Journal of

THE MALTA MARITIME LAW ASSOCIATION

Vol. 1 No. 1 May 2012

MALTA MARITIME LAW ASSOCIATION

In this issue:

NOTE FROM THE PRESIDENT

Dr. Ann Fenech

It is with great pleasure that I welcome you all to our first Malta Maritime Law Association (MMLA) Journal.

The Malta Maritime Law Association is an association made up primarily of lawyers having an interest in maritime law. In addition however the association also welcomes members who offer services related to the international maritime community.

Our aim is to make out of the MMLA the natural forum where persons interested in the development of the maritime sector in Malta can discuss topical issues of international and local importance.

With this very firmly in mind, the association has been very successful in organising a number of seminars with the aim of attracting both lawyers specialising in Maritime law as well as other service providers involved in this sector. During the past two years we have organised seminars on a number of important issues such as for instance a seminar organised jointly with the International Salvage Union on environmental salvage, a seminar on the Rotterdam Rules addressed by Prof. Charles Debattista, and a seminar on the new Maltese Commercial Yacht Code. In addition, this year we have embarked on a series of small meetings aimed at discussing in detail important maritime judgements. All of these seminars have been extremely well attended.

In addition we have also increased our level of participation in events organised by the Comite Maritime International of which we are a member and that ensures that we contribute to this very important voice of International Maritime Law.

The interest in things maritime and Malta should however not be of any surprise to anyone since we are truly a maritime nation in every respect. Equidistant from the Straights of Gibraltar and Suez

and continental Europe and North Africa, makes us an ideal location for bunkering and transhipment; Malta boasts the deepest natural harbour in the Mediterranean which from time immemorial has provided the ideal place for ship repair. The docks in Malta can accommodate small yachts, super yachts to VVLCC's with one of our docks able to accommodate 300 meter vessels for repair; the country's location lends itself to being the ideal base for off shore structures and towage operations; quite apart from ship and yacht repair, it is truly ideally positioned to offer itself as an idyllic yachting base with fabulous marinas making Malta an ideal yacht cruising destination in the summer and an ideal wintering base in winter. Of course on top of all of this is the fact that Malta today has the largest shipping register in Europe with over 45 million tons. Finally the relevance of Malta in the international maritime sector has taken on another dimension in the sector of maritime education. The International Maritime Law Institute under the auspices of the International Maritime Organisation is located in Malta and to this day over 500 students from over 120 countries have graduated from the Institute.

Our position, the maritime related activities taking place here and our extensive shipping register means that Maltese maritime law is becoming increasingly important from an international perspective hence the growing relevance of a Maritime Law Association.

I hope you will enjoy receiving this first journal of ours to be followed hopefully by many more.

Editorial Note

Dr. Nicholas Valenzia

This is the first edition of the Malta Maritime Law Association's bi-annual Journal. A decision was taken back in 2010 by the Association in general meeting to have its own publication to act as a continuous compendium of the academic wealth and knowledge of its members who have over the years been involved in the academic and practical world of maritime legal affairs.

On behalf of the Association I would like to thank all contributors to this journal. A deserved special mention is due to Transport Malta for its continuous support in all initiatives promoted by the Association including this journal.

A FOCUS ON THE BACINO

Dr. Alison Vassallo

Every once in a while a judgment is handed down by the ECJ which, by reason of the ripples it causes in a particular sector of the industry it touches upon, comes to be referred to simply by one word - one such case is that which has come to be referred to as the "BACINO".

The full name of the case is "Etat du Grand-Duche de Luxembourg, Administration de l'enregistrement et des demains v. Pierre Feltgen, Bacino Charter Company SA (C-116/10)" 22nd December 2010 and consisted of a reference for a preliminary ruling made by the Luxembourg Cour de Cassation to the ECJ concerning the interpretation of Article 15(5) of the Sixth Council Directive 77/338/EEC – which was in fact overtaken by Article 148 of Council Directive 2006/112/EC as amended although the content of the article in question has remained unchanged.

