JUDGMENT : The Hon. Mr Justice Langley Commercial Court. 22nd November 2000

INTRODUCTION

1. This is an appeal from the Second Interim Final Award of a panel of 3 Arbitrators dated 14 September 1999. Permission to appeal was granted by Toulson J.

2. The dispute arises out of a charterparty made between the Applicant Charterers and the Respondent Owners dated 13 December 1996 for a voyage from the Arabian Gulf to the US Gulf.

3. Loading of a cargo of crude oil was completed at Al Bakr, Iraq, on 18 December 1996. On 25 December 1996 the vessel suffered a main engine breakdown. Thereafter it was unable to perform the remainder of its voyage at 11 knots, the speed referred to in one of the clauses in the charterparty which lies at the root of the present dispute.

4. As a result the parties varied the charterparty so as to allow for discharge in South Africa. The vessel arrived at Saldanha Bay, South Africa, on 28 February 1997 and discharged there between 5 and 9 March 1997.

5. Various disputes arose between the parties. An arbitration was commenced, and on 15 August 1997 the arbitrators made an Interim Final Award in favour of the Owners in respect of their claim for freight.

6. By an order dated 20 May 1999 the arbitrators ordered that two further issues be tried as preliminary issues. After a hearing on 3 September 1999 the arbitrators published their Second Interim Final Award on 14 September 1999 addressing those issues.

7. The two issues, as set out in Recital B to the award are:
   1. Whether the "Leonidas" failed to perform a laden passage at 11 knots weather and safe navigation permitting as warranted in Clause 20 of the Charter Party?
      The Tribunal held that the answer to this question was "No".
   2. Whether the matters pleaded in paragraph 19 of the Points of Reply (Hague Rules exceptions) are capable of constituting a defence to a claim for damages for breach of an express warranty?
      The Tribunal held that the answer to this question was "Yes".

8. The Charterers appeal on both issues.

THE TERMS OF THE CHARTERPARTY

9. The relevant terms of the Charter Party were as follows:

   PREAMBLE

   IT IS THIS DAY AGREED .... that the transportation herein provided for will be performed subject to the terms and conditions of this Charter Party, which includes this Preamble and Part I and Part II. In the event of a conflict, the provisions of Part I will prevail over those contained in Part II.

   PART I

   ....

   M. Special Provisions:

   Additional Clauses 1-20, as attached, are deemed to be incorporated within this Charter Party.

   ....

   ADDITIONAL CLAUSES

   ....

   20. Scanports Clauses 1-47, dated 1985, as amended and attached are deemed to be incorporated within this Charter Party.

   SCANPORTS CLAUSES 1985 1/47

   ....

   20. SPEED

   VESSEL WILL PERFORM A LADEN PASSAGE AT 11 KNOTS

   WEATHER AND SAFE NAVIGATION PERMITTING.

   (I shall refer to this Clause as "the Speed Warranty")

   PART II

   ....

   20. ISSUANCE AND TERMS OF BILLS OF LADING

   ....

   (b) The carriage of cargo under this Charter Party and under all Bills of Lading issued for the cargo shall be subject to the statutory provisions and other terms set forth or specified in sub-paragraphs (i) through (vii) of this clause and such terms shall be incorporated verbatim or be deemed incorporated by the reference in any such Bill of Lading. .....

   (i) CLAUSE PARAMOUNT. This Bill of Lading shall have effect subject to the provisions of the Carriage of Goods by Sea Acts of the United States, approved April 16, 1936 .... The applicable Act, ordinance or legislation (hereinafter called the "Act") shall be deemed to be incorporated herein and nothing herein contained shall be deemed to be a surrender by the Owner of any of its rights or immunities or an increase of any of its responsibilities or liabilities under the Act. If any term of this Bill of Lading be repugnant to the Act to any extent, such term shall be void to that extent but no further. (I shall refer to this as the Clause Paramount)

10. The Arbitrators chose to deal with the second of the two issues first. They concluded that although after the breakdown the vessel could not perform a laden passage at 11 knots, reading the charterparty as a whole there was no conflict between the two clauses (para 13) and it was still open to the Owners to claim to be relieved from liability if they had complied with their Hague Rules' obligations.

11. It was the Charterers submission before the Arbitrators and before me that the Speed Warranty was an absolute warranty (subject only to the two exceptions of weather and safe navigation) to the effect that the vessel would perform the voyage at 11 knots and that, as it was common ground that after the engine failure it could not do so, the warranty was broken. Mr Collins placed importance on the word "*will",* the fact that the warranty appeared in a voyage charterparty which was an immediate spot fixture, and on the existence of the two express limited exceptions. As to the Clause Paramount, it was Mr Collins submission that it could not affect the true construction of the Speed warranty nor a "*tailor-made"* term agreed between the parties, a factor which was also reflected in the express provision that the provisions of Part 1 were to prevail over those in Part 2 "in the event of a conflict". Finally he submitted that in any event as Section 5 of the United States Act expressly provided for a carrier to be at liberty to increase "*his responsibilities and liabilities*" above those provided by the Act it should be concluded that it had done just that by the Speed Warranty.

12. Mr Eder's submission for the Owners was simply that it was axiomatic that the charterparty should be construed as a whole, that doing so it was possible to give effect and meaning to the Speed Warranty and the Clause Paramount so that the Speed Warranty applied subject to the exceptions of the Clause Paramount if but only if they were otherwise applicable. He also submitted that it would be a remarkable thing for an Owner to agree that come what may apart from weather and safe navigation a vessel would complete a voyage at a speed of 11 knots.

