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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
08/10/2009

B e f o r e :

MR JUSTICE WALKER

Between:

AET INC LIMITED — **Claimant**

- and -

ARCADIA PETROLEUM LIMITED — **Defendant**

Mr Michael Ashcroft (instructed by Thomas Cooper) for the claimant
Mr Simon Croall QC (instructed by Clyde & Co) for the defendant
Hearing date: 24 June 2009

HTML VERSION OF JUDGMENT

Mr Justice Walker :

Introduction

1. This case is about how much demurrage is payable under a voyage charterparty ("the charter") of an oil tanker, the EAGLE VALENCIA ("the vessel"). It was an express term of the charter that it was governed by English law. The only substantive matter calling for determination by the court, at least for the time being, concerns when time started to run at the second load port, Escravos.

2. It is common ground that notice of readiness ("NOR") was tendered at Escravos at 1148 hours on 15 January 2007. The primary case advanced by the claimant owners ("owners") is that the notice remained effective with the consequence under the charter that laytime commenced 6 hours later at 1748 hours on 15 January 2007. Lest their primary case be wrong owners advance alternative cases that further valid NORs were tendered by email at 1539 hours on 16 January 2007 or at 1553 hours on 16 January 2007. Charterers accept that NOR was tendered at 1148 hours on 15 January 2007. They say that it was invalidated because the vessel failed to secure free pratique – an official determination by port health authorities that a ship is without infectious disease or plague and that the crew is allowed to make physical contact with shore - within contractual time requirements. As to the alternative cases, they say that these are time-barred under the charter, and that in any event the emails of 16 January 2007 did not constitute NORs.

Principles governing interpretation of contracts

3. There was no dispute as to the principles I should apply when approaching the interpretation of the charter. The principles were set out in paragraph 25 of owners' skeleton argument. Omitting assertions about application of the principles to the present case, that paragraph stated:

> a. The Court should not approach the task of interpretation … with too nice a concentration upon individual words. Whilst, of course, the words used are important, the language should be construed in a way that best effectuates the objective intention of the parties, with greater regard to the clear objective intention of the parties than to any particular words which they may have used to express their intent.
>
> b. As part of the process of construction, the Court is entitled to restrict, transpose, modify, supply or reject words or terms in a document in order to give effect to the intention of the parties.
>
> c. … the Court should strive to avoid an absurd or very unreasonable commercial result, for example one which would impose upon a party a responsibility or loss that it could not reasonably be supposed he meant to assume. Particularly where a contractual provision is badly drafted, the Court should be unwilling to be driven by semantic niceties to attribute to the parties an improbable and unbusinesslike intention if the language used is capable of an interpretation which attributes to the parties an intention to make provision for contingencies on a sensible and business like basis. Commercial documents must be construed in a business fashion and there must be ascribed to the words a meaning that would make good commercial sense.
>
> d. … a provision that is solely for the benefit of [one party] and/or which seeks to diminish or qualify that party's basic obligation, is to be construed strictly against [that party]. As Brett MR said in Burton v. English (1883) 12 QBD 218: "*The general rule is that where there is any doubt as to the construction of any stipulation in a contract, one ought to construe it strictly against the party in whose favour it has been made.*" See also Staughton LJ in Youell v. Bland Welch & Co Ltd [1992] 2 Lloyd's Rep. 127, 134, indicating that "*in cases of doubt, wording in a contract is to be construed against a party who seeks to rely on it in order to diminish or exclude his basic obligation*".

Principles governing the implication of terms

4. Much of the argument was concerned with parts of owners' case that terms could be implied into the charter. Questions as to the implication of terms arose in *Attorney General of Belize v Belize Telecom Limited* [2009] UKPC 10. The advice of the Board in that case given by Lord Hoffmann was adopted by the Court of Appeal in *Mediterranean Salvage & Towage v Seamar Trading & Commerce Inc* [2009] EWCA Civ 531. The

principles are conveniently to be found in the judgment of Sir Anthony Clarke MR in the latter case as follows:

> 8. The correct approach to the question when to imply a term into a contract or other instrument, including therefore a charterparty, has recently been considered by Lord Hoffmann, giving the judgment of the Judicial Committee of the Privy Council, which also comprised Lord Rodger, Baroness Hale, Lord Carswell and Lord Brown, in *Attorney General of Belize v Belize Telecom Limited* [2009] UKPC 11. I predict that his analysis will soon be as much referred to as his approach to the construction of contracts in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 at 912-3. His analysis in the *Belize* case is extensive: see [16] to [27].
>
> 9. It repays detailed study but for present purposes it is I think sufficient to say that the implication of a term is an exercise in the construction of the contract as a whole: see *Trollope & Colls Limited v North West Metropolitan Hospital Board* [1973] 1 WLR 601, 609 per Lord Pearson, with whom Lord Guest and Lord Diplock agreed and *Equitable Life Assurance Society v Hyman* [2002] 1 AC 405, 459, where Lord Steyn said:
>
> "If a term is to be implied, it could only be a term implied from the language of [the instrument] read in its commercial setting."
>
> See *Belize* at [19] and [20].
>
> …
>
> 12. The central part of Lord Hoffmann's reasoning is from [21] to the first part of [25], where he focused on some of the tests which have historically been used to identify when a term is to be implied into a contract. He said this:
>
> > "[21] It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean. It will be noticed from Lord Pearson's speech that this question can be reformulated in various ways which a court may find helpful in providing an answer – the implied term must "go without saying", it must be "necessary to give business efficacy to the contract" and so on – but these are not in the Board's opinion to be treated as different or additional tests. There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?
> >
> > [22] There are dangers in treating these alternative formulations of the question as if they had a life of their own. Take, for example, the question of whether the implied term is "necessary to give business efficacy" to the contract. That formulation serves to underline two important points. The first, conveyed by the use of the word "business", is that in considering what the instrument would have meant to a reasonable person who had knowledge of the relevant background, one assumes the notional reader will take into account the practical consequences of deciding that it means one thing or the other. In the case of an instrument such as a commercial contract, he will consider whether a different construction would frustrate the apparent business purpose of the parties. That was the basis upon which *Equitable Life Assurance Society v Hyman* … was decided. The second, conveyed by the use of the word "necessary", is that it is not enough for a court to consider that the implied term expresses what it would have been reasonable for the parties to agree to. It must be satisfied that it is what the contract actually means.
> >
> > [23] The danger lies, however, in detaching the phrase "necessary to give business efficacy" from the basic process of construction of the instrument. It is frequently the case that a contract may work perfectly well in the sense that both parties can perform their express obligations, but the consequences would contradict what a reasonable person would understand the contract to mean. Lord Steyn made this point in the *Equitable Life* case (at p

459) when he said that in that case an implication was necessary "to give effect to the reasonable expectations of the parties."

[24] The same point had been made many years earlier by Bowen LJ in his well known formulation in *The Moorcock* (1889) 14 PD 64, 68:

"In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men"

[25] Likewise, the requirement that the implied term must "go without saying" is no more than another way of saying that, although the instrument does not expressly say so, that is what a reasonable person would understand it to mean. …"

13. Lord Hoffmann then warned against considering the subjective state of mind of the parties or their representatives and stressed the need for the court to be satisfied that the proposed implication spells out what the contract would reasonably be understood to mean. He then stated the Judicial Committee's view that the question how the actual parties would have reacted to the proposed amendment was irrelevant and added that it was not necessary for the implied term to be obvious in the sense of being immediately apparent.