The article of law which formed the object of this referral, headed "Exemption of exports for the Community and like transactions and international transport', provided that

"Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse

…

4. the supply of goods for the fuelling and provisioning of vessels:

(a) used for navigation on the high seas and carrying passengers for reward or used for the purpose of commercial, industrial or fishing activities;

(b) used for rescue or assistance at sea, or for inshore fishing, with the exception, for the latter, of ship's provisions"

5. the supply, modification, repair, maintenance, chartering

and hiring of the sea-going vessels referred to in paragraph 4(a) and (b) and the supply, hiring, repair and maintenance of equipment – including fishing equipment – incorporated or used therein".

The facts of the BACINO related to Bacino Chartering Company SA ("Bacino") making available on a regular basis between the 19th July 1998 and 8th August 1999 a vessel which it owned, together with a crew, to natural persons for the purpose of leisure activities on the high seas. On the basis of the assumption that this scenario fell squarely within the parameters of the above cited exemption, Bacino did not charge the natural person VAT on the hire and therefore did not pass any VAT payments calculated on such hire to the Luxembourg tax authorities.

The Luxembourg tax authorities were however of a different view and in 2001 they notified Bacino of the tax assessments for the financial years 1998 and 1999 which set out the amounts of VAT owned by the company for charters carried out during the said period in so afar as in their view the boat was not a commercial vessel but rather a yacht.

Bacino challenged that assessment before the District Court of Luxembourg which dismissed its action, subsequent to which Bacino was successful in arguing before the Court of Appeal that since the vessel was engaged in navigation on the high seas and carrying passengers for reward, the said activity did in fact fall within the parameters of the exemption outlined in article 15(5).

The tax authorities brought an appeal before the Court of Cassation which decided to pose the following question to the ECJ for a preliminary ruling:

"May services provided by the owner of a vessel who, for reward, with a crew, makes it available for natural persons for the purpose of leisure travel on the high seas by those clients, be exempted under Article 15(5) of [the Sixth Directive]…where those services are considered to be both vessel-hire services and transport services?".

It is evident therefore that the question put to the ECJ by the Cour de Cassation in Luxembourg related solely to whether VAT is due on the hire paid by a private person to the owner of a yacht where the latter is in the business of operating the yacht for commercial

purposes on the high seas.

However in so far as article 15(5) refers to other services besides hire, namely those of supply, modification, repairs and maintenance, and since the criteria referred to in article 15(5) (now article 148(c)) for entitlement to the said exception are identical in the case of all of these services in that the yacht in question must be used "for navigation on the high seas and carry(ing) passengers for reward or used for the purpose of commercial activities" the findings of this judgment may logically be said cover all of the cited services, besides naturally the supply of goods for the fuelling and provisioning of the vessels in question as referred to directly in article 15 4(a) (now article 148 (a)).

Turning to the actual findings of the ECJ, it held that "the actual wording of Article 15(5) of the Sixth Directive, which contains a reference to article 15(4)(a), covers the hiring of vessels used for navigation on the high seas and carrying passengers for reward or used for the purpose of commercial, industrial or fishing activities. In order for such a hiring service to be capable of exemption under that provision, the lessee of the vessel concerned must use it for an economic activity

…It follows that if, as in the main proceedings, the vessel is leased to persons who use it exclusively for leisure purposes and not for financial gain, outside the sphere of any economic activity, the hire service does not meet the explicit conditions for VAT exemption set out in article 15(5)..

The exemption set out in Article 15(5) of the Sixth Directive cannot benefit vessel-hire services for charters who intend to use the vessel strictly for private purposes as final consumers".

Perhaps much of the alarm that has trickled down throughout the industry arises as a result of reading more into the judgment than there is. In the author's view, the ECJ in this case has not come up with new law. The court when faced with the facts of the Bacino Case was merely provided with a perfect opportunity of stating in black and white what the real spirit and meaning of the cited exemption is –placed simply being that where the lessee of a yacht uses the yacht for private (leisure) purposes, then the lessee is required to pay VAT on the said service to the owner who in turn uses the yacht for

commercial activities on the high seas.

