Neutral Citation Number: [2018] EWCA Civ 2413

Case No: A4/2017/3026

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
THE HONOURABLE MR JUSTICE POPPLEWELL
[2017] EWHC 2579 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/11/2018

Before:

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LADY JUSTICE KING
and
THE RIGHT HONOURABLE SIR RUPERT JACKSON

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Between:

CSSA CHARTERING AND SHIPPING SERVICES SA	**Respondent /Charterer**
- and -	
MITSUI OSK LINES LTD	**Appellant/ Owner**
PACIFIC VOYAGER	

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Mr Simon Croall QC & Mr Stewart Buckingham (instructed by **Kennedys LLP**) for the **Appellant**
Mr John Russell QC (instructed by **Clyde & Co LLP**) for the **Respondent**

Hearing date: 16th October 2018

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Approved Judgment

Lord Justice Longmore:

1. It is well settled that if a voyage charter contains a provision that the shipowner will proceed with all convenient speed (or with utmost despatch) to a loading port and also gives a date of expected time of arrival or expected readiness to load at the loading port, there is an absolute obligation to commence the voyage to the loading port at such time as it is reasonably certain that the vessel will arrive on or around the expected date; any exceptions in the charterparty do not apply to the period before the approach voyage begins. That was first settled in Monroe Brothers Ltd v Ryan [1935] 2 KB 28 where the owners had entered into a charter for an intermediate voyage after entering into the charterparty which was the subject of the litigation and followed in Evera S.A. Commercial v North Shipping Co Ltd (The North Anglia) [1956] 2 Lloyds Rep. 367 where the vessel (to the knowledge of the charterers) was already performing under an existing charterparty. Those charterparties specified a date when the vessel could be expected to load. The Myrtos [1984] 2 Lloyds Rep 449 extended the principle to a charter which gave an expected time of arrival at the port rather than expected readiness to load.

2. The question in the present case is whether, in a charterparty which contained no expected time of arrival or readiness to load at the loading port but did contain an expected time of arrival at the last discharge port under a previous charter, there is a similarly absolute obligation to begin the voyage to the loading port and, if so, whether that obligation takes effect at such time as it is reasonably certain that the vessel will leave the last discharge port of the previous charter or (perhaps) at such time as it is reasonably certain that the vessel will arrive at the loading port by the cancelling date chosen by the parties.

The facts

3. The Defendant and appellant was the disponent owner ("the Owner") of the VLCC "PACIFIC VOYAGER" ("the Vessel") which was chartered under a charter on the Shellvoy 5 form dated 5th January 2015 to the Claimant ("the Charterer") for a voyage from Rotterdam, or ship to ship transfers off Rotterdam, to the Far East. At the time of the fixture the Vessel was laden with cargo under a previous charter, under which she was shortly to discharge part of her cargo at Ain Sukhna in Egypt, south of the Suez Canal, thereafter go to Sidi Kerir at Alexandria to reload a part cargo, and thence proceed to Antifer, Le Havre for final discharge.

4. In the course of the morning of 12th January 2015, while the Vessel was transiting the Suez Canal, she suffered rapid water ingress in no.1 starboard ballast tank, and developed a starboard list. The cause was attributed to contact with a submerged object connected with dredging operations being undertaken nearby. There is no suggestion that the Vessel, or the Owner, was in any way at fault, or could reasonably have prevented what happened.

5. An underwater survey confirmed that the cargo had to be discharged in Egypt and that she would have to be drydocked for repairs before performing any further laden voyages. The Owner told the Charterer of the incident through the broking channels on 13th January 2015 and there followed correspondence in which the Charterer was informed of the progress of surveying and the prospects for future performance of the charter voyage. The cancellation date was 2359 on 4th February 2015, at which time

the state of play communicated by the Owner to the Charterer was that the Vessel was due to drydock in Cadiz on 8th February 2015 and that repairs there would take "months". On 6th February 2015 the Charterer terminated the charterparty and subsequently brought a claim for damages, which have been agreed, subject to liability in the figure of US$1,202,812.50.

