Tidebrook Maritime Corporation v Vitol SA of Geneva MT "Front Commander" [2005] Int.Com.L.R. 10/21

JUDGMENT : HIS HONOUR JUDGE MACKIE QC. Commercial Court. 21st October 2005

Introduction

1. This is a short point about the commencement of laytime when a vessel arrives before the first layday, arising under the standard form of Asbatankvoy voyage charter, with certain common additional clauses.

2. With admirable initiative and concern for saving costs Mr Davies and Mr Hickey, who appear for the parties , agreed to dispense with pleadings, disclosure of documents, witness statements and other procedural steps and following an order of Mrs Justice Gloster dated 16 August 2005 the case has proceeded on the basis of an Agreed Statement of Facts and Issues.

3. I first set out the Agreed Statement.

Agreed Statement of Facts and Issues

"1) By a fixture concluded on 17th December 2003 the Claimant Owners, Tide Brook Maritime Corporation ("Owners") let their vessel "FRONT COMMANDER" ("the vessel") to the Defendant Charterers, Vitol SA of Geneva ("Charterers").

2) The charterparty was based on an Asbatankvoy form with certain amendments and included the Vitol Voyage Chartering Terms, as amended 1st November 1999.

3) The relevant clauses of the basic Asbatankvoy charter were as set out below, with material amendments to clauses 6 and 7 shown underlined, based on the standard Vitol Voyage Chartering Terms:

5. LAYDAYS. Laytime shall not commence before the date stipulated in Part 1 except with the Charterer's sanction. Should the Vessel not be ready to load by 4.00 o'clock P.M. (local time) on the cancelling date stipulated in Part 1, the Charterer shall have the option of cancelling this Charter by giving Owner notice of such cancellation within twenty-four (24) hours after such cancellation date: otherwise this Charter to remain in full force and effect.

6. NOTICE OF READINESS. Upon arrival at customary anchorage at each port of loading or discharge, the Master or his agent shall give the Charterer or his agent notice by letter, telegraph, wireless or telephone that the Vessel is reedy to load or discharge cargo, berth or no berth, and laytime, as hereinafter provided, shall commence upon the expiration of six (6) hours after receipt of such notice, or upon the Vessel's arrival in berth (i.e., finished mooring when at a sealoading or discharging terminal and all fast when loading or discharging alongside a wharf), whichever first occurs. However, irrespective of whether the berth is reachable on arrival or not where delay is caused to Vessel getting into berth after giving notice of readiness for any reason over which Charterer has no control, such a delay shall not count as used laytime or demurrage. In any event, Charterer shall be entitled to six hours notice of readiness at loading and discharge ports, even if the vessel is on demurrage.

7. HOURS FOR LOADING AND DISCHARGING. The number of running hours specified as laytime in Part 1 shall be permitted the Charterer as laytime for loading and discharging cargo; but any delay due to the Vessel's condition or breakdown or inability of the Vessel's facilities to load or discharge cargo within the time allowed shall not count as used laytime or time on demurrage. If regulations of the Owner or port authorities prohibit loading or discharging of the cargo at night, time so lost shall not count as used laytime or time on demurrage; if the Charterer, shipper or consignee prohibits loading or discharging at night, time so lost shall count as used laytime or time on demurrage. Time consumed by the vessel in moving from loading or discharge port anchorage to her loading or discharge berth, discharging ballast water or slops, will not count as used laytime or time on demurrage.

8. DEMURRAGE. Charterer shall pay demurrage per running hour and pro rata for a part thereof at the rate specified in Part 1 for all time that loading and discharging and used laytime as elsewhere herein provided exceeds the allowed laytime elsewhere herein specified. If, however, demurrage shall be incurred at ports of loading and/or discharge by reason of fire, explosion, storm or by a strike, lockout, stoppage or restraint of labor or by breakdown of machinery or equipment in or about the plant of the Charterer, supplier, shipper or consignee of the cargo, the rate of demurrage shall be reduced one-half of the amount stated in Part 1 per running hour or pro rata for part of an hour for demurrage so incurred. The Charterer shall not be liable for any demurrage for delay caused by strike, lockout, stoppage or restraint of labor for Master, officers and crew of the Vessel or tugboat or pilots.

