

JUDGMENT : Mr Justice Langley: Commercial Court. 1st May 2002.

INTRODUCTION

1. This is a claim for demurrage allegedly due and a counterclaim for demurrage allegedly overpaid. The claims arise out of a contract dated 5 December 1997 by which the Claimant ("Logos") agreed to sell a quantity of base oil to the Defendant ("A-Z") on a C and F basis. The proceedings include a further claim by Logos for US\$ 17,284.81 which was admitted by A-Z at the commencement of the trial. A-Z also then abandoned a counterclaim for re-payment of certain fees. The managing Director of Logos is Mr Jens Victor. The Chief Executive of A-Z is Chief Okafor. Both gave evidence and were in court throughout the hearing.

THE CONTRACT

2. The contract provided for the sale of a minimum of 5300 and a maximum of 6000 "metric tons" of base oil at Logos' option. Shipment was to be from Brazil to Lagos, Nigeria. The price was \$385 a tonne. The other material Articles of the contract were:

"Article 8: Demurrage

Demurrage as per charter party terms and conditions. Demurrage, if any, shall be fully settled by buyer latest 15 days after receipt of demurrage invoice with supporting documentation.

Article 10: Payment Terms

Payment by an irrevocable and acceptable letter of credit ... Buyer to open the letter of credit latest 7 Banking Working Days ... prior 1st January 1998.

Any difference between the Proforma Invoices and the contractual price shall be transferred in cash to seller's nominated account upon signing contract.

Article 16: Other Terms

This Agreement is made subject to seller's reconfirmation to be granted/rejected within two working days from the date of the full agreement."

THE ISSUES

3. There is no dispute that under the charter party dated 19 December 1997 demurrage was incurred at Rio de Janeiro from 2 to 12 January 1998 in a total amount of \$104,493.
4. Demurrage was also incurred at Lagos from 28 January to 17 February which, allowing for various deductions, amounted to some 18 days and 6 hours and a total sum of \$182,510.
5. Logos claims those sums pursuant to Article 8. Logos alleges that the cause of the demurrage time at Rio was the failure by A-Z to open the letter of credit and to make the additional cash payment due under Article 10. Logos alleges that the cause of the demurrage time at Lagos was the failure of A-Z (by its agents, Chrismatel) to provide the necessary customs and Navy permissions to permit discharge and the problems caused by inadequate discharge facilities onshore (piping of inadequate diameter) for which A-Z and its agents were also responsible.
6. A-Z alleges that the cause of the demurrage time in Rio was Logos' failure to reconfirm the contract within 2 days of 5 December which, it is submitted, was required by Article 16 and resulted in delay to the opening of the letters of credit and the making of the cash payment and so to the loading of the vessel. A-Z also alleges that the cause of the demurrage time in Lagos was an electrical fault on the ship which restricted the ship's ability to pump the cargo ashore.

THE FACTS

7. The day before the contract was signed, on 4 December, Logos, at A-Z's request, provided A-Z with the proforma invoices referred to in Article 10. Mr Victor said, and I accept, that the purpose was to enable A-Z to apply to the Central Bank of Nigeria for the relevant foreign exchange if A-Z wished to do so. The invoices were at \$310 a ton and so there was a substantial cash sum due in addition under Article 10 of the contract.
8. The meaning of Article 16 is important but also obscure if the words alone are considered. Mr Johnson submits that "the full agreement" means "this agreement" and so the reconfirmation was required no later than 8 January. In my judgment that is wrong. The phrases are used in apparent contradistinction in the Article itself. "The full agreement" must, I think, refer either to a "full" version of the agreement recorded yet to be drafted, or to some other agreement. In the event, I do not think it matters which it is because I unhesitatingly accept Mr Victor's evidence that at all times after 5 December Logos and A-Z kept each other fully informed of the progress of the contract (in particular the precise quantity to be supplied and the shipping arrangements) and both proceeded at all times on the basis that the contract was to proceed as indeed it did.
9. If it were necessary to do so I would also have been prepared to rely on the evidence concerning the context in which the Article came to be agreed. Mr Victor said, and I accept, that the only source of base oil in Brazil was Petrobras and Chief Okafor knew that. They had discussed the position and at 5 December, whilst Logos was confident it had an oral agreement with Petrobras for the supply, it was concerned to ensure the details and in particular the quantity were finalised. Neither Logos nor A-Z ever contemplated any further "full" agreement being made between them. Against that background the meaning of Article 16 becomes apparent. Once Logos had obtained a final agreement with Petrobras the contract with A-Z would be reconfirmed.

