Pentonville Shipping Ltd. v Transfield Shipping Inc (MV Johnny K) [2006] APP.L.R. 02/10

JUDGMENT : Mr Justice Tomlinson: Commercial Court. 10th February 2006

1. This is an appeal brought with leave granted under s.69(3) of the Arbitration Act 1996 against an award dated 24 March 2005 made by two London maritime arbitrators, Mr Christopher Moss and Mr John Schofield. In the arbitration amongst other claims the owners claimed from the charterers US$ 134,682.59 (net of 5% commission) in respect of what was described as freight/deadfreight/damages. The arbitrators dismissed this claim. The owners appeal against that decision.

2. The arbitrators decided the case upon the basis of written submissions and supporting documents presented by a firm of solicitors acting for the owners and by a firm of claims consultants acting for the charterers. There was no oral hearing.

3. The Claimants as disponent owners and to whom I shall refer hereafter as simply "the owners" chartered their vessel "Johnny K" to the Respondent charterers to whom I shall refer hereafter as simply "the charterers." The charter was for a voyage from Dampier or Port Hedland in Australia to China with a full cargo of iron ore in bulk. Johnny K is a Capesize bulk carrier having nine holds/hatches. In the event the charterers nominated Port Hedland as the loadport. The charter also provided for the vessel to lift 170,000 tonnes 10% more or less in owners' option.

4. The vessel arrived at Port Hedland in the early hours of 29 September 2003 and tendered Notice of Readiness. On arrival at Port Hedland the Master asked for 172,700 tonnes, well within the 10% tolerance allowed.

5. During the exchange of written submissions for the purposes of the arbitration there emerged a dispute between the parties as to what was the rate at which the charterers had agreed to load the vessel. It was agreed that by virtue of the fixture recap certain standard loading terms were incorporated into the charter. There was however a disagreement as to whether there had been incorporated the standard terms relating to Dampier as had been the case in an earlier fixture in respect of the vessel "Jasmine Joy" on which this fixture was based, or rather the terms relating to Port Hedland, which was in the event the nominated port. Strange to relate the owners were contending that the laytime allowed for loading was rather longer than that for which charterers contended, 1 D 17H 50M and 1 D 15H 38M respectively. Unfortunately the two arbitrators were unable to agree on how this dispute should be resolved and rather than go to the expense of appointing a third arbitrator the small demurrage claim which depended upon its outcome was by agreement of the parties withdrawn from the arbitrators' consideration.

6. Fortunately the precise rate of loading agreed is for present purposes academic. The vessel did not berth and commence loading until 1 October 2003. On any view laytime had expired and the vessel was on demurrage before loading began.

7. The arbitrators found that the reason for the delay in berthing was normal port congestion. There are five berths at Port Hedland but only two at which a vessel of the size of Johnny K could load, the Mount Newman A and B berths. Those two berths, as was one other, were controlled by BHP who were the shippers of the cargo. The arbitrators found no evidence of any vessel arriving after Johnny K berthing before her. On the contrary they found that it looked as though the shippers made every effort to berth her as soon as possible, possibly because they were aware that there was a chance of the vessel being neaped given the quantity of cargo intended to be loaded.

8. The full cargo nominated to be loaded could have been loaded. The vessel would have been able to sail with the full contractual cargo on the high tide in the early hours of 2 October 2003. It follows that had she loaded within her laytime she could have sailed with a full cargo.

9. I infer from the arbitrators' findings that the high tide in the early hours of 2 October was the last tide "for approximately three weeks" or "for three weeks or so" on which this vessel, laden with 172,700 tonnes of cargo, could proceed through the exit channel to reach the open sea.

10. This problem apparently arises at certain stages of the tide cycle between springs and neaps. In the event the vessel was ordered or requested to sail having loaded only 156,855 tonnes of cargo, a shortfall of 15,845 tonnes. She in fact sailed on the high tide in the early hours of 3 October 2003. Further cargo was available to be loaded and the arbitrators found that loading could have been completed within a matter of hours. There was ample water for the vessel to lie safely at the berth in a fully laden condition. In that condition she would however, after missing the high tide in the early hours of 2 October, have had to wait for approximately three weeks for the next spring tides.

11. The arbitrators found that in order to use either of the two available berths a vessel of this size has to turn before berthing so that when she is fully laden she can proceed directly out to sea. The arbitrators also found that it would not have been possible for the vessel in her almost fully laden state to have left the berth, anchored somewhere either in or outside the port and then returned to one of the Mount Newman berths to complete loading once the tide cycle was favourable. The reason is because it would not have been possible for the Johnny K to have turned before reberthing. It was only in her unladen state that she was able to turn for berthing and there is nowhere she could have turned after loading or being almost fully loaded.

