



Neutral Citation Number: [2011] EWHC 152 (Comm)

Case No: 2010 FOLIO 849

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
IN THE MATTER OF THE ARBITRATION ACT 1996

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 February 2011

Before :

MR JUSTICE BURTON

Between :

X

Claimant

- and -

Y

Defendant

David Semark (instructed by **Reed Smith**) for the **Claimant**
Michael Nolan (instructed by **Salans**) for the **Defendant**

Hearing dates: 25 January 2011

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
MR JUSTICE BURTON

Mr Justice Burton :

1. This has been the hearing of an arbitration appeal brought with leave of Hamblen J by X, Respondent/Charterers in the arbitration, against the Award by Mr Simon Gault, dated 12 June 2010, in favour of the Claimant/Owners, Y. There were originally three issues between the parties, but only one now remains for me to resolve, namely whether the Arbitrator was correct to conclude that Y's claim for demurrage was made in time, within the time limit laid down by the Charter Party dated 21 September 2007.
2. This Charter Party, being a Continent Grain Charter Party, containing terms otherwise in accordance with a SYNACOMEX 2000 form, contained a number of additional clauses, but materially, for the purposes of this dispute, an Arbitration Clause, Clause 36, which is a modification of the Centrocon Arbitration Clause. The arbitration clause provided, inter alia, that a claim would be time-barred unless the claimant's arbitrator was appointed "*within 12 months of final discharge or termination of this Charterparty.*"
3. The Charter Party constituted a consecutive voyage charter for three consecutive voyages. Discharge in respect of the first voyage under the Charter Party was completed on 8 February 2008. By virtue of Additional Clause 30 "*balance of freight, less despatch or plus demurrage, as the case may be, is payable 28 days after completion of discharge and receipt/agreement of all closing accounts, including Time Sheets supported by Statements of Facts and Notices of Readiness.*" This date was accordingly 7 March 2008. Discharge under the third and last of the three consecutive voyages was completed on 18 May 2008, and the balance of freight was consequently due on 14 June 2008. Twelve months from the first date of discharge (the cut-off date contended for by X) was accordingly 8 February 2009. Y's claim for US\$ 376,086.03 in demurrage, incurred in respect of the first voyage, was made by Arbitration commenced by Y on 23 February 2009. It is, or has become, common ground that termination of this Charter Party should be treated as 14 June 2008 (the last date for payment of the balance of the freight as set out above), such that 12 months from that date of termination (Y's cut-off date) would not expire until 14 June 2009. If X's construction of the time-bar provision in Clause 36 is right, Y's claim for demurrage in respect of the first voyage was commenced 15 days out of time. If Y's construction is right, then its claim was more than 3 months in time.
4. So far as the construction of the Clause by the Arbitrator is concerned, his task was to construe the meaning of the words "*within 12 months of final discharge or termination of this Charter Party*". He concluded, following the decision of the Court of Appeal (Lord Denning MR, Megaw LJ and Sir Gordon Willmer) in **The Simonburn** [1973] 1 Lloyd's Law Rep 392, upholding the decision of Mocatta J [1972] 2 Lloyd's Law Rep 355, that *final discharge* in a consecutive voyage charter means final discharge of the cargo on the voyage in respect of which the claim arises, i.e. in this case the first of the three voyages (see paragraphs 42 and 43(a) of his Reasons). As for "*termination of this Charter Party*", he concluded that that meant (on the facts of this case) termination of the Charter Party at the end of the third voyage, and that the claim was not time-barred by reference to that alternative time limit expressly provided for in Clause 36. He concluded, at paragraph 43 of his Reasons, as follows:

