

The HKey

Banning racial discrimination

The Hong Kong government is poised to introduce substantial new legislation.

In September 2004, the Home Affairs Bureau published a consultation paper about legislating against racial discrimination and invited the public to comment on it. Responses were due by 31 December 2004 – with this deadline subsequently extended to 8 February 2005.

The Hong Kong government now intends to introduce a bill on racial discrimination into the Legislative Council. Not only does the government wish to prevent and combat racial discrimination, but it also needs to fulfil Hong Kong's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination.

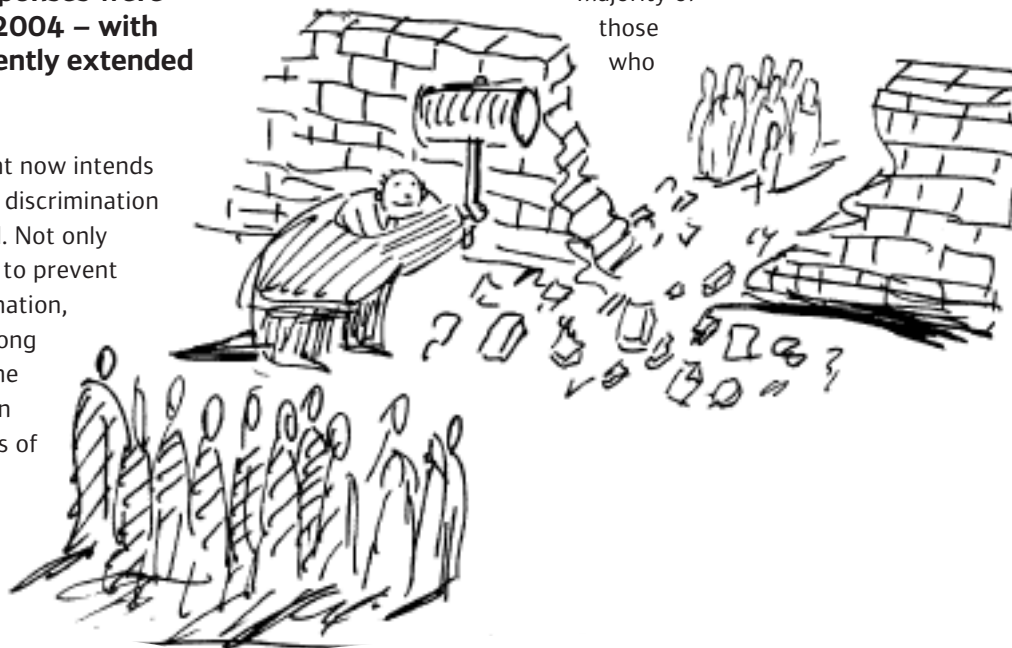
The possibility of legislation on racial discrimination was first

raised in February 1997, when the government published a consultation paper called Equal Opportunities: A Study on Discrimination on the Grounds of Race. A

majority of those who

responded to this paper opposed legislation. In recent years, the question has been revisited and the indications are that there is now less opposition to the idea.

The government has noted that new arrivals (and others) from mainland China sometimes face discrimination in Hong Kong which is not so much racial as a form of social discrimination; this would be outside the scope of the intended legislation. But the government has recognised that this is a contentious issue and has asked the public for its views.



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The new bill

Three anti-discrimination ordinances already exist in Hong Kong: the Sex Discrimination Ordinance, the Disability Discrimination Ordinance and the Family Status Discrimination Ordinance. All three are administered by the Equal Opportunities Commission. The government has proposed that the racial discrimination bill should be modelled closely on the structure and format of these existing ordinances.

The proposed definition of “racial discrimination” is discrimination based on “race, colour, descent, or national or ethnic origin” (as set out in article 1 of the International Convention).

It is proposed that the bill should cover six types of discrimination:

- 1 direct racial discrimination;
- 2 indirect racial discrimination;
- 3 discrimination on the basis of the race or ethnic origin of the spouse or a relative of a person;
- 4 discrimination by way of victimisation;
- 5 racial harassment; and
- 6 racial vilification.

The discrimination would only be covered if it occurred in certain areas of activity.

These are:

- employment;
- education;
- provision of goods, facilities, services and premises;
- advisory and statutory bodies;
- pupillage and tenancy in barristers’ chambers;
- clubs; and
- government.

Exceptions

Small companies and employers (those with fewer than six employees) would initially be excluded from the provisions and given a grace period of three years from the date the bill became law. Exceptions from the anti-discriminatory provisions would also include:

- cases where a genuine occupational qualification or special training was required;
- small dwellings shared by the landlord and a lodger or tenant;
- voluntary bodies and clubs restricting membership to a particular racial or ethnic group;
- certain charities; and
- the appointment of religious ministers.

