Revisiting slow steaming and wrongful arrest claims

Bold arguments were made in the first instance judgment of Eastern Pacific Chartering Inc v Pola Maritime Ltd (The Divinegate) [2022] EWHC 2095 (Comm) to persuade the court to depart from two established lines of authorities. The first relates to the method of proving slow steaming claims. Set out 35 years ago in The Didymi,1 the method has since been approved by a string of judgments.

As for the other, the test for wrongful arrest – requiring an element of malice (actual or implied) on the part of the arresting party – is of even greater antiquity. 160 years since it was pronounced, it remains good law throughout (most of) the common law world.

The claims

The claimant, as disponent owner, claimed outstanding hire, bunkers and some expenses against the defendant charterers for a sum of about US$100,000 under a trip time charter for the vessel *Divinegate*. The owners sought to secure their claim by arresting (what was allegedly) a ship beneficially owned by the charterers (colloquially referred to as a "sister ship"), *Pola Devora*.

Charterers brought two counterclaims against the owners totalling about US$160,000. The first was for slow steaming and hull fouling. The second was for damages for the wrongful arrest of *Pola Devora*.

The application seeking to challenge the English court's jurisdiction to hear the charterers' counterclaim for wrongful arrest was dismissed by Deputy Judge Patricia Robertson QC in June 2021 ([2022] Lloyd's Rep Plus 14).

The facts

The relevant clauses of the charterparty were:

(a) An eco-speed performance warranty that proceeding at eco-speed in weather conditions – no worse than Force 4 (moderate breeze) on the Beaufort Wind Force Scale or State 3 (slight wind sea) on the Douglas Sea Scale – the vessel should be able to achieve a minimum speed of 12.5 knots on a maximum consumption of 21.525 mt of fuel oil.

(b) Clause 8, which provided: "That the Captain shall prosecute his voyages with the utmost despatch, in accordance with Charterers' instructions …"

The vessel was delivered in September 2019, performing a ballast leg from Rotterdam to Riga. This was followed by a laden leg from Riga to New Orleans, during which charterers instructed the vessel to steam at eco-speed. Following discharge at New Orleans, a surveyor noted that the vessel had considerable marine growth on her visible hull area.

In November 2019 the charterers redelivered the vessel and complained that the vessel underperformed due to hull fouling on the laden leg. Charterers contended that payment of hire should cease or that charterers were entitled to deduct from the hire their expenses due to the loss of time when the full working of the vessel was prevented.

On 2 July 2020 the owners arrested the bulk carrier *Pola Devora*. The arrest was affected to (purportedly) secure the owners' claim for hire under the charterparty. The grounds for the arrest were that *Pola Devora* was beneficially owned by the charterers, thus meeting the requirement of a sister ship arrest under the Senior Courts Act 1981 (the "SCA 1981"). In obtaining the arrest warrant, the owners relied on a Lloyd's List Intelligence report which said that *Pola Devora* was beneficially owned by the charterers.

In disputing the owners' position, the charterers provided documents showing that the charterers were merely

Pola Devora's time charterers when the arrest occurred and that GTLK Malta were her true beneficial owners. Put another way, at no point were the charterers *Pola Devora*'s beneficial owners as defined under the SCA 1981. Within hours of receipt of the documents, the owners released *Pola Devora* from arrest.

Decision and analysis

Underperformance and hull fouling

Claims for underperformance commonly arose out of the performance of time charters (and trip charters). Clare Ambrose (sitting as a deputy judge of the High Court) noted that scientific advances have introduced sophistication in the assessment of claims resulting in claims commonly raising questions of law, fact and practice. Therefore, in assessing claims, courts are not wedded to legal methodologies. Instead, the method used reflects commercial practice and the specific wording of contracts chosen by parties.

The charterers acknowledged that where a charter defines the requested speed by reference to a particular speed and consumption in good weather, the conventional method to prove underperformance is: (i) by establishing that during periods of good weather the vessel did not achieve the warranted speed and performance; and (ii) to pro-rate the underperformance against the entire period under review.

