[2003] EWHC 46 (Comm) Case No: 2001 Folio 254

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23rd January 2003

B e f o r e :

THE HONOURABLE MR JUSTICE MOORE-BICK

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TRITON NAVIGATION LTD **Claimant**
- and -
VITOL S.A. **Defendant**

THE 'NIKMARY'

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Miss Vasanti Selvaratnam Q.C. and Mr. Philip Riches
(instructed by **Shaw-Lloyd & Co**) for the claimant
Mr. Timothy Hill (instructed by **Shaw & Croft**) for the defendant

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JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version may be treated as authentic.

The Hon. Mr. Justice Moore-Bick

Mr Justice Moore-Bick:

1. On 2nd December 2000 the vessel *Nikmary* arrived at the Indian port of Sikka and gave notice of readiness to load a cargo of gasoil. She entered berth the following morning where her tanks were inspected by a surveyor from the local office of Intertek Testing Services Caleb Brett ("Caleb Brett") on behalf of the charterers, Vitol S.A., and the shippers, Reliance Petroleum Ltd ("Reliance"). He rejected the vessel on the grounds that all her tanks contained residues of a previous cargo of vegetable oil and were therefore unfit to load gasoil. The vessel therefore shifted to the anchorage to carry out further cleaning. On 4th December the tanks were inspected for a second time by a surveyor from Caleb Brett accompanied by a surveyor from Admiralty Marine Services appointed by the vessel's agents, Interocean Shipping (India) Pvt. Ltd, to protect the owners' interests. They were again rejected as being unfit to load gasoil. The vessel's tanks were inspected for a third time on 5th December. This time the surveyors from Caleb Brett and Admiralty Marine Services were accompanied by a surveyor from Ericson & Richards (Gujarat) who had been appointed by the local representatives of the owners' P & I Club, James Macintosh & Co. Pvt Ltd. This time the vessel's tanks were passed fit for loading and the master gave notice of readiness at 19.30 hours that day.

2. From 5th December 2000 until 2nd January 2001 the vessel remained at the anchorage waiting for a cargo. Having entered berth at 1500 hours on 2nd January she completed loading a cargo of 27,886 metric tons of gasoil at 1925 hours on 3rd January and sailed for Thessalonika in the early hours of the following morning. On 17th January the vessel called at Limassol on the instructions of the charterers to enable the cargo to be treated with additives. She then proceeded to Thessalonika where the cargo was discharged.

3. The present action raises three main areas of dispute. These relate to the delay to the vessel at the loading port, the amount payable by the charterers to the owners in respect of additional expenses incurred in calling at Limassol, and the time taken to discharge at Thessalonika.

A. Delay at Sikka

4. The main dispute between the parties relates to the time the vessel spent waiting to enter berth at Sikka. The *Nikmary* had been chartered by Vitol on 3rd November 2000 on the 'Asbatankvoy' form with a large number of amendments resulting from the incorporation of Vitol's own chartering clauses. The material terms of the charter, as supplemented and amended by Vitol's terms, provided as follows:

> "B. Laydays:
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> Commencing: 17th November 2000
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> Cancelling: 22nd November 2000
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> . . . . . .
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> 6. NOTICE OF READINESS Upon arrival at customary anchorage at each port of loading or discharge the Master or his agent shall give the Charterer or his agent notice by letter, telegraph, wireless or telephone that the vessel is ready to load or discharge cargo, berth or no berth, and laytime, as hereinafter provided, shall commence upon the expiration of six (6) hours after receipt of such notice . . . . . However, where delay is caused to vessel getting in to berth after giving notice of

readiness for any reason over which Charterers have no control, such delay shall not count as used laytime or demurrage.

7. HOURS FOR LOADING AND DISCHARGING. The number of running hours specified as laytime in Part I shall be permitted the Charterer as laytime for loading and discharging cargo; but any delay due to the Vessel's condition or breakdown or inability of the Vessel's facilities to load or discharge cargo within the time allowed shall not count as used laytime. . . . . .

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18. CLEANING. The Owner shall clean the tanks, pipes and pumps of the Vessel to the satisfaction of the Charterer's Inspector. . . . . .

. . . . . .

30. Operations Clause – Amended

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c) Inspection/Cleaning – Amended

i) The Owner shall clean the tanks, pipes and pumps of the Vessel to the satisfaction of the Charterer's Inspector who shall inspect the Vessel as per local and/or Charterer's requirements prevailing at the time.

(ii) Notwithstanding whether or not the Vessel arrived and tendered NOR within laydays and notwithstanding any previous decision not to cancel the Charter, should, after inspection, the Vessel not be clean to the satisfaction of jointly appointed Inspector, the Charterer shall have the option of cancelling this Charter by giving Owner notice of such cancellation within 24 hours after rejection of the Vessel by jointly appointed Inspector.

iii) Alternatively, should the Charterer still decide not to cancel this Charter, despite the Vessel not being clean to other satisfaction of the jointly appointed Inspector, the Vessel will be required, at Owner's risk, time and expense, to carry out further cleaning, per (i) above, and represent for further inspection by jointly appointed Inspector.

iv) Should, after further inspection, the Vessel still not be clean to the satisfaction of jointly appointed Inspector, the Charterer shall have the option to either cancel the Charter, as per (ii) above, or to request further cleaning, as per (iii) above.

v) Owner shall indemnify Charterer for all direct and/or indirect costs and consequences as a result of the Vessel not being clean to the satisfaction of jointly appointed Inspector and should the Charter not be cancelled, all time until connection of hoses, after the Vessel has been passed as clean to the satisfaction of jointly

> appointed Inspector, shall not count as laytime, or if on demurrage, as time on demurrage."