The real impact of the Bacino case is that, in clarifying when VAT is to be paid by the lessee and when there is an exemption from the payment of such VAT, it has removed any grey areas which previously allowed scope or an interpretation allowing VAT to be waived when in fact it ought to have been collected. In assessing whether VAT is due on a particular service, the Bacino has with the authority it carries, adjusted the collective focus of the industry to the use being made of the yacht by the person availing himself of the particular service. Therefore in the case where the service consists of making a yacht available for charter and the lessee is a private person using the yacht for leisure purposes VAT is due by him to the owner on the hire. By analogy, in the case where the person ordering the supply of fuel, provisions or commissioning the refit of a yacht is the owner of the yacht who is using the yacht for commercial activities on the high seas, then no VAT is due on the said services by the owner to the particular supplier or service provider.

Debate has also arisen with respect to whether the court in referring to the lessees as being "natural persons", intended to exclude its findings in case where the lessee is a corporate entity (as opposed to a physical person) using the yacht for pleasure purposes. In this regard, one must firmly bear in mind that in making its pronouncements, the ECJ replies directly to the question and follows the precise wording put to it by the referring court. As a consequence, in the author's view, one cannot interpret the court's findings as meaning that the exemption does in fact apply in case where a corporate entity is set up to charter the yacht for leisure purposes e.g. to entertain employees on an annual boat trip.

The Bacino has attracted significant criticism directed from all angles of the international yachting community. The main concern for owners is whether they can retain competitive charter rates and whether the prevailing economic climate can support a proportionate hike in rates. Further criticism relates to the uneven playing field which this interpretation would create between persons opting for a holiday on board a yacht and persons opting for a holiday on board a cruise liner where no VAT is charged on tickets. It very much remains

to be seen whether all of this will in fact translate into a tangible threat to the attractiveness of chartering a yacht, or whether this is effectively a storm in a teacup.

CASE REPORT – WIDER SCOPE GIVEN TO FREEZING INJUNCTIONS BY THE COURT

Glory Wealth Shipping Pte Ltd vs. Peninsula Enterprise SpA

Dr. Karl Grech Orr and Dr. Stephanie Saliba

The First Hall Civil Court presided over by Mr. Justice Joseph Zammit Mc Keon, on June 11, 2009, in the case "Glory Wealth Shipping Pte Ltd vs. Peninsula Enterprise SpA", held that under article 37 of the Merchant Shipping Act, an injunction could be registered against sister vessels. Article 37 of the Merchant Shipping Act states amongst others that a creditor may (upon satisfying the requirements therein set out) request the competent court to issue an injunction prohibiting the dealing in a ship or share therein.

The facts in this case were as follows:

Peninsula Enterprise SpA had chartered the m.v. "Kang Yu" from Glory Wealth Shipping Pte Ltd and subsequently failed to honour its contractual obligations under the Charter-Party. As a result, Glory Wealth Shipping Pte Ltd, the owner, instituted a claim of US$ 6,744,219.29 against the charterer, Peninsula Enterprise SpA.

It was stated that the Charterer - Peninsula Enterprise SpA's only asset was the m.v. "Amelia Cacace"; a Malta-flagged vessel.

As there were no other assets, which could be attached to satisfy its claim, the owners applied to the court requesting the issuance of a section 37 injunction over m.v. "Amelia Cacace" to secure its claim under the Charter Party of m.v. "Kang Yu".

At issue was whether article 37 of our Merchant Shipping Act could be extended against "sister" vessels, Article 37(10)(v) states that a creditor who has a claim giving rise to an action in rem against a vessel may avail himself of article 37.

Article 742D of the Code of Organisation and Civil Procedure

(Cap. 12 of the Laws of Malta) provides that an action in rem may be brought against any vessel which is, at the time when the action is brought, owned or bareboat chartered by the person who is responsible in personam.

Peninsula Enterprise SpA claimed that an action under article 37 could not be brought against sister ships. It was argued that freezing injunctions could be brought against a sister ship only in so far this was explicitly provided in the law.

Whereas article 742D permitted actions in rem against sister ships, article 37 did not explicitly mention this possibility.

Peninsula Enterprise SpA drew the court's attention to the fact under article 37 an action could be brought against "a" vessel rather than against "any" vessel. This meant that a section 37 injunction could be made only against a vessel, connected with the debt.

This court disagreed.

