Cero Navigation Corporation v Jean Lion & CIE [2000] Int.Com.L.R. 01/11

JUDGMENT : The Hon Mr Justice Thomas. Commercial Court. 11th January 2000

Introduction

1. There is before the court an appeal on the question of whether on the proper construction of clause 28 of a charterparty on the standard form of the Sugar Charterparty 1969 a strike occurring during the running of the laytime interrupted the running of laytime.

2. The owners had chartered their vessel *Solon* to the Charterers under a charterparty on that standard form dated 11 July 1996 for a voyage from Paranagua, Brazil to Algiers, Algeria with a cargo of sugar. The vessel arrived at Paranagua on 30 July 1996 but did not commence loading until 8 September 1996; loading was not completed until 26 September 1996. There is an underlying factual dispute as to whether the loading port was affected by strikes and, if so, when the strike occurred.

3. The parties agreed to refer their dispute to the sole arbitriment of Mr Schofield, a distinguished London Maritime Arbitrator and the author of a much used text book on laytime and demurrage. It was agreed that he should determine the following preliminary issue: "***Whether on its true construction, a strike within the meaning of clause 28 operates so as to interrupt laytime***".

4. It was accepted by the charterers that if the strike had commenced after the expiry of the laydays and therefore whilst the ship was on demurrage, clause 28 would have provided no protection and demurrage would have been payable. That followed from the decision of Hobhouse J in the ***Forum Craftsman*** [1991] 1 Lloyd's Rep 81 on the same clause of this same form of charter. The question in issue between the parties therefore was whether clause 28 operated to interrupt laytime if the strike prevented or delayed the loading of the vessel during the actual laydays.

5. In a very clearly reasoned award which analysed the cases in careful and helpful detail, the arbitrator concluded that clause 28 operated so as to interrupt laytime in the event of a strike or other disruption delaying the loading or discharging of the vessel. The arbitrators had also formed the same view in the ***Forum Craftsman*** , but the court did not consider that view on the appeal. However in an award made by other London arbitrators (summarised in Lloyd's Maritime Newsletter 481) other arbitrators had held that clause 28 did not interrupt the running of laytime; those arbitrators noted that their decision might run counter to a widely held belief but it followed not only from their view of the wording of the charterparty but also from the decisions of the courts in the ***Kalliopi A,*** [1988] 2 Lloyd's Rep 101, ***The Forum Craftsman*** **and** ***The Lefthero*** [1992] 2 Lloyd's Rep 109 on whether general exceptions clauses excused the charterers' liability in demurrage. They stated that if the market did not like the result, then the answer was to change the wording of the standard form. This the market has done by the Sugar Charterparty 1999 form, though the 1969 form is still in use.

The relevant clauses of the charterparty

6. The printed form of the charter contained at clause 8 a general exceptions clause in favour of the owners broadly applicable to maritime perils. Clause 18 provided:

   ….. *In the event of a breakdown of a winch or winches by reason of disablement or insufficient power, the laytime to be extended pro-rata for the period of such inefficiency in relation to the number of working gangs available. If on demurrage, time lost pro-rata to be deducted from same.*

7. The laytime provision for the loading port was clause 19; it provided:

   At loading port, laytime for loading to begin at the next regular working period commencing before 3pm after written notice of readiness to receive cargo has been tendered to Agents in ordinary office hours, whether in berth or not, Saturday afternoon, Sundays (or local equivalents) and holidays excepted.

   Laydays at the average rate of 750 metric tons calculated on gross weight provided vessel can receive at this rate, per weather working day of 24 consecutive hours, time from noon Saturdays to 8am Mondays (or local equivalents) and from 5pm day preceding a holiday until 8am next working day excepted, even if used, shall be allowed to the said Charterers, for loading and waiting for orders. Time employed in shifting anchorages or loading places within the same port or its jurisdiction not to count as laytime, and shifting expenses to be for Owners account.

   The provisions for laytime at the discharging port (clause 22) were materially similar.

8. Clause 28 entitled "Strikes and Force Majeure" provided as follows:

   Strikes or lockouts of men, or any accidents or stoppages on Railway and/or Canal, and/or River by ice or frost, or any other force majeure causes including Government interferences, occurring beyond the control of the Shippers, or Consignees, which may prevent or delay the loading and discharging the vessel, always excepted.