14. Importantly, he concluded his analysis in [26] and [27] by reference to *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 282-283, where Lord Simon of Glaisdale, giving the advice of the majority of the Judicial Committee, said that it was "not … necessary to review exhaustively the authorities on the implication of a term in a contract" but that the following conditions ("which may overlap") must be satisfied:

"(1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying' (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract".

Lord Hoffmann expressed the Judicial Committee's opinion thus:

"[27] The Board considers that this list is best regarded, not as series of independent tests which must each be surmounted, but rather as a collection of different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract actually means, or in which they have explained why they did not think that it did so. The Board has already discussed the significance of "necessary to give business efficacy" and "goes without saying". As for the other formulations, the fact that the proposed implied term would be inequitable or unreasonable, or contradict what the parties have expressly said, or is incapable of clear expression, are all good reasons for saying that a reasonable man would not have understood that to be what the instrument meant."

15. It is thus clear that the various formulations of the test identified by Lord Simon are to be treated as different ways of saying much the same thing. Moreover, as I read Lord Hoffmann's analysis, although he is emphasising that the process of implication is part of the process of construction of the contract, he is not in any way resiling from the often stated proposition that it must be necessary to imply the proposed term. It is never sufficient that it should be reasonable. This point is clear, for example, from the well-known speech of Lord Wilberforce in *Liverpool City Council v Irwin* [1977] AC 239, where he rejected at page 253H to 254A the approach of Lord Denning, which was to permit the implication of reasonable terms. He identified two classes of implied term in the case (as here) of a complete, bilateral contract. He said that in a case of established usage the courts are spelling out what both parties know and would, if asked, unhesitatingly agree to be part of the bargain. That is not, in my opinion, this case. Lord Wilberforce added at page 253G:

> "In other cases, where there is an apparently complete bargain, the courts are willing to add a term on the ground that without it, the contract will not work – this is the case, if not of *The Moorcock* … itself on its facts, at least of the doctrine of *The Moorcock* as usually applied."

Lord Wilberforce stressed that the test is one of necessity. Is it necessary to make the contract work?

16. I should also note that, since the end of the argument, Rix LJ has drawn my attention to what he described in *Socimer Bank Limited v Standard Bank Limited* [2008] EWCA Civ 116, [2008] Bus LR 1304 at [105] as a useful and authoritative modern restatement of the relevant principles by Sir Thomas Bingham MR, giving the judgment of this court, which also comprised Stuart-Smith and Leggatt LJJ, in *Phelps Electronique Grand Public SA v British Sky Broadcasting Limited* [1995] EMLR 472.

17. Rix LJ quoted an extensive passage at pages 480 to 482 in *Phelps*. So I will not do the same but will content myself with these few points, which seem to me to underline the principles stated by Lord Hoffmann but also to stress the importance of the test of necessity. Thus, after saying that both parties accepted the propositions stated by Lord Simon in the *BP Refinery* case (and quoted by Lord Hoffmann), Sir Thomas Bingham said that they distilled the essence of much learning on implied terms but that their simplicity could be almost misleading. He then said this:

> "The courts' usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties themselves have expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, ex hypothesi, the parties themselves have made no provision. It is because the implication of terms is potentially so intrusive that the law imposes strict constraints on the exercise of this extraordinary power."

18. Reference was then made to cases in which terms are routinely and unquestionably implied, as in the case of a term that a surgeon will exercise all reasonable care and skill. He added:

> "But the difficulties increase the further one moves away from these paradigm examples. … It is much more difficult to infer with confidence what the parties must have intended when they have entered into a lengthy and carefully-drafted contract but have omitted to make provision for the matter in issue. Given the rules which restrict evidence of the parties' intention when negotiating a contract, it may well be doubtful whether the omission was the result of the parties' oversight or of their deliberate decision; if the parties appreciate that they are unlikely to agree on what is to happen in a certain not impossible eventuality, they may well choose to leave the matter uncovered in their contract in the hope that the eventuality will not occur.
>
> The question of whether a term is to be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong. For, as Scrutton LJ said in *Reigate v Union Manufacturing Co (Ramsbottom) Limited* [1918] 1 KB 592 at 605:
>
> > "A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, 'What will happen in such a case', they would both have replied, 'Of course, so and so will happen; we did not trouble to say that; it is too clear'. Unless the court comes to some such conclusion as that, it ought not to imply a term which the parties have not themselves expressed…"

> And it is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown that one of several possible solutions would without doubt have been preferred: *Trollope & Colls …* at 609-10, 613-14."

The significance of both *Liverpool City Council v Irwin* and the *Phillips Electronique* case is that they both stress the importance of the test of necessity. Is the proposed implied term necessary to make the contract work? That seems to me to be an entirely appropriate question to ask in considering whether a term should be implied on the assumed facts in this case.

The charter

5. The charter was dated 18 December 2006 and was based on the Shellvoy 5 form. Demurrage was stated to be: "60,000 USD PDPR". Laytime was 96 running hours. Other express terms of the charter included those falling into 2 categories. The first comprises Part II of the Shellvoy 5 form as amended. The second comprises what were described as "Shell Additional Clauses – February 1999." I deal with the 2 categories in turn.

6. Various clauses in Part II of the Shellvoy 5 form as amended have potential relevance. I shall number these "II.n" where "n" is the number of the clause in question. Relevant clauses are set out below, on occasion with sentences numbered in square brackets for ease of reference

> II.13 (1) Subject to the provisions of Clauses 13(3) and 14, …
>
> (a)
>
> [13.1.a1] Time at each loading or discharging port shall commence to run 6 hours after the vessel is in all respects ready to load or discharge and written notice thereof has been tendered by the master or Owners' agents to Charterers or their agents or the vessel is securely moored at the specified loading or discharging berth whichever first occurs.
>
> [13.1.a2] However, if the vessel does not proceed immediately to such berth time shall commence to run 6 hours after (i) the vessel is lying in the area where she was ordered to wait or, in the absence of any such specific order, in a usual waiting area and (ii) written notice of readiness has been tendered and (iii) the specified berth is accessible.
>
> [13.1.a3] A loading or discharging berth shall be deemed inaccessible only for so long as the vessel is or would be prevented from proceeding to it by tidal conditions, awaiting daylight, pilot or tugs, or port traffic control requirements (except those requirements resulting from the unavailability of such berth or of the cargo).
>
> [13.1.a4] If Charterers fail to specify a berth at any port, the first berth at which the vessel loads or discharges the cargo or any part thereof shall be deemed to be the specified berth at such port for the purposes of this Clause.
>
> [13.1.a5] Notice shall not be tendered before commencement of laydays and notice tendered by radio shall qualify as written notice provided it is confirmed in writing as soon as reasonably possible.
>
> (b) Time shall continue to run
>
> (i) until the cargo hoses have been disconnected …
>
> ...

(3) Notwithstanding anything else in this Clause 13, if Charterers start loading or discharging the vessel before time would otherwise start to run under this charter, time shall run from commencement of such loading or discharging.

(4) For the purposes of this Clause 13 and of clause 14 "time" shall mean laytime or time counting for demurrage, as the case may be.

…

II.15 (1) Charterers shall pay demurrage at the rate specified in Part I(J).

...

Demurrage shall be paid per running day or pro rata for part thereof for all time which, under the provisions of this charter, counts against laytime or for demurrage and which exceeds the laytime specified in Part I(I). Charterers' liability for exceeding the laytime shall be absolute … .