4) The following additional clauses forming part of the standard Vitol Voyage Chartering Terms were also incorporated, with agreed amendments underlined.

31. Operational Compliance Clause.

Owner shall indemnify Charterer for any damages, delays, costs and consequences of not complying with Charterer's voyage instructions given in accordance with the Charterparty.

The vessel is to give ETA notices in accordance with Charterer's voyage instructions and where time permits at least 72/48/24 hours prior to arrival at load and discharge port(s). When such ETA notices are not given, any resulting delay at either load or discharge port(s), to be for Owner's account.

The vessel shall not tender Notice of Readiness prior to the earliest layday date specified in this Charterparty and laytime shall not commence before 06:00 hours local time on the earliest layday unless Charterer consents in writing.

If a conflict arises between terminal orders and Charterer's voyage instructions, the Master shall stop cargo operations and contact Charterer immediately. The terminal orders shall never supersede Charterer's voyage instructions and any conflict shall be resolved prior to resumption of cargo operations.

33. Early Loading Clause.

If Charterer permits vessel to tender NOR and berth prior to commencement of laydays, all time from berthing until commencement of laydays to be credited to Charterer against laytime and/or time on demurrage. Saved time to be split 50/50 Owners / Charterers.

5) The laycan agreed in the charterparty was 9 – 10 January 2004.

6) Pursuant to the Charterers' orders, the vessel proceeded to Escravos in Nigeria, where she was to load a cargo of oil.

7) On 6th January 2004, Charterers sent the following email to Owners, via the brokers, E.A. Gibson Ltd:- "Charterers confirm NOR to be tendered on arrival Escravos, and to berth/load as soon as instructed thereafter by terminal." A copy of this email is attached

8) On 7th January 2004, an email was sent to Owners, via the brokers, as follows:- "charterers reconfirm that 'front commander' to tender nor on arrival escravos" A copy of this email is attached.

9) On 7th January 2004, a further email was sent to Owners, via the brokers, which included the following message:- "front commander will tender nor on arrival ie 08 January 0030 and we want her to berth/commence loading 08 January." A copy of this email is attached.

10) The vessel arrived at Escravos and tendered NOR at 00.01 hours on 8 January, prior to the first day of the laycan which was 9 January 2004. She initially anchored but she was instructed by the Terminal to proceed in to berth to load. She weighed anchor at 10.18 hours the same day and was all fast at her loading berth at 12.00 hours. Hoses were connected at 13.12 hours and loading commenced at 16.48 hours on 8 January. Loading was completed at 07.36 hours on 10th January; hoses were disconnected at 08.42 hours and the vessel sailed from Escravos at 13.06 hours on 10 January.

11) Demurrage was incurred on the voyage, in respect of which Owners sent Charterers a timely demurrage claim. In their calculation of the laytime used at the port of Escravos, Owners gave Charterers credit for 50 per cent of the time between 12.00 hours on 8th January (when the vessel was made all fast at her berth at Escravos) and 00.01 hours on 9th January (being the commencement of the laydays and the time at which Owners considered laytime would otherwise have commenced).

12) Charterers have paid the majority of the demurrage claim but a dispute has arisen concerning part of the claim, since Charterers contend that, pursuant to clause 5 of the standard Asbatankvoy form and additional clause 31, laytime should not start to count prior to 06.00 on the first day of the laydays, which was 9 January 2004. In this connection Charterers also contend that they never gave their consent to laytime commencing prior to 06.00 on 9 January 2004. Owners contend that such consent was given, expressly or impliedly, by the emails sent by Charterers or by loading commencing with the knowledge and consent of the Charterers.

13) Owners claim US$ 70,489.71 (net of commission) in respect of demurrage calculated in accordance with the attached Statement whereas Charterers' position is that no further demurrage is due.