12. In paragraph of 22 of their Reasons the arbitrators record that in their claim submissions the owners said that the charterers ordered the vessel to sail before the full nominated quantity of cargo had been loaded. They also record that the charterers denied this, saying that the vessel had been requested to sail by the port authorities,

and that the owners had asked the charterers whether they wanted the vessel to remain at their time and expense until the full quantity had been loaded, failing which the vessel would sail and they would claim deadfreight. Finally the arbitrators record that in their reply submissions the owners accepted that the vessel had been ordered to leave the berth by the terminal/port authorities.

13. The evidence filed in support of and in opposition to the grant of leave to appeal threw up a debate whether the owners had, additionally, argued in the arbitration that, irrespective by whom precisely it may have been given, the order to leave the berth was an order for which the charterers are responsible. The written submissions show plainly that the owners did take this point, as Cooke J observed in granting leave to appeal.

14. Unfortunately the arbitrators have not made a precise finding on the question by whom the order to leave the berth was given. I have already referred to the fact that in paragraph 3 of their Reasons they find that the berth at which the vessel loaded was controlled by the shippers BHP. In paragraph 2 of their Reasons the arbitrators find that "the vessel sailed on orders from the terminal/port authorities (see paragraph 22 below), having loaded some 156,855MT of cargo, as against the nominated quantity of 172,700MT." It was in paragraph 22 of their Reasons that the arbitrators recorded that in their reply submissions the owners accepted that the vessel had been ordered to leave the berth by the terminal/port authorities. The arbitrators nowhere identify a port authority distinct from the terminal or terminal authority but in paragraphs 24, 28,33 and 54 they record, variously, that the instruction to vacate the berth (paragraph 24) or the order to sail (paragraphs 28, 33 and 54) was given by the port authority. I think it unlikely that they are referring to two separate orders. For the reasons which I have already set out it may be that an order to vacate the berth was tantamount to an order to sail since the vessel would in fact be unable to return to the berth. Although the arbitrators make no finding, there is as one would expect a distinct port authority which is called, unsurprisingly, Port Hedland Port Authority. In fact, as evidence filed by the charterers in opposition to the application for leave to appeal shows, the port authority owns and operates the two berths of five situated within the inner harbour which are not controlled by BHP.

15. At paragraph 51 of their Reasons the arbitrators find that it was necessary for the vessel to sail to avoid being neaped. Paragraph 24 is a critical paragraph and I set it out in full: - *"In any event, we do not think that the Charterers can be held liable for the instruction to vacate the berth given by the port authorities and that at the end of the day was the real reason for the vessel sailing. Even had they wanted to (and from a commercial perspective, it would have been unrealistic for them to want to block the use of one of the only two berths that could take ships of this size) the Charterers could not have prevailed against the wishes of the port authorities."*

16. Paragraph 24 of the arbitrators' Reasons is in some respects puzzling. On the face of it the reference to "they" and "them" in the second sentence is a reference to the charterers. It is not immediately obvious to me why the port authorities should have had an interest in the matter distinct from that of the operators of the terminal. One reason could I suppose be safety – it might not be acceptable to have a vessel in the port in a condition in which she could not if required leave on the next high tide. However that is speculation on my part and may in any event be inconsistent with the arbitrators' finding at paragraph 20 of their Reasons that the vessel could have remained at the berth fully laden waiting for the next spring tides. I am not sure whether this finding embraces within it what would be permitted as well as being an observation upon the available depth of water at the berth. Mr Kenny for the charterers suggested that the port authority might have an interest in maintaining throughput of vessels in the port so as to maximise the paid employment of their tugs and stevedores and other facilities at the port. That is speculation on his part. In any event there is no finding by the arbitrators that the port authority provides tugs or stevedores and I do not know what the position is.

17. In short there is no clearly and consistently expressed finding by the arbitrators on the question by whom the order to sail was given. There is also no reason found for the giving of the order over and above the finding that it was necessary to avoid the vessel becoming neaped. Thus it is neither found that the real reason underlying the order was a commercially motivated desire not to have the berth blocked and unusable for three weeks nor that the port authority, as distinct from the terminal operator, had reasons connected with the discharge of its administrative functions for requiring the vessel to leave the berth and the port.