"(d) ... As with most issues of construction, the proper construction of clause 36 is largely a matter of impression. In a single voyage charter, there would not normally be a significant delay between "Final discharge" and "Termination of this Charter Party". In the context of a single voyage charter, in my view it is more likely than not that the time bar in clause 36 was intended to run from the later of these two events rather than the earlier in order to give the parties 12 months in which to pursue any cause of action which accrued after discharge of the cargo. That intention seems to me to be more in accord with a clause which gives two alternative events from which the time bar runs. In the normal case, the inclusion of an alternative time bar running from "Termination of this Charter Party" would be to extend the time when a claim became time barred beyond the date when it would become time barred if time ran only from "Final

discharge” of the cargo, and I conclude that this was the intention of the clause. I appreciate that when incorporated into a consecutive voyage charterparty, the result of this construction can be that time may not start to run until a considerable length of time after the voyage in relation to which the cause of action has accrued. I also appreciate that by incorporating clause 36 into a consecutive voyage charterparty, the parties may not have realised that the result might be a considerably longer period before any claim under the charterparty was time barred than would be the case when the clause was used in a single voyage charterparty. However, I do not think that there is any justification for construing the clause differently when it appears in a single voyage charterparty to when it appears in a consecutive voyage charterparty. If the parties wish time to run under a consecutive voyage charterparty from “final discharge” of the cargo on the voyage pursuant to which the relevant obligation arose, it would be easy enough to achieve that by deleting the alternative of time running from “Termination of this Charter Party”.

(e) ... Accordingly, I conclude that in this case, the time bar under clause 36 ran from termination of the parties’ primary obligations under the charterparty and not from “final discharge” of the cargo under the first voyage, as termination of the parties’ primary obligations under the charterparty occurred after “final discharge” of the cargo under the first voyage. I reach this conclusion on the basis of what I find to be the ordinary and natural meaning of the words used and I do not think it is necessary to resort the contra proferentem principle to reach the conclusion which I have reached on the construction of Clause 36.”

5. On this appeal, Mr Semark for X has supported the conclusion of the Arbitrator as to the meaning of *final discharge*, but has challenged his conclusion with regard to the Clause as a whole. He submits that, on a proper construction of the Clause, it must mean that the time limit starts by reference to *final discharge* or *termination of this Charter Party*, whichever is the earlier, and that the reference to *termination* is to a situation in which the Charter Party is, for whatever reason, terminated prior to the actual or intended date of discharge, such that, on any basis, the date of discharge at the end of the relevant voyage is the last available cut-off. Mr Nolan supports the conclusion of the Arbitrator as to the construction of the Clause, but further or in the alternative:
 - i) If it be necessary, he challenges the conclusion by the Arbitrator as to the meaning of *final discharge*, contending that the Arbitrator was not constrained by **The Simonburn** to find (on the facts of this case) that it related to discharge of the first voyage, but rather that it should relate to final discharge at the end of the last voyage, i.e., on the facts of this case, 28 days before termination of the Charter Party.
 - ii) If necessary, if Y should turn out to have been wrong in its interpretation of Clause 36, then he seeks, pursuant to s12 of the Arbitration Act, 1996, an extension of time for commencing arbitration proceedings. A point was properly taken by Mr Semark that no formal application had been issued by Y, which had simply relied on a contingent request for the Court to extend time made in paragraph 39 of its solicitor’s witness statement in opposition to X’s application for permission to appeal dated 6 August 2010. Particularly as X’s solicitor’s reaction to that suggestion had been (and then not until 21 January 2011, shortly before this hearing) to suggest that any such application was premature, Mr Semark, in the event, did not pursue any procedural point, and it was agreed that I could deal with such application as if a timeous formal application had been made. Of course it would only arise if X’s appeal were successful in respect of the Arbitrator’s conclusion.

Final Discharge

6. The first question logically to decide is the meaning of *final discharge*, as to which Mr Semark and the Arbitrator both rely on **The Simonburn**. Mr Semark particularly emphasises the concise reasoning of Lord Denning at 394:

“The important words of the clause are:

“Any claim must be made in writing within three months of final discharge.”

Originally when the Centrocon form was introduced, it was for a single voyage. On such a voyage the words “final discharge” meant the discharge of the cargo for that voyage, that is, the final discharge of the whole cargo for that voyage.