Immigration law would not be affected by the new legislation.

Commission’s role

It is proposed that the Equal Opportunities Commission should be given certain functions and powers to enable it to administer the relevant provisions of the bill; these would include powers to conduct formal investigations, obtain information, make recommendations to any body for changes in its policies or procedures, issue an enforcement notice, and to assist by acting as conciliator or mediator.

As an alternative, it has been proposed that there should be a new Commission for Racial Equality.

Remedies

Under the proposals, an individual would be able to initiate civil proceedings in tort if another person committed an act of unlawful harassment or vilification against him or her.

There would also be a criminal offence of racial vilification; this would cover the following conduct:

- 1 threatening physical harm towards – or towards any premises or property of – the person vilified; or
- 2 inciting others to threaten physical harm towards – or towards any premises or property of – the person vilified.

Plan of action

The Home Affairs Bureau will analyse the responses it has received and take them into account in its final draft of the bill, with the aim of introducing it into the Legislative Council in May or June this year.

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But your skull was like an eggshell...

When does a claimant's pre-existing condition affect the amount of damages he or she receives?

When an employee claims employees' compensation and/or damages for personal injury, he or she needs to show that the injury came about as a result of an accident for which the employer is liable. In itself, this is often easy enough to prove; but problems can arise where there is a pre-existing medical condition. In these cases, the question of causation can be difficult to resolve and expensive to litigate.

The expression "pre-existing medical condition" means a condition which has predisposed the claimant to the physical state¹ complained of. The existence of a pre-existing condition is relevant not only when deciding on the employer's liability, but also, in common law claims, when fixing the level of damages.

What caused the injury?

Where the facts allow it, the employer can defend the case by saying either that the accident did not cause any injury at all, or that any disability and loss resulting from the accident has been superseded by the continuing effects of a pre-existing condition.

A detailed examination of the claimant's medical history is needed and medical expert opinion must be obtained. But it must be remembered that it is always the trial judge who makes the final decision; this is assisted – but not dictated – by the medical evidence, bearing in mind that, when it comes to establishing causation, the law and medicine apply different standards.

It has long been decided that the accident only needs to be one of the causes of the injury complained of: it does not have to be the only cause. Two recent cases illustrate this point. Both of these examples are claims for employees' compensation – but the key issues also apply to claims for common law damages.

Wong Hoi Chung v LKK Trans Ltd (decided by the Court of Appeal on 23 March 2004) was a claim for employees' compensation concerning avascular necrosis (AN), a condition which results from the temporary or permanent loss of blood supply to the bones. Without blood,

the bone tissue dies. This causes the bone to collapse and, if this involves bone near a joint, it often leads to destruction of the joint surface.

The applicant fractured his left hip when he fell from a height of four feet. After the accident, it was discovered that, in both legs, he had AN of the femoral head. Following the fall, the plaintiff complained of severe pain in the left hip. An X-ray, taken shortly after the accident, showed a minimal impacted fracture of the cortex of the femoral head. An MRI scan revealed bilateral AN of the hip, with the collapse of the left femoral head. The applicant underwent surgery on his left hip; but the condition did not much improve.



The applicant's expert formed the view that it was possible that the fracture was caused by the accident, but said that, where there was AN of the hip – which is likely to be a pre-existing condition – subchondral fracture can sometimes occur with trivial injury.

The medical expert instructed by the defendant agreed that the accident could have enhanced the pre-existing condition in the left femoral head by bringing forward the occurrence of the subchondral fracture and the femoral head's collapse. The court heard that, before the accident², in spite of the pre-existing condition, the applicant was able to work as a delivery worker, which normally required lifting and carrying goods and some climbing.

The Court of Appeal decided that, on a balance of probabilities, the applicant did sustain a fractured hip as a result of the fall and confirmed that the correct principle of law was:

- Causation is a matter for the judge, not the doctors. The judge will be assisted by the medical evidence but will not be dictated to by it (confirming the decision in *Lee Kin Kai v Ocean Tramping Co Ltd* (1991)).
- It is sufficient that the accident was a cause of the injury; it need not be the sole cause. *Leung Koon Chun v City Act Trading Ltd* (decided on 24 April 2002), the deceased, a carpenter,

suffered a fatal heart attack while at work. Before the accident, he had sought medical attention for his high cholesterol level and had been warned by the doctor to quit smoking. The deceased was required to work quite long hours – though the judge said that the schedule could not be described as heavy. There was evidence from medical experts on both sides; from the widow about the deceased’s life-style; and from the employer on his work pattern. The court decided that the employment did not contribute to the death in any way; he died solely as a result of the disease.

How much compensation?