ISSUES FOR DETERMINATION

14) The issues for determination by the Court are:

I. If or when the NOR given at 00.01 on 8 January 2004 became effective for the purpose of the commencement of laytime..

II. At what date and time laytime commenced.

III. Whether the charterers by their email of 6 or 7 January or by commencing loading consented to laytime commencing prior to the first day of the laycan, which was 9 January."

4. In addition to that statement the parties have also relied upon an agreed bundle containing a copy of the charter as drawn up to reflect the Recap, a notice of readiness, a time sheet and statement of facts, emails from the Defendant Charterers Vitol ("Vitol") and a Demurrage Statement prepared by the Claimant owners ("Tidebrook") and the skeleton arguments of each side. As the matter proceeded on the basis of agreed facts. , I reach a decision within the four corners of that document. If this case goes further and the parties wish to rely upon any additional background material of the kind referred to in argument it will be helpful for this to be included in a supplemental agreed document.

5. The amount in issue $70,489.71 is comparatively small. The advocates describe this as a "Clash of the Titans" and say that there are other cases which might turn on the outcome. It is for that reason that I agreed to put my reasons in writing rather than give my decision on the spot.

Owners' submissions

6. Mr Davies submits on a variety of grounds that laytime commenced early. His main ground is as follows. By Clause 5 of the charter laytime cannot commence before the first day of the laydays "except with charterers sanction". Additional Clause 31 develops the requirement of consent or sanction so that the vessel "shall not tender NOR …. and laytime shall not commence before 06.00 hours local time on the earliest layday …. unless charterer consents in writing". He submits that since the tendering of NOR and the commencement of laytime are linked in this way consent to one means consent to the other. The three emails referring to the tender of NOR are therefore to be taken as consenting in writing to earlier commencement of laytime.

7. He submits that Clause 33 is consistent with that pattern and reflects it, referring as it does to "if charterer permits a vessel to tender NOR and berth prior to commencement of laydays". He develops these points on pages 3 and 4 of his skeleton argument in the Agreed Bundle. Mr Davies suggests that where charterers in their emails not only tendered NOR but made it clear that they wanted the vessel to berth/commence loading on 8 January it is disingenuous for them to claim that laytime was not to start running 6 hours after the tender of the NOR at 06.00 on 8 January.

8. Owners' second ground is that consent to laytime was implicit in the consent to loading. Laytime is the time for loading and a reasonable business person would have seen it as obvious that the parties intended laytime to commence.

9. Mr Davies has a variation of this argument which is that laytime commenced on berthing since under Clause 6 "*laytime …. shall commence upon ….. the Vessel's arrival in berth ….*". He argues that by providing the vessel with a berth and ordering her to proceed to it charterers consented under Clause 5 to the commencement of laytime. He has further arguments of waiver, which he concedes will have no application unless he is successful on one of his earlier grounds.

10. He has an alternative argument, which he accepted not to be his best point, that laytime commenced by operation of law. This is advanced on the basis of ***Transgrain Shipping BV Global Transporte Oceanico SA (Mexico 1)*** [1990] 1 Lloyd's Rep 507 and ***Glencore Grain -v- Flacker Shipping (Happy Days)*** [2002] 2 Lloyd's Rep 487. The considerations arising in those cases seem to me to be irrelevant to the question whether or not the requisite consent has been given under a contract.

Submissions of Charterers

11. Charterers argue that since they never gave their agreement to laytime commencing early it should not start before 06.00 on 9 January. Additional clauses prevail over the printed clauses and the only question is whether the charterer "consents in writing" under additional Clause 31.

12. Mr Hickey cites the commentaries to be found in the agreed bundle and two cases ***Nelson & Sons -v- Nelson Line Liverpool Ltd (No 3)*** [1908] 113 CC 235 (HL); ***Pteroti Compania Naviera, SA -v- National Coal Board (Khios Breeze)*** [1958] 1 Lloyd's Rep 245. These support the general proposition that work in loading/discharging a vessel prior to the commencement of laytime under a charterparty has no effect on the laytime computation. He relies more on the express words of Clause 31 and submits that the emails do not amount to consent in writing to the commencement of laytime. He says that it is obvious that if an email had been replied to with a suggestion that laytime had commenced this would have been vigorously denied by charterers.

