JUDGMENT : Mr Justice Walker : Commercial Court. 7th December 2007

Introduction

1. This is an appeal under s 69 of the Arbitration Act 1996. By a contract dated 21 September 2006 the appellant ("CIC") bought from the respondent ("Man") a quantity of sugar "f.o.b. stowed (1/2 safe berth(s)) Santos." Among other things the contract stated:

Payment:	*… Letter of Credit to be available at sight for 100% of invoice value against shipping documents.*
	Letter of Credit to allow part shipments, negotiation of documents within 21 days after Bill of Lading date. …
	Letter of Credit for entire contractual tonnage to be opened in fully workable form in favour of seller within 5 working days of contract date …
Shipment Period:	*One vessel only presenting October 2006 Shipment at Buyer's Option, with 10 days pre-advise of vessel arrival. …*
Loading:	*…*
	Lay days at the average rate of 1000 MT per day … provided vessel can receive at this rate …
	At loading port in the event of congestion Master has the right to tender notice of readiness at the customary waiting place … whether in berth or not, whether in port or not, whether in free pratique or not, whether customs cleared or not.

2. The contract also said that the rules of the Refined Sugar Association ("the RSA") were incorporated. Rule 7 was in these terms:

   In cases of FAS, FOB and FOB Stowed contracts, the Seller shall have the sugar ready to be delivered to the Buyer at any time within the contract delivery period. The Buyer has the option of taking delivery of the contract quantity in one or more lots during the contract delivery period …

   The Buyer having given reasonable notice, shall be entitled to call for delivery of the sugar between the first and last working day inclusive of the contract delivery period. The Buyer must give notice … to the Seller of the name/s of the vessel/s on which the sugar is to be shipped and the vessel/s expected time of arrival at the loadport and the tonnage to be loaded …

   If the vessel/s has presented herself in readiness to load within the contract delivery period, and loading has not been completed by the last day of the period, the Seller shall be bound to deliver and the Buyer bound to accept delivery of the balance of the cargo or parcel up to the contract quantity …

3. On 25 September 2006 CIC opened a letter of credit. It is common ground that this letter of credit required presentation of a bill of lading dated no later than 31 October 2006. During the afternoon of 25 September 2006 Man insisted that under the contract a bill of lading might have a date in November, and that the letter of credit should accordingly provide for a bill of lading dated in October or November. They drew particular attention in this regard to congestion problems at Santos. CIC replied that evening maintaining that the letter of credit was in strict compliance with the terms of the contract, and that Man should trust CIC to abide by what CIC described as their contractual obligation to extend the letter of credit shipment period if it became necessary as a result of delay in loading. During the early afternoon of 26 September 2006 CIC repeated that if it became clear that, despite Man's compliance with its contractual obligations, shipment would not in fact be completed during October they would extend the shipment period in the letter of credit appropriately. They gave Man until 4 p.m. that day to withdraw their demand for amendment of the letter of credit, failing which CIC in effect said that Man's conduct would be treated as repudiatory. Man replied that if CIC presented their vessel at the end of October the bill of lading date would be in November. Attempts to reach agreement were unsuccessful and during the evening of 26 September CIC held Man in default and terminated the contract.

4. In accordance with the contract CIC's claim for damages against Man came before a panel of arbitrators of the RSA. Man reserved the right to bring a counterclaim for damages against CIC. In a reasoned interim award dated 24 May 2007 concerning liability on CIC's claim the panel found that the letter of credit was not in accordance with the terms of the contract and that CIC's claim accordingly failed. CIC were granted permission to appeal by Simon J on 3 September 2007.

The preliminary question

5. The question of law ("the main appeal question") set out in the arbitration claim form is:

   Where an FOB buyer is obliged to open a fully workable letter of credit and:

   (a) the sale contract provides for a shipment period during which the vessel must present for loading;

   (b) the RSA rules apply envisaging that, if two pre-conditions have been met, loading may continue until an uncertain date after the end of the contract delivery period.

   what final bill of lading date and expiry date should be provided for in the buyer's letter of credit?