By sub-paragraph 37(10)(v), the scope of article 37 was widened, pointed the court, and persons having an action in rem could also request an injunction under article 37.

As Article 37 was to be read in conjunction with article 742 of Chapter 12 of the laws of Malta, a section 37 injunction could be issued in the following two cases:

(i) against a Maltese ship, if the debtor was the owner, charterer, or simply in possession or control of the ship at the time when the cause of action arose. In this case, the debtor had to be the owner, beneficial owner or bareboat charterer of that ship at the time when the injunction was requested;

(ii) against a Maltese ship if the debtor was the owner or beneficial owner of that ship at the time a request for a section 37 injunction was filed, even if the ship had no connection with the claim.

In absence of any appeal, this judgement became res judicata.

MANAGING
THE SHIP MANAGER'S BENEFITS

Dr. Ivan Vella

Preliminaries

What follows is an attempt to unravel or 'de-construct' the provisions of the Merchant Shipping Act [Cap. 234 of the Laws of Malta] – hereinafter the "Act" - and of the Merchant Shipping (Taxation and Other Matters relating to Shipping Organisations) Regulations [LN 224 of 2004 as amended by LN 83 of 2010] promulgated under the Act – hereinafter the "Regulations" – that purport to grant tax and other related benefits in determinate circumstances in respect of income derived by ship managers from ship management activities. Those provisions are 'inspired' by the Commission communication C(2004) 43 – Community guidelines on State aid to maritime transport (2004/C 13/03).Regulation 3(6)(i) of the Regulations declares that income arising from 'ship management activities is deemed to be income derived from 'shipping activities' as the same are defined in the Act. This would seem to suggest that ship management activities are equivalent in status, and are afforded the same treatment at law, as shipping activities. Article 85 of the Act as amended by regulation 2 of the Regulations defines 'ship management activities' as 'those activities carried out by a ship manager and consisting in, but not limited to, the entire crewing of a ship referred to in regulation 3(6)(i)(b) of the [Regulations] , and, or the provision of technical management thereto.'

Two preliminary considerations are immediately borne out by this definition: first, the activities must be carried out by a ship manager; and second, they must consist in at least one of crewing or technical management. It is clear that much hinges on the meaning of the term 'ship manager' that is also defined by article 85 of the Act, as amended by regulation 2 of the Regulations.

Conditions

In effect there are in total not less than 12 conditions imposed by the Act and by the Regulations to enable a ship manager to enjoy

the benefits contemplated by law. The first eight emanate from the definition of the term 'ship manager' set out in article 85 of the Act as amended by regulation 2 of the Regulations. The last four are established in paragraphs (a), (b), (c) and (d) of regulation 3(6)(i) of the Regulations. The conditions are:

(1) The ship manager must be a licensed shipping organization. For such purpose the manager must apply to be licensed under the provisions of the Merchant Shipping (Licensing of Shipping Organisations) Regulations [LN 238 of 2005].

(2) The ship manager must be 'established' in a Member State of the EU or of the EEA. It is presumed that the ship manager must show it has an actual presence in any such State and that its activities are carried out, at least in the main part, therefrom.

(3) It must include a reference to the ship management activities it carries out in its objects as reflected in its memorandum of association or equivalent constitutive document.

(4) The ship manager must 'assume responsibility' for the crew or technical management (or both) of a ship being a tonnage tax ship registered under the provisions of the Act (even under a bareboat charter registration) or any other ship in respect of which the tonnage tax referred to in sub-paragraph 2 of paragraph (b) in regulation 3(6)(i) has been paid.

(5) The ship manager must prove that it complies with the relevant international standards relating to ship management activities. This would presumably include certified compliance with the ISM Code under the International Convention on the Safety of Life at Sea adopted in London in 1974.

(6) The ship manager must also fulfil all 'requirements established under the laws of the European Union'.

(7) It must also satisfy such conditions as may be laid down from time to time by the Registrar-General.

(8) It must register with the Minister responsible for finance by submitting in writing its name, the address of its registered office and the name and tonnage of the ship or ships for which it has assumed responsibility for the crew or technical management (it must also notify the Minister every time any alteration is made to such particulars).

