JUDGMENT : The Hon. Mr Justice Toulson: Commercial Court. 12th December 2006

Introduction

1. By a voyage charterparty the defendants ("the owners") chartered the motor tanker C*ount* to the claimants ("the charterers") for the carriage of a cargo of petroleum products from Sitra to "1, 2 or 3 safe ports East Africa Mombasa/Beira range". In the event the charterers nominated Beira. The charterparty was on an Asbatankvoy 1997 form and included the following terms:

   "1. WARRANTY-VOYAGE-CARGO. The vessel…being... loaded shall forthwith proceed, as ordered on signing Bills of Lading, direct to the Discharging Port(s), or so near thereunto as she may safely get (always afloat), and deliver said cargo…"

   "9. SAFE BERTH-SHIFTING. The vessel shall load and discharge at any safe place or wharf, or alongside vessels or lighters reachable on her arrival, which shall be designated and procured by the charterer, provided the vessel can proceed thereto, lie at, and depart therefrom always safely afloat…"

2. The C*ount* arrived at Beira and tendered her notice of readiness on 29 June 2004. On the day of her arrival another inbound vessel, *British Enterprise*, went aground in the channel which links the port with the sea. After being re-floated, the *British Enterprise* grounded a second time in the channel on 1 July. The C*ount* proceeded to the discharge berth on 4 July after the *British Enterprise* had completed discharge operations.

3. The C*ount* completed the discharge of her cargo early on 9 July, but she was unable to sail from the port because on 5 July an inbound container ship, the *Pongola*, had grounded in the approach channel at almost the same spot as the *British Enterprise* had first grounded. As the *Pongola* was blocking the channel, the port authorities closed the channel to vessel traffic, and the C*ount* was not able to sail from Beira until 13 July.

4. The owners claimed from the charterers the amount of their loss resulting from the delay to the C*ount* caused by the blockage of the channel by the *Pongola* on the ground that this loss resulted from breach by the charterers of the safe port provisions.

5. The claim was referred to arbitration and dealt with on written submissions. In a reasoned award the arbitrators, Mr P. B. Buchan and Mr M. J. Baker-Harber, upheld the owners' claim, which they quantified at US $63,241.58.

6. The charterers obtained permission to appeal against the award on the following questions of law:

   a) In determining whether a port is unsafe for the purposes of a safe port warranty in a voyage charterparty, is the relevant question whether the port is unsafe for the chartered vessel itself or is it sufficient for the owners to show that the port is unsafe for other vessels?

   b) Is delay caused by a temporary obstacle which is not such as to frustrate the commercial venture capable of making a port unsafe for the purposes of a safe port warranty?

   c) Where a chartered vessel is delayed by another vessel grounding as a result of the port being unsafe for that other vessel, are the charterers in breach of the safe port warranty where:
   i) The grounding is temporary and occurs after the date when the port was nominated by the charterers; and
   ii) The delay is not one which frustrates the commercial venture?

   d) On the facts found, was there a breach by the charterers of the safe port warranty?

7. The charterers seek an order reversing the award or remitting it to the arbitrators for further consideration on the following grounds:

   a) That the tribunal was wrong to find that the port of Beira was unsafe and that in consequence the charterers were liable to the owners in damages for detention.

   b) That the tribunal was wrong to find that the port was unsafe in the abstract by reference to the fact that two other vessels had grounded there. It should have asked itself, following the statement of Sellers LJ in the *Eastern City* [1958] 2 LL Rep. 127 (cited with approval by the House of Lords in the *Evia (No.2)* [1983] 1 AC 736), whether the port was safe for the C*ount* itself. Had it asked itself that question, it would have found that the port was safe for the C*ount* which entered and left the port without running aground.

   c) Having held that the C*ount* was delayed for a little over four days by the fact that, after the charterers had nominated the port, the *Pongola* had grounded in the access channel, the tribunal should have held that since the *Pongola* had not grounded at the date of the nomination, the port was not prospectively unsafe and further, following the decision of the Court of Appeal in the *Hermine* [1979] 1 LL Rep. 212, that since the delay was temporary, and not one which frustrated the adventure, the port was not unsafe.