…

(3) Owners shall notify Charterers within 60 days after completion of discharge if demurrage has been incurred and any demurrage claim shall be fully and correctly documented, and received by Charterers, within 90 days after completion of discharge. If Owners fail to give notice of or to submit any such claim with documentation, as required herein, within the limits aforesaid, Charterers' liability for such demurrage shall be extinguished.

...

7. Of the "Shell Additional Clauses – February 1999" the only relevant clause for present purposes is clause 22. I shall refer to it as "SAC 22." It is set out below with typographical corrections and with sentences numbered in square brackets for ease of reference:

22. Clearance Clause

[22.1] If Owners fail

(A) to obtain Customs clearance; and/or

(B) free pratique; and/or

(C) to have onboard all papers/certificates required to perform this Charter,

either within the 6 hours after Notice of Readiness originally tendered or when time would otherwise normally commence under this Charter, then the Original Notice of Readiness shall not be valid.

[22.2] A Notice of Readiness may only be tendered when Customs clearance and/or free pratique has been granted and/or all papers/certificates required are in order in accordance with relevant authorities requirements.

[22.3] Laytime or demurrage, if on demurrage, would then commence in accordance with the terms of this Charter.

[22.4] All time, costs and expenses as a result of delays due to any of the foregoing shall be for Owners' account.

[22.5] The presentation of the notice of readiness and the commencement of laytime shall not be invalid where the authorities do not grant free pratique or customs Clearance at the anchorage or other place but clear the vessel when she berths.

[22.6] Under these conditions the NOR would be valid unless the timely clearance of the vessel for customs or free pratique is caused by the fault of the vessel.

History of events

8. The events that occurred are common ground. The vessel loaded at two terminals off West Africa. The first was Bonga, where she arrived on the morning of 13 January 2007, tendered her NOR at 0912, and loaded her cargo from 1924 on 13th to 2348 on 14th January. She sailed from Bonga Terminal at 0730 hrs on 15th January 2007.

9. The Vessel then proceeded to the second loadport, Escravos - the Chevron terminal at the mouth of the River Escravos in Nigeria. The vessel provided an ETA at Escravos Terminal of 1100 hours on 15 January 2007 and was informed by the authorities at Escravos Terminal that the berth was occupied and the earliest that the vessel was likely to berth was the evening of 18 January 2007. She tendered a NOR ("the original NOR") at Escravos at 1148 on 15 January 2007. At this stage she was required to wait at anchorage since the berth was occupied.

10. The port health authority representatives boarded the vessel at the anchorage at 0730 hours on 16 January 2007 and free pratique was granted at 0830 hours on that same day. The Master protested to all relevant parties, including charterers, that free pratique had not been granted within 6 hours of the tender of the NOR. At 1539 hours that day the Master sent charterers and others an email ("the 1539 email"). The subject line stated: "Notice of Readiness at Escravos, Nigeria – Repeated". The 1539 email continued:

> WITHOUT PREJUDICE TO THE NOTICE OF READINESS TENDERED ON 15 – JAN – 07 ON ARRIVAL
>
> Please be informed that M.T. "Eagle Valencia" arrived and anchored at Escravos terminal, Nigeria at 1148 hrs local time on 15-Jan-07 and is ready in all respects to load a parcel of Escravos Crude Oil as per terms, conditions and exceptions of the relevant Charter party.
>
> Please accept Notice of readiness tendered at 1148 hrs local time on 15-Jan-07.
>
> Agents R.I.C: Please inform all parties concerned.

11. At 1553 hours on 16 January 2007 the Master sent charterers and others an email ("the 1553 email"). The subject line stated: "Update at Escravos Terminal". The 1553 email continued:

> Please be informed that Eagle Valencia arrived Escravos terminal and tendered NOR at 1148 LT on 15-Jan-07. Vessel is presently anchored off the terminal, awaiting berthing.
>
> 16-Jan-07, 0730: Port officials on board.
>
> 16-Jan-07, 0830: Free pratique granted.
>
> ...

12. The vessel was required to wait at the anchorage until 19 January 2007. The pilot boarded at 1354 hours on that day and the vessel was all fast at the berth by 1542 hours that day. Loading commenced at 2100 hours on 19 January 2007 and completed at 0830 hours on 21 January 2007. The vessel unmoored and sailed for the discharge port later that same day.

13. The vessel arrived offshore Galveston on 7 February 2007. The vessel berthed and commenced discharge on 8 February 2007. The vessel completed discharge and sailed from the discharge port on 12 February 2007.

14. On 8 March 2007 owners duly presented their demurrage claim together with certain documents "to support and substantiate our demurrage claim". Owners did not forward to charterers on 8 March 2007 or thereafter the two emails of 16 January 2007.

15. On 21 August 2007 charterers reverted in relation to owners' demurrage claim. Charterers made some minor points in relation to time spent at Bonga Terminal and at the discharge port, which owners subsequently accepted. Charterers also suggested, for the first time since 8 March 2007, that laytime did not commence at Escravos Terminal until the vessel was all fast at the berth since "free pratique was not obtained within 6 hrs per c/p clause 22". The issue as to whether laytime commenced at Escravos Terminal 6 hours after the NOR tendered at 1148 hours on 15 January 2007 or, instead, only when the vessel was all fast at the berth, at 1542 hours on 19 January 2007, was thereafter debated in correspondence. No agreement could be reached. Charterers made a payment of US$193,500 and no more on account of demurrage. It is the disagreement between the parties as to whether laytime ran between 1748 hours on 15 January 2007 and 1542 hours on 19 January 2007 that has given rise to the present proceedings.

Owners' primary case: arguments of the parties

16. Mr Michael Ashcroft for owners began by referring to the terms of clause II.13. The original NOR met all requirements of this clause: see *Compania de Naviera Nedelka SA v Tradax Internacional SA (the "Tres Flores")* [1974] 1 QB 264. The only question was whether charterers could rely upon SAC 22 to invalidate the original NOR. At common law, barring some express contractual provision to the contrary, a valid NOR may be given without having obtained free pratique if it is reasonably believed to be a mere formality. In the present case the slight delay in obtaining free pratique was not due to any fault on the part of owners, and indeed was wholly beyond their control. Charterers' interpretation, under which that slight and blameless delay put back the running of time for 2 days, had an unreasonable effect.

17. Various ways of avoiding that unreasonable effect were advanced by owners. First, paragraph 3(a) of the amended particulars of claim suggested an implied term:

> Owners were not to be regarded as having failed to obtain customs clearance and/or free pratique for the purposes of [SAC 22] if it was not in fact reasonably possible for Owners to procure the same.

18. Paragraph 8(a) of the amended particulars of claim then asserted:

> On a true construction of [SAC 22] alternatively by virtue of the implied term [above], Owners did not "*fail*" to obtain free pratique within 6 hours after NOR was tendered. As a matter of fact, the granting of free pratique was within the terminal's absolute discretion and it was not reasonably possible for Owners to obtain free pratique sooner than they did.

19. Next, paragraph 8(b) of the amended particulars of claim said:

> Further or alternatively, free pratique was and/or had been obtained prior to and/or upon the vessel berthing and therefore Owners did not fail to obtain free pratique "*when time would otherwise normally commence under this Charter*" and the authorities cleared the vessel when she berthed such that pursuant to the final sentence of clause 22 the original NOR was not invalidated.

