

3. Case Reports

Damages - lack of responsibility by the Malta Drydocks for repairs on yacht

The Court of Appeal on 29th May 2009 in the case *"Avonstar Contractors Limited vs Sammy Meilaq and Lawrence V Farrugia on behalf of the Malta Drydocks"*, held (among other things) that the Malta Drydocks failed in their contractual duty to carry out the repairs properly. It was no excuse that the owners had not requested insulation of the exhaust pipe.

The Malta Drydocks should have warned the owners of the dangers and the risk of fire, if the exhaust pipe was well lagged.

The company Avonstar Contractors Limited, through its Malta agent, Mr E Gatt, engaged the Malta Drydocks to carry out repairs on its UK registered motor yacht, m.y Flingot, (registration number 386369) at its Yard, situated at Manoel Island.

Mr E Gatt negotiated on behalf of the owners with the Malta Drydocks and gave instructions in relation to the yacht. The works related to repairs on the yacht's exhaust pipe on one of its engines. Part of the metal piping was changed but the new part was not covered with lagging/insulation material, to prevent overheating and the risk of fire of other inflammable parts of the yacht's wooden structure.

It did not result that owners had ever instructed the Malta Drydocks to cover the exhaust pipe with insulation; and nor did the Malta Drydocks warn the owners of the consequence of overheating.

It so happened that after part of the exhaust pipe was replaced, a foreman of the Malta Drydocks asked Mr E Borg as the owner's representative, to take the yacht out for a sea trial to test whether the repairs were satisfactory however no representative of the yard was present during the sea trial.

After E Borg berthed the yacht at the Yard, smoke was coming out from the engine however he did not check whether any possible flame, in the area surrounding the exhaust pipe had been extinguished. Later that night the yacht caught fire and the next day it was found completely gutted.

The parties disputed whether the repairs had been completed and whether the yacht had been re-delivered to its owners at the time of the incident.

On the one side, the Malta Drydocks insisted that their repair job had been finalised, and on the other, the owners disagreed, saying that other works still had to be effected.

Avonstar Contractors Ltd instituted legal proceedings for damages against the Malta Drydocks. They claimed that :

- i) The Malta Drydocks were fully responsible for damages since the repairs were not effected by a competent person, in accordance with the necessary skill and trade; and
- ii) The Malta Drydocks failed to supervise the yacht, whilst it was in its custody and possession.

The Malta Drydocks contested that the repairs had been completed and that the yacht had been re-delivered to its owners and that it was not duty bound to preserve the yacht, when it was not in its custody.

On the 7th February 2006, the Court of First Instance ordered the Malta Drydocks to pay 80 (eighty) per centum of the damages. Owners had to suffer twenty per centum, owing to their contributory negligence.

The First Court held that:

- (i) As regards contractual relations with owners, it was not necessary to consider whether there was *culpa in eligendo*.
- (ii) The Yard had a duty to carry out repairs, properly, up to the expected standards of skill and trade and that it was to be held responsible for poor workmanship in particular:
 - a. It should have insulated the exhaust pipe and not allow the yacht, to sail out to sea in such a condition. It should also have

ensured that a representative of the Yard was present during sea trials.

- b. It should also have been aware of the danger of fire by not insulating the exhaust pipe.

The First Court also found E Borg to be partly at fault. It said that he should have ascertained on his part, that any possible flame was extinguished.

Aggrieved by the decision of the First Court, the Malta Drydocks entered an appeal, calling for its revocation.

On 29th May 2009 the Court of Appeal gave judgment by dismissing the yard's appeal and by confirming the decision of the First Court.

The following reasons were given for the Court's decision:

- i) The Malta Drydocks failed in their contractual duty under the contract of works to carry out the repairs properly.
- ii) The Malta Drydocks should have warned the owners of the dangers and the risk of fire, if the exhaust pipe was not well lagged.

This was not done and, furthermore the Court pointed out, the incident would not have occurred, if the exhaust pipe had been insulated.

Article 37 - Merchant Shipping Act Chapter 234 of the laws of Malta

The First Hall Civil Court on 11th June, 2009 in the case 'Glory Wealth Shipping Pte Ltd, vs Peninsula Enterprise SpA, held (among other things) that a claimant, having an action in rem against a vessel under Maltese law, was also entitled to obtain an injunction against another vessel belonging to its same debtor under article 37 Merchant Shipping Act Chapter 234 of the laws of Malta,

The First Hall Civil Court had to decide in the circumstances whether a 'sister ship' injunction was legally possible in terms of Article 37.