5. The vessel arrived off the port of Sikka on 30th November and spent the best part of the next two days cleaning. However, despite the later protestations of the master to the contrary, Miss Selvaratnam Q.C. accepted on behalf of the owners that her tanks were not clean when the master gave notice of readiness on 2nd December and that further cleaning had been necessary in order to make her fit to load. At the trial, therefore, attention was directed mainly to the reason for the vessel's failure to berth between 5th December and 2nd January. The owners contended that the delay was due to the absence of any cargo, whereas Vitol contended that the vessel had simply lost her turn in the queue as a result of the time taken to carry out additional cleaning and had been forced to wait while cargo was supplied to other vessels which had arrived within their nominated loading periods.

6. Vitol had agreed to buy the cargo that was eventually shipped on the *Nikmary* from Reliance under a contract dated 31st October 2000. The contract provided for delivery of the goods f.o.b. one safe berth Sikka between 17th and 21st November 2000. Payment was to be made by letter of credit. The contract incorporated Shell's General Terms and Conditions of Sale which, among other things, allowed the seller to terminate the contract or suspend supplies of oil if the buyer failed to comply with its obligations to provide a letter of credit in accordance with the contract.

7. Subject to any other provisions of the charter, time started to count under clause 6 six hours after the vessel had been cleaned to the satisfaction of the charterers' surveyor and had given notice of readiness, that is, at 01.30 hours on 6th December. The total laytime allowed was 84 hours and therefore, if the owners are correct, laytime expired and the vessel went on demurrage at 13.30 hours on 9th December. She completed loading on 20.15 on 3rd January and so was on demurrage for 25 days 8 hours and 45 minutes. At a demurrage rate of US$11,500 a day or pro rata the sum of US$291,691.75 is due to the owners in respect of time spent waiting at Sikka.

8. Mr. Timothy Hill on behalf of Vitol submitted that by virtue of clauses 6, 7 or 30(c) of the charter none of the time spent waiting at Sikka counted for the purposes of calculating laytime and demurrage. He also submitted that the delay to the vessel was caused by the fault of the owners themselves and that the charterers were therefore relieved of any liability to pay demurrage for that reason if no other. Before considering these submissions in greater detail it is necessary to make some further findings about the production and supply of gasoil at the Reliance refinery and the availability of cargo throughout the time the *Nikmary* was waiting at the anchorage.

9. The primary source of evidence concerning the nature of the refinery and the manner in which Reliance conducted its operations for the production and delivery of gasoil at the time in question was Mr. Jayaraman Rajaraman, a senior manager in the company's Supply and Trading division. Some evidence in relation to these matters was also given by Mr. Matthew Ferry, an oil broker working for Vitol Services Ltd in London, and Capt. Chandra Mani of Ericson & Richards who had conducted his own investigations into these questions in India on behalf of the owners. Mr. Rajaraman gave his evidence in a straightforward and convincing manner and I am satisfied that he was an entirely honest and reliable witness. He, of course, could speak from first-hand knowledge derived from his experience working as a manager at the refinery. Mr. Ferry derived his knowledge from trading gasoil in the international market for petroleum products. To that extent, therefore, it may be said that his evidence was rather less well grounded than that of Mr. Rajaraman, but it is part and parcel of a broker's job to be informed about the refineries that produce the products in which he trades and there was in fact very little difference, if any, between them. Capt. Mani could not speak from first-hand knowledge either. He had done his best to obtain reliable information about the working of the refinery, the requirements of the

Indian domestic market for gasoil and the movements of vessels at Sikka at the relevant time from a variety of sources, but it became apparent that some of the information he had obtained was not in fact sound. In these circumstances where there was a conflict between the witnesses I have preferred the evidence of Mr. Rajaraman.

10. The Reliance refinery is a newly-constructed plant operating to modern standards. It became fully operational in early 2000 and produces a range of products including gasoil which is supplied both to the internal market and for export. At the time in question the refinery was producing about 10 million tons of gasoil a year. Much of the gasoil produced in India is required for domestic consumption and at the time in question a government body called the Oil Co-ordination Committee acting under the auspices of the Ministry of Petroleum was responsible for organising supplies to the domestic market. Early in the month the Committee advised each producer of gasoil of the quantity it was required to make available to the domestic market during that month. The balance of production was available for export, but when entering into forward commitments for the sale of gasoil for export a producer had to take account of its obligation to supply the domestic market in accordance with the Committee's directions.

11. Gasoil, known in India as 'high speed diesel' or 'HSD', may be produced with a range of characteristics depending on the particular requirements of the end user. In order to comply with local pollution regulations gasoil intended for use in Western Europe must not contain more than 0.2%. by weight of sulphur and not be darker than 2 on the standard ASTM test used throughout the industry. The comparable Indian regulations are less restrictive: the sulphur content may be as high as 0.25% by weight and the colour as dark as 5. There are other differences between the Indian domestic specification for HSD and typical European gasoil specifications, but they are not relevant for present purposes.