The Employees’ Compensation Ordinance (ECO) section 5(1) provides that an employer is liable to pay compensation for “personal injury caused by an accident arising out of and in the course of employment”.

Once it is decided that the accident did cause the injury, the next question is whether the sum payable in damages should be subject to any discount in circumstances where a pre-existing condition has, to some extent, contributed towards the current state of the claimant. In employees’ compensation claims, the answer is, unfortunately, no. There has been a long line of cases on this issue, most recently confirmed in the Court of Appeal decision in the Wong Hoi Chung case. The reasoning is simply that:

- Section 5 entitles the employee to compensation once it is established that there was an accident and that it caused him or her personal injury.
- Under section 10(5), the employee is deemed to have suffered permanent incapacity if he or she has received periodical payments under this section for a period of 24 months from the date the sick leave began or, if the court allows it, for a period of 12 months⁴.
- Once there is permanent disability, compensation is payable under section 7 and section 9; these sections make no provision for any apportionment or discounting.

As far as claims in common law are concerned, where it is appropriate, a discount will be applied to various heads of damage. The Court of Appeal decision in *Chan Kam Hoi v Dragages et Travaux Publics (1998)*⁵ makes this clear. The plaintiff sustained a back injury and also alleged that there was psychiatric damage. Although he had suffered no symptoms before the accident, he had a pre-existing degenerative condition of the spine. Both the doctors involved in the case agreed that the plaintiff could not return to his pre-accident job at the construction site.

In the Court of Appeal, Mortimer VP divided cases of this kind into three categories and explained whether or not damages should be reduced in each category:

- 1 Where the plaintiff was almost certain to have gone through life unaffected by the condition, the defendant would be liable in full for any damage.
- 2 Where there was a strong possibility that some other event or the natural progression of the condition would have brought about the plaintiff’s present state, it would become necessary to discover the degree of this possibility when the court decided what reduction in damages was appropriate.
- 3 a case where the plaintiff’s present state would certainly have come about at some stage, an allowance must be made; the extent of the allowance would depend on the evidence as to when the precipitating event would have occurred.

Having considered the evidence, the court reduced the plaintiff’s damages by 45% for pain and suffering, partial loss of pretrial earnings, and future loss of earnings.

The level of discount which should be applied depends very much on the severity of the pre-existing condition, as well as on other factors. Although previous decisions are useful as guidelines, each case must depend on its own facts.

Is it fair?

Opinions will be divided about the fairness of not reducing employees’ compensation where a pre-existing condition has definitely contributed towards the claimant’s disability. Clearly, this has come about because of the way the ECO is worded. But, bearing in mind that any employees’ compensation paid will be deducted from the final award for common law damages, any unfairness will be neutralised as long as the employer succeeds in arguing, in the related common law claim, that the pre-existing condition did indeed affect the current disability.

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Not all my fault

Employers and their insurers have good cause to celebrate, following a recent seminal court judgment.

In *Yardway Motors Ltd v Tam Siu Lun*, the Court of Appeal ruled that an employer who was partly to blame for an accident resulting in the death of an employee could recover some of the compensation from a third party who shared responsibility for the accident. In upholding the general approach adopted by the first instance judge, the court has taken an important step away from the old all-or nothing position: previously, a employer who was partially responsible for an accident could not reclaim anything from anyone else who shared the blame for what happened.

Traditional position

The traditional all-or-nothing answer was established nearly 100 years ago in *Cory & Son v France Fenwick*, and upheld as recently as 1999 in the combined *Wong Yat Chiu v Chan Kwok Wah/Gammon Construction v Chan Kwok Wah* and *Wong Yat Chiu* cases. At the heart of the debate has been the difference – if any – between an employer’s right to claim an indemnity (the wording used in section 6 of the Workmen Compensation Act 1906) and an employer’s right to recover (the wording used in section 25 of the Employees’ Compensation Ordinance) from a third party in respect of compensation paid by the employer to an accident victim. The fact that section 25 of the

Ordinance was modelled on section 6 of the 1906 Act has only made the question harder to answer.

In the combined *Wong Yat Chiu* cases, Gammon Construction argued that the word “recovery” meant that an employer could ask for a contribution from a third party who was either wholly or partly to blame. The trial judge disagreed, saying that:

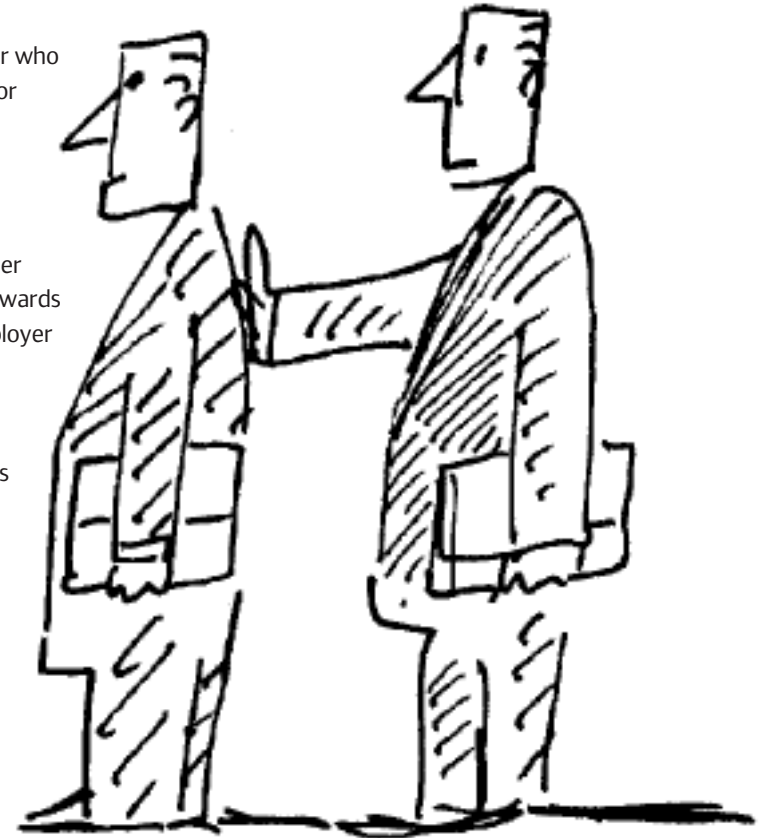
- section 25 of the Ordinance was an all-or-nothing indemnity provision, so if the employer was partly responsible for the accident, then it carried the can for all the compensation payable; and
- Gammon could not clawback any part of the compensation under section 9(3) of the Civil Liability (Contribution) Ordinance because section 9(3) applied to contributions but not to indemnities.

A better approach

A more sympathetic line was taken by the trial judge in *Yardway Motors*. Adopting the argument advanced by Gammon in *Wong Yat Chiu*, the trial judge ruled that section 25 of the Ordinance deliberately used the word recovery instead of indemnity to allow for the apportionment of blame in cases where both the employer and others are at fault. The Court of Appeal has now confirmed the judge’s approach, saying:

- Section 25 of the Ordinance is indeed an indemnity provision.
- However, an employer who is partly responsible for the accident resulting in a compensation payment can nevertheless seek a contribution from other responsible parties towards the damages the employer has had to pay.
- Even though section 25 of the Ordinance is an indemnity provision, a partially-to-blame employer can, as an alternative, also claim a contribution from a third party under the Civil Liability (Contribution) Ordinance.

Taken altogether, this new ruling by the Court of Appeal removes a longstanding burden on employers who, until now, have been forced to carry all the blame for accidents that have only partly been their fault.



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Produce on delivery

The trend is in favour of straight bills of lading being presented before the delivery of goods.

The international maritime community aspires to the unification of maritime law worldwide but this is a difficult goal to achieve. For example, different common law jurisdictions have taken varying views over the issue of whether a carrier may deliver goods without requiring the presentation of a straight bill of lading. This highly important – but awkward – question has recently been revisited by the House of Lords in *The Rafaela S* [2005] All ER (D) 236.

Different bills of lading

A straight bill of lading (straight bill) is one that is not transferable to someone other than the consignee specified in the bill. By contrast, traditional bills of lading made out “to order” or “[a specified consignee] or to order” are transferable, and are treated as documents of title.

As will be seen below, there are two contrasting views about the need to produce the key documentation before shipped goods are handed over¹. One view is that, because of its non-transferability, a straight bill resembles a sea waybill, which does not require production of the original document before delivery. The alternative view is that, notwithstanding the lack of transferability, a

straight bill remains a bill of lading for which presentation is essential before handover.

The English position

In *The Rafaela S*, the UK House of Lords agreed with the lower court’s view that a carrier must require presentation of the straight bill before delivery of goods unless the straight bill expressly provides otherwise. However, the court expressed this view in passing, as the main question was whether the straight bill of lading in question was a “bill of lading or any similar document of title” under the Hague-Visibly Rules. The law lords ruled that it was.

Nonetheless, *The Rafaela S* confirms that issues relating to a bill of lading should be resolved by applying the usual contract principles – that is to say, by interpreting the document’s true nature and effect and ascertaining objectively what the parties intended.

The House of Lords rejected the argument that a straight

bill is a sea waybill rather than a bill of lading simply because it is non-transferable. There were two particular reasons for this conclusion in the case in hand:

- The document repeatedly described itself as a “bill of lading”. When considering a bona fide mercantile document issued in

the ordinary course of trade, a court will ordinarily be slow to reject the document’s description, particularly where (as here) the document is issued by the party seeking to reject the description.