9. Clause 40, a typed provision, stated:

   At loading and/or discharging port(s), Master has the right to tender Notice of Readiness by cable from customary anchorage and in case of congestion only, when time to count as per Charter-Party whether in berth or not, whether in port or not, whether in Free Pratique or not, whether Customs cleared or not but always provided refusal to grant Free Pratique and/or Customs clearance is not caused by problems with Master and/or Crew.

The approach to issues of construction

10. In the ***Kalliopi A*** [1988] 1 Lloyd's Rep 101, Staughton LJ set out his view as to the correct manner in which such questions of construction of this type of charterparty clause should be approached:

As is usual in such cases we were referred to quite a number of decisions on different contracts containing different wording. It must, I suppose, be accepted that the interpretation of a charterparty cannot be conducted solely on the basis of the ordinary English meaning of the words which the parties have used in their contract. Regard must be had to what the same or similar words or phrases have been held to mean in the past. As I ventured to say in ***The Radauti*** *(at p.278):*

> *Once a particular clause, phrase or word has received an authoritative interpretation from the Courts, it is thought right to follow that interpretation in other cases in the belief that the parties to subsequent contracts will have had it in mind when concluding their bargains or at least their legal advisers will have considered it when deciding whether to pursue a dispute subsequently.*

The decisions on the same or similar wording

11. The owners contended that it was clear from the decisions in ***the Kalliopi A,*** the *Forum Craftsman* and the ***Lefthero*** that as a matter of principle, general exceptions clauses which were claimed to operate as exceptions clauses for laytime and demurrage had to be clearly expressed if they were to have that effect; they were subject to the principle that an ambiguous clause was no protection whether the issue was interruption of laytime or liability for demurrage. They also contended that the clauses considered in those cases were materially similar to the clauses in the present charterparty and it followed from those decisions that laytime was not interrupted. The charterers did not accept either of these contentions. It is therefore first necessary to examine those cases.

12. The first in point of time was the ***Kalliopi A***. She was delayed from berthing and discharging by congestion at the port of Bombay; clause 36 of the charter provided that " *the act of God, restraint of Princes ……. and all and every other avoidable hindrances which may prevent the loading and discharging always mutually excepted.*" The charterers conceded that the laydays expired whilst the vessel was waiting and delayed by congestion; they conceded that congestion did not interrupt the running of laytime under clause 36. Nonetheless, they contended that clause 36 did excuse the charterers from their liability in demurrage for the same congestion which continued after the laydays had expired. They made the concession because under the laytime provisions of the charter, laytime was to commence on arrival "*whether in berth or not*" – a provision directed at making laytime run even if there was congestion. The result of the concession was that the parties had plainly made, on that basis, what was described as a "*bizarre contract*". Not surprisingly the Court of Appeal rejected the charterers' contention. Staughton LJ did so on the basis that the clause did not make it sufficiently clear that the charterers were to be exempted from liability for periods when the vessel was already on demurrage. He applied the general principle which he expressed in these terms: "*It is established law that* "***When once a vessel is on demurrage, no exceptions will operate to prevent demurrage continuing to be payable unless the exceptions clause is clearly worded to have that effect***" *… See Scrutton on Charterparties ……This is a rule of construction imposed on the parties by law. It is sometimes expressed, not wholly accurately, in the shibboleth "Once on demurrage always on demurrage". It is described by Lord Diplock in* ***The Dias*** *as but an example of the general principle that when a party is in breach of contract an ambiguous clause is no protection*"

13. After referring to another justification for the rule – that if the ship had been discharged within the laydays, she would not have been in a position of vulnerability to the peril claimed to operate as an exception - he stated that that reasoning was not applicable to that case: "*The vessel was already affected by congestion during the laytime; the charterers' breach in failing to discharge her within the laydays did not of itself cause her to be exposed to any subsequent peril. However, I do not regard that as a ground for holding the general rule to be inapplicable*"

14. However, Staughton LJ stated expressly that he had not considered whether the words "mutually excepted" in clause 36 interrupted the running of laytime; nor whether, if the clause had that effect it could do so where the peril in question was commercial congestion and the charter contained a "*whether in berth or not*" provision.

