

SALVAGE AND DECOMMISSIONING

Case of stamina and determination

Regular columnist Simon Tatham looks at how the routine top-overhaul of a four-stroke V16 port engine of a tug led to a 10-year court battle over the purchase order wording



► Simon Tatham

One of my tasks as columnist is to trawl through recent shipping law reports and alert readers to decisions that might impact upon their tug operations or be of general interest to the industry. Conscious that these are businesses either run by or employing many engineers, this can be somewhat unrewarding. However, there is the occasional gem and in this edition I do have something for the engineeringly minded. It also contains a couple of useful lessons for purchase managers who might therefore resist the temptation to immediately turn the page.

The case involved the routine top-overhaul of a four-stroke V16 port engine of a tug by the engine manufacturer's service company in Singapore. After the work, which included a complete change of lube oil, was completed, a free-running test (without load) was carried out during which, after six or seven minutes, the engine seized up, suffering significant damage. The main bearings and journals were variously wiped out and scored and the crankshaft bent. Needless to say, repair costs were both high and time-consuming, with the result that the claim included loss of use for one month and the cost of chartering in a substitute tug for three months. It's not altogether surprising that the owners took the service company to court.

The cause of the damage was the failure to prime the engine. The procedure, involving rotation of the crankshaft using the starting motor until the requisite oil pressure is reached, is designed to ensure that all components were coated in lubricant prior to mechanical movement. It did not take place, despite manufacturer's guidelines which indicated that there was a risk of damage if the engine ran for only 15 seconds at low oil pressure.

The defendant service company raised a good number of arguments seeking

to demonstrate other causes, including vibrational wear caused by some earlier damage to the port side propeller tips. However, these were examined and rejected on the balance of probabilities by the judge.

The next question was whether the service company's terms of sale had been accepted. These sought to exclude liability for consequential damages including for loss of profits or other economic loss and, in any event, limit liability to the price of the works. The claimant argued, conversely, that their own standard purchase terms and conditions referred to in its purchase order applied, prevailing over those of the service company.

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What had happened was that the claimant had been provided with a quotation for the works – on each page of which was stipulated that any acceptance was subject to the service company's standard terms, which would become terms of the contract. This quotation was accepted orally and only followed up weeks later by the claimant's purchase order. The court found that the purchase order was only intended to signify acceptance of the quotation, nor could it be regarded as a counter-offer. The claimant's acceptance, in turn, of the purchase order did not vary the terms of contract.

Since the service company's terms applied, the next question was whether the loss of use claims mentioned above were excluded as being "consequential damages... including loss of profits or other economic loss". This is a tricky area and great care in drafting needs to

be taken to effectively exclude liability. The words appearing on the tin might appear to the non-lawyer as self-evident but that is not necessarily the case, as seen here. Moreover, where there is a lack of clarity or element of doubt in the wording of an exclusion clause, it is a long established principle that the conditions will be construed by the courts against the party seeking to hide behind the protection they purport to provide.

The court correctly concluded that these items of loss were losses flowing directly, naturally and in the course of ordinary events from the breach. They were not to be regarded as remote or consequential and were therefore not excluded from recovery.

The claimants were now 40-love in the third set, but could they still win the match? The final question for the court was whether the losses might still be capped to the contract price. The judge very simply found that this cap, being part of the exclusion clause wording dealing with consequential damages, was directed towards just that, not to other, direct, liabilities.

Game, set and match then to the claimants. That said, it took them almost 10 years to bring the case to court in Singapore – which says something for their stamina and determination.

The case can be found at *Lloyd's Law Reports* [2018] Vol 1 page 95: *Pan-United Shipping Pte Ltd v Cummins Sales and Service Singapore Pte Ltd*.

Simon Tatham is a partner of Tatham & Co and founder member of the TugAdvise.com service. He has more than 30 years' experience of shipping law.

Tsavlis Salvage has been inducted into the Green Award Foundation at a reception at the Yacht Club of Greece. The foundation certifies shipping companies and vessels that demonstrate excellent performance, meeting strict requirements covering safety, quality and environmental consciousness.

Resolve Marine and Salvage has extended its use of *MV Lana Rose*. The vessel is currently at its US Gulf port facility in Theodore, Alabama. Built as a Norwegian North Sea Ice Class fishing

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trawler and later refitted as a seismographic research vessel, Resolve purchased *Lana Rose* for hurricane response and humanitarian aid work but says it sees great potential for the vessel in the field of ocean conservation and research.

Nippon Salvage's Yoshiaki Nishibe has resigned from the governing executive committee of the ISU. He was its longest-serving member. The committee

has welcomed new members Matthias Reinartz from Chile's Ultratug and Nippon Salvage's Sukekazu Shimonishi.

The American Salvage Association and the North American Marine Environment Protection Association are seeking US students who have recently participated in a science or engineering fair, either individually or in a team of up to three people, to participate in the 8th Annual Marine Sciences Scholarship Competition to win scholarship funds. Learn more at education@namepa.net