Time bars in cargo claims – applying to extend

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In Expofrut SA and Others v Melville Services Inc and Another (The "Africa Reefer") – QBD (Comm Ct) [2015] EWHC 1950, the owners agreed to carry a cargo of fresh pears aboard their vessel "Africa Reefer" from Argentina to Antwerp. The cargo interests complained that the cargo had been damaged.

Carriage was made pursuant to bills of lading that were incorporated into a Charterparty which included a London Arbitration clause and the Hague Visby Rules.

The cargo interests initiated proceedings in Belgium and a court surveyor was appointed who produced a report favourable to the cargo interests. When the owners eventually came to produce a defence, they contested jurisdiction and argued that the dispute was subject to London arbitration.

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The cargo interests did not attempt to commence arbitration nor did they seek an extension of time to do so. They were of the view that the arbitration clause did not apply because of article 96 of the Belgian Private International Code and article 91 of the Belgian Maritime Law. The Belgian court later ruled that the dispute was required to be resolved in arbitration and not in the Belgian courts.

The cargo interests appealed this decision and at the same time issued a notice of arbitration and attempted to persuade the owners to agree to a stay (unsuccessfully) and then similarly sought a stay from the arbitrators (also unsuccessful).

In April 2015, the cargo interests issued the present application for an extension of time of some three years and eight months in order to commence arbitration.

The court held that cargo interests could seek to rely upon section 12(3)(b) of the Arbitration Act 1996, that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question. They noted that the provisions of the Arbitration Act 1996 were more restrictive than the Arbitration Act 1950 with regards to these issues.

The issue for the court to determine was whether the conduct of the owners made it unjust to hold the cargo interests to the strict terms of the time bar for commencing arbitration. By participating in the Belgian proceedings and by raising the jurisdiction point only when a defence became due, the court considered that the owners did not waive their right to claim arbitration and had not submitted to the jurisdiction of the Belgian court. The court stated that mere silence by the owners did not render the barring of the claim unjust for the purposes of 12(3)(b) of the Arbitration Act 1996. There had to be some deliberate conduct, not necessarily wrongful or blameworthy, but causative.

In accordance with section 12(3)(b) of the 1996 Arbitration Act, it was the conduct of the owners which had to make it unjust to hold the cargo interests to the time bar for commencing arbitration.

The court held that no causative conduct was present on behalf of the owners and therefore the cargo interests could not rely upon 12(3)(b) of the Arbitration Act – the cargo interests were not entitled to an extension.

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