12. The Reliance refinery produces gasoil as part of a continuous process. The colour of the product is always less than 2, reflecting the high distillation standards obtainable with new process equipment of modern design. All the gasoil produced at the refinery during December 2000 therefore met the colour requirements of both the domestic market and the European export market. According to Capt. Mani, Reliance produces a very high quality gasoil for export with a sulphur content of 0.05% by weight which is a different product from the HSD supplied to the domestic market. This evidence was given on the basis of information derived from an unnamed source in November this year. Mr. Rajaraman confirmed that the refinery does now produce a very low sulphur gasoil and accepted that it is a different product. However, he said that in order to ensure the very low sulphur content it is necessary to maintain complete segregation of the process units, tanks and lines used in its production and that it cannot be produced as part of the standard refinery process. He said that the refinery had not been producing that product in December 2000.

13. In the light of Mr. Rajaraman's evidence I am satisfied that in December 2000 Reliance produced only one grade of gasoil, all of which was produced by the same process using the same tanks and lines. As part of the ordinary production process different streams were blended and run into an intermediate storage tank where the finished product was sampled and tested before being pumped to storage tanks where it was tested once again before delivery. The sulphur content of the product did not normally exceed 0.2% and therefore satisfied the requirements for export and was stored in the marine tank farm by the loading jetty. Sometimes the sulphur content was a little higher while still remaining within the domestic requirement of 0.25%. Product that did not meet the export specification was automatically directed to the domestic market, but it was not uncommon for Reliance to supply to the domestic market product that met the requirements for export.

14. At Sikka Reliance had the facilities to load gasoil onto both ocean-going and coastal vessels as well as rail and road tankers. It could also supply gasoil to the domestic market by pipeline. The marine tank farm contained six dedicated gasoil tanks from which vessels were loaded at the jetty, but it was also possible to pump cargo from these tanks into the pipeline for supply to the domestic market. The jetty at which gasoil was loaded was equipped with two product lines. One of these was used solely for gasoil; the other was used primarily for kerosene, but could be used to load gasoil if it were first emptied and flushed.

15. The obligation to supply gasoil to the domestic market in accordance with quotas imposed by the Oil Co-ordination Committee led Reliance to programme its supply arrangements on a monthly basis. I am satisfied that it adopted a conservative approach to forward export commitments to ensure that it did not find itself unable to meet either its commitments to the government or its contracts with export buyers. Such a course could, however, lead to a situation in which oil became available for export during any given month for which no commitment already existed. In this context the cargo bought by Vitol may be described as a 'November' cargo in the sense that Reliance had agreed to supply a cargo to a vessel tendered by Vitol capable of completing loading by 21st November. It was the practice of the Oil Co-ordination Committee to notify refiners early in the month of the quantities of gasoil required for the domestic market during that month and until that had happened Reliance did not know the full extent of its obligations. Once it had received notification from the Committee it knew how much product it was committed to supply during the remainder of the month and could programme supplies to meet its obligations accordingly. At that stage its ability to accommodate unscheduled deliveries was more restricted.

16. An analysis of movements at the port between 5th December 2000 and 3rd January 2001 shows that apart from two days, 24th and 25th December, the jetty was constantly occupied by vessels loading gasoil. Most of the vessels were loading cargo for the Indian domestic market, but four vessels loaded cargoes for export, the *Gerd*, the *River Spring*, the *Konpolis* and the *Althea*. The *Konpolis* did not enter the berth but loaded at the anchorage by ship-to-ship transfer from the *Leon* which had been chartered by Reliance as a storage vessel.

17. The *Leon* was already occupying the gasoil loading berth when the *Nikmary* gave notice of readiness at 19.30 hours on 5th December. The *Gerd* did not arrive at Sikka until 22.30 hours on 5th December, but she was given precedence over the *Nikmary* because she was a 'December' vessel and had arrived within her contractual loading period. Similarly, both the other export vessels which Reliance was committed to load in December, the *River Spring* and the *Althea*, and the coastal vessels lifting cargo for the domestic market were loaded ahead of the *Nikmary* which was unable to berth until 2nd January.

18. Miss Selvaratnam submitted that at all material times between 5th December 2000 and 2nd January 2001 there was a lack of gasoil of export quality at the terminal and that it was the absence of cargo that prevented the *Nikmary* from loading. In support of that submission she relied on refinery records of product movements in and out of the tanks at the jetty, on various messages received by the owners in response to their enquiries and on the fact that no further cargo was shipped for export after the *Althea* had completed loading on 15th December.

19. The owners' firm belief that there was no cargo available during the period of the vessel's detention at Sikka, attested to both by the managers' representative, Capt. Georgantzoglou, and the broker handling the fixture, Mr. Gialozoglou, is understandable in the light of the messages that they were receiving throughout that time. For example, on 6th December the vessel's agents reported that due to cargo unavailability the vessel was scheduled to berth on 7th or 8th December. Then on 8th December the owners were told that the indications from Reliance were that there was no fixed berthing programme for the vessel. On 11th December the agents reported that they had been given to understand that the vessel might berth around 13th-14th December. Perhaps the

clearest statement is to be found in a message emanating from Vitol on 14th December in which it said that

> "our suppliers have advised that subsequent to the vessel being passed clean to load that they are temporarily unable to supply the grade of cargo required by our purchase contract and that this situation may not be resolved for some several days."

20. Then on 19th December James Mackintosh reported that their enquiries suggested that there was no cargo available for loading because Reliance had not been receiving sufficient supplies of crude oil to maintain a continuous supply of product.

