Are some redelivery notices open to interpretation?

Recent case shows how parties can make wording work for them

Alexander Sandiforth

ARE approximate redelivery notices worth the paper they are written on?

In the *Zenovia*, [2009] EWHC 739 (Comm) the latest redelivery date for the vessel was November 22, 2007.

On October 5, 2007, an approximate notice of redelivery was given as per the requirement of the charter (amended NYPE form) for November 4 "...wp, wog ...".

This message was passed up the chain and the date given to the owner was November 6. On October 15, the charterer sent owners a message which read: "we hereby have to revise the date of redelivery... to abt Nov 20", it having become clear to the charterer that it could undertake an extra voyage before the contractual redelivery date.

However, the owner had already fixed the vessel with a laycan of November 1-11, 2007 and withdrew it from service on November 2.

The dispute therefore concerned the status and effect of a notice of approximate redelivery date and intended port given by a time charterer to an owner pursuant to the requirements of a time charter in amended NYPE form.

London arbitrators found in favour of the owner on the basis of promissory estoppel in that the owner had refixed the vessel in reliance on having it back in time for the new fixture and that there was an implied term that once such notice had been given the charterer was obliged not to do anything preventing the date given from being met.

They also found that 'wp' meant 'without prejudice', treating this as analogous to 'wog' (without guarantee) but concluded that these terms did not alter the effect of the notice.

Permission to appeal was granted by Flaux J and the appeal was heard by Tomlinson J.

While Tomlinson J could not deal with the arbitrators' findings on the meaning of 'wp', (this in his opinion probably meaning weather permitting rather than without prejudice) because it was not appealed, he did feel that the award could be set aside on this basis alone: it not being possible in the absence of a subsequent agreement for a notice given without prejudice to give rise to a promissory estoppel binding the notice giver.

Tomlinson J, however, proceeded to examine the arbitrators' underlying analysis. Not to do so, in his opinion, would have "left scope for argument that [their] approach...[was] basically sound". Unsurprisingly, he ordered that the award be set aside.

There was an implied term that once such notice had been given charterers were obliged not to do anything preventing the date given from being met

In reaching his conclusion, Tomlinson J found:

1. The charter contained provision for the giving of five notices of approximate redelivery followed by a further four notices of definite redelivery. Assuming that the notices were given honestly or in good faith, Tomlinson J was sure that the parties did not intend that the giving of a 30- or 20-day notice had the effect of preventing the charterers from doing anything which may prevent the date given in the initial notice from being met.

2. The fact that a port also had to be given with each subsequent notice, rather than the initial notice only, implied that it was envisaged that the port may change and militated against charterers being bound by the initial notice.

3. On the facts of the case it was impossible to imply the term that the arbitrators had done, its width presenting "real difficulties".

4. The requirement of promissory estoppel could not succeed, the charterers having said "nothing from which it could reasonably be inferred that they were abandoning any contractual rights". Nor had the charterer said anything from which the owner "could reasonably infer that the charterers intended what they had said to affect the legal relationship between them".

The practical question raised and recognised in this case is who can take advantage of a rising market — owners or charterers? This decision clearly favours charterers.

However, in doing so it raises the further question of what benefit such a notice, given in accordance with the charter, provides owners (notwithstanding the fact that it may be given honestly or in good faith) given that the main purpose of the giving of such notice is to allow owners to plan the next employment of the vessel.

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Oil slicks are not the only source of trouble: the UK has only this year implemented the significant and controversial Environmental Liability Directive 2004.

Business warning over environment law

NEW environmental regulations brought into force in March will create extra burdens for business, Hull-based law firm Andrew Jackson has warned, *writes Sandra Speares*.

The UK has only recently implemented the Environmental Liability Directive 2004 by introducing the Environmental Damage (Prevention and Remediation) Regulations 2009.

Writing in the firm's Oceans of Knowledge legal update, partner Andrew Oliver said that the directive was one of the most significant and controversial pieces of European Union environmental legislation to date and was aimed at the "prevention and remediation of environmental damage based on the polluter pays principle".

Mr Oliver said activities that can trigger the regulation include any allowed under an environmental permitting scheme, like waste management activities, the management of mining waste, discharges to water and ground water, water abstraction and the use of pesticides.