15. The second of the three cases was the decision of Hobhouse J in the *Forum Craftsman.* As I have mentioned, the charterparty was on the Sugar Charterparty 1969 and clause 28 was unamended, as in this present case. Hobhouse J considered that clause 28 was very similar to the general exceptions clause in ***The Kalliopi A*** (though that clause had referred only to prevent); and that the case was in substance indistinguishable.

16. The dispute under the charterparty of ***the Forum Craftsman*** related to a period when, after the expiry of the laydays, the vessel was ordered off berth by the port authorities. The argument advanced by the charterers (which is relevant to the present dispute) was that in those circumstances the discharge of the vessel was delayed by government interference beyond their control; that therefore under the terms of clause 28 there was no liability for demurrage. Without examining the facts, the arbitrators rejected that submission as a matter of law, holding that although clause 28 operated on the running of laytime, it did not affect the accrual of demurrage once the charterers had breached their obligation to load or discharge the vessel within the permitted laydays. As the vessel was on demurrage when it was alleged the order was given, clause 28 provided no defence to a claim for further demurrage.

17. Hobhouse J upheld their decision that the clause did not exclude liability in demurrage. He held that the parties in entering into the charterparty had shown in the clauses (which were not materially different to the present charterparty) a consciousness of the distinction between laytime exceptions and exceptions which affected the liability in demurrage, but that they have nevertheless expressed in clause 28 in general and unqualified terms and they have not expressly referred to the liability for demurrage in this clause.

18. After referring to the principles applying to the construction of laytime and demurrage provisions, he concluded:

"Accordingly the Courts have declined to construe exceptions clauses as qualifying the obligation to pay demurrage unless clearly so expressed; a clause which can on its ordinary language, read in the context of the charterparty in which it appears, sensibly be construed as applying to other obligations or liabilities will not be construed as relieving a charterer of his liability to demurrage.

The subject matter of cl.28 is causes which may prevent or delay loading or discharging. The application of this clause therefore could include a period during which demurrage was running because there is still a continuing obligation to discharge during that period. But likewise it must also be read as having a wider application. It covers cases of prevention as well as delay; it covers liabilities in unliquidated damages, as for example damages for failure to load or damages for detention; it was accepted before me (although this might be questionable) that it could also protect owners as well as charterers. It follows that the subject matter of the clause does not itself make it clear that it is intended to exclude a liability in demurrage.

If such an implication is to be found it must be by reason of the inclusion in the clause of the words "always excepted". The word "always" imports an absence of qualification and is often used for that purpose in the drafting of exceptions clauses. However in the present context the clause has to demonstrate a clear intention that the exception should apply even when the vessel is on demurrage whether or not the operation of the peril arises from the earlier breach by the charterer of his obligation to discharge within the laydays. For a clause to have such a clear intention requires language that leaves one in no doubt that that is what the parties intended. Clause 28 falls short of demonstrating such an intention. It could have said so in express terms; another clause in the same charter-party does so. It could have used language which was expressed in terms of liability which must apply after breach as in ***The John Michalos****. But the parties have not done either of these things. They have left their intentions in doubt.*

19. The arbitrator in the present case found it somewhat surprising that, if Hobhouse J had disagreed with the view of the arbitrators that the clause did operate as an exception during laytime, he did not say so. However, I do not consider that necessarily follows for he was concerned in the appeal only with the question of whether an excepted event arising after the expiry of the laydays operated as an exception to the obligation to pay demurrage.

20. Both of these decisions were considered by the Court of Appeal in the ***Lefthero.*** She was chartered to carry a cargo to Iran at the height on the Iran- Iraq war. The charterparty contained a number of special provisions including a clause which provided that laytime should run continuously from arrival at Bandar Abas at the entrance to the Gulf until she passed back on the return voyage; clause 28 of the charterparty provided that neither the Owners nor the charterers should *"be responsible for any loss or damage or delay or failure in performing hereunder, arising or resulting from … restraint of princes"*. The vessel was ordered to Bandar Khomeini at the head of the Gulf , but was twice turned back by the pilot as she could not keep speed with the convoy; this happened before the laydays expired. She discharged at Bushire over a long period of time and substantial demurrage was claimed. The arbitrators found that the pilot's order to turn back was a restraint of princes within clause 28 and demurrage was not due in consequence for a significant part of the time she was discharging.