21. These messages were put to Mr. Rajaraman in cross-examination, but he was adamant that there was no shortage of cargo required to meet Reliance's December commitments. He said that Reliance had produced about 968,000 tons of gasoil in December 2000 of which about 745,000 tons were supplied to the domestic market, partly by ship, but mainly by other means. That evidence was not challenged and tends to confirm that there was no general interruption in the production of gasoil during that period. In the absence of refinery records Mr. Rajaraman was unable to say how much of the gasoil produced in December met the export requirement of 0.2% sulphur, but I am satisfied from his description of the production process that a large part of it did. What also emerged strongly from his evidence, however, was the importance that Reliance attached to meeting its delivery obligations for the month in question. The messages reaching the owners did not distinguish clearly, if at all, between a physical shortage of cargo and the absence of a cargo *for this vessel*. Mr. Rajaraman confirmed that if the *Nikmary* had been a 'December' vessel, that is, if Reliance had originally contracted to load her in December, a cargo would have been made available for her soon after her tanks had been passed fit for loading, but that is not surprising because her cargo would then have formed part of Reliance's existing December commitments.

22. The tank farm records for the early days of December do not in my view support the conclusion that there was a shortage of cargo suitable for export at that time. Caleb Brett were appointed to act as cargo inspectors under the contract between Vitol and Reliance. On 29th November the master of the *Nikmary* gave his ETA at Sikka as 1700 hours on 2nd December. On 1st December Reliance nominated tank 813-001 for loading and a sample was taken and analysed by Caleb Brett later that day. However, on 2nd December Reliance changed its instructions and offered tank 813-003 for loading in place of tank 813-001. Mr. Rajaraman said that in order to keep stock moving the contents of tank 813-001 had been delivered to the domestic market via the pipeline and that is supported by the tank farm records for 3rd December which show tank 813-001 emptying and tank 813-003 about two thirds full with its contents static. An analysis carried out by Caleb Brett showed that the contents of tank 813-003 complied with the contract between Reliance and Vitol.

23. In the event the product in tank 813-003 was loaded onto the *Leon* and transhipped into the *Konpolis*. Miss Selvaratnam suggested that it had never really been available for shipment on the *Nikmary*, but I am unable to accept that. In the first place, Reliance had formally nominated the contents of tank 813-003 to Vitol for loading on the *Nikmary* and had sent with its nomination a certificate of quality confirming that the parcel conformed to the contract. It would not have done so if it had not been its intention to ship that parcel on the *Nikmary*. Secondly, I am confident that the *Nikmary* would not have been called into berth on 3rd December if Reliance had not had a cargo for her. Not only would that be contrary to all normal practices, it was contrary to the practice at Sikka as confirmed both by Mr. Rajaraman and the representative of Caleb Brett, Mr. Maiti. Finally, the decision to ship the contents of tank 813-003 on the *Leon* can be explained by ordinary operational requirements. Production at the refinery is a continuous

process and in the absence of unlimited storage capacity product must be moved. Once it became clear that the *Nikmary* was unable to load on 3rd December it made good sense to ship the contents of tank 813-003 onto another vessel so as to make further space available on shore.

24. In these circumstances I am satisfied that cargo was available for the *Nikmary* when she arrived at Sikka and that she would have begun loading on 3rd December if her tanks had been ready to receive cargo on that date. When the *Nikmary* arrived at Sikka on 2nd December the Oil Co-ordination Committee had yet to notify Reliance of its requirement for the domestic market in December and Reliance itself was willing to load the vessel, treating the cargo as left over from November. By the evening of 5th December, however, Reliance had been notified of the quantity it had to supply to the domestic market during that month and had started programming deliveries taking into account both its obligation to supply the domestic market and its existing export contracts for shipment in December. Although not every parcel of gasoil produced by Reliance during December is likely to have had a sulphur content of 0.2% or less, I am satisfied that throughout December Reliance was routinely producing gasoil with a specification that conformed to its contract with Vitol. Mr. Rajaraman confirmed that there was no problem with congestion at Sikka during December 2000 and I am satisfied that the delay in loading the *Nikmary* was caused by Reliance's unwillingness to provide a cargo to the vessel until it had met all its existing commitments for the month of December. It was for that reason only that the *Nikmary* was kept waiting until early January when it could be loaded out of available product before the Committee notified Reliance of the requirements of the domestic market for product to be delivered in January.

25. Against this background I turn to consider the grounds on which the charterers submitted that laytime did not count at Sikka until the vessel went into berth.

(i) Clause 30(c)

26. The charterers' primary argument was that by virtue of clause 30(c)(v) time did not begin to count until the vessel was in berth and cargo hoses had been connected. They relied in particular on the following words at the end of the clause:

> " . . . . . and should the vessel not be cancelled, all time until connection of hoses, after the Vessel has been passed as clean to the satisfaction of jointly appointed Inspector, shall not count as laytime, or if on demurrage, as time on demurrage."

27. Clause 30(c) is one of the additional clauses introduced by the incorporation into the charter of the Vitol Voyage Chartering Terms. Its purpose is twofold: to impose on the owners an obligation to clean the vessel to the satisfaction of the charterers' inspector, and to give the charterers the right, if the vessel fails to meet that requirement, to require further cleaning, if necessary several times, while preserving their right to cancel the charter if the vessel still fails to meet the required standard of cleanliness. Moreover, I agree with Mr. Hill that the language of the final sentence of clause 30(c)(v) is quite clear in its terms and that once the clause comes into operation none of the time between the acceptance of the vessel and the connection of hoses counts for the purposes of calculating laytime and demurrage. The clause, therefore, strongly favours the charterers, but its rigour is tempered by placing the decision as to the vessel's cleanliness on the occasion of the second and any subsequent inspection in the hands of an inspector appointed by owners and charterers jointly.