20. Finally, paragraph 8(c) of the amended particulars of claim said:

> Further or alternatively, the NOR was not invalidated because the lack of free pratique between 1148 hours on 15 January 2007 and 0830 hours on 16 January 2007 was due to the authorities not granting free pratique promptly at anchorage. Properly construed, Shell additional clause 22 does

not render a NOR invalid in circumstances (i) where, as in the present case, free pratique is not obtained within 6 hours after NOR due to delays by authorities in inspecting the vessel and granting free pratique while the vessel remains at anchorage and/or (ii) where, as in the present case, the lack of timely clearance was not caused by the fault of the vessel. Further or alternatively, on a true construction of the final sentence of clause 22, alternatively as a matter of necessary implication (to be implied so as to reflect the obvious but unexpressed intention of the parties), the original NOR was not invalidated where (i) free pratique was not obtained within 6 hours after NOR due to delays by the authorities in inspecting the vessel and granting free pratique while the vessel remained at anchorage and (ii) the vessel had been cleared by the time she berthed and (iii) the delays in obtaining clearance were not the fault of the vessel.

21. In support of these alternative constructions owners relied upon the principle cited in paragraph 25(d) of their skeleton argument [see paragraph 3 above]: in cases of doubt, wording in a contract is to be construed against a party who seeks to rely on it in order to diminish or exclude his basic obligation. That principle applied to this case because SAC 22 defined circumstances in which an otherwise valid NOR might be subsequently invalidated. SAC 22 was cutting down owners' rights under the charter. It was not possible to read it as conferring any benefit on owners that they would not have at common law.

22. In support of the argument on implied terms, Mr Ashrcroft referred to *Mediterranean Salvage* case and the discussion by the Court of Appeal in that case (as quoted earlier in this judgement) of the opinion of the Judicial Committee of the Privy Council in *Attorney General of Belize v Belize Telecom Limited* [2009] UKPC 11. At paragraph 12 of his judgment in *Mediterranean Salvage* Sir Anthony Clarke MR had quoted from Lord Hoffmann in paragraphs 21, 23 and 25 of *Belize*. Those passages dealt with what must be shown in order to support the implication of a term. They made it clear that there was no prerequisite that a contract could not work at all without the implication. It was enough that the consequences would contradict what a reasonable person would understand the contract to mean. Paragraphs 16 and 18 of the judgment of Sir Anthony Clarke MR showed that there was still life in the "officious bystander", for he was discussing an objective approach under which the court must look at the contract and assess what a reasonable person would have intended it to mean. In paragraph 23 of *Belize* Lord Hoffmann cited Lord Steyn saying that an implication may be necessary "to give effect to the reasonable expectations of the parties." This citation from Lord Steyn must form part of the explanation of the law propounded in the Court of Appeal decision in *Mediterranean Salvage*.

23. As to argument (a), Mr Ashcroft referred to the principle cited at paragraph 25(b) of his skeleton [see paragraph 3 above] and added that if he tried to turn the water into wine but was unable to do so it would be not natural to say he had "failed". On the contrary, it was more natural to say that he was "unable to do" what he wanted to do. The use in [22.1] of "failed" indicated that it must be something that it was possible to achieve. Concepts of fault were found in [22.5] and [22.6]. They were not in any way alien to SAC 22, nor did SAC 22 involve a "bright line" test. There was therefore no reason to give clause SAC 22 anything other than its natural meaning. Indeed it would suffice for owners that at least a reasonable interpretation of the word "failed" was that there must be a failure to do something that it was possible to achieve. Under the principle mentioned earlier, the court should apply that reasonable interpretation against the charterers.

24. Mr Ashcroft summarised his argument at that point as being to the effect that charterers could not rely on [22.1], because obtaining free pratique between 11.48 hours on 15 January 2007 and 17.48 hours that day was not achievable during that period. No-one could have persuaded customs to come out to the vessel and grant free pratique during that period.

25. Mr Croall QC, who appeared on behalf of charterers, objected that this was not the case he had come to meet. That case had been that owners did all they reasonably could. The question whether customs could have been persuaded to come out to the vessel and grant free pratique between 11.48 hours and 17.48 hours on 15 January 2007 had not been addressed in evidence. Mr Ashcroft responded that owners were entitled to rely on free pratique being unobtainable in the 6 hour period contemplated by the charter. Subsequent developments would be irrelevant, because in the absence of SAC 22 at common law there was no requirement that there be free pratique at the time of the notice of the NOR, it being a mere formality. He added that in all laytime cases there is usually an implied exception for fault on the part of owners.

26. A further point was described in this way at paragraph 27(c) of owners' skeleton:

> The clause indicates that the original NOR is not invalidated if free pratique has been obtained "*when time would otherwise normally commence under this Charter*", which the parties accept on the pleadings would be upon the vessel being made fully secure at the berth. To interpret the clause such that the NOR remains valid if free pratique has been obtained by the time the vessel berths makes sound business sense in circumstances where it may be impossible for even the most diligent shipowner to obtain clearance within 6 hours of tendering NOR and where free pratique is often seen as a mere formality. The last sentence of the clause lends considerable support to this construction, suggesting that it is sufficient if the vessel is cleared upon berthing where timely clearance within 6 hours of the tender of the original NOR was not obtainable through no fault of the vessel.

27. Mr Ashcroft submitted that charterers must show not only that free pratique had not been granted within 6 hours of NOR, but also that free pratique had not been granted when the running of time otherwise would normally commence. Both sides agreed that running of time would otherwise normally commence when the vessel was first tied up. While Mr Ashcroft accepted that this was not his strongest point, he stressed that the construction relied on by charterers necessitated reading in "whichever is the earlier."

28. Mr Ashcroft then turned to what was submitted to be a particularly strong point. This was set out in paragraph 27(d) of owners' skeleton:

> Most significantly, the final part of the clause (beginning "*The presentation of the notice of readiness and the commencement of laytime*"), although very badly drafted (which is a point upon which Owners rely), can and should be read as indicating that the original NOR is not invalidated if the vessel is cleared by the time that she berths (even though she was not cleared within 6 hours of the original tender of NOR, through no fault of owners). With respect, it is absurd to argue (as Charterers necessarily must) that the parties intended to distinguish between, on the one hand, a situation in which the vessel was cleared at anchorage, but outside the 6 hours period, and, on the other hand, a situation in which the vessel was cleared only upon berthing. There is no sensible commercial reason for such a distinction. The final part of clause 22 cannot have been intended to be limited to a case in which the vessel obtains free pratique only when she berths and to have no application to a case in which the vessel in fact obtains free pratique <u>sooner</u> whilst at anchorage, but still not within 6 hours of the original tender of NOR: that would mean that Owners were in a far better position if the relevant public health personnel boarded the vessel and granted free pratique later, rather than sooner. That would be a capricious and nonsensical result. The obvious commercial purpose of this provision is to provide that the original NOR is not invalidated (1) where timely clearance (i.e. within 6 hours of the tender of the NOR) is unobtainable through no fault of the vessel and (2) where timely clearance is not delayed by the fault of the vessel and (3) where the vessel is cleared by, at latest, the time that she berths. [SAC 22] should be construed as if the words "*at latest*" were included in the latter part of the clause as follows (with emphasis supplied and with the infelicities of language per the original wording):
>
> *"...The presentation of the notice of readiness and the commencement of laytime Shall (sic) note (sic) be invalid where the authorities do not grant free pratique or customs Clearance at the anchorage or other place but clear the vessel <u>at latest</u> when she berths. Under these conditions the nor would be valid unless the timely clearance of the vessel. For customs or free pratique is caused by the fault of the vessel.*"
>
> That construction of the clause would properly reflect what the Court can take to be the true, businesslike, intention of the parties.