21. Their award was set aside by the Court of Appeal who held that the excepted peril of restraint of princes within clause 28 did not provide a defence to a claim for demurrage. Lloyd LJ who gave the leading judgment said he could see no relevant difference between the clause in the ***Lefthero*** and that in **the *Kalliopi A*** and rejected charterers' arguments to that effect. Accordingly the clause did not provide a defence to the claim for demurrage.

22. The charterers sought to draw a further distinction; they contended that the excepted peril (the restraint of princes) operated in the *Lefthero* before the laytime expired; the cause of the delay was therefore not the charterers' breach in detaining the vessel beyond the laydays but the excepted peril. On this basis they sought to distinguish both the ***Forum Craftsman*** and the ***Kalliopi A***. Although the Court of Appeal accepted that, as the *Forum Craftsman* was on demurrage when the excepted peril operated, it was distinguishable on this basis, in the ***Kalliopi A*** the peril was in operation during the laydays and the factual situation was the same as in the ***Lefthero;*** it was indistinguishable. Lloyd LJ continued:

"I can find no support for [charterers'] suggested distinction in Staughton LJ's judgment. Indeed the judgment is inconsistent with such a distinction. Having referred to the cases on which [the charterers] rely, Staughton LJ said at p 106, col 2 [in a passage which I have already set out]:

> *"That reasoning is not as Evans J observed, applicable to this case. The vessel was already affected by congestion during the laytime; the charterers' breach in failing to discharge her within the laydays did not of itself cause her to be exposed to any subsequent peril. However I do not regard that as a ground for holding the general rule to be inapplicable"*

So it is clear that the Court regarded the general rule as applicable even though the vessel was not already on demurrage when the peril operated"

23. This was the view he had taken in ***The Johs Stove*** [1984] 1 Lloyd's Rep 112; that charterparty, as he observed in the *Lefthero*, contained an almost identically worded general exceptions clause. That clause provided that neither the owner nor the charterers "*were to be responsible for any delay.. arising or resulting from strike*"; the ***Johs Stove*** arrived when there was congestion arising from a long strike. The charterers argued that the general exceptions clause operated as an exception on laytime; Lloyd J rejected that argument:

"I agree with the arbitrator that a general exceptions clause such as clause 19 will not normally be read as applying to provisions for laytime and demurrage, unless the language is very precise and clear."

The decision of the arbitrator

24. The arbitrator carefully considered all of these decisions (and others); he set out a series of principles which he considered emerged; I need not set them all out, but the following were of central importance:

AA: Whether a clause applies to limit the running of laytime or excludes liability for demurrage is essentially a question of construction.

BB. An ambiguous clause provides no protection in either case but simply because it covers more than one case does not necessarily make it ambiguous.

…….

"GG. Notwithstanding what was said in ***The Lefthero****, a greater degree of certainty that a clause extends to protect a party already in breach of his obligations to load or discharge within the prescribed time appears to be required in a demurrage exceptions clause without detracting from the general rule at AA*

Applying those principles, the arbitrator held that there was sufficient certainty about clause 28 to hold that it did apply to interrupt laytime.

The general application of the principle that an ambiguous clause is no protection

25. The owners submitted that there was nothing in principle or authority that supported what the arbitrator had said at GG; the charterers were under a primary obligation to load within the laydays and a secondary obligation to pay demurrage for exceeding that period. In ***Photo Productions v Securicor*** [1980] AC 827 Lord Diplock had stated at page 850 that an exclusion clause was "*one which excludes or modifies an obligation whether primary, general secondary or anticipatory secondary, that would otherwise arise under the contract by implication of law*"

26. Thus as a matter of principle it could not be said that less clarity was required to relieve the charterers from their primary obligation to load within the laydays than the clarity required to relieve them from their secondary obligation to pay demurrage for failing to do so.