The problem here is to apply the clause when it is not a single voyage charter but a consecutive voyage charter.

*The objects of a clause such as this were well stated by Mr Justice Mocatta in **The Himmerland** [1965] 2 Lloyd’s Rep 353. They are (a) to provide some limit to the uncertainties and expense of arbitration and litigation; and (b) to facilitate the obtaining of material evidence. To these I would add (c) to facilitate the settling of accounts for each voyage as and when they fall due.*

In order to achieve these objects, I think the words “final discharge” mean final discharge of the cargo on the voyage in respect of which the claim arises. The Judge so held: and I agree with him. The owners are out of time and this claim is barred.”

7. There are thus three reasons: (i) the importance of certainty (ii) the objective of obtaining material evidence within a short time after the relevant events (iii) the facilitation of the settling of accounts for each voyage separately. Mr Nolan points out that, since the Court in **The Simonburn** was addressing the original and unamended Centrocon form, and not Clause 36 in the form before me, the decision is not strictly binding. Further he submits (i) that the nature of the difference between the two clauses, namely the added words by reference to termination, means that the clause is now different, and the presence of the alternative of *termination of this Charter Party* (on the basis of his contention) gears the whole clause more towards the end of the last voyage. His submission is that the obvious meaning of the words *final discharge* in a consecutive voyage charter is by reference to the discharge of the last cargo. He submits that the objects of certainty and speed of collation of evidence are as well served by his construction, now that the period has been extended from 3 months to 12 months. He submits that, when the period was only 3 months, in the context of a charter for five consecutive voyages, as in **The Simonburn**, the apparent intention that claims be brought and evidence be gathered would be undermined if the 3-month period only started to run from the end of the last voyage. Evidence, instead of being gathered within 3 months, might not be gathered until 3 months after completion of the last voyage, i.e. perhaps 8 months after the event. However in the case of a 3-voyage charter party such as the present one, with a 12-month time limit, evidence gathered in proceedings commenced 364 days after final discharge of the cargo carried on the first voyage is unlikely to be significantly fresher than evidence gathered in proceedings commenced 364 days after termination of the charter party following completion of the third voyage, about 3 months later. He further submits that (contrary to the views of Mocatta J, Lord Denning, and Megaw LJ), in a consecutive voyage charter a settling of accounts at the end of the charter party is preferable, when there can be a final balancing of accounts with off-setting of dispatch and demurrage on all three voyages.
8. I conclude that, although I might be free to reach a different conclusion in relation to this clause from that reached in relation to the original unamended Centrocon form in **The Simonburn**, I should not do so. Although my decision is addressed to this case, namely a

voyage Charter Party with three consecutive voyages, the same approach would be bound to be applied to a voyage Charter Party with, say, eight consecutive voyages, such that all of Lord Denning's three rationales would remain relevant and applicable, and certainly the first two have been regularly emphasised, not only by Mocatta J at first instance (expressly approved by Megaw LJ in the Court of Appeal), in **The Simonburn**, but also in other judgments, such as those of Mocatta J in **The Himmerland** [1965] 2 Lloyd's Rep 353 and **The Aristokratis** [1976] 1 Lloyd's Law Rep 552, relating to a single voyage charter party and a time charter respectively. *Final discharge* in a consecutive voyage charter has, in my judgment, become generally accepted as meaning and relating to the discharge of the cargo on the voyage in respect of which the claim is made, and that now well understood meaning does not need to be, and should not be, disturbed by the addition of the extra, alternative, words in Clause 36.

“Or termination of this Charter Party”

9. I therefore approach the construction of Clause 36 on the basis that the Arbitrator was correct in his conclusion with regard to the interpretation of *final discharge*, and I turn to the balance of the clause, which has been the subject matter of Mr Semark's appeal.