6. The charterparty terms were contained in a fixture recap which adopted the Shellvoy 5 form subject to amendments by the CSSA Additional Voyage Terms as further amended in the fixture recap. The relevant terms included the following:

i) By clause 3:

> "3. Subject to the provisions of this charter the vessel shall perform her service with utmost despatch and shall proceed to [Rotterdam or STS off Rotterdam] … and there…. load a full cargo…."

ii) By clause 11:

> "11. Should the vessel not be ready to load by [2359 local time on 4th February 2015] Charterers shall have the option of terminating this charter unless the vessel has been delayed due to Charterers' change of orders pursuant to Clause 26, in which case the laydays shall be extended by the period of such delay.
>
> However, if Owners reasonably conclude that, despite the exercise of due diligence, the vessel will not be ready to load by [the cancelling date] Owners may, as soon as they are able to state with reasonable certainty a new date when the vessel will be ready, give notice to Charterers declaring the new readiness date and asking Charterers to elect whether or not to terminate this charter. Unless Charterers within 4 days after such notice or within 2 days after the termination date (whichever is earlier) declare this charter terminated, [the laycan dates] shall be deemed to be amended such that the new readiness date stated shall be the commencement date and the second day thereafter shall be the termination date.
>
> ……..
>
> The provisions of this Clause and the exercise or non-exercise by Charterers of their option to terminate shall not prejudice any claims which Charterers or Owners may have against each other."

iii) By part 1(A) of the charter, as amended, the Owner guaranteed the Vessel's description "at the date hereof and from the time when the obligation to proceed to the loadport(s) attaches."

iv) By clause 1 the Owner undertook to exercise due diligence to ensure the seaworthy condition of the Vessel "from the time when the obligation to proceed to the loading port(s) attaches and throughout the charter service."

v) The printed Part 1(B) of the Shellvoy 5 form provides for completion of "Position/Readiness" by two entries, one under "Now" and the other under "Expected ready to load". The agreed terms in the fixture recap provided for the inclusion in 1(B) of words which did not adopt either heading as such, but instead gave details of the anticipated timetable for completion of the current voyage in the following terms:

> "POSITION: ETA AIN SUKHNA 9 JAN, 2015 (PART DISCHARGE)
>
> ETA SUEZ CANAL 10 JAN, 2015 (TRANSIT)
> ETA SIDI KERIR 12 JAN, 2015 (RE-LOADING)
> ETA ANTIFER 25 JAN, 2015 (DISCHARGING)
> ALL ABOVE BSS IAGW / WP"

which being interpreted, is "on the basis if all goes well/weather permitting".

The Judgment

7. In paragraph 14 Popplewell J paraphrased part of Devlin J's judgment in the North Anglia in which he dealt with a submission of Mr Ashton Roskill QC for the owners that the printed obligation to proceed to the loading port (in that case Fort Churchill in Canada) with all convenient speed only arose when the previous charter service had been completed. At page 374 Devlin J said:-

> "I think that, in order to consider the effect of that contention, it is as well to begin by seeing just what the printed words standing by themselves should be construed as meaning. The obligation is that the ship "shall with all convenient speed sail and proceed to Fort Churchill." Now, there is no date at all as to when the ship is to sail; nor is there any warranted date as to when she is to arrive. What, then, does the obligation mean? If it is to be given any effect at all, some time for sailing must be put in it. If there were nothing in the terms of the charter-party which could guide the Court, I think the Court would be constrained to hold that it means "shall forthwith with all convenient speed sail and proceed to Fort Churchill", or it might mean "shall within a reasonable time sail and proceed to Fort Churchill." But, whichever way you looked at it, the date that governed it would be the date of the charter-party itself, it being an obligation undertaken, and, though no time is mentioned, the implication or construction would be that it would be within a reasonable time. But the shipowner is permitted for this purpose to have recourse to the expected date of readiness to load. If he had warranted to be at Fort Churchill on Sept 27, then manifestly one would have said that he need not sail until the time arises for him to comply with his warranty. It could not possibly be argued that he was

> obliged to sail at once so as to get to Fort Churchill earlier than his warranty. So, in the same way, if he were to put in an earlier date than Sept 27, it is reasonable to construe the charter-party as providing that he should "sail at such time as is calculated to get him to Fort Churchill at or about the date he said he expected to be there." That is exactly the meaning given to the clause in Monroe Brother, Ltd v Ryan, sup."