18. I set out the remaining relevant paragraphs of the award: -

> *"23. Had she remained at the berth, loading could have been completed within a matter of hours (and would have been completed, since we are satisfied that despite what the Owners say, there was no shortage of cargo) and with completion of loading, demurrage would have ceased. In the absence of any breach by the Charterers of the safe berth warranty, the cost of the subsequent delay would prima facie have fallen to the Owners, as would any liability to the owners of the berth in continuing to occupy it after loading had been completed.*
>
> *28. We accept of course that the charter provides for the Owners to specify that up to 10% more or less cargo above the basic intake be loaded and that the Master asked for 172,700 mt, that is 1.59% above the basic figure. Clearly as we have indicated above, the reason why the nominated cargo was not loaded was because had it been, the vessel would have been unable to sail for approximately 3 weeks and it was the Owners' responsibility to ensure that the quantity of cargo they sought could be loaded. In any event, as we have already pointed out, it was the port authorities that ordered the vessel to sail.*
>
> *29. We do not believe that the charterers can be blamed in this instance for the failure to load the quantity originally sought by the Master.*
>
> *31. We do not believe that there was a failure by the charterers, or those for whom they are responsible, to make a full cargo available for loading, either when the vessel became an arrived ship or subsequently. That it was not*

loaded within the allowed laytime (indeed loading did not commence until after demurrage began) does not give to any remedy other than the payment of demurrage.

*32. We were referred at some length to the well known case of **Aktieselskabet Reidar v. Arcos Ltd** [1926] 25 L1.1. Rep. 513, a decision of the Court of Appeal and the principles enunciated therein.*

33. Suffice to say, we are satisfied that that case remains good law. Whether to bring themselves within those principles, the Owners must demonstrate a separate breach of some other contractual provision other than the obligation to load the intended cargo within the agreed laytime or simply that the Owners must show that they have suffered two distinct heads of damage, the second being of a separate type, which was not covered by the demurrage rate, is in this case academic. However it is viewed, the loss said to have been suffered by the Owners, other than the delay which is covered by the demurrage provision, did not arise from any fault on the part of the charterers. At the end of the day, the order to sail was given by the port authorities and the Charterers cannot be blamed for that decision."

19. In the light of these findings and discussion the arbitrators rejected the owners' claim for deadfreight/damages. As I read it their reason for so doing was that they did not regard the owners' loss in that regard as having been caused by any breach of contract by the charterers. They held that the owners' loss was caused by an order of the terminal/port authorities.

20. The owners put forward essentially two grounds of appeal. They say that the arbitrators were bound to find in accordance with the decision of the Court of Appeal in ***Aktieselskabet Reidar v. Arcos Ltd*** that the charterers were liable to pay deadfreight or damages in a like sum. They also say that the arbitrators were wrong to hold, if they did, that the charterers were not responsible for the order of the terminal/port authorities having found as a fact that the berth at which the vessel loaded was controlled by the shippers. In developing these arguments Miss Clark for the owners submitted that the arbitrators failed to address themselves properly to the question of causation. If they had done, so she submitted, they would have found that the order to sail was itself caused by the charterers' failure to load the cargo within the laytime permitted. On the second question she submitted that it is an obvious inference that the vessel was ordered to leave so that the berth would not be blocked. Miss Clark points to the fact that, as the arbitrators find, the charterers unsuccessfully argued that the shippers' loading terms were incorporated into the charterparty. Those terms provide, as the arbitrators find at paragraph 51 of their Reasons, that the loading terminal may cease loading if, as in the present case, it is necessary that the vessel sail to avoid being neaped. That tends to suggest, submits Miss Clark, that the order to sail was a commercially inspired decision, not something done by the port authority in the ordinary exercise of its administrative functions.

21. Mr Kenny for the charterers accepted that if the order to sail had in fact been given by the shippers, BHP, then the arbitrators' award cannot stand. However, he submitted, the use of the word "terminal" by the arbitrators was apt to mean either the shippers or the port authority. The arbitrators in fact found, so he submitted, that the order was given by the port authority.

22. Mr Kenny also submitted that the award could be upheld on other grounds, on the basis that even if the order to sail was one for which the charterers were responsible, still the owners' loss was effectively caused by their own breach of contract either in failing to keep the vessel available to load a full cargo or because they were in breach of their contractual undertaking that Port Hedland was a place where the vessel could safely perform all the owners' obligations. The first of these arguments founders at least upon the arbitrators' finding that the vessel was ordered to leave. The second argument is in my judgment misconceived. Even if the owners did so warrant, there was no breach. As the arbitrators record at paragraph 2 of their Reasons there was and is no suggestion that a requirement to wait for three weeks at the berth, had that been permitted, would have frustrated the commercial purpose of the charterparty. The arbitrators point out in paragraph 23 of their Reasons that the cost of such delay would prima facie have fallen to the account of the owners, since the obligation to pay demurrage would have ceased and, although the arbitrators do not expressly say so, the demurrage code represented the owners' only avenue of redress so far as concerned loss of time consequent upon the charterers' breach of charterparty in failing to load within the permitted laytime.