13. I was referred to two authorities. Perhaps unsurprisingly each counsel relied on them to support their submissions.

14. In ***Marifortuna Naviera SA v Government of Ceylon*** [1970] 1 Lloyds Rep 247 Mocatta J held that an express "tailor-made" clause (Clause 21) providing that the Owners should be *"responsible for*" expenses incurred by a failure of the vessel to be ready to load when notified prevailed over the paramount clause in the particular charterparty. The failure was the result of an excepted cause (negligent navigation) but the paramount clause contained no "*non-repugnancy*" provision nor an express incorporation provision of the type of the present clause. Had it done so, as Mr Eder submits, and Mr Collins accepts, the result would probably have been different (see in particular at pages 255-6). Further it was an important part of the reasoning of Mocatta J that if the paramount clause were to prevail there was *"little or no practical value to be attached*" to clause 21.

15. Although Mr Collins submitted that the same applied in this case I agree with Mr Eder that it does not. A failure of the vessel to make 11 knots for reasons not the subject of any of the Hague Rules' exceptions would be a breach of the charterparty. The example used in argument was where it was shown that the vessel in normal operation was only capable of a laden speed of 10 knots.Whether the Speed warranty is absolute as Mr Collins contends or only a capacity warranty it has purpose.

16. The second authority is the ***Satya Kailash*** [1984] 1 Lloyds Rep. 588. In that case the chartered vessel damaged the vessel it was engaged to lighten by negligent navigation. The charterparty contained a Clause Paramount (Clause 24) referring to the 1936 United States Act "which shall be deemed to be incorporated herein". The Clause Paramount was held to be effective to exclude claims for the damage.

17. The charterparty also contained Clauses (Clauses 39 and 52) which provided that the chartered vessel would be fully seaworthy on delivery. It was argued for the claimants in the context of a submission (which was rejected) that the 1936 United States Act was not effectively incorporated into the charterparty that the submission was supported by the presence of the two clauses imposing unqualified obligations of seaworthiness. Robert Goff LJ considered the submission at page 594. He said:

> *...in our judgment these clauses (39 and 52) cannot affect the construction to be placed on Clause 24 as such. The most that could be said of these clauses is that, as typed clauses, they might be given precedence over the printed clause paramount in Clause 24 so as to override pro tanto the provisions of s 4 (1) of the United States Act as incorporated into the charter. We cannot see that the fact that the parties have thought fit to provide for an absolute warranty of seaworthiness in these clauses can otherwise affect the incorporation of the United States Act into the charter by clause 24. If anything their presence presupposes that the qualified seaworthiness obligation under sections 3(1) and 4(1) of the United States Act would otherwise be applicable.*

18. In these dicta, Robert Goff LJ was expressly addressing a direct and irreconcilable conflict between a typed clause and a printed clause. In my judgment that is to beg the first question which arises in this case and which was I think the question the arbitrators also addressed. Unless Mr Collins can establish such a conflict in this case, I do not see how he can derive assistance from these dicta. It also demonstrates the dilemma for Mr Collins which I think became apparent during the submissions. If there was no conflict, as he said first was his primary submission, then it acknowledged the two clauses could properly be reconciled. If there was a conflict it presupposed that reconciliation was not possible because the Speed Warranty had to be construed as an absolute warranty despite Mr Eder's submissions that it would be a remarkable agreement for an Owner to make.

CONCLUSION

19. Whilst I, like the Arbitrators, think there is force in Mr Collins' submissions on the proper construction of the Speed warranty addressed in isolation and I accept that tailor-made clauses will normally prevail over typed clauses

that is in my judgment only so if there is indeed a "conflict" between the two (as this charterparty also expressly provides). The courts will, however, seek to construe a contract as a whole and if a reasonable commercial construction of the whole can reconcile two provisions (whether typed or printed) then such a construction can and in my judgment should be adopted. The "*conflict*" can of course be found either as a matter of language or effect. In the ***Satya Kailash*** the Court was addressing a conflict of language. In the ***Marifortuna*** Mocatta J was addressing a conflict which resulted in an express clause being rendered without any practical effect.

20. In this case I accept Mr Eder's submission. In my judgment the Arbitrators were right both to address first the question whether the two clauses could and should be construed so as not to conflict and to conclude that they could. They can sensibly and commercially be read together so that the Speed Warranty is o apply as such but subject to the Owners establishing, if it be material, that the cause of the vessel failing to reach 11 knots was one or more of the statutory exceptions. If it were otherwise the Clause Paramount would be emasculated in a manner which is contrary to its express terms. I do not think the wording permits any reliance on Section 5 of the United States Act as it says in terms that the Owner is not to be deemed to be surrendering any of its rights or immunities under the Act. In any event Clause 5 is of no relevance if the Speed Warranty and the Clause Paramount are not in conflict.

21. If (as I think it may well be) that is to read the Speed Warranty as in effect a provision that the vessel is capable of a speed of 11 knots on "a" laden voyage rather than an absolute warranty that it would perform the chartered voyage at that speed come what may (except bad weather or navigation) then in my judgment such a result is both legitimate and indeed commercially appropriate. Not only do I agree with Mr Eder that it would be remarkable for an Owner to make the agreement for which Mr Collins contends but I cannot conceive why an Owner who did so would choose to except from it only weather and navigation conditions but not other matters which could arise without any semblance of fault on his part.

22. For these reasons as I indicated at the end of the hearing this appeal will be dismissed, and I will hear the parties on any orders as to costs they may seek. I should record that I also declined to give permission to appeal as I did not consider that the matter was one which fell within Section 69(8) of the Arbitration Act 1996.

Mr M. Collins QC ...instructed by Messrs Stockler Charity for the Claimants)
Mr B. Eder QC ...instructed by Messrs Holman Fenwick & Willan for the Defendants)