8. Popplewell J, having pointed out the difficulties of the Owner's submission in the case before him that its obligation was merely to exercise due diligence to start the approach voyage by a date when the Vessel would be expected to arrive at the loading port by the cancelling date (a submission not now pursued), said:-

> "21. I conclude, therefore, that as in each of the voyage charter cases I have cited, there is in this charterparty an absolute duty on the Owners to commence the approach voyage, when the clause 3 obligation to proceed to the loading port attaches, at a particular point of time. That time is to be a reasonable time, and the identification of when is reasonable falls to be determined in the light of the other charterparty terms. There was some debate in argument as to whether the issue was one of construction or implication. I did not find this of assistance. Since Mr Buckingham accepted that on any view there needs to be implied some term as to when the clause 3 obligation arises, it is not a case in which it is necessary to impose the rigorous requirements which arise when considering whether to imply any term of the first type referred to by Lord Neuberger in Marks & Spencer PLC v BNP Paribas Security Services [2016] A.C. 742 AT [15]. If it mattered I would treat it as an issue of construction, as did both Greer LJ and Roche LJ in Monroe. The only implication is the implication into clause 3 that the obligation to proceed is one to do so within a reasonable period of time, which is an implication of law; it is then a matter of construction what a reasonable time is: see Devlin J in The North Anglia at p. 375 col 2.
>
> …
>
> 23. In this case, I do not regard the cancelling date as the critical term which informs the question of what is a reasonable time at which the clause 3 duty to proceed attaches. The charterparty also contains ETAs which these Owners were prepared to give in relation to the estimated time of arrival of the Vessel at the intermediate ports for the cargo operations on the previous voyage, including her final discharge at Antifer. These estimates were qualified by the rubric "IAGW/WP" (If All Goes Well/Weather Permitting), but that is no different in substance from the caveats which are implicit in an unqualified ETA at the loading port, which is merely an estimate based on what can reasonably be expected to occur in the normal course of events and without unexpectedly adverse weather. These intermediate

> port ETAs attracted the attendant Sanday v Keighley Maxted obligation that they must have been honestly given and on reasonable grounds. They are considered contractual statements, albeit estimates not guarantees, in the same way as an ETA at the loading port. They are equivalent to an ETA of arrival at the loading port for the purposes of deriving a time at which the Vessel could be expected to commence her approach voyage and come under the obligation in clause 3 to proceed there with utmost despatch. The only difference is that the intermediate port ETAs help identify that point working forwards, whereas when an ETA at the loading port is given the time is calculated working backwards. That is an immaterial distinction in the context of determining what is a reasonable time for commencing the approach voyage by reference to owners' estimates for the progress of the vessel towards arrival at the loading port, which is what informs the content of the Monroe obligation. They are of equivalence in being the estimates on which charterers can reasonably rely in identifying the commencement of the chartered service and in order to make arrangements for loading. Further confirmation that the ETAs at intermediate ports were intended to perform the same function as an ETA at the loading port is to be found in the fact that in the fixture recap they were identified for insertion in part 1(B) of the Shellvoy 5 form which the printed words show is intended to record an expected ready to load date.
>
> 24. The Owners gave intermediate port estimates which involved the Vessel arriving at Antifer on 25 January 2015 for final discharge of her previous cargo. Such estimate carries with it an estimate that she would take a reasonable period after arrival at Antifer to complete discharge. She was bound thereafter to embark on the chartered service. It is therefore the end of that additional period of reasonable discharging time that the Owners gave as an estimate of the expected commencement of the approach voyage and of the chartered service. In my judgment that is the time at which the Owners were under an absolute obligation to commence the relatively short approach voyage to Rotterdam, namely at the end of a reasonable discharging period for the Vessel if she were to arrive for final discharge at Antifer on 25 January 2015."