28. In the present case the first inspection was carried out by Mr. Maiti, the charterers' surveyor, alone. When Mr. Maiti carried out the second inspection he was accompanied by an inspector acting for the owners and on the third occasion an inspector appointed by the vessel's P & I Club

was also in attendance. On that occasion all three surveyors agreed that the vessel was clean enough to load. Mr. Hill was therefore able to submit with some justification that there had been a joint inspection and that the requirements of the clause had been satisfied in spirit, if not in form, even though none of the inspectors was acting on the joint instructions of the owners and charterers. The difficulty with that argument, however, is that the clause as a whole provides quite unambiguously for the vessel's condition to be judged by an inspector appointed by both parties jointly and cannot be construed as providing in the alternative for a joint inspection of the kind that took place in this case. There is no reason, of course, why the parties should not have agreed that a joint inspection of the kind that took place in this case should suffice, though there would always be the risk that the two surveyors might not agree. However, there is no evidence that either party made a suggestion of that kind. When on 4th December the master informed the owners that the tanks were ready for loading the owners simply asked the charterers to carry out a further inspection together with their own surveyor. Vitol did not seek to invoke clause 30 and as a result there was no inspection by a jointly appointed inspector. In those circumstances the procedure set out in clause 30(c) was not implemented and Vitol is unable to rely on it to prevent laytime from running in this case.

29. Miss Selvaratnam also submitted that even if as a matter of construction Vitol was entitled to rely on clause 30(c)(v), the delay to the vessel in the present case was caused by Vitol's own failure to have a letter of credit in place under its contract with Reliance or by its failure to ensure that the loading period in the sale contract matched the charterparty laycan dates.

30. If I am right in my conclusion that clause 30(c)(v) does not protect Vitol in this case, nether of these points arises, but I think it right to express my views on them briefly nonetheless. The letter of credit as originally opened required shipment to have been completed by 21st November and its validity expired on 15th January 2001. Acting on its own initiative at a time when the vessel was expected to load soon after her arrival at Sikka, Vitol arranged for the shipment date to be extended 5th December and following the rejection of the vessel's tanks on 3rd December it obtained a further extension to 10th December. Neither of those extensions was requested by Reliance which seems to have been content to leave the matter in abeyance until the delivery of a cargo became imminent. Once it became clear that the vessel would be delayed indefinitely Vitol took no further steps to have the letter of credit amended. On 2nd January 2001 Reliance informed Vitol that the *Nikmary* was scheduled to berth later that day and asked for the shipment date to be extended to 15th January and the validity to be extended to 2nd February. Mr. Rajaraman, who sent the message, explained that Reliance would need to see both amendments before the vessel completed loading. The amendments were duly made later the same day. Reliance may have been entitled to refuse to load the vessel until a satisfactory letter of credit was in place, but there is nothing in the evidence to suggest that the delay in loading the *Nikmary* had anything to do with the absence of a suitable letter of credit.

31. At first sight the suggestion that the cause of the delay to the vessel was a failure on the part of Vitol to ensure that the loading dates under its contract with Reliance matched the laycan dates in the charterparty strikes one as a little odd. In their original form the two contracts, although not quite in matching terms, were structured in a way that was commercially satisfactory. When it became apparent that the vessel was unlikely to meet her cancelling date Vitol agreed to extend it, first to 29th November and then to 2nd December. After that no further extension was agreed, but Vitol did not seek to cancel the charter and it therefore continued in effect.

32. Vitol did not attempt to agree a corresponding extension to the loading period in its contract with Reliance, but even if it had done so such an extension would not have been granted. Mr. Rajaraman explained that when a vessel arrived too late to complete loading within the agreed shipment period it was not Reliance's practice formally to extend the period, although it would

often agree to provide a cargo at a time convenient to itself. The reason for that is obvious: Reliance was generally unwilling at a late stage in the programming process to incur a new obligation to deliver cargo within a specific range of dates. Thus in the present case, although Reliance was still willing at the end of November to accept the vessel for loading at a time convenient to itself, it was not willing to undertake a formal commitment to supply a further cargo in December. Whether or not it is right in these circumstances to say that the delay to the vessel was caused by Vitol's failure to obtain an amendment to its contract with Reliance, it is the case that its failure to have in place effective contractual arrangements for a cargo to be loaded within a specific range of dates immediately following the vessel's presentation in readiness to load was ultimately responsible for her failure to load sooner than she did. This is an aspect of the matter to which I shall return in the context of Mr. Hill's next argument.

(ii) Clause 6

33. Mr. Hill's next submission was that the vessel was delayed in getting into berth for a reason over which the charterer had no control within the meaning of clause 6 of the charter and that therefore none of the delay counted as used laytime.

34. In *Nereide S.p.A. di Navigazione v Bulk Oil International Ltd (The 'Laura Prima')* [1982] 1 Lloyd's Rep. 1 the House of Lords considered the application of the same form of wording to a situation in which the vessel was prevented from getting into berth by congestion. The dispute had originally been referred to arbitration and the umpire had found that the sole cause of delay was the unavailability of a berth due to the presence of other ships for which the charterers were not responsible and over which they had no control. However, the charterers had agreed to designate a loading berth that was reachable on arrival and in that context their Lordships held as a matter of construction that the expression "delay . . . . . getting into berth" referred only to delay in getting into a berth designated in accordance with the charter, that is one that at the time of its designation by the charterer was reachable by the vessel. The clause therefore only operated to protect the charterers against delay caused by some intervening event.