This method – referred to as the "good weather" method – was first reasoned by Hobhouse J in *The Didymi*.2 The method was approved by Bingham LJ on appeal,3 by Lloyd LJ in *The Gas Enterprise*,4 and most recently in *The Ocean Virgo*.5 In *The Pearl C*,6 Popplewell J endorsed such a conventional approach in the context of a claim for breach of the duty to proceed with utmost despatch.

The method, however, has not escaped criticism. The authors of *Time Charters* suggest that it is owed "more to pragmatism than principle" and that:

"as weather data and performance modelling become more sophisticated and accurate, it may become possible for experts to undertake a single, reliable analysis, comparing the performance in fact achieved in the conditions in fact experienced against the performance that ought to have been achieved by a ship capable of the promised performance."7

Perhaps in latching on to this criticism, the charterers argued that underperformance can be established by reference to the measured RPM (revolutions per minute) of the vessel's engine, which reflects the engine's speed. In proving this method, the charterers relied on calculations given by their expert witness and an assessment of the distance a vessel can theoretically travel for every revolution of the propeller.

The judge dismissed the RPM method and held that where the parties have adopted the "good weather" method in their charterparty, this will be the primary method of assessment. An alternative method will be available, in principle, but it will have to be shown to be as reliable and consistent if it is to displace the "good weather" method on the facts. She reasoned that the RPM method was unsatisfactory because it (among others) incorrectly assumed that resistance on the hull would be the same even if the engine was run at different speeds and failed to make any allowance for weather conditions being a reason for reducing the engine speed. In summary, it was held that the method was a very theoretical calculation, and it was not a reliable measure of loss. With regard to the "good weather" method, it was further concluded that time spent sailing with a positive current would be counted and the parties could have made express provision excluding positive currents if they had wanted these to be deducted.

Having relied on the "good weather" method, the court went on to hold that there had been underperformance giving rise to a loss of time of 16 hours. However, the claim for hull fouling was rejected, because to allow that claim would result in a double recovery for the charterers.

Although speed and consumption clauses usually constitute intermediate terms, a serious discrepancy may

discharge the contract. This grave consequence – if nothing else – may mean that it is prudent to stick to established methods of proving losses, especially if those methods (despite their inadequacies) have been approved by the courts. It may also be said that if expert evidence is adduced, the assumptions underlying the evidence must be thoroughly examined before they are adduced in court.

Damages for wrongful arrest

The charterers submitted that there was no basis to arrest *Pola Devora* for a claim under the charterparty. Therefore, they were entitled to damages because the arrest, among others, deprived them of the use of *Pola Devora* under their time charter with Pola Rise. The charterers contended that the modern re-statement of the law allowed damages to be awarded if there was a "genuine but understandable mistake" in making the arrest, even if it did not imply malice.8

The judge, however, did not accept this gloss. She noted that the Court of Appeal had only recently endorsed the test first laid down by the Privy Council in July 18589 on the following terms:

"no damages can be claimed for wrongful arrest absent malice (bad faith) or (effectively) gross negligence on the part of the arresting party … It is recognised that this rule of English law is capable of bearing harshly on a shipowner in circumstances where it subsequently transpires that the arrest was unjustified, but the shipowner is left without remedy for his loss: *The Kommunar (No 3)*. None the less, that is the rule and it carries Privy Council authority: *The Evangelismos* 12 Moo PC 352."10

In short, it was held that a finding of malice is an essential prerequisite for the charterers to be awarded damages.

Indeed, despite criticism that the test – requiring a finding of malice – is difficult to meet, it remains good law in Malaysia,11 Singapore,12 New Zealand,13 and Canada.14 In these countries, the alternative remedy of awarding costs against a frivolous litigant is a deterrent, although such costs may not always compensate for the financial loss arising from the arrest.15 Australia16 and South Africa,17 however, have enacted legislation to adopt a less stringent method in awarding damages for frivolous arrests.