9. The judge then said that, if he was for any reason wrong about that, he would accept the Charterer's alternative submission that the obligation to proceed with the utmost despatch began to operate at a date when it would reasonably be expected that the Vessel could arrive by the cancelling date. He accordingly upheld the Charterer's claim to damages for breach of the obligation to perform her service with the utmost dispatch.

The submissions

10. Mr Simon Croall QC for the Owner submitted that:-

1) the previous authorities were decisions on their own wording; the charterparty in the present case had different wording which should be construed without any slavish adherence to previous authorities which certainly could not constitute in any sense a "hallowed doctrine";

2) the two substantial differences in the wording were (a) that there was no date of expected readiness to load on arrival at Rotterdam and (b) that the obligation of utmost despatch was expressly made "subject to the terms of this charter";

3) accordingly the obligation of "utmost despatch" could only attach when the vessel departed from her last discharging port under her previous charter;

4) since she never did depart from her last discharging port, the obligation of utmost despatch never arose;

5) the inclusion of the itinerary of expected dates at Ain Sukhna, Sidi Kerir and Antifer under the previous charter was only to make clear the vessel was performing a previous service, a point underscored by the wording "bss iagw/wp"; and

6) the cancellation/termination clause was irrelevant because it merely gave the Charterer an option without giving any right to damages.

11. Mr John Russell QC supported the judge's analysis and submitted further:-

1) the court was bound by the principle of Monroe v Ryan that the exceptions in the charterparty (e.g. in this case, for collision or accidents or perils of the sea) did not apply to a time before the chartered service began;

2) the Owner's proposition that the utmost despatch obligation only applied when the Vessel left the last discharge port under her previous charterparty meant that, even if the Owner were entirely to blame for the Vessel's failure to depart her last discharging port, the utmost despatch obligation would never apply;

3) the fact that the parties agreed to put the Vessel's itinerary under the previous charter into the section (or box) marked 'B' in Part I of the printed Shellvoy 5 form entitled "Position/Readiness" showed that the itinerary was intended as equivalent to a statement in respect of the time at which the Vessel was expected to be ready; why else would it be there?

4) The true construction of a combination of section/box B and clause 3 of Part II of the Shellvoy 5 form was therefore that the obligation of utmost despatch arose at such time as it was reasonable to suppose the vessel would reach the loading port of Rotterdam once a reasonable time for discharge had elapsed; and

5) If all this were wrong the obligation of utmost despatch must at least arise at such time as it was reasonable to suppose that the Vessel should sail to meet her cancelling date.

Decision

12. I would for my part accept Mr Croall's first submission to the extent that every charterparty must be construed on its own terms; so far, so uncontroversial. But in a

business world (such as the shipping world) previous decisions on the same or similar clauses must be treated as authoritative in the interests of business certainty. Although phrases such as "hallowed doctrine" (pace Staughton J in the Rio Claro [1987] 2 Lloyds Rep 173, 179) should perhaps best be avoided, previous cases on similar wording should be regarded as helpful guides in situations similar to situations that have arisen before.

13. It was at the second stage of Mr Croall's submissions that they began to break down. The obligation of utmost despatch is an important obligation and is intended to give comfort to a charterer. Mr Croall's submission gives virtually no weight to it; that is to put altogether excessive emphasis on the absence of an expected remedy to load or arrival provision in the charter. As Devlin J said in the North Anglia (at page 374) if the obligation is to be given any effect at all, some time for sailing must be put in. That must mean that the vessel must either proceed "forthwith" at the date of the charter or "within a reasonable time". The inclusion of the itinerary shows that "forthwith" cannot be meant. So one has to look to the terms of the charterparty to ascertain what that reasonable time would be. It is in these circumstances that the shipowner is, to use Devlin J's words, "permitted to have recourse to the expected date of readiness to load". If the Owner is to be permitted to have recourse to that expected date, so also is the Charterer. There is no particular magic in the concept of a date of expected readiness to load; it is merely a provision to which the parties may "have recourse" in order to ascertain what a reasonable time will be.