10. The principles of construction are not in doubt:

- i) This is not a standard clause: it was an additional clause, added to the standard terms. Further it is clear that it was a clause drafted by X, put forward by X (see paragraph 2 above), and thus, in the event of ambiguity, it should be construed *contra proferentem*, i.e. so as to give less weight to the interpretation put forward by the *proferens*, X (see e.g. **The Pera** [1985] 2 Lloyd's Rep 103 at 106): though perhaps only if the meaning of the words is finally balanced (see **The Sabrewing** [2008] 1 Lloyd's Rep 286 at 290-291).
- ii) This is a time-bar clause, analogous to a limitation clause, and so should be construed strictly (see e.g. **The Starsin** [2004] 1 AC 715 at 779 para 144 and **The Sabrewing** at paras 16-17).
- iii) If words require to be added to make sense of the clause, then the seminal passage in the judgment of Chadwick LJ in **City Alliance Ltd v Oxford Forecasting Services Ltd and Anr** [2001] 1 AER (Comm) 233 at 237 is applicable:

“13. ... It is not for a party who relies upon the words actually used to establish that those words effect a sensible commercial purpose. It should be assumed, as a starting point, that the parties understood the purpose which was effected by the words they used; and that they used those words because, to them, that was a sensible commercial purpose. Before the court can introduce words which the parties have not used, it is necessary to be satisfied (i) that the words actually used produce a result which is so commercially nonsensical that the parties could not have intended it, and (ii) that they did intend some other commercial purpose which can be identified with confidence. If, and only if, those two conditions are satisfied, is it open to the court to introduce words which the parties have not used in order to construe the agreement. It is then permissible to do so because, if those conditions are satisfied, the additional words give to the agreement or clause the meaning which the parties must have intended.”

11. Before I address the submissions of the parties, it should be clarified that there was one apparent conclusion by the Arbitrator which neither party supported, and, because it was certainly of some significance in the way that Mr Semark put his appeal in his skeleton (as will appear), I should clear this out of the way. This appeared in a passage in paragraph 43(b) of the Arbitrator's Reasons, as follows:

“Termination of this charter party” plainly means discharge of the parties’ primary obligations under the charter party either by performance or by accord and satisfaction or by repudiatory breach or by frustration [or] by any other method by which such obligation may come to an end, and I can sensibly so construe these words.”

12. If indeed the Arbitrator meant that a charter party continues, i.e. termination of it does not take place, until after “*performance or ... accord and satisfaction*”, i.e. until payment in full of any outstanding claims, for example, for freight, then that cannot be right. Mr Semark, not surprisingly, based a good deal of submission in his skeleton upon this apparent conclusion, by reference to its leading to an “*uncommercial result*”. Thus he submitted as follows, in his skeleton:

“16. For example, one consequence of the Arbitrator’s approach was that he was unable to specify when (i) the termination event would have occurred and/or (ii) when time would have commenced for the purposes of limitation. His wide, open-ended interpretation of “termination” therefore extended the start of the limitation period to some wholly indeterminate future point ...

20. Again, the Arbitrator’s contrary analysis creates uncommercial results:

(a) If his view that the Charterparty cannot be said to be “terminated” whilst any party’s obligation remains unfulfilled is correct, it would then always be open to a charterer to defeat an owners’ right to rely on a timebar provision simply by failing to pay the 5% balance freight to him, irrespective of how much time had elapsed since the completion of discharge.

(b) Similarly, if the Arbitrator’s approach is right, a demurrage claim could never be timebarred whilst it remained outstanding.”

13. Termination must be the date when the last of the primary obligations under the Charter Party is due to be performed, not when it actually is performed. This became common ground during the course of argument, as set out in paragraph 3 above, as the date due for payment of the balance of the freight. However, the Arbitrator’s conclusion does not depend upon, or need, such an extended and uncertain date for the date of termination.