The court went on to hold that the owners' conduct in making the sister ship arrest did not give rise to an inference or finding of malice or gross negligence. The publicly available information in the Lloyd's List Intelligence and Seaweb reports suggested that the registered owner of *Pola Devora* was Pola Rise. This was wrong as GTLK Malta was in fact the registered owner of *Pola Devora*. There was a lack of clarity in public documents as to the registered ownership of *Pola Devora* at the time of arrest. Consequently, it would not have been obvious to the owners at that stage that the beneficial ownership of *Pola Devora* was held by GTLK Malta. The charterers were named on some public records as the beneficial owner and so there was some basis for the owners' stand then that the charterers were in fact beneficial owners. The owners' post-arrest conduct did not give rise to an inference of malice as they released the vessel immediately when the registration documents and bareboat charters were produced.

Supplementing the authorities cited by the judge, it is worth noting the observation of Karthigesu J – which may be helpful to admiralty solicitors – in a judgment where there was a similar divergence between the ownership details in the Lloyd's Register of Shipping and the vessel's registry port:

"The reference to Lloyd's Register of Shipping in my view is most significant. No shipping lawyer can be without it … [A]ny divergence in the information contained in the Lloyd's Register of Shipping and that obtained from the vessel's port of registry needs to be further investigated to ascertain the true beneficial ownership before proceeding in rem in a jurisdiction such as ours."18

Lastly, it should be said that this claim was brought by way of a counterclaim at trial. This meant that the charterers opted to forego the more common route of seeking damages via an interlocutory application to strike

out or set aside the claim form or arrest warrant. Using the usual route, the charterers would have had to persuade the court via witness statements (rather than viva voce evidence).19 It may be the case that the modest sums involved did not justify the making of a separate interlocutory application. Or alternatively, once *Pola Devora* was released (leaving the owners' claim unsecured), there was no urgency to set aside or strike out the claim form.

Clive Navin Selvapandian, Advocate & Solicitor (High Court of Malaya), Messrs Christopher & Lee Ong

1 *Didymi Corporation v Atlantic Lines and Navigation Co Ltd (The Didymi)*

2 [1987] 2 Lloyd's Rep 166 (QBD (Comm Ct)) at pages 170 to 171.

3 [1988] 2 Lloyd's Rep 108 (CA), page 117.

4 *Exmar NV v BP Shipping Ltd (The Gas Enterprise)* [1993] 1 Lloyd's Rep 352, page 366.

5 *Polaris Shipping Co Ltd v Sinoriches Enterprises Co Ltd (The Ocean Virgo)* [2018] Lloyd's Rep Plus 101, para 6.

6 *Bulk Ship Union SA v Clipper Bulk Shipping Ltd (The Pearl C)* [2012] 2 Lloyd's Rep 533, para 53.

7 Andrew Baker et al, *Time Charters* (7th Edition, Informa, 2014), para 3.68.

8 *Centro Latino Americano de Commercio Exterior SA v Owners of the Ship Kommunar (The Kommunar) (No 3)* [1997] 1 Lloyd's Rep 22, page 30.

9 *The Evangelismos* (1858) 12 Moo PC 352, page 359.

10 *Natwest Markets plc (formerly known as The Royal Bank of Scotland plc) v Stallion Eight Shipping Co SA (The MV Alkyon)* [2019] 1 Lloyd's Rep 406, para 43.

11 *The Win Moony* [2005] 1 MLJ 141, page 98.

12 *The Xin Chang Shu* [2016] 1 SLR 1096, para 27.

13 *Mobil Oil New Zealand Ltd v The Ship "Rangiora"* [2000] 1 NZLR 49, page 65; [2000] 1 Lloyd's Rep 36.

14 *Armada Lines Ltd v Chaleur Fertilizers Ltd* [1997] 2 SCR 617 (SCC), para 20.

15 Toh Kian Sing, SC, *Admiralty Law and Practice* (3rd Edition, Lexis Nexis 2017), page 211.

16 Admiralty Act 1988, section 34.

17 Admiralty Jurisdiction Regulation Act 1983, section 5(4).

18 *The Andres Bonifacio* [1991] 1 SLR(R) 523 (HC), para 24.

19 *The Xin Chang Shu* [2016] 1 SLR 1096, para 23.