35. This form of wording was considered again in *Société Anonyme Marocaine de L'Industrie du Raffinage v Notos Maritime Corporation (The 'Notos')* [1987] 1 Lloyd's Rep. 503. In that case the vessel was chartered to discharge at a sea-line at Mohammedia but the charterers had not undertaken that the berth would be reachable on arrival. After giving notice of readiness the vessel was prevented from discharging, first by swell of sufficient severity to render the sea-line unusable and secondly by the need to wait for another vessel, which had been turned off the sea-line when conditions deteriorated, to complete discharging. Their Lordships held that the charterers were protected in respect of delay during the first period which had been caused by swell. (It was common ground before their Lordships that the clause did not protect them in respect of the second period.) Lord Goff, with whom the other members of the House agreed, considered that the words in question were of general application and that the delay to which they referred was the postponement of the time, for any reason whatsoever over which the charterers had no control, when the vessel, having arrived at the port and given notice of readiness, could get into berth. The case was distinguishable from *The 'Laura Prima'* because the charter contained no undertaking by the charterers to designate a berth reachable on arrival.

36. As in *The 'Notos'*, the charter in the present case contains no undertaking on the part of the charterers to designate a berth reachable on arrival. I would accept, therefore, that clause 6 is effective to protect the charterers where delay is caused by congestion over which they have no control. However, the problem in the present case was not one of congestion in the usual sense of a queue of vessels waiting their turn to berth, but of the scheduling of supplies. That is reflected in the fact that the *Gerd*, which arrived and gave notice of readiness on 5th December after the *Nikmary's* tanks had been accepted, was taken in to load ahead of her. The cargo shipped on the

Gerd conformed to the requirements of the contract between Vitol and Reliance, but the *Gerd* was loaded in preference to the *Nikmary* because Reliance had a commitment to load the *Gerd* in December but no comparable commitment to load the *Nikmary*.

37. Mr. Hill submitted that the scheduling of liftings at Sikka was a matter entirely outside the charterers' control. If the vessel had been detained at the anchorage as a result of the imposition of some arbitrary loading programme, that might have been so, but that is not what happened. It was common ground in the light of decisions such as *Postlethwaite v Freeland* (1880) 5 App. Cas. 599, *Ardan Steamship Co. v Andrew Weir & Co* [1905] A.C. 501 and *Sociedad Financiera de Bienes Raices S.A. v Agrimpex (The 'Aello')* [1961] A.C. 135 that Vitol was under an absolute obligation to provide a cargo for the vessel, but what is perhaps more important in the present case is the time at which it was bound to have a cargo available. Modern voyage charters invariably define the time within which the ship is to be loaded and the charterer is entitled to the full use of the laydays for which he has paid. Where, as here, it is not necessary for a cargo to be available to enable the vessel to become an arrived ship, the charterer is not bound to have a cargo ready as soon as the vessel gives notice of readiness, but he must have it ready in sufficient time to enable loading to be completed within the laydays: see *Vergottis v William Cory & Son Ltd* [1926] 2 K.B. 344 and *Universal Cargo Carriers Corporation v Pedro Citati* [1957] 2 Q.B. 401, per Devlin J. at pages 428-429 . Unless the contract provides otherwise, the shipowner is not concerned with the arrangements that have to be made to enable the cargo to be available at the loading port.

38. Under clause 5 Vitol became entitled to cancel the charter when the *Nikmary* failed to arrive at Sikka by 4.00 p.m. local time on 2nd December. It had 24 hours in which to consider its position and could still have exercised that right following the inspection of the vessel's tanks the next day. In the event it chose not to cancel the charter, no doubt because it considered it to be in its interests to keep the vessel at Sikka for loading, but one consequence of allowing the charter to remain in existence was that it remained under an obligation to make a cargo available in time to enable her to complete loading within the laytime. It had purchased a cargo from Reliance for loading between 17th and 21st November, but having failed to tender a vessel to load during that period it was not then in a position to demand a cargo for the *Nikmary* as soon as she did become ready to load and could only obtain one as and when Reliance was willing to make it available.

39. The cause of the delay in the present case, therefore, was Vitol's failure to have a cargo available for shipment. Mr. Hill did not seek to argue that that was a matter over which it had no control, and rightly so. The obligation to have a cargo available at the place of loading is of fundamental importance and any clause intended to qualify it must be clearly expressed if it is to have that effect: see *Bunge y Born Co. v H. A. Brightman & Co.* [1925] A.C. 799, per Lord Atkinson at page 811 and Viscount Sumner at page 816. The language on which the charterers seek to rely forms part of a clause dealing with the commencement of laytime. It is not apt in my view to excuse the charterers from the consequences of failing to have a cargo available for shipment.