The arbitrators' award

8. In their clearly expressed reasons, the arbitrators summarised the owners' case as follows:

   "7. The owners contended that the Count had been delayed by the grounding of the Pongola because the port of Beira had not been a prospectively safe discharge port at the time that the charterers had nominated the port for the discharge of part of the Count's cargo, nor had it been safe at any material time. Beira was prospectively unsafe, said the owners, because the buoys in the access channel were not correctly positioned or the channel had not been adequately monitored or because there was no adequate system in place for achieving those results."

9. The arbitrators went on to refer to the evidence advanced by the owners in support of that case: in particular, evidence about the groundings of the *British Enterprise* and the *Pongola*, and information published in maritime literature and on websites about the port of Beira and its changing sandbanks.

10. Summarising the charterers' case, the arbitrators noted the following contentions:

i) The owners had failed to establish a causal link between the alleged unsafety of the port and the loss which the owners claimed to have suffered.

ii) The buoys were moved from their position by bad weather, not because there was any lack of monitoring by the port authorities, and all necessary steps were taken by the port authorities to re-position them.

iii) The grounding of the *British Enterprise* and the *Pongola* could have been avoided by the exercise of good navigation and seamanship by the pilots and/or masters.

iv) *"Where, observed the charterers, a charterer is under an obligation to nominate a safe port or place, his obligation is to nominate a port or place which is, at the time of the nomination, prospectively safe for the period of the vessel's call, in the absence of any abnormal or unexpected future events…For the owners to succeed, the charterers contended, they had to establish that the vessel itself had been exposed to danger and had suffered a loss as the result of such exposure. The charterers maintained that in this case, the vessel was never exposed to any danger, but was merely detained in port because of the grounding of another vessel in the approach channel."* (para. 15)

v) *"The charterers noted that while the owners alleged that the Count was prevented from sailing until the Pongola was re-floated, they did not allege that the vessel suffered any damage apart from the delay. Citing the decision in the* ***Hermine*** *[1979] 1 Lloyd's Rep. 212, the charterers stated that although delay to a vessel caused by dangers and obstructions may make a port unsafe, in order for it to do so the delay has to be unreasonable and capable of frustrating the charter as a whole. In the present case, they said, the delay was neither excessive nor unreasonable, nor was it capable of frustrating the charter as a whole."* (para. 19)

vi) *"As an alternative argument, the charterers submitted that the warranty given in clause 9 of the charterparty, to which the owners had referred, did not extend to the vessel always being able to depart from the berth immediately after completion of loading or discharging. The warranty in that clause, according to the charterers, was limited to the vessel being able to depart from the berth always safely afloat and, as the vessel had done so, there was no breach of the warranty in clause 9."* (para. 21)

11. The arbitrators first considered whether there was a causal link between the alleged unsafety of the port and the owners' loss, or, as they put it, "Was there a causal link between the groundings and the delay to the *Count*"? There was no dispute as to the answer to the latter question, and the arbitrators set out their approach to the legal consequences as follows:

> *"24. We accept the owners' argument that if the Pongola had gone aground in the access channel by reason of the port having been unsafe because of any or all of the reasons set out in paragraph 7 above [incorrect positioning of the buoys or inadequate monitoring of the channel], then a causal link was established between the port being unsafe and the loss suffered by the owners as a result of the delay to the Count. The question for us, therefore, was whether the grounding of the Pongola was the consequence of any of those reasons, or whether the charterers were correct in maintaining that the grounding was caused by navigational error."*

12. The arbitrators then addressed the causes of the grounding of the *British Enterprise* and the *Pongola*. They concluded that the groundings were not caused by navigational error, but rather by misalignment of the buoys, and that the misalignment resulted from poor monitoring of the channel rather than from recent bad weather. The buoys were out of position in relation to the safe channel because there had been changes in the configuration of the channel as a result of shifting sand banks or shoals.