23. In my judgment the decision in ***Reidar v. Arcos*** is not determinative of the dispute in owners' favour. In that case there was no question of the vessel waiting since, unless she could arrive at an UK port to which the Master expected to be and was in the event ordered before 30 October, it was unlawful until the following summer for the Master to carry the entire cargo nominated. There was no suggestion that waiting partly laden over the winter at Archangel was either possible or sensible. Had the question arisen it would no doubt have been found that such an exercise would frustrate the commercial purpose of the charterparty. There has been much debate over the years as to the true ratio of the decision in ***Reidar v. Arcos***. Perhaps the most comprehensive discussion is to be found in the judgment of Potter J in ***Richco International Ltd v. Alfred C Toepfer International GMBH "The Bonde"*** [1991] 1 Lloyd's Rep.136. Like the arbitrators, I consider that this debate is for present purposes academic. In ***Reidar v. Arcos*** it was held that had the charterers loaded at the agreed rate the entire nominated cargo would have been on board in sufficient time to allow the vessel to reach a United Kingdom port on or before 30 October. At least two analyses are possible. One analysis is that the charterers' breach in failing to load at the agreed rate caused the vessel to sail without a full cargo. Another analysis is that it was the charterers' own breach in this respect which put it out of their power to perform their independent obligation to load a full and complete cargo. On neither analysis is there any difficulty of causation – the vessel could not lawfully have carried more cargo nor was it suggested that she should wait until she could, and so it could not

successfully be argued that it was the act of the owners in sailing without waiting for a full cargo to be loaded which gave rise to the loss.

24. Here it is the case that had the charterers loaded the cargo at the contractually agreed rate the vessel could have loaded the nominated cargo and sailed without delay. However the arbitrators have effectively found that the charterers' breach in that regard did not cause the vessel to fail to carry the nominated cargo. They have found that the cause of the vessel's failure to carry the nominated quantity was the order to sail, by whomsoever given. That was a conclusion which it was open to the arbitrators to reach. It was also in my judgment self evidently correct. The vessel could have loaded the nominated quantity had she waited at the berth for a period which would not have frustrated the charterparty. The arbitrators record at paragraph 21 of their Reasons that it is not suggested that such an exercise would have frustrated the charterparty. The arbitrators found at paragraph 20 that the vessel could have remained at the berth waiting for the next spring tides. There is no finding to the effect that in no circumstances would a vessel be permitted so to remain. The reason why the vessel sailed without the full cargo nominated is because she was not allowed to remain at the berth for the further three weeks which would be required in order to enable her both to load and to sail with that quantity. For these reasons the owners' reliance upon ***Reidar v. Arcos*** is in my judgment misplaced. The charterers' breach in failing to load at the required rate has been found not to have caused the owners the relevant loss. Further, the charterers' breach in this respect has not been found to have put it out of their power to load a full and complete cargo.

25. However the fact remains that the charterers had a contractual duty both to provide and to load the full nominated cargo. That was complemented by the owners' contractual duty to make the vessel available to receive on board the full nominated cargo. The charterers did have a full cargo available for loading. The reason why a full cargo was not loaded is that the owners did not remain at the berth long enough to receive it. However if the order to leave the berth is properly to be attributed to the charterers, then it is the charterers who have prevented the owners from fulfilling their contractual obligation. In that situation, the charterers having a contractual obligation not to prevent the owners from fulfilling their contractual obligation, the charterers have no answer to the claim for deadfreight, or for damages for failure to load a full and complete cargo, because in breach of contract they prevented the owners from making the vessel available to receive a full cargo. That is no doubt why Mr Kenny concedes that the award cannot stand if the order to sail was given by the shippers. However the logic underlying that concession is that the owners' claim must succeed if the order to sail is an order for which, as between owners and charterers, charterers are responsible, or to put it another way is an order which is to be attributed to them.