- The document in the case bore close resemblance to a traditional bill of lading in



most aspects. For instance, it followed the traditional practice of being issued in a set of three originals and required delivery upon presentation.

According to the law lords, the parties intended the straight bill in question to be a bill of lading which had to be presented before the goods could be delivered. In *The Rafaela S*, in fact, the straight bill expressly stipulated this requirement. However, the court considered that this requirement is implied anyway in a straight bill unless there are express terms to the contrary. The House of Lords adopted the view taken by the Singaporean Court of Appeal in *Voss v APL Co Pte Ltd* [2002] 2 Lloyd's Rep 707 that there is no reason why one should automatically infer that the parties intend to do away with the other main characteristic of a bill of lading – namely, delivery upon presentation².

The Singaporean position

Voss v APL clearly establishes that, under Singapore law, a straight bill must be presented before the delivery of goods.

Affirming the lower court's decision, the Court of Appeal held (after a detailed analysis of conflicting Singaporean, English and Hong Kong case authorities) that the parties intended the straight bill to be a bill of lading. It must, therefore, be presented before delivery of goods. In reaching this conclusion, the court

closely followed the reasoning used by the House of Lords in *The Rafaela S*.

The Court of Appeal in *Voss* then went on to say that there must be clear words showing that the parties actually intended the instrument to be treated, in all respects, as if it were a sea waybill and that its presentation on delivery was consequently unnecessary. The court gave commercial reasons for its decision:

- 1 This approach prevents confusion and avoids shipowners and / or their agents having to decide whether a bill is a straight bill or a traditional bill of lading, with all the attendant risks of making the wrong decision.
- 2 It also provides the seller or a bank with security against default by the buyer: the seller/bank can refuse to deliver the straight bill before full payment. Equally, the buyer obtains assurance that the seller has shipped the cargo before it has to make payment.
- 3 Finally, presentation of the bill before delivery of the goods kills off any chance of the shipper suing under the original contract of carriage.

The Hong Kong position

At present in Hong Kong, delivery of goods may be made to the consignee named in a straight bill without having to produce the bill itself. The

issue arose in *The Brij* [2001] 1 Lloyd Rep 431, where the Hong Kong High Court held that “straight bills are also very much known to the shipping world and the essence of straight bills is that they are not negotiable and the contractual mandate is to deliver to [the] named consignee without the production of the original document”.

In reaching this view, the court simply relied on Benjamin's Sale of Goods (5th edn) which stated (at para 18-014) that “under a straight bill, the carrier is entitled and bound to deliver the goods to the originally named consignee without production of the bill”.

The US position

The US position is governed by the Pomerene Act 1916. This provides that a carrier may deliver goods to the consignee specified in a straight bill without requiring the presentation of the bill itself. The exception is where, before delivery, the carrier receives instructions from the seller to the contrary.

Commentary

The disparity is clear. At a local level, the Hong Kong position now differs from the English standpoint, although it is likely that the Hong Kong approach will be reviewed in the light of *The Rafaela S* when a suitable opportunity arises. In the meantime, however, industry professionals should ensure that there are clear express

provisions in the bill if they want to dispense with its presentation. But in the absence of such express provision, carriers should insist on the presentation of straight bills before delivery takes place.

On a broader scale, the key question still remains, though: how can jurisprudential differences be reconciled in the interests of unifying international maritime law? While there is no straightforward answer, in practice it is sensible to adopt the English and Singaporean approaches to the problem. As *Voss v APL* suggests, there are strong commercial incentives for requiring presentation before delivery is made, which overcome the once-traditional practice of not insisting on presentation of the straight bill at the point of handover.

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Letters of credit and illegality

The autonomy principle – that letters of credit remain independent of underlying transactions – has been shaken but not stirred by recent litigation.

Enron’s collapse captured headlines around the world and spawned many lawsuits, both inside and beyond the US. In the case of Mahonia Ltd and JP Morgan Chase Bank v West LB AG [2004] EWHC 1938 (Comm) – involving Enron North America Corp (ENAC) – the English courts were asked to address the issue of illegality in relation to letters of credit.

The general rule is that both the Hong Kong and the English courts will refuse to enforce a letter of credit where performance of it would be illegal under the relevant governing law¹. A trickier question, though, is whether the courts will also decline to enforce a letter of credit where it is the transaction supported by the letter of credit – rather than the letter itself – which is illegal. Put another way, is the well-known autonomy principle – often described as the lifeblood of international commerce and something which should not be weakened in any way – still intact?

