

AN ADJUSTER'S NOTE ON THE SUPREME COURT DECISION IN "THE LONGCHAMP"

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Background:

This case involved a chemical tanker that was seized on 29 January 2009 by Somali pirates. A ransom demand of US\$6 million was made by the pirates. After negotiation, a final ransom of US\$1.85 million was agreed on 22 March 2009 and the vessel was released. During the period of negotiation the shipowner incurred expenditure totalling US\$181,604.25 which was claimed and allowed in an adjustment as general average under Rule F of the York Antwerp Rules, 1974. The majority of the disputed expenditure related to crew wages and maintenance (including high risk area bonus), and the cost of fuel consumed during the detention period.

The adjuster's reasoning for this allowance was that had the initial ransom demand been paid it would have been allowable to general average under Rule A. The negotiation therefore resulted in significant savings to general average and the expenses incurred during the period of negotiation should be allowed under Rule F in substitution for the higher cost of paying the initial ransom demand.

Cargo interests disputed the adjustment, there was a submission to the Advisory Committee of the Association of Average Adjusters, and the committee by a majority came out against the terms of the proposed adjustment. However, the High Court upheld the adjustment and held that it would have been reasonable for shipowners to pay the initial ransom demand. This decision was overturned by the Court of Appeal which held that expenses only fell under the terms of Rule F if they were incurred in place of other allowable expenses, i.e. that there must be one or more alternative courses of action available. The Court held that there was only one option open to shipowners, namely negotiation, and whether this was a long or a short negotiation did not constitute a different course of action. The Court, however, did not reverse the High Court's finding that payment of the initial ransom demand of US\$6 million would have been reasonable.

Supreme Court judgement:

The Supreme Court has now handed down its judgement and has allowed the shipowners' appeal by a majority of 4 to 1. The two main points at issue were whether or not it would have been reasonable to pay the initial ransom demand, and whether or not negotiation represented an alternative course of action.

On the first point the Court appeared to have difficulty accepting that payment of the initial ransom would have been reasonable, however did not wish to interfere in the decisions of the lower courts. In any event, the Court held that it was not necessary to determine whether or not it would have been reasonable to pay the initial ransom as the reference in Rule F to an "expense which would have been allowable" is a reference to an expense of a nature which would have been allowable rather than the quantum of that expense. Furthermore, the judgement stated that even if this analysis was incorrect, Rule F would still apply to whatever sum was determined to have been the maximum reasonable ransom payable.

On the second point the Court was of the opinion that the contention that the language of Rule F required an "alternative course of action" goes nowhere. The judgement mentioned that the requirement for an alternative course of action was "very dangerous" and could "lead to difficulties and potential anomalies in practice" in terms of attempting to define where the line is to be drawn between "alternative courses" of action. The Court concluded that the language of Rule F does not require that the expenses be incurred in pursuing an "alternative course" but in any event held that in this case, negotiating the ransom was a different course of action to paying the initial demand.

A final point of importance concerns the relationship between Rule C and Rule F. Cargo interests argued that Rule C excludes indirect losses caused by delay and that this exclusion must therefore apply to the claim for expenses incurred during the negotiation period. The Court held that Rule C does not apply,

"Rule C applies to expenses and other sums claimed by way of general average as consequences of a general average act... It does not apply to expenses covered by 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."

Why has this case generated so much interest?

This case is particularly interesting as the Supreme Court decision has overturned decades of accepted average adjusting practice in terms of the application of Rule F. With reference to this, Lord Sumption said:

"In the absence of a comprehensive body of case law (general average rarely reaches the courts), adjusters have adopted a variety of practices or rules of thumb to supplement the Rules. This is perhaps inevitable, but such practices are not law and there is a tendency in this field for them to lose sight of the basic concepts expressed in the Rules themselves."

The difficulty with this case was outlined by Lord Mance in his dissenting judgement,

"Rule F was not designed with the present situation in mind.

The classic circumstances in which it is treated as applying are cases where there is one obvious or natural course of action open to the owners following a general average event, but there is also some different action, which might if taken lead to a more generally beneficial outcome overall... What is however clear on any view is that Rule F is not intended to cover general average situations in which owners simply do what would in the ordinary course be expected of them in the interests of the common adventure."

In the "classic circumstances" mentioned by Lord Mance, Rule F applies where expense has been incurred in order to reduce delay whereas in this case, Rule F has been applied in the reverse circumstances, where delay has been incurred in order to reduce expense. However, most would consider that the delay has not been "incurred" at all, as a period spent negotiating the ransom is regarded as a necessary and unavoidable result of the hijacking. For these reasons, the accepted practice of average adjusters was not to make allowances under Rule F in these circumstances; of course, this will now change.

Practical effects of the Supreme Court judgement:

The most obvious consequence of the judgement is that vessel operating expenses incurred while a ransom is being negotiated are now recoverable under Rule F insofar as the negotiation results in a saving to the general average. There are apparently a number of piracy adjustments which have been delayed while awaiting this decision and these are now likely to be issued on the basis of this judgement. In this case, the operating expenses were limited to crew wages and maintenance, and fuel and stores consumed during the period of negotiation. Following the Supreme Court's decision regarding Rule C, there is nothing to stop other expenses incurred on a periodic basis being included, such as port charges and demurrage. It remains to be seen how widely this will be applied, although it seems unlikely that the principle could properly extend as far as including mortgage payments.

Whilst the principle can be extended to other situations, such as delays while negotiating salvage awards, this will rarely arise in practice given that salvors often accept security which allows the vessel to proceed - so it is difficult to see where any delay would arise. That said, there are exceptions, for example salvors in some jurisdictions will only accept cash by way of security; their initial demands are typically very high, and are routinely negotiated down to more reasonable levels. It would appear that expenses incurred during these negotiations will now be allowable under Rule F.

Given that Rule F was never intended to be applied in the manner now endorsed by the Supreme Court it is possible that steps may be taken to return to the interpretation of Rule F which was previously accepted. This could be achieved by an amendment to the York Antwerp Rules, by express wording in contracts of carriage or by some form of market agreement. Given that the York Antwerp Rules were comprehensively revised in 2016, it seems unlikely they will be revised again any time soon. In terms of finding another method to bypass the Supreme Court decision, it may be that the scope of the decision is simply too narrow to be of much concern, especially with incidents of Somali piracy on the wane. Ultimately, while most adjusters might have disagreed with the application of Rule F in this adjustment, the principle now laid down by the Supreme Court is by no means unreasonable.