13. The arbitrators concluded, in paragraph 44, that "Beira was not a safe port between 29 June and 13 July 2004". They then considered whether it was prospectively unsafe at the time that it was nominated by the charterers. They answered that question in the positive, because they considered it highly unlikely that at the date of nomination (17 June) the buoys were properly positioned.

14. The arbitrators dealt with the charterers' argument based on the ***Hermine*** (that the reason for the *Count* being unable to leave its berth was a temporary obstruction in the channel, which, because of its temporary nature, did not involve a breach of the safe port warranty) as follows:

> *"47. Relying on the decision in the* ***Hermine*** *the charterers contended that the Pongola, while aground in the access channel, represented only a temporary obstacle which did not make the port unsafe as it did not lead to an excessive or unreasonable delay, nor did it frustrate the charter as a whole. We were not persuaded by this argument, but, instead, by the owners' response that this case was irrelevant because there were no characteristics of the port concerned that made it unsafe and the owners therefore had to argue that the mere fact that their vessel was delayed made the port unsafe. We agreed with the owners that the Hermine was concerned with the length of delay required for a temporary obstacle or danger to cause a port to be considered unsafe and therefore had no relevance to the present case."*

The Charterers' submissions

15. Mr Nolan submitted that the arbitrators made two errors of law.

16. First, they did not directly address the charterers' argument set out in paragraph 15 of the award. They did not explicitly find that the *Count* was exposed to danger and suffered a loss as a result of such exposure, nor could they have so found since the *Count* berthed and left the port in safety.

17. Rather, the arbitrators made a general finding that the port was unsafe and concluded that, because conditions existed at the time of the nomination which led to the grounding of the *British Enterprise* and the *Pongola*, the charterers were therefore in breach of contract and liable for the consequences of the delay resulting from the grounding of the latter.

18. It was submitted that this was a flawed approach in law.

19. Secondly, Mr Nolan submitted that the arbitrators were wrong to distinguish the *Hermine*. The only impediment to the *Count* leaving the port on 9 July after the discharge of her cargo was that the channel had been closed because it was blocked by the *Pongola*, but this was a temporary obstruction, which could not give rise to a claim for damages for breach of contract.

The owners' submissions

20. On the first point, Mr Broadbent submitted that the arbitrators did conclude that the port of Beira was prospectively unsafe for the *Count* at the date of the nomination. He submitted that on a fair reading of the award their reasoning could be summarised as follows:

    a) When the charterers nominated the port of Beira in mid-June as the discharge port, it was prospectively unsafe for the *Count* because the buoys marking the access channel were out of position and there was no adequate system in operation for monitoring the access channel leading to the port. The nomination of Beira was therefore a breach of the charterers' contractual obligation to nominate a port which was, at the time of the nomination, prospectively safe for the period of the vessel's likely visit, in the absence of some abnormal and unexpected future event.

    b) The same deficiencies in relation to the access channel made it unsafe for other vessels and caused the *Pongola* to ground.

    c) The grounding of the *Pongola* delayed the departure of the *Count*, causing loss to the owners.

    d) This loss was therefore caused by the charterers' breach of contract.

21. On the second point, Mr Broadbent submitted that the *Hermine* was distinguishable because in that case there was no finding that the port was prospectively unsafe for the *Hermine* at the time of the nomination. In the present case the owners did not suggest that the obstruction caused by the *Pongola* was what made the port unsafe. Rather, they relied on the grounding of the *Pongola* as evidence of pre-existing conditions which made the port unsafe at the time of the nomination, and also to establish causation of the owners' loss.