6. Mr Hamblen QC, who appeared with Ms Jones for CIC, acknowledged that the answer to the main appeal question would only assist his clients if it were held by the court that the contract in the present case identified a shipment period under which loading had to be completed by 31 October 2006. In this judgment I shall deal in the first instance with the preliminary question whether CIC are right to contend that the contract in the present case identified a shipment period under which loading had to be completed by 31 October 2006.

Contentions on the preliminary question

7. The forensic points to be made on the main appeal question sometimes overlapped with those to be made on the preliminary question. In their skeleton arguments and oral submissions counsel understandably did not always clearly distinguish the two. In what follows I seek to summarise the main points which appear to me to have relevance to the preliminary question.

8. Mr Hamblen submitted that leaving aside RSA Contract Rule 7, so far as shipment period was concerned, this was a classic f.o.b. contract under which loading had to be complete by the end of the month specified in the contract, namely October 2006. The Panel had wrongly read the Shipment Period clause with an additional full stop: *"One vessel only presenting October 2006. Shipment at Buyer's Option …"*. If punctuation was to be added, the more natural construction was "*One vessel only presenting. October 2006 Shipment at Buyer's Option …"*. Properly construed the clause meant "*One vessel only presenting [for] October 2006 Shipment at Buyer's Option*".

9. In support of this contention Mr Hamblen noted that the words in question appear against the rubric "*Shipment Period"* and observed that the ordinary meaning of "*Shipment Period"* is the period during which the goods must be shipped. In f.o.b contracts it is axiomatic that the seller must ship the goods at the latest by the end of the period specified for shipment in the contract. He referred to *Benjamin's Sale of Goods*, 7th edition at paragraphs 20-029 and 20-030, where the classic f.o.b. contract is said to oblige the seller, on receipt of proper shipping instructions, to ship the goods "at latest by the end of the period (if any) specified for shipment in the contract", and if the time for shipment is expressly at the buyer's option (or the contract is silent on the point) the buyer is normally entitled to call for shipment at any time during the period. In the present case the Panel held that the contract contained no defined period during which the goods had to be shipped or delivered, because October was merely the period when the vessel had to be presented. However that could not be right, for it involved rewriting of the contract to say "vessel presentation period" instead of "shipment period". A defined shipment period was necessary in order to make the contract workable – if the period were for such time as might be needed to stow the cargo on board a vessel presenting in October, that time would depend on factors such as the weather, the terminal to be used, and the amount of congestion at the terminal. All of these factors could not be known to the buyers. Uncertainty of that kind was deprecated by Diplock J in ***Ian Stach Ltd v Baker Bosley Ltd*** [1958] 2 QB 130, 148.

10. He added that the Panel's construction of the contract was contrary to ***Compagnie Commerciale Sucres et Denrées v C. Czarnikow Ltd ("The Naxos")*** [1990] 1 WLR 1337, where the House of Lords considered an FOB stowed contract which provided for delivery "To one or more vessels presenting ready to load during May/June …". Observations by Lord Ackner were relied on as showing that on this wording the cargo had to be loaded before the end of June.

11. Mr Andrew Baker QC for Man submitted that when construing the relevant words it was logical to put in a full stop before the capital "S" of "Shipment at Buyer's Option." It was a nonsense to place the full stop so that the passage began with a sentence, "One vessel only presenting." He contended that the law is familiar with, and sees no difficulty in, the possible need to imply, by reference to standards of reasonableness, letter of credit requirements not spelt out in a sale contract (see ***Ficom S.A. v Sociedad Cadex Limitada*** [1980] 2 Lloyd's Rep 118, 131). The sale contract did not require the letter of credit to contain a last date for shipment at all. There was nothing unfair or uncommercial about CIC having to err on the side of caution if it wanted to impose one but did not bother to agree it with Man in advance. In the *Ian Stach* case Diplock J had at p. 148 stressed that what was required was that by the time the shipping period started the seller should have received from the banker the assurance that if he performed his part of the contract he would receive payment. In the present case the panel comprised commercial men who lived and breathed these contracts, and had said in their award that the objective establishment of a reasonable final shipment date involved no less certainty than the establishment of other reasonable dates in the performance of a sale of goods contract, for example the delivery of goods within a reasonable time where no date was fixed by the contract. This should weigh heavily against CIC's suggestion that Man's construction of the contract was commercially impracticable.

