Ship Sale and Purchase: If an MOA (on Norwegian Saleform 1993) is cancelled before the buyer has paid the 10% deposit, is the buyer still liable to pay the deposit or only damages?

In this case, the buyer, a West of England Member, contracted on 28 April 2010 to purchase the GRIFFON (a 1995 bulk carrier of 27,011 GT) under a Norwegian Saleform (1993 version) MOA, for US$22 million.

By clause 2 of the standard form it was provided that:

"*As security for the correct fulfilment of this agreement the buyers shall pay a deposit of 10% of the purchase price within 3 banking days after this Agreement is signed by both parties and exchange by fax/email..".*

By clause 13 of the MOA it was provided that:

"*Should the deposit not be paid in accordance with Clause 2, the sellers shall have the right to cancel this Agreement, and they shall be entitled to claim compensation for their losses and for all expenses incurred together with interest.*

Should the Purchase Price not be paid in accordance with Clause 3, the Sellers have the right to cancel the Agreement, in which case the deposit together with interest earned shall be released to the Sellers. If the deposit does not cover their loss, the Sellers shall be entitled to claim further compensation for their losses and for all expenses incurred together with interest."

The arbitration tribunal found in the buyer's favour, however, the arbitration tribunal's decision was subsequently overturned in the High Court.

Following the parties' signature of the MOA on 1 May 2010, the deposit fell due on 5 May but was not paid by the buyer, and on 6 May, the seller cancelled the contract (as he was entitled to do under clause 13 of the MOA). The seller sold the vessel to a new buyer later that month for US$21.5m (less commission), although the vessel was not delivered to the new buyer until September 2010.

The parties submitted a preliminary issue for the arbitration tribunal to determine whether, in these circumstances, the buyer was liable to pay the amount of the

West of England Insurance Services (Luxembourg) S.A., Tower Bridge Court, 226 Tower Bridge Road, London, SE1 2UP
T +(44) (0)20 7716 6000 F +(44) (0)20 7716 6100 E mail@westpandi.com W www.westpandi.com

Ship Sale and Purchase: If an MOA (on Norwegian Saleform 1993) is cancelled before the buyer has paid the 10% deposit, is the buyer still liable to pay the deposit or only damages?

deposit (namely US$2m, that is, US$2.2m less commission) or only the amount of damages that would compensate the seller for his actual loss. The facts of this case are stark because the seller claimed that his actual loss was only US$275,000.

Surprisingly, in these circumstances, there is little English legal guidance on this point: in both *Blankenstein* [1985] 1 LLR 93 (Court of Appeal) and in *Anna Spiratou* [1998] 2 SLR (Singapore Court of Appeal) the deposit had not fallen due by the time the contract was cancelled; additionally, *Blankenstein* concerned different (1966) Norwegian Saleform wording which did not contain the first limb of clause 13 (quoted above)*.

The arbitration tribunal found in the buyer's favour, finding as a matter of construction that the two limbs of clause 13 provide for what is to happen in different circumstances, namely the buyer's failure to pay the deposit (the first limb of clause 13) and the buyer's failure to pay the purchase price (the second limb of clause 13). Whereas, in both limbs there is a right to cancel the MOA, the tribunal held that each limb of clause 13 was intended to provide a fundamentally different approach so that, where there was a failure to pay the purchase price (the second limb of clause 13), the seller would have a right to the deposit, even if the deposit exceeded the seller's actual loss.

The buyer was given leave to appeal the ruling to the Court of Appeal.

However, where there was a failure to pay the deposit (the first limb of clause 13), the tribunal held that there was nothing in the language of the MOA to suggest that the seller would have a right to the deposit. In that latter event, the tribunal held that the seller's rights are a) to cancel the contract (as the seller did in this case) and b) to claim "compensation" i.e. for his actual losses. (As the buyer's counsel argued in the High Court, where the seller is entitled to cancel the contract he can then sell the vessel immediately, thereby reducing any losses suffered, and there is no commercial reason to imply into the first limb of clause 13 a right for the seller to recover the deposit as this would constitute a windfall benefit to the seller.)

The arbitration tribunal's decision was, however, overturned in the High Court by Teare J, who held that since the deposit had fallen due before the contract was cancelled, as a matter of English Common Law, the seller's right to the deposit was not subsequently lost due to the buyer's breach in not paying the deposit, and that if the seller's accrued right to the deposit were to be lost in these circumstances, clause 13 would have to state so expressly. Teare J was particularly struck by the importance to the seller of the right to the deposit which is a right which has been emphasised in a long line of English land law (and other) cases.

Teare J did give the buyer leave to appeal to the Court of Appeal, and the Court of Appeal's decision is expected later in 2013.

** Note that clauses 2 and 13 of the current 2012 Norwegian Saleform are not materially different from the 1993 version that is in issue in this case.*

The buyer has FDD insurance with the West of England, and the Club is supporting the legal costs of this case.