29. A crucial point here was that the parties could not sensibly have intended that [22.5] and [22.6] applied only to a case where free pratique is obtained when the vessel berths. Capriciously, owners would be in a better position if customs boarded later rather than sooner.

30. Mr Ashcroft noted a contention by charterers that [22.5] and [22.6] only applied to ports where the practice was that free pratique would only be granted on berthing. That, however, was not what [22.5] and [22.6] said – they did not say "never" or "do not ever". The evidence was that the time when free pratique was granted was "exclusively terminal's discretion." Accordingly it was just a question of "when she berths".

31. Mr Ashcroft submitted that the first part of [22.5] referred to the period within 6 hours of NOR. That was what was dealt with in the earlier part of SAC 22. As sensible commercial people the parties must have had a broader conception in mind than simply the moment when the vessel berthed – they had in mind "at latest, when she berths."

32. Mr Ashcroft's next contention was set out in owners' skeleton at paragraph 27(e):

> Further, if (which is not the case) limitations upon the rules of construction mean that clause 22 cannot be construed in the way outlined immediately above, then, for the reasons previously given, a term should be implied (to reflect the obvious objective intentions of the parties) such that the original NOR is not invalidated where both of the following conditions are satisfied: (1) the authorities do not grant free pratique or customs clearance within 6 hours after the original tender but do clear the vessel at latest when she berths; and (2) timely clearance of the vessel is not delayed by fault of the vessel. The parties, as reasonable business people, would necessarily have agreed to such a term if it had been proposed to them at the time of contracting.

33. This, Mr Ashcroft acknowledged, was simply a fall back to achieve the result sought by owners by implication if it could not be achieved by construction. Finally Mr Ashcroft asserted that in any event owners could submit that the vessel should be regarded as having been cleared when she berthed, the clearance given on 16 January 2007 being a continuing state of affairs.

34. On behalf of charterers Mr Croall submitted that their construction gave meaning to any piece of language used in SAC 22. Moreover, there was no evidence that free pratique was granted at the berth. Charterers relied on documents which they said showed that free pratique could be obtained within 6 hours of NOR while awaiting a berth at Escravos. On the present occasion, all depended on when officials were sent out. It might not be within owner's power to speed up the process, but it was not impossible for that to be achieved. It was wrong to say that a delay of more than 6 hours would be a certainty.

35. Mr Croall noted that as SAC 22 operated to determine when laytime commenced, it was designed to allocate the risk of delay. It did not determine the extent of charterers' obligations or affect the content of those obligations. As Evans J (as he then was) put it in *The Mexico I* [1988] 2 Lloyd's Rep. 149 at 153:

> Fixing the contractual laytime has the effect of limiting the time within which the charterer's major obligation to load or discharge the vessel must be performed, but otherwise it has only what has been called the "secular" object of allocating the financial consequences of delay caused to the ship.

36. The Court of Appeal in *The Mexico I* [1990] 1 Lloyds Rep 508 pointed out that an invalid notice was a nullity and could not be relied on at a later stage. The task was to construe the contract. The fact that the common law would not have required something made no difference, save this, it pointed to the parties wishing to depart from the common law. One must give effect to what the parties agreed even though to some it may appear uncommercial.

37. As to the principle of construction at paragraph 25(d) of owners' skeleton argument, it only arose where the effect of the relevant wording was to limit the liability of the party seeking to rely on it. That was not the case here. What [22.1] did was to give a liberty to tender NOR early provided that each of (A), (B) and (C) were met. This was a port charter, and (C) would not be a mere formality. If the parties had been content to adopt the approach in *Compania de Naviera Nedelka SA v Tradax Internacional SA (the "Tres Flores")* there would have been no need for SAC 22. The aim of that clause was to ensure that charterers knew where they stood, as at the time when it was said that the lay time began to run. Moreover if the words were clear there was no need to resort to the principle suggested by Mr Ashcroft.

38. As to general principles of construction, the language used by the parties was the surest guide to their intention. The factual matrix in the present case did not assist one way or the other, except that there was an intention to achieve something other than the meaning of II.13 at common law, and that for commercial parties it was important to know where they stood. The more difficult something was to operate, the less likely it was to be what the parties had agreed.

39. As to the proper approach to the implication of terms, paragraph 18 of his judgement in the *Mediterranean Shipping* case showed that Sir Anthony Clarke MR considered necessity to be a vital element. A reasonable man was unlikely to imply a term if a contract worked perfectly well without it, and nothing about the factual matrix suggested that a reasonable man would be anxious to add anything to what the parties had omitted in this case. The decision of Gloster J in *Waterfront Shipping Company Limited v Trafigura AG* (The *Sabrewing*) [2008] 1 Lloyds Rep 286 concerned a time bar clause, and thus had relevance to owners' alternative case. On the primary case it had relevance as well, stressing that strict compliance with a time bar clause was necessary. At page 295 Gloster J highlighted the importance of formality and certainty.

40. The common law position was summarised in paragraph 15.23 of Cooke and others, *Voyage Charters* (3rd Edition 2007):

> Equally a notice which states that the vessel is actually ready, but is given at a time when she is not actually ready… is invalid. Moreover, in the absence of agreement, or conduct on the part of the charterer giving rise to waiver or an estoppel, such a notice does not become valid as and when the ship becomes ready, even if the charterer is aware that the ship is ready. English law does not recognise the concept of an "inchoate NOR", or a "delayed action device."

41. In *Galaxy Energy International Limited v Novorossiysk Shipping Company* (The *Petr Schmidt*) [1998] 2 Lloyds Rep 1 the charter required that NOR be tendered within 0600 to 1700 hours local time. The Court of Appeal upheld owners' contention that a notice tendered out of hours took effect when those hours began. That had no relevance to the present case, for it was not concerned with a re-tender of a previously invalid notice. What had been tendered on 15 January 2007 was invalid, and sending it again on 16 January 2007 could not make it valid.

42. It was common ground that the requirements listed in (A) to (C) of [22.1] were cumulative. The consequence, submitted Mr Croall, was that all three requirements must be satisfied within the time set out if the NOR were to be valid and effective to trigger the commencement of lay time. The natural meaning of the verb "fail", and indeed the entirety of [22.1] was to require owners to have satisfied those requirements within the time specified. The word "fail" meant only that something was not achieved. One might enter the ballot for Wimbledon tickets and not succeed: thus one had failed, even though one had done all that reasonably could be done. This was a bright line test, one simply ascertained whether what was required was achieved or not. It was counterintuitive to suggest that the test should be whether one took adequate steps, and whether time was lost as a result. Moreover as regards [21.1] charterers did not have to ask the court to insert "whichever is the earlier" – the word "or" said that. If owners were right one could put a line through "either within 6 hours after NOR originally tendered."

