeal allowed the Respondents’ subsequent appeal.

JUDGMENT

The Appeal is allowed. Lord Neuberger gives the lead judgment with which Lord Clarke, Lord Sumption and Lord Hodge agree. Lord Sumption gives a concurring judgment. Lord Mance dissents on the facts.

REASONS FOR THE JUDGMENT

The Appellants submitted that the negotiation period expenses fell within the expression “expense incurred” by the owners within Rule F and those expenses were incurred “in place of another expense” (i.e. the \$4.15m saved as a result of the negotiations with the pirates). Further, the negotiation period expenses were less than the “general average expense avoided” and it thereby followed that they were properly allowable under Rule F [14].

The Court found that the Judge and Court of Appeal incorrectly assumed that the owners had to establish that it would have been reasonable to accept the pirates' initial demand in order to justify the contention that the negotiation period expenses were allowable under Rule F. Such an assumption would lead to very odd results. It would mean that, if a ship-owner incurs an expense to avoid paying a reasonable sum, he can in principle recover under Rule F, whereas if he incurs expense to avoid paying an unreasonable sum (i.e. a larger sum), he cannot recover [18]. Further, the reference in Rule F to "another expense which would have been allowable as general average" does not mean an expense whose quantum is such that it would have qualified as a claim under Rule A of the Rules (which refers to "extraordinary sacrifice or expenditure") [19]. Therefore, subject to the Respondents' other arguments, the negotiation period expenses fell under Rule F as they were incurred to avoid paying \$6m [20].

The Respondents submitted that the negotiation period expenses did not fall within Rule F because the payment of reduced ransom of \$1.85m was not an "alternative course of action" to the payment of the ransom originally demanded but was merely a variant [22]. The Court found that the incurring of the negotiation period expenses did represent an alternative course of action from the payment of the \$4.15m (the amount by which the ransom was reduced). The former involved incurring vessel operating expenses and the latter involved paying a ransom [26]. To imply some qualification such as the requirement that the negotiation period expenses must be incurred so as to achieve an "alternative course of action" was very dangerous [29]. The Rules are an international arrangement and should be interpreted in the same way as an international convention or treaty, unconstrained by technical rules of English law or by English legal precedent, on broadly accepted general principles [29].

The Respondents raised four further points. Firstly, they contended that the Appellants could not recover under Rule F as they had never made a conscious and intentional choice between paying the \$6m ransom initially demanded or negotiating [33]. The Court held that the question of whether one expense has been incurred "in the place of another expense" must be assessed objectively [34]. Secondly, the Respondents contended that the negotiation period expenses were not "extra" expenses within the meaning of Rule F. The Court found that there was no reason for restrictively interpreting the word "extra" so as to require an expense to be of a nature which would not normally have been incurred in response to the peril threatening the adventure [35]. Thirdly, the Respondents contended that the negotiation period expenses may have been incurred even if the owners had agreed to the pirates' initial demand. However, the Judge considered that it was more likely than not that the vessel would have been released promptly if the \$6m demand had been accepted. It was not appropriate for the Supreme Court to interfere with this finding of the Judge [36].

Finally, the Respondents contended that because Rule C of the Rules excludes "indirect loss" from general average expenditure and/or because Rule IX includes crew wages and maintenance where it applies, the claim in the present case must fail. The Court held that even though negotiation period expenses fall within Rule C it does not follow that they fall outside Rule F. By definition, sums recoverable under Rule F are not themselves allowable in general average, but are alternatives to sums which would be allowable [37]. Further, in terms of Rule IX, the Court did not agree that because vessel-operating expenses were specifically allowed in one type of case that it should be presumed that they are excluded from every other type of case [38].

Both the lead judgment by Lord Neuberger [25] and the concurring judgment by Lord Sumption [42] observed that a variety of practices have been developed by practitioners in relation to the Rules but that the law cannot be determined by reference to these practices. In his dissenting judgment [45-68], Lord Mance concluded that whilst the Appellants had established that Rule F is in principle capable of applying to negotiation period expenses, they had not established on the only factual basis on which their case had been put that they had a claim under Rule F [68].

References in square brackets are to paragraphs in the judgment

NOTE This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>