14. If therefore one asks whether there is any provision in this charterparty to which one may have recourse to determine what is a reasonable time the answer is almost self-evident. The itinerary has already been used to exclude the possibility that "forthwith" is meant; it must surely be equally usable to enable the parties (and, if necessary, the court) to decide what is the reasonable time at which the obligation of utmost despatch is to attach; on this basis the reasonable time is, as Mr Russell submits, such time as it is reasonable to suppose the Vessel will leave Antifer for Rotterdam once a reasonable time for discharging has elapsed. Since the distance from Antifer/Le Havre to Rotterdam is comparatively short that would be on or about 28th January 2015. Since the Owner did not exercise the utmost despatch on or about that date, (or indeed, at any other time) the Owner is in breach and the Charterer is entitled to damages accordingly.

15. Mr Croall posited a case in which there was a long gap between discharge at the last discharge port and the time where the vessel would be expected at the loading port under the relevant charter. That is not this case and it is idle to speculate on the reasons why an owner might set out an itinerary for a previous voyage when it would be of only marginal interest to the charterer. In this case the itinerary would have been of much more than marginal interest to the Charterer. It tells him of the rough date when the vessel will be available to load the Charterer's cargo, a matter of great concern to any charterer. Mr Croall's submission that the inclusion of the itinerary was only to make clear that the vessel had a previous charter to perform is misplaced. If that had been the intention the words "currently under charter for a voyage from the Middle East to Europe" would have been entirely adequate. The fact that an ETA for discharging at Antifer was given shows that that information was considered important.

16. The addition of the wording "bss iagw/wp" does not, in my judgment, "underscore" any intention to indicate that the Vessel was subject to a previous charter. If anything

it serves to underscore what would anyway be implicit in the estimates given in the itinerary namely that they were estimates given honestly and on reasonable grounds.

17. Nor do I consider that Mr Croall can derive any assistance from the words "subject to the provisions of this charter" in clause 3 of the charterparty. It is axiomatic that all the provisions of the charterparty have to be read together so it must be doubtful if the words can be said to add (or subtract) anything of significance from clause 3. But, in any event, Mr Croall accepted that this court was bound by Monroe v Ryan to hold that any exceptions in the charterparty could not apply to the performance of a previous charter with which the Charterer had nothing to do. He has, however, reserved the right to challenge Monroe v Ryan in a higher court.

18. Devlin J began his conclusion of the relevant part of his judgment in the North Anglia at page 376 with these words:-

> "In short, the position is this, that if a shipowner wants to make the beginning of one voyage contingent upon the conclusion of the one before, he must say so in clear terms. There is clearly a number of things that would have to be worked out in order that such an arrangement should be made as would be fair to both sides. It may be that the shipowner had it in mind in this case that that was what he wanted. But, if he did have that in mind, he has not put it into such language as would make it plain to any reasonable charterer that the charterer was being invited to accept the risks of delay under an earlier charter-party in which that charterer was not concerned. To pass those risks on to a person who was not a party to that charter requires, in my judgment, if not express language, at least much clearer language than that which has been adopted in the present case."

I would echo these observations and say that, if the Owner had wanted to make the beginning of the chartered service contingent on the conclusion of the previous voyage, much clearer words than the parties have chosen would be required.

19. What I have said so far relieves me from any need to consider the Charterer's alternative argument that the cancellation date of 4th February provides a further indication of the time at which it would be reasonable to say that the obligation of utmost despatch arises. If, for any reason, it were impermissible to rely on the expected date of arrival of 25th January at the last discharge port under the previous charter, I would have difficulty in saying that the cancellation date would do instead. It would be necessary to know why it was that 25th January could not be relied on and, if it were because there was no ETA Rotterdam, that might apply equally to any argument about the cancelling date.

20. If, however, there had been no itinerary given and the only guide was the cancelling date, that might be a different matter. That can (and should) be left to another day for the (perhaps somewhat surprising) terms of such a charterparty to be considered.

Conclusion

21. As it is I would uphold the decision of Popplewell J and dismiss this appeal.

Lady Justice King:

22. I agree.

Sir Rupert Jackson:

23. I also agree.