Now we have Mr Justice Cooke’s ruling on the subject in the Mahonia case. Banks, accountants, exporters, importers, their insurers and those involved in international trade need to pay close attention both to the decision itself and to the judge’s

accompanying commentary in order to get a rounded picture of current judicial thinking on the topic.

Background

In August 2001, JP Morgan entered into a structured financing arrangement (SFA) with ENAC, under which JP Morgan lent \$350m to Enron in September 2001. Enron then agreed to pay JP Morgan back \$356m after six months.

To effect the SFA, swap transactions (whereby the parties agreed to exchange fixed and floating payments at specified dates) were concluded between ENAC and Mahonia (a special purpose vehicle established to help JP Morgan), JP Morgan and Mahonia, and ENAC and JP Morgan, respectively. If all parties performed their obligations under the swaps, the net effect would be payment of the \$350m loan by JP Morgan to ENAC through Mahonia; and, six months later, the payment by ENAC to JP Morgan (again, through Mahonia) of the agreed sum of \$356m. Apart from anything else, doing things this way put Enron’s financial statements in a better light than if the funding was achieved through a simple loan agreement.

Under the ENAC/Mahonia swap, ENAC provided letters of credit for \$315m as security for its obligations. The letter of credit

at the heart of the present dispute – valued at \$165m – was issued by West LB. However, before ENAC’s obligations under the ENAC/Mahonia swap took effect, Enron went into Chapter 11 bankruptcy in the US. Mahonia claimed under the letter of credit issued by West LB.

West LB resisted payment on the following grounds:

- 1 Mahonia/JP Morgan had conspired with Enron to engage in wrongful accounting. West LB argued that, under the applicable US accounting principles and securities rules, Enron should have accounted for all the arrangements involving the swap transactions as a loan, instead of as separate prepay transactions.
- 2 Mahonia/JP Morgan had conspired with Enron to obtain the letter of credit by making misrepresentations to West LB about the nature of the underlying transaction (namely, that it was a loan and not a trade transaction).
- 3 The SFA (including the procurement of the letter of credit) was illegal, as its purpose was to allow Enron to engage in wrongful accounting.

The court’s findings

Mr Justice Cooke concluded that there was no conspiracy between Mahonia/JP Morgan and Enron either to engage in wrongful accounting or to obtain the letter of credit by misrepresentation.

First, the accounting method adopted by Enron did not breach US accounting principles or securities rules. Further, at the relevant times, Mahonia / JP Morgan did not know – and were not responsible for – the accounting methods adopted by Enron. The choice of accounting methods was a matter between Enron and its accountants, Andersens.

Second, Mahonia/JP Morgan did not make any misrepresentations to West LB. They had no duty to inform West LB of transactions other than the particular Enron/Mahonia swap deal, which (independently of the other swap transactions) gave rise to the obligation in respect of which the letter of credit provided security. Again, Mahonia/JP Morgan left it to Enron to procure the letter of credit and had no knowledge of how Enron proceeded subsequently.

Mr Justice Cooke also took the view that, in any event, West LB was only concerned with the creditworthiness of Enron when it came to



deciding whether or not to issue the letter of credit. Moreover, under a facility agreement between West LB and Enron, West LB had no choice but to issue the letter of credit regardless of the nature of the underlying transaction. West LB was eager to provide structured financing services and, even if it had enjoyed full knowledge of the SFA, would still have issued the letter of credit.

In the light of all these findings, there was simply no basis for alleging that the SFA and the individual swap transactions were illegal.

Illegality

The judge went on to say that, while the evidence did not support a finding of illegality, a novel issue had been raised in argument. This was whether or not a court would refuse to enforce a letter of credit on the grounds that it had been procured by criminal fraud or, alternatively, tainted with illegality in a case where the underlying transaction was itself illegal.

Mr Justice Cooke ruled that, if either of these things had happened in Mahonia, he would not have enforced the letter of credit². He made three key points:

- 1 If West LB had established that there was an unlawful underlying purpose for the SFA (ie that it constituted the provision of a loan for which wrongful accounting was intended), then the letter of credit would have been directly tied to the illegal purpose as it would have formed an important part of the SFA.
- 2 It is established principle that the courts will not enforce a security (for instance, a guarantee) given for an illegal contract. A letter of credit is analogous to a form of security, and an arrangement whose purpose is to facilitate wrongful accounting would clearly be illegal.
- 3 Public policy dictates that a court will not help to enforce a contract, a security or something akin to a security for a contract, where the underlying purpose of that contract is contrary to the law of the friendly foreign state where performance will take place, and a “great magnitude” of unlawfulness is involved.

Commentary

Banks will be relieved that the autonomy principle remains intact. Letters of credit deal with documents alone and are not dependent on the underlying transactions. It is often difficult, if not impossible, for a bank to detect whether the parties concerned are pursuing an illegal act at

the time it receives its customer’s request to issue a letter of credit. It is only in the most exceptional case that a court will intervene to stop payment under a letter of credit or to excuse a bank from paying under the letter of credit.