13. Mr Hickey argues that there is no room for the implication of the term and that since Clause 6 is subject to and overridden by additional Clauses 31 and 33 there is nothing in Mr Davies' point about berthing. Since additional Clause 33 deals expressly with early loading and the situation which arose in this case where NOR has been tendered and the vessel berths before the laydays begin, there is no justification for implying a term or loosening the wording of the requirement for consent.

Decision

14. The relationship between Owners and Charterers is of course governed by the charterparty. This specified that the laycan was 9-10 January 2004. Laytime is only to commence before the stipulated date with (Clause 5) "*the charterer's sanction*" and, more explicitly (additional Clause 31) "*charterer consents in writing*". The question is whether Owners have shown that the emails amounted to that consent in writing. In my judgment they did not. The emails do not give consent explicitly. I do not consider that they give consent implicitly either. The emails confirm that NOR is to be tendered on arrival and that Charterers want the vessel to berth/commence loading early.

15. Additional Clause 33 entitled "*Early Loading*" provides expressly for what is to happen when there is early loading prior to commencement of laytime. It is not necessary or right to read into emails which consent to the situation for which additional Clause 33 provides consent in addition that laytime start early under additional Clause 31.

16. While the cases cited by Mr Hickey are useful background they are of no direct application. The only question is whether or not the emails constitute consent under Clause 5 and additional Clause 31. In my view they do not as they are not explicit enough to have the contractual significance claimed by Owners. The points of construction advanced cannot displace what seems to me the clear answer to the central question.It follows that I see no room for the implication of terms as suggested by Mr Davies. The issue is not the terms of the contract but whether there has been consent. His point on berthing fails because of the existence and terms of the additional clauses.

17. It follows that the answers to the 3 issues for determination set out in Paragraph 14 on page 4 of the agreed Statement of Facts and Issues are as follows. Laytime commenced at 06.00 on 9 January 2004 as provided by additional Clause 31 of the charterparty. Charterers did not either by their emails or by commencing loading consent to earlier commencement of laytime.

"Time saved"

18. It is common ground that "time saved" under additional Clause 33 cannot have its normal meaning of referring to the period from the completion of loading/discharge to the expiry of the laytime and must be a reference by the parties to all time used in loading or discharging before the commencement of the laydays.

19. Although I have answered the questions raised by this application Mr Davies put forward in his skeleton argument an alternative submission based on Clause 33. He says it does not matter when laytime actually starts because all "time saved" is to be split 50/50 between owners and charterers. He says that Owners are to receive a 50% credit but, on Charterers interpretation in their calculations, receive none at all. He submits that the only realistic approach to the clause is to "count" time saved before laydays as laytime in fact and then credit equally to both sides.

20. Mr Hickey does not address this matter in his skeleton argument but submits, as I understand it, that the meaning of the clause cannot be shaped by what may or may not be commercial consequences. He suggests that the only sensible interpretation to be given to the 50/50 wording is that Charterers are to receive later only half the credit given by additional Clause 33 in its unamended form. I agree. Whatever difficulty this presents it is not a justification for departing from Clause 31 and starting laytime early. The additional words should be read to mean that the amount of credit to the charterer should be reduced to 50% of what it would have been under the unamended clause. However this question is not strictly before the court. Mr Hickey said that if my view of the agreed issues would be different but for the amendment of additional Clause 33 it would be helpful for me to record this even though my observations would be strictly irrelevant. As it happens that distinction makes no difference to my view.

21. I believe I have dealt with the issues which arise for decision. If there are additional matters unresolved I shall be grateful if the parties will let me know and, at the same time, submit corrections of the usual kind and a draft order. I am grateful to Mr Davies and Mr Hickey for their very helpful submissions informed as they were by their very considerable experience in this area of the law.

Mr Jeremy Davies of Davies Johnson and Co for the Claimants
Mr Denys Hickey of Ince and Co for the Defendants