General principles

22. In relation to the general questions of law identified in the charterers' claim form (i.e. questions a), b) and c) in paragraph 6 above), the relevant principles can be summarised in the following propositions:

    i) A safe port clause in a charterparty obliges the charterer to nominate a port for loading, or discharge, whose characteristics are such that, barring unforeseeable future events, it will be safe for the vessel at the time when she will reach it, use it and leave it. (See ***the Evia (No.2)*** [1983] 1 AC 736 at 757.)

    ii) A port is safe for a vessel if she can reach it, use it and leave it, without (in the absence of some abnormal occurrence) being exposed to danger which cannot be avoided by good navigation and seamanship. (See ***the Eastern City*** [1958] 2 LL Rep 127 at 131, approved by the House of Lords in ***the Evia*** at 749, 756.)

    iii) A port will not lack the characteristics of a safe port merely because some delay, insufficient to frustrate the adventure, may be caused to the vessel in her attempt to reach, use and leave the port, by some temporary evident obstruction or hazard. (See ***SS Knutsford Ltd v Tillmanns & Co.*** [1908] 2 KB 385 (CA), [1908] AC 406 (HL); and ***the Hermine*** [1979] 1 Lloyd's Rep 212.) That is different from the situation where the characteristics of the port at the time of the nomination are such as to create a continuous risk of danger. Moreover, since good seamanship cannot necessarily be expected to protect against hidden hazards, it is particularly possible in the case of a latent hazard to envisage that there may be a continuous risk of danger (making the port unsafe to nominate) although whether it results in actual danger to the vessel may be a matter of chance.

    iv) Nomination of an unsafe port by a charterer under a charterparty containing a safe port clause constitutes a breach of contract for which the owner is entitled to recover damages for breach of contract in respect of any resulting loss, whether through delay (***Ogden v Graham*** (1861) 1 B&S 773) or damage to the vessel (***Reardon Smith Line Ltd v Australian Wheat Board*** [1956] AC 266) or through taking avoidance measures (***Evans v Bullock*** (1877) 38 LT 34), subject to ordinary principles of causation and remoteness.

On the facts found, was there a breach of the safe port warranty?

23. The arbitrators found that at the time of the nomination the characteristics of the port of Beira were such as to make it prospectively unsafe because the buoys were out of position and there was no procedure in effect to monitor satisfactorily any changes in the configuration of the access channel. It is in my view implicit in what they said that for those reasons they judged the port to be an unsafe port to nominate for the *Count* at the time of the nomination. If I were in doubt about that, I would have considered exercising the power under section 70(4) of the Act to ask the arbitrators to amplify their reasoning, but I regard that as an unnecessary exercise.

24. I therefore reject Mr Nolan's first ground of attack on the award. Turning to the second ground, he argued that an owner is not entitled to damages under a safe port clause for loss caused by delay, unless the delay was such as to frustrate the commercial venture. The proposition is based on the decision of the Court of Appeal in the ***Hermine***. I do not accept that it is a correct analysis of the effect of that decision, and the proposition is also inconsistent with previous authority approved at the highest level.

25. In ***Ogden v Graham*** (1861) 1 B&S 773, a voyage charterparty provided for a vessel to load at Swansea and proceed to a safe port in Chile, with leave to call at Valparaiso. While she was at Valparaiso, the charterers nominated the port of Carrisal Bajo as the port of discharge. At the time of the nomination that port had been declared closed by the Chilean government, because the district in which it was situated was in a state of rebellion. When the rebellion was suppressed, the port was re-opened and the rest of the voyage was uneventful. There was no question of the commercial venture having been frustrated. On the contrary, it proceeded to its conclusion. But the delay at Valparaiso was 38 days, and the owners claimed damages for their resulting loss. Blackburn J held that the charterers had not complied with the condition in the charterparty that they should name a safe port and he concluded: *"That being so, they are liable for damages for not naming a safe port within a reasonable time, and the measure of damages will be regulated by the detention of the ship at Valparaiso beyond that time."*

26. The decision was cited with approval by Dixon CJ in his dissenting judgment in ***Reardon Smith Line Ltd v Australian Wheat Board*** [1954] 2 Lloyd's Rep 148, 154, and by Lord Somervell in the judgment of the Privy Council in the same case [1956] AC 266, 279, which reversed the judgment of the majority of the High Court of Australia. It was also referred to by Lord Roskill in the *Evia* at 765, as an "impressive" authority, although he was there referring to it on a different point.