12. As to ***The Naxos***, it was common ground in that case that apart from the equivalent of RSA Contract Rule 7 there would have been a May/June 1986 shipment period. However the contract wording was materially different: *"Delivery: To one or more vessels presenting ready to load during May/June 1986 …"*. It was further argued that even in that wording "*during May/June 1986*" qualified "*presenting"*, not "*ready to load*" – contrary to what was common ground in that case. Whether the parties' agreement was right did not fall to be decided by the House of Lords, and it was irrelevant to the decision whether in the absence of the RSA Rules the vessel had merely to present by end June or had to present capable of completing loading by end June. In the present case the words "*Shipment at Buyer's Option, with 10 days pre-advise of vessel arrival"* were used to ensure that when precisely (within October) shipment should commence was determined by when, following a contractual pre-advice of arrival, CIC's vessel presented herself.

13. In a written reply Mr Hamblen contended that the panel's conclusion that the contract identified only a vessel presentation period had been only faintly supported in Man's written and oral argument. The written reply sought nevertheless to answer Man's points on ***The Naxos*** by saying:

    (1) … The inclusion of "ready to load" in the Naxos clause adds nothing. First, these words obviously do not in themselves mean that loading has to be completed within a particular period. The House of Lords based their analysis on the wording of the whole clause, not these particular words. Secondly, the only way a vessel can be "presented" (certainly in this contract) is by tendering a notice of readiness. The whole purpose of an NOR is to state that the vessel is ready to load and a valid NOR cannot be given unless the vessel is so ready. A "presenting" vessel is therefore necessarily one which is "ready to load".

    *(2) Although the passages relied on by CIC may not have been in issue in that case, it is nevertheless significant that the House of Lords analysed the contract as containing a delivery period which could be extended in certain circumstances (**[3]**/**[53]**). They recognised that May/June was the "contract shipping period" (p1344A) and "delivery period" (p1348B), which Rule 14.4 could "extend" (p1348B and p1349D) in the event that it came into operation.*

14. The written reply added that the Panel acknowledged that the award introduced an element of uncertainty, and further acknowledged that a letter of credit requires a final shipment date.

Analysis of the preliminary question

15. CIC suggest that the preliminary question was "only faintly" put in issue by Man. That does not accord with my recollection of the oral argument. Mr Baker advanced his points with commendable succinctness, and with no lack of vigour.

16. The answer to the preliminary question turns on how one construes the words *"One vessel only presenting October 2006 Shipment at Buyer's Option, with 10 days pre-advise of vessel arrival."* Does the word "presenting", as CIC suggest, focus on the preceding words "*One vessel only",* with the consequence that the subsequent words "October 2006" look towards the next word "Shipment? Or is it, as Man contend, concerned to define what the "One vessel only" must do in October 2006, with the word "Shipment" being what it is that will be at the buyer's option?