(iii) Clause 7

40. Mr. Hill then submitted that since the *Nikmary* would have loaded immediately if she had presented with clean tanks on 2nd December, the whole of the delay in this case was due to the vessel's condition within the meaning of clause 7 with the result that none of the time spent waiting to berth counted against laytime. I am unable to accept that submission. As was pointed out by Lord Roskill in *The 'Laura Prima'*, any clause of this kind must be construed in the context of the rest of the charter and I think it is clear that whereas clause 6 is concerned with notice of readiness, berthing and the commencement of laytime, clause 7 is essentially concerned with loading and discharging operations. The reference to the vessel's condition forms part of a phrase that also refers to breakdown and the inability of the vessel's facilities to load or discharge

cargo within the time allowed. That is a clear indication that it is directed to aspects of the vessel's condition that have a direct effect on its ability to handle cargo. Accordingly, I am unable to accept that as a matter of construction it extends to aspects of the vessel's condition that existed before a valid notice of readiness was given but had already ceased to exist at that time. Quite apart from that, however, I am satisfied for the reasons already given that the real cause of the delay to the vessel in this case was Vitol's failure to have a cargo available when the vessel was ready to load.

(iv) Fault of the shipowners

41. Finally Mr. Hill submitted that the *Nikmary* was delayed in berthing by the fault of the shipowners so that laytime did not run while she waited for a cargo. The difficulty with this argument, however, lies in identifying an act or omission on the part of the shipowners that can properly be characterised as a fault and which prevented Vitol from performing its contract: see per Donaldson J. in *Gem Shipping Co. of Monrovia v Babanaft (Lebanon) S.a.r.l (The 'Fontevivo')* [1975] 1 Lloyd's Rep. 339 at page 342. Mr. Hill submitted that the fault in this case lay in allowing the vessel to arrive at Sikka with dirty tanks, but I am unable to accept either that that involved a breach of the charter or that it was the effective cause of the subsequent delay. By clause 1 of the charter the vessel was bound to proceed to Sikka with all convenient despatch and present ready to load. Having previously carried a cargo of vegetable oil, she had to be cleaned to make her fit to load gasoil. She was not clean on arrival at Sikka, but it was not suggested that the crew had failed to do as much as they could in the course of the voyage and there is no evidence that would enable me to make a finding to that effect. Nor does the evidence enable me to find that the vessel could with reasonable efforts have been made ready to load before 5th December.

42. Mr. Hill sought to argue that under this charter it was a breach of contract to tender the vessel in an unclean condition, but I am unable to accept that. The charter might have imposed an obligation on the owners to tender the vessel ready to load by a certain date at the risk of incurring liability in damages, but it did not in fact do so. It merely gave Vitol the right to cancel if the vessel was not ready by the agreed date. To give notice of readiness prematurely is not a breach of charter; it is simply ineffective to start time running. Once the vessel had been properly cleaned a valid notice of readiness could be given and was given. Only then did the charterers' obligation to load within the laydays arise, but it was their own inability to make satisfactory arrangements to obtain a cargo rather than the vessel's previous condition that prevented them from doing so.

(v) Conclusion

43. Since the charterers' failure to load the Nikmary at Sikka with the agreed laytime was not caused by the owners' fault and since none of the terms of the charter operate to relieve them from the consequences of that failure, the charterers are liable to pay demurrage in the sum of US$291,691.75.

44. In addition to their claim for demurrage the owners sought to recover the cost incurred in returning to the anchorage on 3rd December to resume cleaning. They maintained that if the charterers had had a cargo available for the vessel she would have been allowed to remain at the berth while cleaning was carried out. I think that is highly unlikely, however, both in the light of the use that was made of the berth between 3rd and 5th December, and in the light of the evidence of the surveyor, Mr. Maiti, that vessels are not allowed to clean alongside. Accordingly, I reject the owners' argument and this part of their claim fails.

B. Costs relating to the call at Limassol

45. The *Nikmary* left Sikka on 4th January 2001 bound for Thessalonika. On 15th January Vitol ordered her to call at Limassol to enable the cargo to be treated with additives. The vessel reached Limassol at 16.00 hours on 17th January and sailed after the completion of cargo operations at 19.30 hours on 19th January. The charterers accepted that they were liable to pay for the additional time taken to complete the voyage to Thessalonika at the demurrage rate in accordance with clause 29 of the charter. They also accepted that they were liable to pay for the additional fuel oil consumed as a result of the deviation, but they denied any liability to pay for diesel oil on the grounds that the cost was included in the demurrage rate. The owners, on the other hand, said that they were entitled to be paid for the daily cost of diesel because 'bunkers' includes both fuel oil and diesel.

46. The relevant parts of clause 29 provided as follows:

> "Interim Ports Clause – Amended
>
> Charterer shall pay for any interim load/discharge port(s) at cost. Time for additional steaming, which exceeds direct route from first loadport to furthest discharge port, shall be paid at the demurrage rate plus bunkers consumed . . . . . plus actual port costs, if any."

47. The word 'bunkers' simply means fuel carried for the ship's own use. It is capable of referring both to fuel oil for burning in the main engine and to diesel oil used mainly for powering the auxiliaries. Ultimately its meaning in any given case depends on the context in which it is used. The principle underlying clause 29 is expressed in the first sentence: Vitol were to reimburse the owners in respect of the additional costs actually incurred in loading or discharging at interim ports. Steaming time necessarily involves the consumption of fuel oil, so it is not surprising that the second sentence of cause 29, which approaches the matter from the point of view of additional steaming time, should provide for the bunkers consumed in the process. No separate provision is made, however, for time spent in port. That is probably because demurrage, being liquidated damages for detention, notionally reflects the full cost to the owner of keeping his ship in port. As such it is deemed to cover all normal running expenses, including the cost of diesel oil required to run the ship's equipment.