10. It is at this point in considering the facts that it becomes necessary to comment on a number of documents which Logos submits are not authentic. The first document is a copy of the 5 December contract itself produced by A-Z which bears a typed addendum and two signatures of Mr Victor. To understate the case the appearance of the document itself is curious. Mr Victor said the signature looks like his but he did not write it on any such document. He also said that he would not (and indeed could not) have agreed to the added words as he would have been agreeing to something he knew he could not fulfill. I am quite satisfied that Mr Victor's evidence is to be believed.
11. There are three other documents purportedly written by A-Z to Logos which Mr Victor said Logos never received. Chief Okafor was unable to provide any specific details as to how they were sent or delivered to Logos. The first is a letter signed for Chief Okafor by his secretary dated 6 December 1997 which refers to the cash balance due under Article 10 and "maintains" that it can only be paid with the Letter of Credit. The final paragraph of the letter refers to the payment of demurrage. Again I regret to say that I am quite satisfied this document is also not genuine. The previous day Chief Okafor had signed the contract recording (Article 10) his agreement that the cash balance would be paid that day. On the evidence there never was a payment of demurrage by A-Z to Logos until May of the following year when part payment was made in respect of the contract. The final paragraph of the letter is therefore inexplicable.
12. The second letter is signed by Chief Okafor and dated 15 December. It says that Logos "none reconfirmation" of the order was causing problems with the letter of credit because the Central Bank of Nigeria only sells foreign exchange on Wednesdays, and requests confirmation of the order. Again I regret to say that contrary to Chief Okafor's evidence I am also satisfied this letter was never delivered to Logos. I accept Mr Victor's evidence that he was in regular communication with Chief Okafor about the contract, and in particular the precise quantity of base oil which Petrobras was to supply. There was therefore no need for such a letter. Further, on 17 December (which was a Wednesday) Logos sent a fax to A-Z for the attention of Chief Okafor confirming "as advised to you yesterday" the allocation by Petrobras of 5800 tons of base oil. This fax requested payment of the cash balance and although Chief Okafor suggested it was a response to his letter it makes no reference to it and is much more consistent with Mr Victor's account of continuing discussions. It follows that at no time did A-Z complain about or question any earlier lack of reconfirmation.
13. Finally a further letter signed by Chief Okafor dated 17 December states that the Chief "still" maintains that the cash payment can only be made with the Letter of Credit. The letter makes no reference to the 6 December letter and again I accept Mr Victor's evidence that it was not received by Logos.
14. I should add that the originals of these documents and original copies were not available in this country as they should have been but the court was told they were in store in Lagos. Despite the court's insistence that they be couriered from Nigeria to London and apparent agreement to steps being taken to achieve that over the night of 15 and 16 April 2002, on the morning of 16 April the court was told that the originals were held in a safe to which only Chief Okafor had the keys and the keys were not available in Lagos to obtain access to the safe.
15. On 18 December Chief Okafor did write to Logos requesting that the invoices for the base oil be split into six. On 19 December Mr Victor replied enclosing six invoices as requested and adding:
"It is imperative that the L/Cs are in place with us latest Monday/Tuesday next week due to the holidays. The vessel we are working to fix will commence loading 30th Dec. but Petrobras need their L/C from us end next week. Keep us advised."
16. There was no reply to this letter, nor to a further chaser (for both the letters of credit and cash payment) sent by Logos to A-Z on 19 December which recorded the nomination of the "San Nicolas" for shipping the cargo and notified loading dates and demurrage rates.
17. A-Z's bankers took steps to set up the letters of credit only on Wednesday 24 December. Logos continued to chase. Demurrage began to be incurred on 2 January. Eventually on 12 January 1998 the issue of the Letters of Credit and the receipt of the cash payment of \$450,000 was confirmed to Logos. The demurrage claimed ended on that day. The cash payment was made from A-Z's London bank.
18. The vessel sailed from Rio on 15 January. Notice of readiness was given at Lagos on 28 January. She waited for berthing instructions until 8 February. The Master's log records that on 8 February the vessel was awaiting custom and Navy clearance before it could discharge the cargo and that A-Z's agent (Chrismatel) should have obtained the clearances before the vessel berthed. The log records that clearances were received on 9 February when discharge commenced but proceeded slowly "due to the strong back pressure by 6" shore line which connected to the 4" line before the shore tanks". The log also records that discharge was interrupted between 12 and 14 February because Chrismatel had not paid customs dues.
19. The Log is fully supported by other documents. On 28 January the Master requested A-Z to arrange the supply of a number of 6" hoses to effect discharge. On 12 February he issued a letter of protest in respect of the flow rate restriction caused by the hose in fact supplied. On the same day he issued a letter of protest about the failures to obtain customs and Navy clearances and repeated it for the final customs problems on 13 February. Logos was aware of these difficulties. It instructed independent surveyors to attend the vessel. They (Clipper Marine Nigeria Ltd) reported on 18 February in terms which support the Master's Log and Letters of Protest. Logos wrote to A-Z on 23 February 1998 enclosing Clipper Marine's Report and saying *"if the vessel is at fault, then obviously it will have to be deducted from the demurrage claim. If Chrismatel has something more substantive to present we shall be happy to receive same"*. There was no reply.