17. CIC say that the decision in *The Naxos* requires me to hold that the word "presenting" in the contract between them and Man does not define what must be done in October. Such a contention runs counter to the general principle that a court construing a contract must have regard to the particular terms and factual matrix of the contract in question. I am satisfied that CIC are not right in suggesting that *The Naxos* binds me to reach the conclusion they seek. I agree with Man's contentions that whether the parties' agreement was right did not fall to be decided by the House of Lords, and that it was irrelevant to the decision whether in the absence of the RSA Rules the vessel had merely to present by end June or had to present capable of completing loading by end June. As to point (1) of CIC's reply, the House of Lords merely adopted the parties' agreement and did not analyse the basis for it. If the parties are agreed on an aspect of what the contract meant it would be remarkable if a court were to differ from this. I do not say that the parties' agreement was wrong – I do not know the full terms or factual matrix of that particular contract. For what it is worth, on the material available in the report, the parties' agreement seems to me likely to have been right – the words "during May/June" appear to be directed to the period of loading rather than the period within which the vessel must be presented. The present case involves rather different wording. I agree that a presenting vessel is one that is able to give a notice of readiness conforming to the contractual requirements for that document. That begs the question whether the parties intended that one of the contractual requirements was that the vessel would be able to complete loading in October. Point (2) in CIC's reply asserts some significance in the willingness of the House of Lords to adopt the parties' agreement, but this seems to me to take the matter no further for the reasons I have given in relation to point (1).

18. Accordingly my task on the preliminary question is to construe the contract having regard to its particular terms and factual matrix. I do not accept that Man's construction is inconsistent with the rubric "Shipment Period." What that construction involves is that the period within which the sellers must stow the cargo is the period of time needed in order to stow the cargo on board a vessel presenting in October. True, it does not specify an end period with a fixed date. That however, may be in the interests of the buyer, avoiding the need to nominate a vessel on which the cargo could be stowed by 31 October. I accept that as a matter of commercial reality a letter of credit will usually need to specify fixed dates which are to be specified in the bill of lading or other evidence of completion of shipment. Accordingly in a case where the contract itself does not identify a fixed deadline the buyer will have to make a reasonable estimate of when shipment will be complete. To an extent the buyer may need to make inquiries of others. That however does not seem to me to be in the same league as the uncertainty which caused concern to Diplock J in the ***Ian Stach*** case, where the construction rejected by Diplock J would have meant that at the time the shipping period started the seller would not have from the banker any assurance that if he performed his part of the contract he would receive payment. I agree with the panel that contracts for the sale of goods not uncommonly require a party to make a reasonable estimate of the time needed for a particular purpose. A similar example to that of the panel is the need for a buyer, when an f.o.b. contract fixes a date for completion of loading, to nominate a vessel which is capable of loading the goods by the fixed date: see *Benjamin's Sale of Goods* at paragraph 20-043.

19. Against the contentions of CIC, and in my view clearly outweighing them, are the clear inferences which in my view are to be drawn from the way in which the parties expressed themselves in the words I have quoted. I accept Mr Baker's submission that the words "Shipment at Buyer's Option, with 10 days pre-advise of vessel arrival" were used to ensure that when precisely (within October) shipment should commence was determined by when, following a contractual pre-advice of arrival, CIC's vessel presented herself. This is consistent with the passage from *Benjamin's Sale of Goods*, 7th edition at paragraph 20-030 cited by Mr Hamblen. It may not have been necessary to make express contractual provision in this regard, but it was desirable to do so in order to ensure that both sides knew clearly where they stood. It follows that the words "Shipment at Buyer's Option, with 10 days pre-advise of vessel arrival" stood on their own. Consistently with this a notional full stop is to be inserted before the capital "S" of "Shipment", and the preceding section reads "One vessel only presenting October 2006." That has the merit of making grammatical sense. More importantly, for the reasons given above – which are in essence those of the panel – it appears to me to be well capable of making commercial sense.

Conclusion

20. My analysis of the arguments leads me to conclude that despite Mr Hamblen's careful and sustained submissions CIC do not succeed on the preliminary question. That conclusion renders it unnecessary to examine the main appeal question. I say nothing on that question, for in my view it is preferable that any decision on the point should await a case in which it necessarily arises for decision.

Mr Nicholas Hamblen QC and Ms Susannah Jones (instructed by Middleton Potts) for the claimant
Mr Andrew W Baker QC (instructed by Jackson Parton) for the defendant