14. I turn to Mr Semark’s submissions:

- i) He points to the Arbitrator’s statement in paragraph 43(d) that “*I do not think there is any justification for construing the clause differently when it appears in a single voyage charterparty [from] when it appears in a consecutive voyage charterparty*”, but submits that the Arbitrator has already implicitly accepted that there must be such a difference, by reference to his adoption, in relation to his conclusion as to the meaning of *final discharge*, of Lord Denning’s rationales, and particularly the third one. He also points to the Arbitrator’s intention, expressed in paragraph 43(b), that he “*should give effect to both terms*”, i.e. the *final discharge* and the *termination*, but submits that, far from giving effect to both terms, he has emasculated the *final discharge* time limit.
- ii) He submits that the only commercial and sensible construction of the clause, giving effect to Lord Denning’s three rationales in a consecutive voyage charter, is to construe it on the basis (set out in paragraph 5 above) that the time limit is twelve months after *final discharge* or *termination of this Charter Party*, whichever is the earlier. He contrasts this with Y’s construction, which he characterises as being *final discharge or termination of this Charter Party, whichever is the later*. With regard to his favoured interpretation, if there is earlier termination of the Charter Party, by repudiation or cancellation, then that is the date which starts the twelve-month time

limit running. If there is no such earlier termination, then *final discharge* (as defined in accordance with **The Simonburn**) triggers it.

15. He supports this conclusion as follows:

- i) This is the only way to give effect to the established proposition that, in a consecutive voyage charter, time runs from final discharge. Otherwise there is uncertainty; final discharge will have come and gone without the parties knowing whether that is or is not the trigger date. On his case, the only time when final discharge will not be the trigger point is if there has been earlier termination.
- ii) If the date of final discharge is not to be the trigger point, then the second and third of Lord Denning's rationales are undermined. He points to Mocatta J's concerns in **The Aristokratis** (admittedly a time charter case) at 555 that:

"If the limitation period only runs from discharge of the final cargo carried during the period of the charter, there would be in effect a longer period relative to the earlier voyages and the period allowed after discharge of the end of the first voyage would be the longest."

- iii) If the trigger date is to be, as construed by him, 'whichever is the later', then, although that is straightforward if there is discharge followed by termination, if there is a termination followed by discharge (i.e. the termination takes place in circumstances such that there is still cargo left to be discharged), the subsequent date of discharge may be uncertain, leaving an uncertainty as to which date applies.
 - iv) The purpose of X's amendment to the Centrocon form to include an alternative of 'earlier' termination, on his construction, must be taken to be to avoid what I called the 'black hole', pointed out by Megaw J in **Denny, Mott & Dixon Ltd v Lynn Shipping Co Ltd** [1963] 1 Lloyd's Law Rep 339 at 345 and by Mocatta J in **The Simonburn** at 358-9, namely where there is termination as a result of an event in which the cargo is lost, and there is thus no discharge, so that there is no 12 months trigger, and the 6-year limitation period applies.
 - v) Mr Semark further points out that the construction contended for by Y would allow in some cases for a lengthier period than that provided for in Article III r6 of The Hague Rules, which would or might create problems for those owners required by their P & I clubs to contract on terms no less favourable to the owner than The Hague Visby Rules.
16. Mr Nolan however submits that he is simply adopting the straightforward meaning of the words "*within ... 12 months of final discharge or termination of this Charter Party, whatever the case may be*", and his construction does indeed, as the Arbitrator intended, "*give effect to both terms*". There are two starting points for the giving of notice, either the final discharge or the termination of the charterparty, and the claim is in time if it complies with either deadline. It is not a question of when a cause of action arises, but when notice must be given, and it is in time if within 12 months of either date. He is not therefore reading in the words "*whichever is the later*", as characterised by Mr Semark.
17. Mr Nolan's submissions are as follows:
- i) The problems of uncertainty raised by Mr Semark do not arise, since the notice can and must be served within 12 months of either the discharge or the termination, and it is bound to be easily apparent when one of those took place, even if not both of them. Indeed he submitted that the difficulty is rather with Mr Semark's contention, because, on Mr Semark's interpretation of the clause, there may still be a black hole. If there is an incident leading to loss of cargo, but there is no cancellation of the Charter Party, and the vessel continues with the next voyage, then there is no *final discharge* of the relevant cargo, and no earlier termination.