43. Turning to [22.2] here, to, the expression "and/or" meant "or" – with the consequence that in order to for an original NOR to remain valid at least one of (A) to (C) must have been achieved. The effect was that owners could tender a NOR when the vessel is not yet in all respects ready as long as she is ready in one of the three respects and will become ready in all respects within 6 hours. On that basis [22.3] was clear. As to [22.4], this made clear that it was not simply a question of the running of time, if there were delays then extra time, costs and expense would be added to owners' account. That left [22.5] and [22.6]. These were of limited application, being only concerned with the position where, at the port in question, the authorities do not grant free pratique at the anchorage but only clear a vessel once she berths. This was not the case in Escravos. Additionally on [22.5] and [22.6] this vessel was in fact cleared at anchorage – "when she berths" meant "on or after berthing." The only instance where the parties referred to fault in this context was in [22.6], although charterers acknowledged that as part of the background owners would be unable to claim the running of time where this was attributable to their fault. That did not invalidate the argument that the parties wanted a bright line test.

44. There was no basis for distorting the language, and that was fatal to any implied term argument. A reasonable man would reach the same conclusion, it was impossible to say that in order to make the charter party work there needed to be an implied term.

45. In reply owners relied on evidence that free pratique at Escravos is sometimes granted at the berth rather than at the anchorage. They reiterated that SAC 22 should be construed against charterers because it set out circumstances where an otherwise valid NOR would become invalid – in effect amounting to a laytime exception. Returning to the meaning of "fail", in the example of failure to achieve success in a ballot one would not naturally say that one had "failed", merely that one "had not" or "did not" or had been "unable" to succeed. In the present case relevant personnel refused to board before the morning of 16 January 2007. A closer analogy was an application for a licence to enable something to be done by a particular date. If administrative delays meant that the application was not considered in time, one would not naturally say that the person had "failed" to get the licence by that date. Charterers had suggested a distinction between something which was impossible in all circumstances and something which was unachievable at a particular moment in time by a particular person ("outside their control"). If one regularly walked across a particular bridge, and one night the bridge was closed, one would not naturally say that one had "failed" to walk across it that night. One would say that one "had not" or "did not" or had been "unable to do so". The obligations in [22.4] would result where owners "fail" under [22.1], and it was inherently unlikely that those results should arise from delays outside owners control and due, rather, to third parties at the port. A delay by the authorities in granting free pratique, for which owners were blameless, might cause significant losses to charterers – at the load port these might go beyond the cost of storing the cargo and cause a fluctuation in the price of the commodity, something often fixed by reference to the date by which all the cargo is loaded onto the ship. If the parties had really intended that owners should be liable for losses to charterers caused by delays outside owners' control and due to third parties with whom owners had no relationship, one would have expected them to use very clear words to demonstrate this intention. The word "fail" carried with it an element of responsibility, owners not achieving what they could/should have been able to achieve.

46. Certainty was not achieved by charterers' construction. It would not necessarily be clear to charterers whether the vessel had all papers/certificates on board required to perform the charter within 6 hours of tender of NOR. Further, [22.5] and [22.6] would in any event introduce elements of fault and thus a lack of clarity. There was no reason to suppose that both parties intended a slightly more certain result at the cost of a commercially unreasonable result. If "fail" meant what owners suggested, the evidence indicated that the delay in obtaining free pratique was totally outside owners' control.

47. Owners noted that if their construction of "fail" succeeded, the remaining arguments advanced by owners on construction of SAC 22 were academic. Taking these in turn, it was not right to say the word "or" made it unnecessary, on charterers' construction, to read in "whichever is the earlier". The question remained, did the parties mean "whichever is the earlier" or "whichever is the later"? Commercial considerations supported the latter view. If the clause meant "whichever is the later", there was no redundancy. As to [22.2], this demonstrated the difficulty of giving a coherent meaning to each and every part of the clause. Charterers themselves had shifted their stance. Their statement of case had asserted that it related only to a re-tendered NOR in circumstances where the original NOR was invalid. They have now suggested that it meant that at least one of the three requirements must be fulfilled at the time that the original NOR was tendered. This demonstrated that SAC 22 was a very badly drafted clause. It was very difficult, and perhaps not possible, to interpret it in a way which achieved absolute coherence. Rather one should be looking to give the clause a fair and reasonable commercial construction, so far as language permitted.

48. Nothing in the language used in [22.5] and [22.6] supported the view that they only applied in a case where authorities never granted free pratique at anchorage and only ever granted it at berth. Owners had demonstrated why this was unreasonable and capricious, and charterers' response was simply a flat denial. There was no answer to owners' commercial absurdity argument.

Owners' primary case: analysis

49. SAC 22 supplements clause II.13. Both are concerned with the allocation of risk. Some aspects of that allocation are straightforward. Thus, for example, it is clear from clause II.13(1)(a) that if bad weather, tidal conditions, ice, awaiting daylight, pilot or tugs prevent the vessel from proceeding to berth time will not begin

to run. Similarly if port traffic control requirements prevent the vessel from proceeding to berth – other than port traffic control requirements resulting from the unavailability of that berth or of the cargo – time will not begin to run. The general structure of clause II.13(1)(a) is to identify when time starts to run. The starting point is that this will be 6 hours "after the vessel is in all respects ready to load or discharge and written notice thereof has been tendered by the Master… to charterers… and the vessel is securely moored at the specified … berth." In an ideal world speedy and efficient performance of the charter would be achieved by the vessel proceeding to the berth without delay. However [13.1.a2] recognises that the ideal may not be achieved with the result that there could be some delay before the vessel is securely moored at the specified berth. In that event time is to commence to run 6 hours after each of three defined conditions are met. The first is that the vessel is "lying in the area where she was ordered to wait or, in the absence of any such specific order, in the usual waiting area". The second is that a written NOR has been tendered. The third is that the specified berth is accessible – with an additional sentence explaining what is meant by "inaccessible", thereby allocating risk in relation to the events mentioned earlier.

50. When one turns to SAC 22 it is apparent at once that this clause has not been drafted with the care one would have expected of a legal draftsman. Thus [22.1] repeatedly uses the expression "and/or". The parties agree, however, that the requirements separated by this expression are in fact cumulative, and that in order to achieve this, because the clause is concerned with things not done, the expression "and/or" in [22.1] must mean simply "or". The approach of proceeding by reference to things not done carries the further difficulty that it is not clear whether those things are seen as reflecting obligations which would otherwise arise on owners or which are to be regarded as imposed on owners, or are simply events which may or may not occur and if they do not occur will have a particular consequence. I do not find it helpful to try to assess what "natural" meaning the word "fail" may have in general usage – it seems to me that the word "fail" is likely to take its colour from its context.

51. The expression "and/or" reappears in [22.2]. If it means "or" that would have the virtue that the expression is given the same meaning in both [22.1] and [22.2]. This approach was eventually adopted in charterers' oral submissions. However in my view it cannot be right. It has the consequence that in order to be valid a NOR must be tendered at a time when one of three things has occurred. That would be a commercial nonsense. It is impossible to see any sensible reason why the parties should have thought that there was some merit in having only one – it matters not which – of those three things. In my view the clear intention of the parties in [22.2] was to refer back to [22.1], and to use "and/or" as the same thoughtless shorthand for referring to the three things that had been referred to in [22.1]. Whichever of those things had not been achieved, it would need to be achieved before any further NOR could be tendered. This conclusion is fortified by [22.3], which is plainly contemplating what happens after a new NOR, rather than referring to the NOR which has been invalidated under [22.1].

52. Turning to [22.4], there is considerable force in owners' criticisms of the drafting of this sentence. It would be astonishing if the parties had intended these words to apply literally if [22.1] is within "any of the foregoing" and refers to failures beyond owners' control. This may lead to the conclusion that [22.1] should be regarded as referring solely to a failure on the part of owners to fulfil obligations which otherwise exist in relation to (A), (B), or (C). Another possibility might be that "all time, costs and expenses" was intended to refer only to time lost to the owners or costs and expenses incurred by the owners. This construction, however, was not put forward by either side.

