

Take care in heavily mined waters

Regular columnist Simon Tatham takes a look at a court judgment under TOWCON and warns of the risk to tugowners of cancelling or withdrawing from a disputed contract



► Simon Tatham

2016 has drawn to a close, and it was an interesting year. It also ended with a rare event: a court judgment under TOWCON. Before you get too excited and call your broker to start applying red tracked alterations to the standard wording, no ground breaking changes follow from the ruling. But as always there are useful lessons to be learnt.

You are welcome to plough through the 20 pages of the judgment if you have time, and there is plenty there to consider both in terms of how a contract was negotiated and performed, as well as how the parties fell apart and what legal traps they stumbled into. However, more likely your patience and time are limited so let's distil it down to the key pointers that emerge.

The case dealt with a common problem of fixed sum tows: if it goes more slowly than anticipated, other than for weather delays, the tugowner is likely to be losing money, alternatively the hirer's future planned use of the tow on arrival is in jeopardy. Questions arise whether the slow speed is down to the performance of the tug or something else.

We had one such case where the tow was a new hull. The hirers engaged a second tug at great expense and pressed for the additional cost also withholding the final lump sum instalment. The second tug, however, added only half a knot. It transpired that the

unfinished hull had a number of openings in it and it was pretty obvious that these greatly affected the hull speed. The hirers climbed down and paid the hire.

The recent case involved a tow by Singaporean operated tug *Harmony I*, a four engine, 13,000bhp, 146 tonnes bollard pull, 1980-built but more recently modernised AHTS vessel.

It was contracted to tow an FPSO of 134,000dwt, operated by a Swedish oil company, half way around the world. The contract provided that the tow be 'in light ballast condition', which is a relatively common stipulation.

The parties disputed what quantity of ballast amounted to light condition. The judge applied a previous 2006 Commercial Court judgment that light ballast condition is "concerned with ensuring physical fitness, primarily stability, for the tow's voyage ...", that is the minimum ballast required for physical safety.

The hirers had indeed ballasted down for other good reasons on the advice of their naval architect, but this was found to be some 30,000 tonnes over light ballast condition on delivery, later reduced to about 10,000 tonnes.

Having won on that point, the tugowners failed to recover the claimed delay payments under clause 17(a)(ii) together with damages

for the extra bunker costs because they could not demonstrate that the additional weight and draft had a material effect on the towing speed. In particular, the tow speed did not increase as a result of the deballasting of 20,000 tonnes.

The tugowners had furthermore anticipated 4.5 knots using two engines. It was held that they could not rely upon clause 17(a)(ii) as it required the tugowner to make a decision to slow steam because the tow could not be towed at the original contemplated speed. Here the tow could have achieved that average speed by using all four engines, but obviously at the expense of further fuel which tugowners were reluctant to incur.

TOWCON does not contain a standard provision as to the speed to be achieved, but the hirers counterclaimed that tugowners had in effect agreed a collateral term guaranteeing a speed of 4.5 knots and were liable in damages. That was rejected.

Finally the tow had stopped en route while the parties sought to resolve their differences. When they failed to do so the tugowners gave notice of cancellation and withdrawal. This was ill-advised and they were found to have wrongfully repudiated the contract.

As a result they were also liable in damages for the hirers' net costs of employing a second tug to complete the tow.

So what lessons can be learnt? For starters any party contemplating terminating a contract is entering heavily mined waters: complex issues arise and it is essential to take legal advice.

Secondly, the more information that can be exchanged pre-contract the better to enable proper calculations as to speed and performance particularly when concerning complex hull forms.

Thirdly, don't confuse 'light ballast condition' with towing warranty surveyors' recommendations: they may be two very different things.

Finally, if the contract is keenly priced, as inevitably it is in this market, take great care to ensure that the downside risk of things going wrong is not additionally falling on to the operator, as that will simply guarantee that a loss is made.

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Tug assists Channel storm rescue

French salvage and rescue tug, *Abeille Languedoc*, was involved in a dramatic rescue operation during Storm Angus in the English Channel, amid winds of up to 97 miles an hour.

Almost half the 23-man crew of cargo ship *Saga Sky* were evacuated by helicopter after it lost all engine power and struck an unmanned rock barge. The holed vessel then started taking on water.

The UK Coastguard, assisted by the RNLI, said the 'major incident' took place about three miles south west of the Port of Dover.



The rescue operation involved two helicopters plucking 11 crew from the deck of the stricken vessel. The rest remained on board the 220m long ship in order to help get it to a safe port.

The RNLI dispatched two lifeboats to stand by as the helicopter teams swung into action. The stricken vessel, which was flying a Hong Kong flag, later drifted on to a sandbank, where the remaining crew were able to restore some power.

Abeille Languedoc, sent to the scene from Boulogne, France, is a Bourbon-affiliated vessel, chartered by the French Navy and is on permanent watch, ready to sail in less than 40 minutes, 24 hours a day, seven days a week. *Saga Sky* was taken to Dunkirk to undergo repairs. The UK Marine Accident Investigation Branch said it had deployed a team to Dover to conduct a safety investigation into the incident. The RNLI said there was no sign of pollution.

◀ Salvage and rescue tug *Abeille Languedoc*