The regulations also apply to the transport of dangerous goods and the transport and release of genetically modified organisms, the law firm explained.

Other activities caught by the rules include those that cause environmental damage to protected species, natural habitats and sites of special scientific interest.

Mr Oliver said that the directive did not impose criminal liability but required those who cause pollution to take immediate preventative action, report the damage promptly to regulators and carry out remedial measures.

Regulators can also take the necessary measures themselves and recover costs from the polluter.

The regulations apply to damage:

- to water anywhere in England up to one mile offshore;
- within a site of special scientific interest;
- to any protected species or natural habitats in England and in English waters up to the continental shelf.

The regulations define environmental damage as damage to protected species or habitats as identified in the Birds Directive or the Habitats Directive including damage which "significantly affects the attainment or maintenance of favourable conservation status".

Mr Oliver said that there were certain exemptions to the regulations including damage caused before March 1, 2009, caused by natural disasters or exceptional natural phenomena and damage arising from lawful commercial sea fishing. Under the rules, the Environment Agency was responsible for enforcement.

As far as criminal liability was concerned, Mr Oliver said that while it was not an offence under the regulations to cause damage in the first place, as that was usually an offence under other existing legislation, it was an offence for a operator to:

- fail to comply with a notice to take measures to prevent imminent environmental damage, served under regulation 13(2);
- fail to comply with a notice to take measures to prevent further environmental damage, served under regulation 14(2);
- fail to comply with a remediation notice, served under regulation 20(2).

Offences are punishable in the magistrates court with a fine not exceeding the maximum of £5,000 ($7,437) on conviction on indictment in the Crown Court, with an unlimited fine and/or a term of imprisonment not exceeding two years.

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Wharfinger's warranty held not to include foreshore

ADMIRALTY Court trials are few and far between these days. *Bon Ami** was a hard fought one played out over three days before Mrs Justice Gloster, *writes James Watthey*.

The vessel was a massive wooden 22 m Scottish drifter built in 1958. In a previous life, it had been a commercial fishing vessel but it was being converted for charter work.

Its owner wanted to lay it alongside at Mashfords yard at Cremyll to dry out so he could pressure wash the hull and apply antifouling.

The only layerage available was a tidal mud berth, which had a sharply sloping beach at the landward end. Mashfords' staff explained that the presence of that beach meant that the vessel must be placed sufficiently towards the seaward end of the layerage; if it was placed too far towards the landward end, its bow would end up resting on the beach and it would "ground hollow", that is, be left with a large expanse of the keel unsupported.

The owner did not listen to the warnings and the vessel did ground hollow, suffering serious sagging damage.

The most important part of the decision from a legal point of view, was the duty of care owed by wharfingers. The claimant had pleaded an implied warranty of safety and duties under the Occupiers' Liability Act, but Gloster J accepted that this could not be the case where the seabed was tidal foreshore and therefore presumed to be owned and controlled by the Crown. Rather, the wharfinger's duty was merely to ascertain whether the layerage bed was safe and warn to the extent that it was not (applying the case of the *Moorcock*).

Even though the wharfinger did own and control the quay walls and "thus, in effect, the mooring" the common duty of care under the Act was held to be no more onerous than the duty in the *Moorcock*.

Therefore, once the judge found as a fact that Mashfords' staff had given a warning to move the vessel aft to where it would have lain safely aground, judgment for the yard was inevitable.

The case also provides a warning to claimants tempted to bring large loss of use claims when the evidence does not support the contention that the vessel would have earned its keep but for the incident.

It was found that the vessel had never been employed profitably and was not ready to be so employed, either physically or in terms of certification.

As a result of the concessions made by the claimant when cross-examined on this issue, the judge said that she had formed an adverse view of his general credibility as a witness, including on the crucial question of whether the requisite warning had been given. Future claimants ignore this example at their peril.

The yard and its insurers were represented by the author of this report, a barrister at Hardwicke Building who was instructed by Elliot Bishop of Hill Dickinson.

**Christopher George v Coastal Marine 2004 Limited [2009] EWHC 816 (Admlty) Bon Ami.*