27. In my view, the ***Hermine*** is not authority for any wider proposition than that which I have stated at paragraph 22 iii) above. This view is fortified by what Lord Roskill said about his judgment in the *Hermine* when he came to reconsider it in the *Evia* at 762. There he said the issue in the case was whether there was a breach of the promise which had arisen on nomination because much later there was a temporary delay of a non-frustrating kind.

28. In the ***Hermine***, as Lord Roskill said, the ship had been delayed in the Mississippi on her way to the sea after discharging at the port of Destrehan, because of a silting up which the arbitrator had found not to be an abnormal occurrence. Donaldson J held that because the ship had been delayed for a commercially unacceptable time, there was a breach of the charterer's promise, although the port had been entirely safe at all times in all other respects. The Court of Appeal reversed this finding. Referring to his earlier judgment, Lord Roskill said: *"On re-reading my judgment I agree that the passage [1979] 1 Lloyd's Rep 212, 217: **'Is it enough for the delay to be 'commercially unacceptable' or has the delay got to be of a frustrating nature before the owner can complain of it as creating a breach of the warranty of safety?'** might perhaps, with the wisdom of hindsight of four years, have been better worded if the sentence had concluded: 'as constituting or evidencing a breach of the charterer's promise at the time of nomination regarding the future safety of the ship'. But I think that the general intent of that passage, especially in the light of what Geoffrey Lane LJ (as he then was) subsequently said, is without any amendment reasonably plain."*

29. Geoffrey Lane LJ had said at 219-220: *"Certain matters in this somewhat convoluted field appear to be clear. First of all, if the nominated port is a port into or away from which it is possible for this particular ship under the terms of the charter to get only at the cost of damage to the ship then (always excepting some abnormal circumstance) it is an unsafe port. Obviously it is not necessary for the ship to suffer actual damage before the port can be said to be unsafe… Thirdly, it is not every hazard which will make the port unsafe. There are two main exceptions… The second exception is that if the hazard is merely a temporary one then it will not constitute lack of safety, nor make the port unsafe."*

30. In the present case the arbitrators' finding that the port was unsafe was not based on the fact that there might be a merely temporary hazard. It was based on characteristics which were not merely a temporary hazard, namely that the buoys were out of position as a result of shifting sands and that there was no adequate system for monitoring the channel. The reasoning in the ***Hermine*** does not bar a finding by the arbitrators that these characteristics, existing at the time of the nomination, were such as to create a continuing risk of danger to vessels, including the *Count*, when approaching and leaving the port, and it was therefore an unsafe port to nominate.

31. Finally, in the course of his oral submissions Mr Nolan sought to argue that the grounding of the *Pongola* was a breach in the chain of causation between the charterers' breach of contract in nominating the port and the owners' loss. This was not a point on which leave to appeal was sought or given, but in any case I cannot see that it would have had any realistic prospect of success.

32. On the basis that the grounding of the *Pongola* was caused by the characteristics which made the port an unsafe port to nominate for the *Count*, I cannot see that it was an independent event which broke the chain of causation between the breach of contract and the owners' loss, any more than if the port had been unsafe because it was in a war zone and the delay had been caused by another vessel being sunk in the hostilities.

33. For those reasons, I uphold the arbitrators' award.

Mr Michael Nolan (instructed by Davies Johnson & Co.) for the Claimant
Mr Edmund Broadbent (instructed by MFB) for the Defendant