27. The charterers submitted that there was a distinction. When an excepted peril operated when the vessel was on demurrage, then the charterer was already in breach of contract and so the exception had to be very clear. However, when an excepted peril operated during laytime, the charterer was not then in breach; the exception took effect by extending the time for performance so that the charterer continued not to be in breach of his obligation to load. It took effect in a manner similar to phrases such as "*time not to count*" which Hobhouse J had observed in **the *Forum Craftsman*** defined the obligation (see page 87 of the judgment). A provision which affected the obligation during the laydays was not in these circumstances an exceptions clause, but a clause which modified the performance; the words therefore did not have to be so clear, because the charterer was never in breach and did not need to be excused from the consequences of his breach

28. In my view the owners' submission is in substance correct. The rule "*once on demurrage always on demurrage*" can, as the cases point out, make for a lack of clarity; it is a phrase best confined, as Lloyd LJ suggested in the *Lefthero*, to the general proposition that the express exceptions to laytime do not apply when the vessel is on demurrage. When the question is whether a general exception clause applies to excuse performance of the relevant obligation during laytime or demurrage, the rule "once on demurrage always on demurrage" is not relevant; it is the general principle that an ambiguous clause is no protection which applies. That is because the issue is whether the clause excuses the charterer from his obligations under the charterparty; during laytime there is the primary obligation to load the vessel within the laydays and after the expiry of the laydays, although the primary obligation to load continues, there is the secondary obligation to pay demurrage for breach of the obligation to load within the laydays. In both cases the question is whether the clause is sufficiently clear to excuse the charterer from performance of the relevant obligation.

29. It appears from the ***Lefthero*** that a general exceptions clause similar to clause 28 will not excuse the obligation to pay demurrage, even if the event relied on began during the laydays. When the event started to operate, if it were to have the effect of extending the laydays, it would necessarily also have an effect on the obligation to pay demurrage, as the laydays would be extended for the appropriate period; the consequence would be that the obligation to pay demurrage would either never arise or be reduced by an amount equivalent to the extension of the laydays. It must therefore follow from the decision in the ***Lefthero,*** that if a similarly worded general exceptions clause does not excuse the payment of demurrage, it will not usually operate as a laytime exception. If it did it would in effect operate as an exception to the obligation to pay demurrage, but the decision in the *Lefthero* holds it does not. Thus, although in the ***Kalliopi A*** the question may have been left open as to whether the charterers were correct in making the concession that the general exceptions clause did not operate to extend the laydays, it follows from the decision in the ***Lefthero*** that it was indeed correct.

30. Furthermore, once it is accepted (as is set out in the second of the principles listed by the arbitrator) that the general principle that an ambiguous clause is no protection applies to exceptions to laytime and demurrage, then it must be a matter of construction whether, looking at the whole of the charterparty, there is under the clause in issue an exception from laytime or an exception from demurrage. The same degree of clarity must be required in each case.

Earlier decisions

31. Before applying these principles to the present charterparty, it is necessary to refer to two further decisions relied on by the charterers. The first was ***Crawford & Rowatt v Wilson, Son & Co*** (1896) 1 Com Cas 277 where there was a claim for demurrage at the discharge port. The charterparty set out the rate of discharge weather permitting;

demurrage was to be paid over and above the laydays; it then provided: "*The cargo to be taken from alongside at charterer's risk and expense. The Act of God, restraint of Princes and Rulers…. and all unavoidable accidents or hindrances in procuring, loading and/or discharging the cargo … always excepted.*" Prior to the vessel's arrival at the port of discharge, there was a rebellion at the port and discharge was delayed. The Court of Appeal held on the facts that the rebellion created a hindrance in discharging the cargo and that the charterers were not liable for demurrage. The judgments are solely concerned with the question as to whether there was a hindrance; as far as I can discern from the report there was no argument on whether the exceptions clause applied to laytime or demurrage; it was accepted it did. In these circumstances and in the light of the much more recent authorities, I cannot see how this case can assist the charterers.

32. The second case was ***Larsen v Sylvester*** (1908) 96 LT 94; the vessel was delayed by congestion for 9 days whilst waiting to load; she then loaded within the 84 hours allowed as laytime. The charterparty contained an exceptions clause which stated: *"the parties hereto mutually exempt each other from all liability arising from floods……and any other unavoidable accidents and hindrances of what kind soever beyond their control preventing or delaying the working, leading or shipping the said cargo occurring on or after the date of this charter until the actual completion of loading*" . The argument in all the courts was on the question as to whether congestion was an unavoidable hindrance within the meaning of the exception; it was found that it was and that demurrage was not payable. Again I do not see how this case assists the charterers in the light of the point actually argued and in view of the more recent authorities.