- ii) Mr Nolan submits that, on his construction, there is a satisfactory resolution of the black hole, and one which allows straightforward operation of Clause 36 (but with two alternative trigger dates):
 - a) If there is a termination prior to *final discharge*, and the vessel proceeds to discharge, then the notice must be given within twelve months of either date.
 - b) If there is a loss of cargo prior to discharge, but no termination (as in (i) above), then the date will be the eventual termination of the Charter Party.
 - c) If there is final discharge, and the Charter Party then terminates subsequently, by effluxion, then there are two alternative dates.
- iii) There is thus no uncertainty on the facts of this case, very little extension of time (4 months on the facts of this case – see paragraph 3 above), and the opportunity for the settling of accounts at the end of each voyage, because the notice does not need to be put in at the last available date.
- iv) Neither party's construction accords exactly with The Hague Rules; and, particularly in the absence of any or any admissible evidence about the impact on P & I Clubs, that could not have affected the Arbitrator's conclusion and should not affect mine.

Conclusion

- 18. I am persuaded by Mr Nolan that his submissions are to be preferred, for the reasons he has given, such that the same conclusion is reached as was reached by the Arbitrator, although without reference to his more flexible construction of *termination*, if such it was, referred to in paragraphs 11-13 above. Mr Nolan's case, on this part of Clause 36, is in no way inconsistent with **The Simonburn**: it is a construction of a different clause, with an added alternative time limit, and none of Mr Semark's submissions persuade me that Mr Nolan's solution is in any way unworkable or inconsistent either with authority or with commercial practice. I also accept that his construction, insofar as this is relevant at all, is a more satisfactory way of dealing with the black hole in such a way that a 12-month time limit becomes universally applicable to all possible events.
- 19. I conclude that Mr Nolan is not involved in adding words, but is construing the existing words without any addition. He does not need 'whichever is the later', nor indeed is that appropriate, where, on his construction, notice can be put in within twelve months of either trigger date. It is Mr Semark who is adding the words 'whichever is the earlier', and, I conclude, is doing so when I am not in any way satisfied (to revisit Chadwick LJ's words) "*that the words actually used produce a result which is so commercially nonsensical that the parties could not have intended it*" or indeed that "*they did intend some other commercial purpose which can be identified with confidence*": both conditions require to be satisfied before Mr Semark's words can be added and in my judgment neither are.
- 20. Like the Arbitrator, therefore, I do not need to resort to the 'contra proferentem' rule.
- 21. It was suggested that the construction of this clause, as contained in a consecutive voyage charter, would or might be of general application. That depends whether there are other such clauses which contain two alternative trigger dates for the 12-month time limit; but I am satisfied that, as to the construction of this particular clause, the Arbitrator's conclusion that the notice given by Y which, in the event, was given within 12 months of the termination, was in time, was correct, and Y is not time-barred.

Extension of Time

- 22. In the circumstances, I do not need to resolve the s12 application by Y, referred to in paragraph 5(ii) above. My attention has been drawn to **Vosnoc Ltd v Transglobal Projects Ltd** [1998] 1 WLR 101, **The Catherine Helen** [1998] 2 Lloyd's Law Rep 511, **The Seki**

Rolette [1998] 2 Lloyd's Law Rep 638 and **Harbour and General Works Ltd v The Environment Agency**, per Colman J in the Commercial Court, [1999] 1 AER (Comm) 953, and in the Court of Appeal [2000] 1 WLR 950. If Y had been wrong, and X's construction of Clause 36 had been right, and Y's notice had been 15 days out of time because of its misconstruction of the Clause, then I should have needed to consider the provisions of s12(3)(a) of the 1996 Act, in the light of those authorities, so as to conclude whether it could be said that reliance upon such mistaken construction was a "*circumstance ... outside the reasonable contemplation of the parties when they agreed the provision in question*", before deciding whether it was just to extend the time. In the circumstances no such difficult consideration is necessary, as the arbitration claim was not out of time.