53. Thus before one reaches [22.5] and [22.6], what can conveniently be called the general parts of SAC 22 – the provisions in [22.1] to [22.4] - are badly expressed and contain what might be a crucial uncertainty as to the nature of the three things which, if owners "fail" in relation to any of them, bring SAC 22 into play.

54. It is in my view clear that the general parts of SAC 22 are to be distinguished from [22.5] and [22.6]. Those sentences are not concerned with the position generally. They are only concerned with the position "where the authorities do not grant free pratique or customs clearance at the anchorage or other place but clear the vessel when she berths." I cannot accept charterers' submissions that these words are intended to focus upon the general practice of the port. They seek to identify a special position. The choice is between a construction which departs from the general position where in relation to this particular vessel the special position has arisen, and a construction which requires the parties to investigate and resolve what the practice at the port is without regard to what happened to the vessel, it being unclear whether reference is being made to a general practice or to an invariable practice or as to how the practice is to be identified.

Charterers themselves acknowledge the desirability of a "bright line" approach. It seems to me that such an approach will be achieved if the special position is concerned with what actually happened in relation to the vessel. Accordingly I reject charterers' assertions that these last two sentences of SAC 22 focus upon anything other than what happened in relation to the vessel in question.

55. What are the particular circumstances which these last two sentences have in mind? The language is imprecise. It seems to me, however, that they clearly have in mind the special position found in [13.1.a2] – cases where the vessel does not proceed immediately to her berth. The reference to "anchorage or other place" is a reference to the location of the vessel during the 6 hours after giving NOR. The absence of customs clearance and free pratique at that stage will cause no loss of time if customs clearance and free pratique can be obtained on berthing or earlier. Owners are right to point out that it would be absurd to think that "when she berths" excludes clearance prior to berthing. Securing clearance prior to berthing only assists in making sure that there will be no loss of time. The consequence is that in such a case [22.6] prevents the general position under the earlier part of SAC 22 coming into play. The original NOR would be valid – subject to what would in any event otherwise be the case, that owners could not rely upon a delay caused by the fault of the vessel.

56. Accordingly my conclusion is that [22.5] and [22.6] have a clear commercial purpose. It would be obvious to commercial parties that the general parts of SAC 22 were seeking to give charterers at least a measure of protection against adverse consequences if (A), (B) or (C) were not achieved when time would normally commence to run under II.13. However, where the running of time fell within the special circumstances in [13.1.a2], a failure within the 6 hours specified in that sentence to obtain (A) or (B) would not necessarily have any adverse consequences for charterers. If the vessel fell within [13.1.a2], there was no need to obtain free pratique or customs clearance during the 6 hours immediately following the NOR. If customs clearance and free pratique were both obtained when the vessel berthed there would be no reason whatever for the general regime under SAC 22 to apply as regards (A) or (B). With these commercial considerations in mind it seems to me clear that this is a common type of case where the parties have not used language with precision. It is wrong in such a case to concentrate on individual words, and charterers' focus upon the precise words used is misplaced, particularly in the context of a poorly drafted clause such as SAC 22. I have reached this conclusion without needing to refer to the principle that a provision solely for the benefit of one party is to be construed strictly against that party.

57. The history of events in this case plainly brings the vessel within the special provision in [22.5] and [22.6], when construed in the manner I have indicated above. At the expiry of the 6 hours identified in the second sentence of II.13(1)(a) the authorities had not granted free pratique. When she berthed free pratique had been granted. Accordingly I conclude that, whatever the extent of the additional benefit conferred on charterers by the general part of SAC 22, [22.5] and [22.6] had the effect that charterers could not claim that benefit.

58. In these circumstances it is not necessary for me to resolve the disputes as to the true construction of the general part of SAC 22 and as to owners' contentions that the court should if necessary imply an appropriate term into the contract. If [22.4] is taken at face value then in my view that points very strongly, for the reasons given earlier, to [22.1] being concerned only with a failure on the part of owners to meet their obligations arising otherwise than under SAC 22 as regards each of (A), (B) and (C). Certain aspects of my own analysis of [22.1] to [22.4] were not, however, canvassed at the hearing. As I have reached a clear view on [22.5] and [22.6] I do not think it desirable to list the case for further argument on the general parts of SAC 22. Accordingly I express no concluded view as to the true extent of those general parts.

59. If I had reached a different view as to the true meaning of [22.5] and [22.6] it might have been necessary to make findings of fact as to certain aspects of the practice at the port. The evidence in this regard comprised a statement of Mr Hardcastle, a gentleman of considerable experience with regard to Nigerian ports, and documentary material including answers by the port authorities to various questions. Mr Hardcastle was not called to give oral evidence. As the precise matters on which this evidence would be relevant must depend on the particular construction of SAC 22 arrived at, and the evidence can be assessed without further observations from me, I do not think any useful purpose is served by my attempting to identify from this material particular answers to what, in my view, must be hypothetical questions. I merely record that (1) the evidence makes it clear that it is not invariably the practice at Escravos to clear the vessel only at the stage of berthing; and (2) free pratique might take place within 6 hours of NOR while awaiting a berth at Escravos

– but this would depend on what the authorities decided to do, and there was no guarantee that owners would be able to speed up the process.

Owners' alternative case: arguments of the parties

60. Owners submitted that, if necessary, each of the emails of 16 January 2007 relied upon constituted a valid NOR under the charter. No particular form or content was required other than notification by the vessel that a state of readiness, whether to load or discharge, existed at the time when it was given. The first of the two emails was headed "NOR repeated" and made clear that, without prejudice to the original NOR tendered on 15 January 2007, NOR was being repeated. It stated expressly or impliedly that the vessel had arrived and was ready for loading as at the time that the email was transmitted. As to the second of the two emails, it must be read and understood in the light of what had gone before. It provided an update as to the status of the vessel, and expressly or impliedly stated that she had arrived and was ready for loading. If necessary, owners relied upon the observations of Evans LJ in the *Galaxy* case: at page 5 of the report he accepted a suggestion that there was an implied representation that the statements were accurate at the moment that the notice was tendered.

61. Owners then turned to charterers' reliance upon the time bar clause. Such clauses were treated similarly to limitation or exclusion clauses: they must be clearly and unambiguously expressed, and will be stringently interpreted against the party seeking to rely upon them. The court should not construe them in such a way as to amount to an unpleasant trap for commercial people, depriving valid claims of effect and rendering the contract inoperable by all but a pedant. The wording of the time bar clause did not require owners to say any more than, "there is a demurrage claim and reliance is placed on all documents sent to charterers previously." In *Babanaft International Co SA v Abant Petroleum Inc* (the *"Oltenia"*) [1982] 1 Lloyds Rep 448 there was a time bar "unless a claim has been presented … in writing with all available supporting documents within 90 … days from completion of discharge …". Bingham J held that the commercial intention was to ensure that claims were made by the owners within a short period of final discharge so that claims could be investigated and if possible resolved while the facts were still fresh. This could only be achieved if the charterers were put in possession of all the factual material which they required in order to satisfy themselves whether the claim was well founded or not. The expression "all supporting documents" did not debar owners from making factual corrections to claims presented in time nor from putting a different legal label on a claim previously presented. It shut out owners from enforcing a claim, the substance of which and the supporting documents for which, had not been presented in time. All this was subject to "de minimis" exceptions. Owners submitted that the alternative case fell within these observations. There was no obligation to tender the precise claim within the time bar period when all that was being done was by way of fallback to allow for a reduction of the claim. While accepting that the emails of 16 January 2007 did not form part of the documentation provided with the demurrage claim, owners asserted first that there was no obligation to provide supporting documents in a single package. It sufficed that the emails had been sent on 16 January 2007 to charterers and were thus in their possession. Second, owners sought to rely upon the "futility principle": there was no point in owners resending the very same documents that had been transmitted to charterers on 16 January 2007. Third, any technical failure to comply with the time bar provision was de minimis in circumstances where charterers had already received from owners on 16 January 2007 the very documents upon which owners now wished to rely.