20. Despite this documentation and Mr Victor's evidence about it, Chief Okafor said in evidence that the Master had simply recorded what he had untruthfully in order to cover up the fact that the cause of the delays in discharge was an electrical fault in the vessel's own equipment.
21. The only basis for Chief Okafor's reference to an electrical fault are two letters from Chrismatel to Logos. The first, undated, protests about such a fault and the second, dated 8 February 1998, and apparently referring to the first, states that "due to electrical fault discovered in the vessel the discharge rate was slow and the vessel spent 8 working days to discharge the consignment". On any view the letter must be mis-dated as discharge did not commence until 9 February. Mr Victor said he was aware of a suspected problem with one pump on the vessel, hence he sought the independent inspection with the result stated. To put it at its lowest this is a quite inadequate evidential basis on which to seek to challenge the other evidence which I have mentioned, let alone on which to make the allegations against the Master to which I have referred.
22. On 13 February 1998 in a letter, signed by Chief Okafor on behalf of A-Z, A-Z wrote in terms that "we accept the demurrage attracted Overseas", which can only be a reference to Rio, and accepting demurrage in Lagos subject to a point on the number of days then involved which forms no part of the present dispute. All the matters of which A-Z complain were known to the company at the date of this letter.
23. In May and June 1998 A-Z in fact paid Logos \$135,920 towards the demurrage due (which A-Z now counterclaims on the basis payment was made by mistake). Logos gives credit for the payment in the claim. Logos has paid \$100,000 on account to the owners of the San Nicolas.

DEMURRAGE AT RIO

24. The only defence to this claim is the allegation that failure to re-confirm the contract itself led to delays in opening the letters of credit and making the cash payment.
25. I have already said that in my judgment Logos fully complied with the terms of Article 16 properly construed. But whether it did or not A-Z's obligations to open the letter of credit and make the payment were free-standing and should have been discharged long before any demurrage was incurred. Indeed even after the "reconfirmation" on 17 December (paragraph 12) there was ample time for A-Z to discharge those obligations before 2 January when demurrage began. Nor was the contract conditional on the use by A-Z of foreign exchange facilities in Nigeria. The cash payment was made from other resources.
26. In my judgment there was no breach of Article 16 by Logos; even if there was it was plainly waived and in any event the cause of the demurrage claim was the failure of A-Z to make the cash payment and open the letters of credit as agreed. A-Z rightly acknowledged liability in the letter of 13 February.

DEMURRAGE AT LAGOS

27. Mr Johnson rightly accepts that unless the court finds the probable cause of the delays at Lagos to have been an electrical fault in the vessel's pumping equipment there is no defence to this claim. I am entirely satisfied, as I have indicated, that the causes of the delay were the inadequate shore facilities and the failures to obtain customs and Navy clearances which were A-Z's responsibilities. There is therefore no defence to this claim either.

THE REMEDY

28. Mr Johnson submitted that the right remedy, if Logos succeeded in the demurrage claim to any extent, was an order for an indemnity in respect of any claim by the owners of the San Nicolas and not a money judgment. He submitted that was the effect of Article 8 and in any event that it would not be right for Logos to obtain a "windfall" if it was not to pay on to the owners any recovery. Mr Victor's evidence was that the owners were aware of the present proceedings and, having been paid \$100,000, were content to await their outcome.
29. In my judgment Article 8 entitles Logos to a money judgment and not merely an indemnity. The Article requires full settlement of demurrage by A-Z within 15 days of receipt of documentation. That obligation is owed to Logos. It mirrors Logos' obligation to the Owners in the Special Provisions of the charter party save that Logos' obligation bites within 30 days of receipt of documentation. I think the purpose is clear. Logos is to be paid by A-Z before Logos has to pay the Owners, just as the letters of credit from A-Z to Logos and Logos to the Owners were also to be back-to-back. A-Z, of course, paid the \$135,970 without questioning whether any payment had been made by Logos to the Owners and A-Z was I think right to do so.

CONCLUSION

30. Logos is entitled to a money judgment for the sum of US\$17,284.81 referred to in paragraph 1 and the sums of \$104,493 and \$182,510 (paragraphs 3 and 4) less \$135,970 (paragraph 23). I will hear counsel on questions of interest and costs unless they can be agreed and any other matters they wish to raise when this judgment is handed down.

Mr C. Davies (instructed by Messrs Blick & Co) for the Claimants
Mr J. Johnson (instructed by Messrs Lawrence Jones) for the Defendants