48. Capt. Georgantzoglou said in evidence that the vessel consumes more diesel oil at sea than in port, but the owners' claim proceeded on the basis that the daily consumption was the same in each case and that is borne out by the vessel's logs. However, there is no evidence that the parties had the particular characteristics of this ship in mind when they agreed clause 29 and I do not think that matters such as these can determine its construction. In the end the matter is essentially one of impression. The way in which clause 29 is worded suggests to me that the parties used the word 'bunkers' to mean fuel oil rather than diesel oil, envisaging that the payment of demurrage would adequately compensate the owners for the additional cost of diesel oil resulting from the prolongation of the voyage. This part of the owners' claim therefore fails.

C. Discharging at Thessalonika

(i) Slow pumping claim

49. The vessel arrived at Thessalonika on 23rd January 2001 to discharge and moored at an open sea berth the next morning. A single ten inch hose was provided for discharge. Pumping began at 14.15 on 24th January and finished at 17.00 on 26th January. There was a break of 7 hours 15 minutes on 24th January because of a leaking connection at the ship's side.

50. The owners say that the vessel earned demurrage at Thessalonika in the sum of US$43,156.05. The charterers say that the vessel was not capable of discharging at the rate stipulated in the charter and that no demurrage was earned, or, if it was, that they are entitled to recover an equivalent amount as damages for breach of contract.

51. Clause 27 of the charter provided as follows:

> "27. Pumping Clause – Amended
>
> Owner(s) to agree to discharge the entire cargo within 24 hours or maintain average 100 P.S.I. (pounds per square inch) at the ship's rail provided the shore facilities permit. If shore facilities do not permit discharge within agreed time, then Master to keep pumping logs and issue a letter of protest and to make best endeavours to have both countersigned by the terminal."

52. The vessel did not discharge the entire cargo within 24 hours, nor did it maintain an average pressure at the rail of 100 p.s.i. The owners said that the shore facilities did not permit the vessel to comply with clause 27 because they made only one discharging line available instead of the two requested by the master. They said that if a second line had been available the cargo would have been discharged in half the time.

53. The minimum obligation imposed on the owners by clause 27 was to maintain a pressure of 100 p.s.i. at the ship's rail, or such lower pressure as the terminal could accept. It is true that when he gave notice of readiness the master notified the charterers that the vessel was ready to discharge with two lines and it is also true that only one line was provided, but the charterparty did not give the owners the right to require two lines and provided the vessel maintained the required pumping pressure the owners could not be held liable for failing to complete discharge within 24 hours. The number of lines available had no bearing, however, on the performance of the vessel's pumps and the only complaint made by the master related to the failure of the terminal to make the correct reducer available.

54. 100 p.s.i. is the equivalent of about 7kg/cm^2. The records kept by the receiving terminal show that during discharge the pressure maintained by the vessel's pumps varied between 3.4kg/cm^2 and 4.1kg/cm^2 with an average of 3.6kg/cm^2, in other words, little more than half that required by clause 27. The maximum pressure acceptable to the terminal was 9kg/cm^2. It may be that the vessel could have discharged more quickly if two hoses had been provided, but the fact is that her pumps were actually operating at little more than half the pressure required by the charter. The master did not complain at the time that the vessel was being prevented from pumping at the required rate and he simply declined to sign a letter of protest drawn up by the terminal. The suggestion, first advanced at the trial, that it was too dangerous to increase the pressure at the manifold because of conditions at the berth is not supported by the contemporaneous evidence, or indeed by the master's own witness statement. I am satisfied that the owners were in breach of clause 27 in failing to maintain a pressure of 100 p.s.i. throughout discharge.

55. Clause H as supplemented by clause 1 of the Vitol Voyage Chartering Terms allowed a total laytime of 84 running hours, but the whole of the laytime had already been exhausted at Sikka and the vessel was on demurrage when she arrived at Thessalonika. The owners are therefore entitled to recover demurrage in respect of the whole of the time spent discharging at Thessalonika except for the period by which discharging was prolonged as a result of the vessel's failure to maintain the required pumping pressure. Vitol's own evidence indicates that the effect of almost doubling the pumping pressure to 100 p.s.i. would have been to reduce the time taken

to discharge by only 12 hours 28 minutes. I therefore hold that the owners are entitled to recover 3 days, 5 hours and 36 minutes demurrage at Thessalonika amounting to US$37,183.33.

(ii) Discharging port disbursements

56. By clause F of the charter the owners' liability for port costs at the discharging port was limited to US$20,000. The total disbursement account at Thessalonika was US$37,900 and accordingly the owners sought to recover US$17,900 from Vitol.

57. Vitol put the owners to proof that they had paid the agents' account in respect of disbursements incurred in relation to the vessel's call at Thessalonika. I am satisfied that they have done so and that in principle the owners are entitled to recover the sum claimed. However, Vitol contended that the vessel's failure to maintain the pumping pressure called for by clause 27 resulted in additional costs being incurred in respect of tugs and launches required to attend the vessel during discharge and that it was entitled to recover the additional costs from the owners as damages for breach of the charter.

58. It was necessary to have tugs in attendance throughout the period of discharge because the vessel was lying at an open sea berth and the longer she remained there, the greater the cost that was incurred. The actual cost of tug attendance was US$32,011.67, but Vitol calculated that it would have been reduced to US$20,586.30 if the vessel had maintained the pumping pressure required by clause 27. That part of the evidence was not challenged and I accept that it is correct. The amount recoverable from Vitol in respect of disbursements at Thessalonika is therefore reduced to US$6,474.63.