62. Charterers dealt first with the email of 15.39 hours on 16 January 2007. It stated that the vessel had arrived at 11.48 hours on 15 January 2007 and invited the recipients to accept the NOR tendered at 11.48 hours on 15 January 2007. Thus, while it used the words "is ready", it was not and did not purport to be notice of the vessel's readiness as at 15.39 on 16 January. The same analysis applied, with even more force, to the email sent at 15.53 hours on 16 January 2007. Nowhere in that email was it said that the vessel was ready. It merely recited that on the previous day NOR had been tendered. Thus neither of these documents constituted a NOR given after free pratique was granted. No one thought that they were re-tenders of NOR as at the time that they were sent – if that had been thought the claim would have emerged much sooner than shortly before the present trial.

63. Turning to the time bar, it required notice be given within 60 days and full documentation within 90 days. Neither of these claims had been articulated when the demurrage claim had been advanced within the 60 days. The financial consequences were never explained. Further, neither of these documents had been put forward within the package of the material supplied in fulfilment of the obligation to ensure that "any

demurrage claims shall be fully and correctly implemented" within the 90 day time limit. At paragraph 16 of her judgment in the *Waterfront Shipping* case Gloster J had said that parties were obliged to comply carefully and strictly with demurrage time bar clauses of this sort, which were well known within the industry, and cited the judgment of Bingham J in the *Babanaft* case. Similar arguments as to futility and de minimis to those in the present case were rejected by Gloster J: see paragraphs 25-27 on the de minimis point and paragraphs 32-37 on the futility point. Gloster J held that charterers were entitled to receive a package of documents which was sufficient of itself to inform them of the claim made and the documentary support for that claim. In the present case there was a complete absence of any case being brought on the basis of either of the two emails of 16 January 2007.

64. Owners replied that reasonable recipients of the emails would have regarded them as communicating, as at the time they were transmitted, that the vessel was ready and that she had arrived. That was sufficient for them to be regarded as NORs. The 1539 email was headed "without prejudice to the NOR tendered on 15 January 2007 on arrival" - thus it was plainly asserting more than the historic fact that the vessel had arrived and tendered NOR at 11.48 hours on 15 January 2007. It would have made no commercial sense for the master merely to restate exactly what he had said previously, and it would not have been reasonable to understand the email in that way. Moreover the *Galaxy* case showed that restating what had been said previously could be a valid tender. Alternatively the 1553 email contained express or implicit statements that the vessel had arrived ("is presently anchored off the terminal") and was ready. These statements necessarily followed from the statement that a NOR had already been tendered at 11.48 on 15 January 2007, and from the statements that free pratique had been granted and the vessel was awaiting berthing.

65. In reply on the time bar, owners submitted that the clause did not require notification of variants of a demurrage claim within 60 days – indeed it did not require notification of any "demurrage claim" within 60 days. It merely required owners to notify charterers "within 60 days after completion of discharge if demurrage has been incurred." There was no dispute that owners complied with that provision, which did not even require quantification within 60 days of how much demurrage was said to have been incurred. Had owners supplied the emails of 16 January in the package of documents in support of their claim within the 90 day period it would be strained and wrong for charterers to suggest that owners could not reformulate their claim outside that time limit so as to reduce it. An amendment of that kind would be precisely the sort of amendment contemplated by Bingham J in the *Babanaft* case. Charterers' real argument was about the supporting documents. In the *Waterfront Shipping* case a log signed by the owners was required to be provided and had not been provided. It was a document that was clearly and expressly required by the contract, and thus the case could be distinguished form the present. London arbitrators in a case similar to the present had taken the view urged by owners in the present case. If there were a technical non compliance then it was de minimis in circumstances where charterers had received within time, from owners direct, the 16 January 2007 NORs. As to what had been said by Gloster J on futility, she made it clear that in this regard her judgment was obiter – she acknowledged that the point did not strictly arise. At paragraph 35 she indicated that she was not going so far as to say that the futility principle could never apply in appropriate circumstances to demurrage time bar clauses. She had accepted an argument that it could not apply in that case because the clause required presentation of a package of documents in support of the claim. I was urged by owners not to adopt that approach in the present case. Moreover the present time bar clause did not expressly require and should not be construed as requiring the presentation of a package of documents. Gloster J's comments had been made in the context of documents "received from third parties". Whereas it might be reasonable to say that charterers cannot be expected to hunt through their files to check whether further relevant documents had been received from third parties, it was not unreasonable to say that it was futile and unnecessary for owners to supply again a particular document that owners had already forwarded to charterers direct. Owners could have said simply that they relied upon all documents previously forwarded to charterers. If owners had simply re-presented the original NOR by hand after free pratique had been granted they would have had no further documents to tender. These examples tended to indicate that it was unnecessary to supply the 16 January emails to charterers again in order to support the claim. Charterers could not seriously say they needed these documents again when they had them already. Standing back, commercial parties would recoil from a suggestion that a perfectly valid, and sometimes very substantial, demurrage claim could be time barred merely because owners did not re-send a document to support the claim in circumstances where that very document had previously been transmitted by owners to charterers. The court could and should avoid that result.

Owners' alternative case: analysis

66. If I had concluded that owners' primary case failed, then I would not have held that their alternative case assisted them.

67. Owners say that the first part of II.15(3) merely requires notification in general terms that demurrage has been incurred. Charterers say that this would serve no useful purpose, and must contemplate that more by way of explanation must be offered. On that aspect I disagree with charterers. It will be useful to both sides to know where they stand in general terms 60 days after completion of discharge. In the absence of a notification from owners, both sides will be able, 60 days after completion of discharge, to proceed on the footing that there is no demurrage claim.

68. The insuperable difficulty for owners is the requirement that within 90 days the claim "shall be fully and correctly documented and received by charterers… ." It is fundamental to any demurrage claim that the stage when time started to run for the purposes of the claim is clearly identified. The documentation submitted to charterers clearly identified a claim that time started to run at Escravos 6 hours after the original NOR was tendered. There was no hint whatever that owners had a claim that time started to run 6 hours after one or other of the emails of 16 January 2007. It follows that owners are barred from asserting any such claim now.

69. In these circumstances I need not consider what has been described as the "futility principle" – for the reasons I have given, in a case where the documentation supplied within the 90 days failed to make any assertion, express or implied, that time began to run on 16 January 2007, it is simply not open to owners to say that at an earlier stage emails had been sent which could have been, but were not within the 90 days, relied on as an alternative basis of claim.

70. Nor is it necessary to determine whether the emails on 16 January 2007 amounted to NORs. I consider it undesirable to add to the jurisprudence relevant to that question in a case where the point does not strictly arise.

Conclusion

71. For the reasons I have given owners succeed on their primary case.