*Nick Margetson** CASE NOTE

Glencore Energy Uk Ltd and Glencore Ltd versus Freeport Holdings Ltd (Lady M)[1]

1. Introduction

Mr Justice Popplewell of The High Court of Justice and Business and Property courts of England and Wales, Queens Bench Division, Commercial Court handed down judgment in this case on 21 December 2017. The case is of interest to me because I wrote my doctoral thesis[2] about *inter alia* the fire exception and the catch all exception of the Hague (Visby) Rules. The formal name of the Hague Rules is the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading. Its amended version is called the Hague Visby Rules. The fire exception and the catch all exception are contained in art. III(2)(b) respectively (q) of both conventions and are applied the same under both conventions.

2. A brief view of the facts of the case

The claimants ('Glencore') are the purported owners of a cargo of fuel oil. The defendant is owner of the vessel 'Lady M'. While the vessel was on her loaded voyage from Tamam, Russia to Houston, USA in a position about 1000 km west of the Canary Islands fire broke out in the engine room. The vessel was salvaged by Travliris Russ (Worldwide Salvage and Towage) under the conditions of a Lloyds Standard Form of Salvage dated 14 May 2015. It was towed to Las Palmas where the convoy arrived on 31 May 2015. Salvage services were eventually terminated on 2 June 2015. The defendant and the claimants settled the salvor's claim. The defendant paid the salvors an unknown amount and the claimants paid about USD 3.8 million plus some costs. The defendant declared general average on 18 May 2015.
The contract or contracts of carriage contained in the bills of lading were subject to the Hague Visby Rules.

Glencore commenced litigation against the owners in order to recover the salvage costs it paid to Travliris Russ. In order to recover those costs Glencore had to prove that owners were at fault and therefore liable for the loss. It was established that the fire had been started deliberately by the chief engineer and that he may or may not have been acting under the influence of mental illness. The questions the court had to answer were:

1. Does the conduct of the chief engineer constitute barratry?
2. If so, can the owners rely on the fire exception (art. 4(2)(b) H(V)R);
3. If so, can the owners rely on the catch all exception (art. 4(2)(q) H(V)R);

3. Does the chief engineers conduct constitute barratry?

Under English law there is a large body of case law concerning the concept of barratry. The defendant had argued that barratry should be defined as:

'*Any wilful or intentional act of wrongdoing by the master or mariners to the prejudice of the owner or charterer, without the privity of the owner or the charterer, where intention is criminal or fraudulent.*'[3]

The defendant argued that act of the chief engineer could not constitute barratry because his mental illness meant that he did not know what he was doing and therefore his act could not be intentional or wilful.

The Hague (Visby) Rules do not mention barratry. However, prior to the Hague Rules it was common for shipowners to include barratry amongst a list of excepted perils in bills of lading and charter parties. Although the Travaux Préparatoires of the Hague Rules show that barratry was considered to be included in the Hague Rules as an excepted peril it was not. Therefore, it is unclear to me why the court considered the question of barratry.

After an extensive discussion of the law, Mr Justice Popplewell concluded that barratry should be defined as:
'*(i) a deliberate act or omission by the master, crew or other servant of the owners (ii) which is a wrongful act or omission (iii) to the prejudice of the interests of the owner of the ship or goods (whether or not such prejudice is intended) (iv) without the privity of the owner. In order for the act or omission to qualify as wrongful for the purposes of (ii) it must be (a) what is generally recognised as a crime, including the mental element necessary to make the conduct criminal; or (b) a serious breach of duty owed by the person in question to the shipowner, committed by him knowing it to be a breach of duty or reckless whether that be so.*'

Regarding the question whether the conduct of the chief engineer constituted barratry Mr Justice Popplewell held:

'…, *the assumed/agreed acts of the chief engineer may or may not have constituted barratry, depending upon fur-*

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1. [2017] EWHC 3348 (Comm).
2. N.J. Margetson, *The system of liability of articles III and IV of the Hague (Visby) Rules*, Zutphen: Uitgeverij Paris 2008 ('Margetson 2008'). The book can be downloaded for free at: https://pure.uva.nl/ws/files/4159309/55738_thesis.pdf.
3. The Lady M, par. 9.

ther facts as to his state of mind which have not been agreed or assumed.'[4]

In short, after a nine-page discussion of the irrelevant[5] question whether the chief engineer's conduct constitutes barratry Mr Justice Popplewell concludes that the question cannot be answered without more information on the state of mind of the chief engineer.

4. Can the owners rely of the fire exception to avoid liability for fire which was caused deliberately or barratrously?

Art. 4(2)(b) H(V)R (the fire exception) provides:

'*Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:*
(…)
(b) Fire, unless caused by the actual fault or privity of the carrier.'

After a discussion of the case law and the Travaux Préparatoires of the Hague Rules Mr Justice Popplewell correctly concluded that fire meant fire even if deliberately caused by the shipowner's servants or agents or resulting from their negligence. Therefore the owners could rely on the fire exception to avoid liability.

5. Can the owners rely on art. IV(2)(q) to avoid liability?

Art. 4(2)(q) HVR (the catch all exception) provides:

'*Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:*
(…)
(q) Any other cause arising without the actual fault or privity of the carrier, or without the actual fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.'

Mr Justice Popplewell held that he main question under this issue is whether the act of the chief engineer is properly to be regarded as the act of 'a servant' so as to come within the proviso of '*fault or neglect of the agents or servants of the carrier* [which] *contributed to the loss or damage*'.
After having discussed the case law and recognising the need to avoid interpreting the rules by reference to English law Mr Justice Popplewell held:

'*The test should be whether the conduct in question occurs in the course of the servant or agent performing a function in dealing with the ship or cargo which he is performing on behalf of the shipowners, deriving his authority to perform that function on behalf of the owners directly or indirectly through contracts of agency or employment, i.e. availing himself of that facility derived either directly or indirectly from the shipowners, to adopt the language of Colman J approved by Lord Sumption in NYK Bulkship (Atlantic) NV v Cargill International SA (The 'Global Santosh') [2016] 1 WLR 1853AC at [19].*'[6]

Applying that test Mr Justice Popplewell correctly reached the conclusion that the chief engineer was acting as a servant of the Owners when setting fire to the engine room. He was put on board the vessel by the owners to be responsible for the management of the main engines and the engine control room. He was performing the functions of the Owners to look after the Vessel within the field of responsibility on the vessel. It is irrelevant that his conduct was misconduct. The conclusion therefore is that the owners cannot rely on rule 2(q) to escape liability.

6. Closing remarks

To anybody with more than rudimentary knowledge of the Art. 4 par. 2 of the Hague (Visby) Rules a single glance at the established facts of the case is sufficient to know that the owners can rely on the fire exception to escape liability and that they cannot rely on the q-exception. Mr Justice Popplewell spends half the number of pages of the judgment discussing the totally irrelevant question of barratry. That discussion is unnecessary because it is not relevant for the application of the fire example whether a crew member set fire to the vessel intentionally or not. The fire exception is the carrier's strongest exception. Only if the fire was caused by the actual fault or privity of the carrier will the carrier not be able to rely on the fire exception to avoid liability. In all other events of fire, he will.[7] In this case the chief engineer, clearly a servant of the carrier, intentionally set fire to the engine room. That evidentially does not constitute actual fault or privity of the carrier so that the carrier can rely on the fire exception to escape liability.

4. The Lady M, par. 26.
5. See my closing remarks for an explanation of why the question of barratry is irrelevant.
6. The Lady M, par. 61.
7. See Margetson 2008, chapter 5.3 for a very detailed discussion of the fire exception.