B.J. MACFARLANE & CO.

Solicitors for Insurance, Shipping and Trade
4 Lombard Street
London EC3V 9HD

SAMPLE REPORT

A Turtle & Others v. Superior Trading Inc.

19th JANUARY 2009

Principal: B.J. Macfarlane
Regulated by the Solicitors Regulation Authority
In association with Rodgers & Co. Solicitors (Asia) Pte Ltd, Singapore

T: +44 (0) 207 190 2988
F: +44 (0) 207 190 2989
E: b.macfarlane@bjm-co.com
www.bjm-co.com

Description of the Case:	Rig – Tug – fuel – Seaworthiness – Exemption – Liability – Release of Rig – Lost – wreck – Towage – TOWCON – Breach of Agreement
Case name:	*A Turtle Offshore SA Assuranceforeningen Gard-Gjensidig v Superior Trading Inc*
Date of Judgment:	11th December 2008
Court:	Queen's Bench Division
Judge:	Justice Teare
Citation:	[2008] EWHC 3034 (Admlty)

Background: The Claimants, the owners of rig A TURTLE claimed damages from the Defendant, Superior Trading Inc, the tug owners of MIGHTY DELIVERER for the loss of the rig and associated wreck removal expenses. The damages were estimated to be in the region of US$20m.

A TURTLE was a semi-submersible drilling platform or rig which had been laid up at Macae. MIGHTY DELIVERER was a "pusher" tug which was to tow A TURTLE to Singapore via Cape Town pursuant to the terms (as amended) of the standard form of towage contract known as TOWCON. Noble Denton issued a fitness to tow certificate on behalf of A Turtle Offshore SA which stated that the rig was considered to be in good and safe condition for ocean towage from Macae, Brazil to India Ocean. The commercial managers of the tug are Bush Shipping Services Limited ("Bush Shipping") whose chief executive is Mr. Philip Bush.

The towage commenced on 6th March 2006. The progress of the towage was evidenced by the tug's log book and by daily reports sent by the master to Bush Shipping. The daily reports suggested a diesel oil consumption of about 3.5 tonnes per day. On 13th March 2006 there remained on board some 162.8 tonnes of diesel oil. Thus there were about 46.5 days steaming time remaining before the tug ran out of diesel oil. An e-mail from Mr. Bush dated 29th March 2006 showed that he appreciated the need to bunker in the South Atlantic and planned to do so using RUBY DELIVERER. However, it was unclear when RUBY DELIVERER was able to leave a position off Madagascar for Durban.

By 10th April 2006, A TURTLE and MIGHTY DELIVERER were in serious difficulties. Unfortunately for all concerned the tug ran out of fuel in the South Atlantic. The towage connection was released and A TURTLE drifted away from the tug. She was later found on the shores of Tristan da Cunha. Salvage attempts failed and the wreck of A TURTLE was later removed from Tristan da Cunha and dumped at sea.
The owners of the tug denied that they were liable for the loss of the rig and, if they were liable, sought to limit their liability to a sum estimated to be about US$1.6m pursuant to the 1976 Limitation.

Issue: The main issues before the Court were:

1. Whether the tug owners failed, in breach of Part II clause 13[1] of TOWCON, to exercise due diligence to tender the tug in a seaworthy condition and ready for towage;

2. Whether the tug owners performed the voyage properly; and

3. Whether the tug owners were exempted by the terms of TOWCON from liability for the loss of A TURTLE and the expense thereby caused

Held: The Court stated that Clause 13 provided that the tug owner should exercise due diligence to tender the tug in a seaworthy condition and ready to perform the towage. The Court did not accept the submission that in circumstances where the rig owner was only willing to agree to the TOWCON if Noble Denton gave its approval, it followed that in the event that Noble Denton gave its approval it must have been agreed that the tug was seaworthy and ready to perform the towage. The Court assumed that the import of the e-mail dated 16th February 2006 was that the rig owner would not agree to a towage contract on the terms of TOWCON unless and until Noble Denton had approved the tug and/ or towage procedures. By the time the TOWCON had been agreed on 27th February Noble Denton had certified that the tug was suitable for the proposed towage. That approval having been granted it appeared that the rig owner was content to agree to the TOWCON.

There was, according to the Court, no basis upon which it could be stated, as a matter of construction of the TOWCON, that as a result of the e-mail dated 16th February and Noble Denton's approval of the tug and/or of the towage procedures, the obligation under Part II clause 13 was agreed to have been performed. The Court stated that the rig owner had contracted with the tug owner and secured the latter's obligation to exercise due diligence to tender the tug in a seaworthy condition and in all respects ready to perform the towage. In any event any representation of fact on the signing of the TOWCON on 27 February 2006 could not have applied to the towage procedures because they were not approved by Noble Denton until 5th March 2006.

According to the Court, If Superior did rely upon Noble Denton with regard to the sufficiency of bunkers they did so in circumstances in which Seawave's towage procedures did not address the sufficiency of bunkers and there was nothing in Noble Denton's approval of those procedures to suggest that Noble Denton had addressed the question. The Court stated that there was nothing in those circumstances which enabled Superior to say that its own analysis of the bunker question was approved by Noble Denton, an acknowledged expert on the subject of towage procedures, and that therefore it had exercised due diligence to ensure that the tug had sufficient bunkers. That was because the evidence in this case did not reveal that Seawave or Bush Shipping made any proper analysis of the bunker question.