As Mr Justice Cooke pointed out, the refusal to enforce a security given for an illegal contract, even though the security itself is not unlawful, is well recognised in law. It is a principle that was emphatically reiterated in the Hong Kong case, *Wa Lee Finance Co Ltd v Staryork Investment Ltd* [2003] HKEC 576, where the judge said: “Based on public policy, any transaction that is tainted by illegality in which both parties are equally involved is beyond the pale of the law. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. No person can claim any right or remedy whatsoever under an illegal transaction in which he had participated...”

However, as the *Mahonia* case demonstrates, pleading illegality is not the same thing as establishing it in evidence: much will depend on the particular facts of each case.

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Responsibility for Hull Fouling under NYPE

A seminar given by Robert Joiner in Hong Kong in February 2005 looked at hull fouling and its effects and considered the responsibilities for that fouling.

Hull fouling is generally a form of barnacle growth. These organisms are creatures of the tropics. They are known to thrive in ports such as Sepetiba, Brazil; Lorenzo Marques, South Africa; Owendo, Gabon; and Paranagua, Uruguay. They breed all year round. However, they do not like fresh water.

As a rule of thumb barnacles grow at about 0.17 mm per day or about 5 mm per month.

Barnacles grow on areas where anti-fouling paint is weak. Anti fouling paint reacts with seawater to create a biocide which kills the marine organisms. The vessel's movement through the water then polishes off the leached layers of paint plus dead organisms to clean the hull. However, if there is no movement through the water, this cleaning operation is hampered and if stationary for 12 – 14 days, the leached layer starts to act as a barrier to the creation of more biocide. Most manufacturers guarantee the effectiveness of their paint for between 14 - 21 days. Once this period has been spent at a tropical port, the possibility of barnacle infestation is high. This raises the question as to whether owners are in breach of their obligation to deliver a vessel fully fitted for

service if it does not have full anti-fouling protection on delivery. It also raises environmental issues, since the use of the paint has been criticised by organisations such as Greenpeace.

The first consequence of hull fouling most likely to be observed is an under-performance by the vessel. The presence of barnacles, particularly on flat bottom, will reduce the vessel's speed. Even moderate growth will increase hull roughness to cause significant effect on performance. Barnacles can also break down paint and on unprotected steel even cause damage to plates. This leads to the question of whether owners or charterers are liable for such infestation and damage.

Owner's responsibilities

On delivery:

On delivery of the vessel, owners are contracted to provide a vessel which is fully fitted for service. So if there is existing fouling, this is a defect which can entitle charterers to refuse delivery and insist the vessel is cleaned and re-tendered – see the "Ioanna" [1985] 2LLR 164 at 177.

If there is no existing fouling, should the hull be protected from the risk of future fouling? There is no clear authority on the point,

however, in considering an appeal in the "Pamphilos" [2002] 2LLR 681, it is clear that the original tribunal thoroughly investigated the application and the guarantees applying to the anti-fouling paint, in order to check that owners had been duly diligent in this respect. The point was also raised in London arbitration 20/00, but the possible breach caused by existing bad painting was not argued.

It should be borne in mind here that any duty on delivery to provide a seaworthy vessel is replicated on each voyage thereafter if the clause paramount is incorporated into the time charter.

During the charterparty:

Assuming the vessel has been delivered in a fit condition, should matters deteriorate during the course of the charterparty, owners' obligation is to take reasonable steps in reasonable time to maintain the vessel's condition as per clause 1 and/or to exercise due diligence in providing a seaworthy vessel if the clause paramount is incorporated into the time charter.

In London arbitration 10/00, it was considered that owners were entitled to take one voyage after suspected hull fouling

before making a decision on whether to clean. However, that particular case involved no speed and performance warranty, nor any indication that time was of the essence. In cases where the usual speed and performance warranty exists, another tribunal may decide that an obvious case of hull fouling would require immediate attention.

Nor let us forget the potential for a claim for breach of duty to proceed with utmost despatch.

It is as well to act promptly, particularly given the potentially high value of any underperformance claims at current market rates.

Apart from cleaning, there is a dry docking clause at clause 21 which provides for cleaning to take place in owner's time every six months. However, this is normally deleted.

Once hull fouling has been established, then there is a need to take reasonable steps in reasonable time to clean, but at whose cost and in whose time? What are charterers' responsibilities here?