26. The arbitrators as it seems to me recognise and adopt this analysis when dealing with the charterers' counterclaim with which I am not directly concerned. Paragraph 54 of their Reasons reads: -

"54. Conventional wisdom has it that having elected to carry a specific figure, the Master is obliged to load that quantity. However in the present case, the Master certainly did not refuse to load more cargo. He was prevented from doing so by the orders of the port authorities to sail. To that extent, the Owners are right when they say they committed no breach of charter and were not responsible for the full nominated quantity of being loaded. In the same way, we have held that the Charterers are not liable to the Owners for the consequence of the vessel being ordered to sail, we similarly hold that the Owners are not liable to the Charterers for the failure to load the nominated quantity. It follows that any loss resulting from the port authorities' instructions, must lie where it falls. Consequently the Charterers' counterclaim fails."

27. This demonstrates that the critical issue in the case was, in my judgment, whether the order to sail was an order for which the charterers were responsible or which was to be attributed to them. The considerations which inform a decision on such an issue are discussed in a well known trilogy of cases ***Cosmar Compania Naviera S.A. v. Total Transport Corp. "The Isabelle"*** [1982] 2 Lloyd's Rep.81 (Robert Goff J) affirmed by the Court of Appeal without additional reasons [1984] 1 Lloyd's Rep.366; ***Mediolanum Shipping Co. v. Japan Lines Ltd "The Mediolanum"*** [1984] 1 Lloyd's Rep.136 (C.A.) and ***Newa Line v. Erechthion Shipping Co. S.A. "The Erechthion"*** [1987] 2 Lloyd's Rep.180, Staughton J.

28. Paragraph 24 of the arbitrators' Reasons contains a clear holding or finding that the charterers cannot be held liable for the instruction to vacate the berth given by the port authorities. It may be that the arbitrators meant by this that it was not an order for which the charterers were responsible, but the two concepts are not identical. I have already pointed out that despite the reference in this paragraph of their Reasons to an order given by the port authorities there is no clearly and consistently expressed finding by the arbitrators on the critical question by whom the order to sail was in fact given. Moreover as I have also already pointed out there are some puzzling features of paragraph 24 of the Reasons. In paragraph 33 of their Reasons the arbitrators say that the owners' loss did not arise from any fault on the part of the charterers and that the charterers cannot be blamed for that decision. With respect I am not sure that that reflects the correct approach either. The owners' loss could equally be said to have arisen without any fault on their part, as indeed the arbitrators effectively observe at paragraph 54 of their Reasons. The question is not whether the charterers can be blamed for the decision by whomsoever it was made but rather whether that decision is one which, as between the two contracting parties, is to be attributed to them or for which they are responsible.

29. Although the arbitrators refer in four places to the order to sail having been given by the port authorities the position is confused by their also referring on two occasions to the relevant order as emanating from the terminal/port authorities. Furthermore the fact that the order may have been given by the port authority is not in

itself determinative of the question whether it is an order for which the charterers are responsible. The order may for example have been inspired by the shippers although in fact given by the port authority. If the order was in fact given by the terminal and if by the terminal is meant BHP then it is conceded that the award cannot stand, the reason being that that would be an order for which the charterers are responsible.

30. In opposing the grant of leave to appeal the charterers argued that no point was taken before the arbitrators that the shippers were responsible for the order to leave the berth, as opposed to the port authorities, and it was for this reason that "the tribunal did not make any factual findings as to whether it was the shippers or whether it was the Port who had given that order" – see Witness Statement of Clive Aston, paragraph 21(2). At paragraph 20 of the same Witness Statement Mr Aston says that until the application for permission to appeal, the owners never advanced an argument that it was the shippers who ordered the vessel off the berth or that this order was given for and on behalf of the charterers. The latter is not of course the right question to ask. In granting leave to appeal Cooke J observed that the owners clearly had argued in their written submissions that the charterers were responsible for the action of the shippers/terminal/port authorities. With some reluctance I have come to the conclusion that the arbitrators may not have addressed themselves to this question. If they did address themselves to this question, they may not have directed themselves correctly by reference to the appropriate considerations, as discussed in the trilogy of cases to which I made reference at the end of paragraph 27 above. At all events, it is not clear from their Reasons that they have done so.

31. Subject to any further argument which the parties may wish to advance in the light of my conclusions I believe that the appropriate course is that I should exercise my power under s.69(7)(c) of the Arbitration Act 1996 to remit to the arbitrators for reconsideration in the light of the court's determination that part of their award wherein they dismissed the owners' claim for deadfreight/damages together of course with such parts of their award as to costs which are consequential upon their dismissal of the owners' claim. In so doing I should of course make it clear, although two such experienced arbitrators will well understand, that it is perfectly open to them to reach the same ultimate conclusion as that to which they first came.

Miss Geraldine Clark (instructed by Messrs Middleton Potts) for the Claimants
Mr Julian Kenny (instructed by Messrs Swinnerton Moore) for the Respondents