The Court stated that the obligation under Part II clause 13 was personal to the tug owners and could not be delegated to another. If the tug owners had considered themselves to be unable to assess such matters as the tow's resistance, the required towing power, the available bollard pull and the likely achievable speed and in consequence instructed an expert in towage procedures to

[1] ***"13. Seaworthiness of the Tug*** *The Tugowner will exercise due diligence to tender the Tug at the place of departure in a seaworthy condition and in all respects ready to perform the towage, but the Tugowner gives no other warranties, express or implied..……..*

advise them, they would still be in breach of their duty under Part II clause 13 if that expert failed to carry out a proper analysis. They could not be in better position if, instead of instructing their own expert, they chose to rely upon the approval by Noble Denton of the tug and of Seawave's towage procedures, which themselves contained no proper analysis of the bunker question.

Therefore, the Court concluded that the tug owners failed, in breach of Part II clause 13 of TOWCON, to exercise due diligence to tender the tug in a seaworthy condition and ready for the towage.

The Court observed that it was common ground that a time came when it must have been apparent to the tug owners that the tug would run out of bunkers before reaching Cape Town and that action was accordingly required. The Court further found that there was no certainty that RUBY DELIVERER would reach MIGHTY DELIVERER before she ran out of fuel. The Court stated that there being no certainty as to whether RUBY DELIVERER could be released and, if she could be released, no certainty that she could arrive before MIGHTY DELIVERER had run out of diesel oil, the only alternative course of action was to instruct MIGHTY DELIVERER to return to South America.

The Court on evidence found that by 29th March 2006 the tug and tow were about one third of the way across the South Atlantic. The Court stated that there was no dispute that she had sufficient bunkers to return to Brazil. It was more likely than not that the tug and tow could have been ordered to return to the safety of a port in South America or to a point off the coast where the rig could be held in safety. The tug's bunkers could then be replenished. In commercial terms this would be very costly for the tug owners but they had a duty to exercise their best endeavours to perform the towage. The Court stated that the tug owners were entitled to take into account the cost of returning to South America in deciding what action to take pursuant to their duty of best endeavours. However, they must also take into account whether there was any viable alternative course of action. If there was no tug available in Cape Town to proceed to MIGHTY DELIVERER with bunkers the only other alternative method of assisting MIGHTY DELIVERER was to dispatch RUBY DELIVERER from Madagascar but in circumstances where it was not known whether and if so when she could be released from her existing commitment. According to the Court, in those circumstances the tug owners' duty of best endeavours required that the expense of returning to South America be borne by the tug owners. That was because the alternative course of action risked the tug running out of bunkers and having to release the connection to the rig in the South Atlantic as winter approached.

If the Court was wrong in so concluding and reliance on RUBY DELIVERER was the better course of action that course of action ultimately failed. The Court held that the tug owners could not escape responsibility for that failure because they were forced to take that course of action by reason of their own prior breach of clause 13 in commencing the towage without sufficient bunkers.

The Court while dealing with the third issue, stated that the failure by the tug owners to exercise due diligence to ensure that the tug had sufficient bunkers at the commencement of the tow occurred whilst the tug owners were performing their obligations under the TOWCON. They did so negligently in circumstances where there was a risk that the tug might not in fact have sufficient bunkers for the towage to Cape Town. Similarly, the failure by the tug owners during the towage to return to South America occurred whilst the tug owners were performing their obligations under the TOWCON by relying upon RUBY DELIVERER to replenish the bunkers of the tug. Whilst it was not certain that RUBY DELIVERER would reach the tug before the tug had run out of bunkers the tug owners had not ceased to do anything at all in the performance of their obligations.

The Court held that since there was no dispute that the loss and damage claimed by the rig owner fell within the types of loss and damage listed in clause 18 it followed that such loss and damage was for the sole account of the rig owner and that the tug owners were exempt from liability in respect thereof [2]. The judge rejected the argument that the tug owners breach was of such a nature (i.e. so fundamental) that the exemption at Clause 18 could not cover it.

The Court found that when the search for the rig was called off by the tugs on 22 May 2006 the owners of the tug remained bound to exercise their best endeavours to perform the towage. However, they did not seek to perform that obligation. The tugs simply left the scene and the tug owners made no attempt to send another tug. The Court stated that the tug owners' obligations had not come to an end on 22 May 2006. According to the Court, had the tug owners' failure to perform their obligations after 22 May been an effective cause of the grounding and subsequent loss of the rig the tug owners would not have been protected by clause 18. However, it was accepted that that could not be established. At most it was stated that a chance of finding and recovering the rig had been lost. But that, according to the Court, was no more than speculation.

For the above reasons, the owners of the tug MIGHTY DELIVERER were exempted by the terms of TOWCON from liability for the loss of A TURTLE and the expense thereby caused.

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[2] *Clause 18.2 (b) reads: "The following shall be for the sole account of the Hirer without any recourse to the Tugowner, his servants or agents, whether or not the same is due to breach of contract, negligence or any fault on the part of the Tugowner, his servants or agents: (i) loss or damage of whatsoever nature caused or sustained by the Tow (ii) loss or damage of whatsoever nature caused to or suffered by third parties or their property by reason of contact with the Tow or obstruction created by the presence of the Tow (iii) loss or damage of whatsoever nature suffered by the Hirer or by third parties in consequence of the loss or damage referred to in (i) and (ii) above. (iv) any liability in respect of wreck removal or in respect of the expense of moving or lighting or buoying the Tow or in respect of preventing or abating pollution originating from the Tow."*