Clause 28

33. I therefore turn to apply the principles in accordance with the approach specified in the ***Kalliopi A*** , examining the words in the charterparty in the light of the authorities. As the disagreements in the awards of London Maritime Arbitrators show, it is not an easy question.

34. The charterers submitted that whereas clause 28 did not excuse the charterers from paying demurrage as it was not sufficiently clear to do so, it operated to extend the laydays; during the laydays clause 28 did not operate as an exceptions clause, but rather a clause that extended the time for performance. They relied on the distinction made in the speech of Lord Tucker in ***Fairclough Dodd & Jones v J.H. Vantol Ltd*** [1956] 1 WLR 136 at 143 where he said:

"Force majeure clauses are of different kinds. In the case of an exceptions clause, it is generally true to say that it only operates on the happening of an event which would otherwise result in a breach, but there is nothing to prevent the parties providing for an extension of time for performance or for a substituted mode of performance on the occurrence of a force majeure event whether or not such event would have prevented performance".

35. In my view clause 28 operated as an exceptions clause excusing what would otherwise be a breach and not as a clause that provided for an extension of time for performance. There is nothing in the language to suggest that it was anything other an exceptions clause; it used the words "*always excepted*". The clause plainly operated as an exceptions clause when the vessel was on demurrage; it would be a little odd if it operated differently during the laydays as there is no language within the clause to suggest that it could operate in two different ways. Furthermore where the parties had agreed in other provisions of the charterparty to extend laytime, they expressly said so. Thus I approach the question of construction on the basis that clause 28 was an exceptions clause.

36. The charterparty contained in clauses 18, 19, 22 and 40 clear provisions dealing with exceptions to laytime. For example in clause 19, provision was made for laytime to be extended if there was a breakdown of winches and for the opening of hatches not to count as laytime. Thus where there was to be an exception to the running of laytime clear language was used.

37. Although as a matter of language clause 28 is wide enough to provide an exception to laytime, it is clear, for the reasons expressed in the ***Forum Craftsman,*** that the clause covered other circumstances where loading or discharging was prevented and covered liabilities for unliquidated damages, where for example there was a failure to load. An example given in argument was that it would excuse charterers from liability for failing to provide a cargo where a government ban was imposed preventing the export of sugar before the vessel arrived to load. The clause would also protect the owners from a claim by charterers where a strike of the crew prevented the cargo being loaded. The fact the clause also referred to delay (as well as prevention) made no difference; in the ***Lefthero,*** the Court of Appeal approved the view of Hobhouse J that the decision in the ***Kalliopi A*** would have been the same if the clause had contained the words prevent or delay and not merely prevent. Furthermore in the ***Lefthero,*** Lloyd LJ added that he would not in any event have been deterred from reaching the correct construction of the charterparty by the need to give effect to every word of a mutual exceptions clause, especially where the clause was widely worded. In my view content can sensibly be given to clause 28 without it including an exception to the obligation to load within the laydays. Given the clear words used where the parties intended to provide for a laytime exception and the terms of clause 28, I do not consider the words of clause 28 make clear that it is intended to provide an exception to laytime.

38. However, quite apart from the wording of this charterparty, it is also necessary to have regard to the authorities on similar clauses which I have set out and particularly the *Lefthero*. In the ***Lefthero,*** the Court of Appeal decided that a similarly worded clause did not except the charterer from his liability to pay demurrage when the exception which was claimed to excuse the obligation to pay demurrage had begun during laytime. For the reasons I have set out, the effect of this decision must be that the exception also did not operate to prevent

laytime running. I cannot see any material distinction between that clause and clause 28 in the charterparty for this vessel. It is also clear that the Court of Appeal in that case considered that the ***Forum Craftsman*** could not be distinguished from the ***Kalliopi A*** on the basis that in the ***Forum Craftsman*** the period which was claimed to be excepted had begun only after the vessel was on demurrage. Thus, apart from the view I have formed on the language of the charterparty and clause 28, as a matter of authority, the present clause 28 (which is in substance similar to the clause in the ***Lefthero***) does not provide an exception to the running of laytime.

39. I therefore allow the appeal and remit the matter to the arbitrator.

Mr David Bailey (instructed by Jackson Parton) for the Appellants
Mr Michael Ashcroft (instructed by Turner & Co) for the Respondents