Time charterers' responsibilities

Usually, hull fouling during the charter arises as a consequence of owners following charterers' orders to a tropical port where barnacles grow. However, it has been held in

the “RIJN” [1981] 2LLR 267 at 272 that such hull fouling is a normal incident of the charter and not an off-hire event, unless of a wholly extraordinary and unpredictable nature. Reference is made here to the “APPOLLONIOUS” [1978] 1LLR 53 at 866, where Mocatta J describes bottom fouling at Whampoa, a fresh/brackish water port, as unexpected/extraordinary and therefore offhire. By contrast, the eventuality of hull fouling in any seawater tropical zone is a risk which can be considered normal. As such, it will not be considered a defect because it simply arises out of the normal operation of the vessel.

Following on from this, in London arbitration 20/00, where there was a speed warranty, unlike the “RIJN” the tribunal found that fouling in the course of the charter did not constitute a breach. That said, they still found the vessel had under-performed because after she was cleaned, she was still not meeting the warranty.

As for cleaning, generally this is regarded as a matter for owner’s expense, but with hire continuing, given that the need to clean occurred as a normal incident of the voyage and is therefore itself a service required under the charter. This has been confirmed in

the most recent authority, although it refers to an arbitration decision where the time spent cleaning was off-hire – see the “KITSA” reported in brief in Lloyd’s List 25 February 2005. However, this finding was based on an additional off-hire clause, rather than clause 15, and is distinguishable on this basis.

Conclusion


Where a vessel is programmed to land at a seawater tropical port and delays are possible, it is prudent to prepare for hull fouling, check the vessel’s hull on delivery, enquire about the cleaning and painting history, possibly conduct surveys and monitor performance. As soon as fouling is suspected, look for an opportunity to clean at the next port, or risk a claim thereafter.

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Abolition of Estate Duty in Hong Kong

Encouragement for investments and asset management business.

In the government budget for 2005/06, the financial secretary¹ announced the proposed abolition of estate duty. The proposal is part of measures designed to encourage investments – and promote the asset management business – in Hong Kong.



Currently, the tax-free threshold for estate duty is HK\$7.5m, with a maximum rate of 15% on estates valued at more than HK\$10.5m.

The financial secretary said that legislation will be introduced as soon as possible. However, the proposed cut-off date for estate duty liability will not be effective until the legislation is actually enacted².

Following abolition, estate duty will no longer be charged on the Hong Kong assets of any person upon their death. Consequently, the procedures for obtaining grants of probate and letters of administration will be simplified. At present, estate duty clearance must be obtained before the court will make a grant of representation.

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A question of will power

There are lots of excuses but no reasons for failing to make a will.

While most people recognise that a will is probably the most important document they ever have to sign, Consumer Reports – a consumer research organisation based in the US – has recently reported that over 60% of adults in the US are intestate. Other surveys suggest that the number may be even higher, citing superstition, ignorance or laziness as the main reasons for people’s failure to tackle the issue. USA Today reports that many of those surveyed said that they did not have the time, although 30% conceded that they had never even thought about it.

Why do it?

Wills serve two principal purposes:

- 1 they dispose of property and designate people to administer that property; and

- 2 in the case of surviving children, they can be used to appoint a guardian to look after the children.

Indeed, the surveys show that the main reason why people make a will is to name the person who is to take care of their children.

Some of those surveyed thought there was no need to make a will unless they were conducting a sophisticated tax planning exercise. In fact, a will is essential for anyone who wants to leave their affairs in order and to provide for family members or other beneficiaries. If someone fails to make a will, then their estate will pass to members of their family as determined by the law. Given the sad frequency of family disputes, this is often not what people want to achieve.

Hong Kong wills

A will made in accordance with Hong Kong law generally covers the whole of an individual’s estate, both in Hong Kong and elsewhere in the world. For most expatriates, therefore, a will

made in Hong Kong should satisfy all their requirements. There are exceptions, though, in the case of someone who holds property (or is



domiciled) in a country where the law requires all or part of an estate to pass in accordance with its legal regime. Such laws or attendant tax considerations may make it advisable to draw up separate wills for assets in different countries. A person can make two or more wills, each covering assets in different countries, so that the assets in the various jurisdictions can be dealt with simultaneously.

Keeping up with events

In the US surveys, even those who have wills are not perfect. Over one in four of such testators have not changed their wills to keep up with the major developments in their lives. Most people are apparently unaware that wills can easily be changed and should be reviewed whenever there is a major shift in personal circumstances. Lawyers did notice a significant increase in instructions over wills after tragic events such as 9/11; but the majority of people are still ignorant of basic notions – for example, that marriage generally revokes an existing will.

It is likely that any survey in Hong Kong would produce similar results to the US studies. So, to the 60% of the population who haven’t yet made a will, we ask, “What’s your excuse?” We don’t know any good ones.

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For further information about any of the articles within this issue please contact the author concerned or your usual partner.

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