(9) It must keep separate accounts clearly distinguishing the payments and receipts in respect of its ship management activities (for the ship or ships in respect of which it pays tonnage tax) from payments and receipts in respect of any other business.

(10) It must pay annual tonnage tax to the Registrar-General (25% of the annual tonnage tax payable in accordance with the First Schedule to the Act in respect of any tonnage tax ship registered under Part II or Part IIA of the Act or, in respect of any other ship, 25% of the annual tonnage tax that would have been payable had the ship been registered under Part II or Part IIA of the Act).

(11) At least two-thirds of the tonnage of the ships under its management is so managed from the territory of a Member State of the EU or of the EEA.

(12) The ship manager must show that it has a certain tonnage of Community-flagged tonnage under management (see regulation 3(6)(i)(d) for details of the three possible scenarios in this regard).

The benefits

The benefits granted to a ship manager that complies with all the aforementioned conditions are those outlined below:

a) An exemption from tax under the Income Tax Act [Cap. 123] – regulation 3(6)(i) of the Regulations.

b) An exemption from tax under the Income Tax Act for upward dividend distributions made to the ship manager's shareholders and further (and without limitation) made by the said shareholders to their shareholders – regulation 3(6)(ii) applying mutatis mutandis regulation 3(3) of the Regulations.

c) The prerogative to submit and file a declaration in the form set out in the Schedule to the Regulations in lieu of a tax return as would otherwise be required in terms of the provisions of the Income Tax Management Act [Cap. 372] – regulation 3(6)(ii) applying mutatis mutandis regulation 3(5) of the Regulations.

d) The inapplicability of the provisions of the External Transactions Act [Cap. 233], or any other enactment replacing that statute, in

relation to any transaction connected with the management of a ship in respect of which tonnage tax has been paid by the manager or with any ship management activity or with any transaction ancillary thereto – regulation 4 of the Regulations.

e) An exemption from duty chargeable under the Duty on Documents and Transfers Act [Cap. 364], or under any regulations made thereunder or under any other enactment replacing the same, in respect of any instrument connected with or involving the issue or allotment of any security or interest of the ship manager or the purchase, transfer, assignment or negotiation of any security or interest of the ship manager – regulation 5(b) of the Regulations.

The aforesaid benefits are granted at the option of the ship manager which may, by notice in writing to the Registrar-General, opt not to be entitled to the same, and in which case the benefits would be irrevocably waived (regulation 6 of the Regulations).

Drawbacks

It is not all blue in the ship management sky! There are potential pit-falls.

First; as with all other tax benefits under the Act and the Regulations, the benefits in question are premised on the payment of tonnage tax. Double tax relief usually only applies to and covers income tax, corporation tax and revenue tax or kindred taxes paid in a jurisdiction by the person seeking such relief in another jurisdiction. Double tax relief (whether under bilateral treaties or when granted unilaterally) in the latter does not usually extend to tonnage tax paid elsewhere.

Second; for ship managers established or to be established in Malta the benefits only accrue to the advantage of the licensed shipping organization acting as a ship manager, but not to the specialist technical persons employed by the latter. This means that the natural persons actually doing the job do not themselves have a direct benefit or incentive to work for or be employed or otherwise engaged by the ship manager. The recently promulgated Highly Qualified Persons Rules [LN 106 of 2011 as amended by LN 192 of 2011] provide tax incentives to individuals deemed to be highly qualified for eligible

employment and offices with companies licensed or recognized by the Malta Financial Services Authority. Perhaps a leaf may be taken out of that book and similar incentives applied to specialists employed by ship managers established in Malta.

Final remarks

The references in regulation 3(6)(i)(b) and (ii) of the Regulations to "the Act" are presumably references to the Merchant Shipping Act although the term 'Act' is not actually defined in the Regulations. This is stated for the sake of clarification and avoidance of doubt.

Now that the benefits are (more or less) in place the first thing that is needed is knowledge. The second is action. Without either the ship management benefits will simply be pie in the sky!

Malta Maritime Law Association
Malta Transport Centre
Marsa MRS 1917
t. (+356) 27250320
e. mlac1@onvol.net

Supported by

tm
Transport Malta