Article 37 lists the grounds when a claimant could request the issuance of this injunction.

The facts in this case were as follows: the foreign company Glory Wealth Shipping PTE Ltd had claims against Peninsula Enterprises SPA, amounting to USD6,744,219 in relation to the vessel mv Kang Yu which was registered in the Hong Kong Registry of Ships.

As the same company / debtor, Peninsula was also the registered owner of the Malta registered vessel mv Amelia Cacace, (IMO No 9472713), Glory Wealth Shipping sought to preserve its rights by obtaining an Article 37 injunction against mv Amelia Cacace.

Glory Wealth Shipping proceeded by filing legal action in Malta, for an article 37

injunction to prohibit dealings, its sale, the registration of further mortgages and the issuance of a deletion certificate by the Malta Registrar of Ships and Seamen.

By virtue of the court decree dated 10th October 2008, an article 37 injunction was registered over the vessel, mv Amelia Cacace.

In reply, Peninsula, contested the issuance of this injunction.

It was submitted that :-

- (i) a sister ship injunction was not legally possible under Article 37;
- (ii) Glory Wealth Shipping had no right to obtain an injunction and nor did this court have the authority to issue an injunction in the circumstances.

Peninsula argued that Article 37(10) of the Merchant Shipping Act did not open the door to sister ship injunctions. An amendment to our law was necessary for this to be possible. The fact, it said that Glory Wealth Shipping had an action *in rem* against the vessel mv Amelia Cacace, did not mean that an article 37 injunction was also possible against this vessel.

On 11th June 2009, the First Hall Civil Court gave judgement by accepting Glory Wealth Shipping requests, and by rejecting

Peninsula's restrictive interpretation of Article 37.

The court did not consider the remedy provided by Article 37, in isolation and as distinct and separate from that provided under Chapter 12 provisions.

The Court noted that Glory Wealth Shipping acknowledged receipt of a part payment (USD 400,000) on an account basis. There was also an arbitration award (in part) condemning Peninsula to pay the outstanding balance of charter hire (USD 482, 015) but the issue of damages was still pending and still had to be determined. The court considered the nature of an Article 37 injunction. This type of injunction under our Merchant Shipping Act was a special remedy, which did not affect the operations of a vessel, but prohibited its sale and the creation of further mortgages; re: *Gauci Maistre noe vs Dingli noe (PA)* dated 27/08/98.

It was issued on the basis of a *prima facie* claim, provided this claim was subsequently judicially determined (re: *Dingli et noe vs Barbara et noe (PA)* dated 30/06/2000.

Prior to ordering the issuance of the injunction, the court did not have to investigate the merits of the claim, re: *Frendo vs Caruana (PA)* 1/12/1995.

The court considered that sub – paragraph (10) of Art 37 which listed the claims when an injunction could be obtained. Glory Wealth Shipping had an action *in rem* against the vessel, mv *Amelia Cacace*.

A person having an action *in rem*, was also entitled to request an Article 37 injunction in the light of sub paragraph 10 (a) (v) of Article 37, njunction in the light of sub paragraph 10 (a) (v) of Article 37, pointed out the Court.

Art 37 of the Merchant Shipping Act had to be read and construed in the context of other provisions of Chapter 12 of the Laws of Malta, which regulated actions *in rem* and notably Articles 742 (B) (C) and (D) of Chapter 12 of the Laws of Malta.

For these reasons the Court ordered that for a period of six months from the date of this judgement, there could do no dealings, no sales, and no borrowing in respect of the vessel mv *Amelia Cacace* or in shares therein. It prohibited further the registration of any mortgages over this vessel as well as the issuance of any deletion certificate in respect of this same vessel. The Malta Registrar of Ships and Seamen had to be notified of this court order, concluded the Court.

4. Queries And Suggestions

We trust that this issue of our *Shipping & Maritime Law Update* was of interest to our readers, however, should you have any queries or suggestions to make, please feel free to contact Dr. Jotham Scerri-Diacono at jsdiacono@imganado.com, Dr Karl Grech-Orr at kgrechorr@imganado.com or Mr. Michael Sillato at msillato@imganado.com. We will be pleased to hear from you.

Further should you wish to stop receiving the G&A *Shipping & Maritime Law Update* please let us know by contacting Dr. Jotham Scerri-Diacono at jsdiacono@imganado.com.

Contributors

The following persons contributed to this issue:

- Dr. Jotham Scerri-Diacono
- Dr. Karl Grech Orr
- Mr. Michael Sillato
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