JUDGMENT : Mr Julian Flaux QC: Commercial Court. 13th March 2007

Introduction

1. This case involves two disputes as to demurrage claimed by the Claimant (Lia) as seller from the Defendant (ERG) as buyer in respect of two shipments of fuel oil sold pursuant to a so-called "Frame Contract" dated 5 May 1999. Under that Contract, Lia agreed to sell to ERG 40,000 metric tons per month of Russian fuel oil, on either C&F or DES terms, for delivery at the Isab terminal operated by ERG at Santa Panagia Bay in Italy. The Frame Contract was in fact renewed from year to year.

2. The provisions relating to laytime and demurrage were as follows:

   "*12. Laytime*

   36 hours + 6 hours nor shinc to apply for each lot, provided vessel discharges the whole cargo in 24 hrs time. Any delay before berthing, during berthing, after berthing which are the result of bad weather and/or bad sea conditions and/or berth closure by port authority shall count as half the laytime, or if the vessel is on demurrage, as half time on demurrage.

   …

   14. Demurrage

   Demurrages, if any, will be required by seller if owners actually claim it pro rata quantity loaded if part cargo, rata [i.e. rate] *as per c/p… any claim barred if not notified duly supported by relevant documents (whereof copy of c/party and copy of owners' demurrage claim and invoice) within 100 days from b/l date.*"

3. The first dispute concerns demurrage on the MT LIANO, which Lia nominated and ERG accepted on 3 June 1999 as the performing vessel for the fifth shipment under the Frame Contract, a shipment which was sold on DES terms. At the loadport, the cargo was tested and was found off specification in relation to its "P-value" (peptization, a measure of chemical stability). For this reason, on 15 June 1999, the parties agreed to retest the cargo at Santa Panagia and agreed that "*time spent for running [the retest] will not count as laytime or demurrage if vessel already on demurrage*".

4. The vessel arrived at Santa Panagia on Saturday, 19 June 1999, serving notice of readiness at 10.12 hours. Between 12.00 and 16.30 that day the cargo was re-tested and found again to be off-specification. Accordingly, on 21 June 1999, the parties agreed to discount the final price by US$4 per metric ton. The vessel was expected to berth that evening but was delayed because of bad weather. She berthed on 24 June 1999 at about 18.00 hours, commenced discharge at 23.00 that night and completed discharge at 01.15 on 26 June 1999.

5. Lia's original claim for demurrage against ERG was for some US$59,937.50. However, at the trial, Lia accepted that since the Claim Form was not issued until 16 December 2005, the bulk of that claim was, as ERG was contending, time-barred under the Limitation Act 1980. The claim is advanced only in respect of US$9,505.21, being a sum which Lia contends ERG acknowledged as due in May 2000, so that the limitation period ran again from the date of acknowledgment pursuant to section 29(5) of the Limitation Act 1980.

6. The issues in relation to the LIANO shipment are twofold:

   (1) whether, as ERG contends, the remaining claim for US$9,505.21 is time-barred or whether, as Lia contends, the documentation produced by ERG on 30 May 2000 constituted an acknowledgment of that "liquidated pecuniary claim" for the purposes of section 29(5) of the Act;

   (2) whether, as ERG contends, even if not time-barred, the claim is barred under clause 14 of the Frame Contract because Lia failed to produce the relevant supporting documents within 100 days of the bill of lading date or whether, as Lia contends, either the relevant documents were produced or ERG is estopped from alleging the contrary.

7. The second dispute concerns demurrage on the KOGALYM which was the nominated vessel for the thirtieth shipment under the Frame Contract. Whilst the vessel was at the loadport on 11 and 12 January 2000, the cargo was tested and found to be off specification particularly as regards its P value. Following a telephone conversation between Mr Emin Aliyev of Lia and Mr Ernesto Mignone of ERG, the latter sent a telex on 12 January 2000 stating:

   "Ref telcons about [this] cargo…, please note the following:

   We understand from the inspector telex that the…cargo is out of specs (in particular of P Value). Therefore parties agree that the following specs will be re-tested at disport in our laboratory by the independent inspector (Saybolt):

   …..

   on an average sample representative of all cargo tanks taken on board the vessel when she arrives on roads at S. Panagia Bay.

   It is understood that all time spent for the above will be for seller's account.

   Should the cargo be found on specs laytime will run upon berthing."

8. The vessel arrived at Santa Panagia at 23.10 hours on 14 January 2000. She remained at the roads for a day or more because of bad weather. Eventually, on 18 January a Saybolt inspector came on board and took samples of the cargo. These were tested and it was found still to be off-specification. A further conversation took place between Mr Aliyev and Mr Mignone as to what to do with the cargo and it was agreed that ERG would

accept it at a discount. The agreement was reflected in a telex from Mr Mignone to Mr Aliyev of 19 January 2000, which provided:

"*We understood from Inspector telex that P. value retested at disport is 1.7. Therefore in the light of the above parties agree that the cargo is exceptionally accepted by Buyer and a discount of USDLRS/TM 1.5 (one point five) to the contractual price is recognised to the buyer (see also our contractual telex no.1570/… dated 30th December 2000)*

Other terms and conditions unchanged."

9. The vessel berthed on 22 January 2000 and completed discharge on the morning of 23 January 2000. At the trial, Mr Julian Kenny who appeared for Lia, accepted that his clients' claim for demurrage should be limited to the amount for which Lia was liable to the owners from whom it had chartered the vessel, being US$63,035.07. Mr Macey-Dare for ERG did not pursue an argument that no owners' invoice had been provided in accordance with clause 14 of the Frame Contract. As a consequence, the only dispute was one as to construction of the Frame Contract and the telexes of 12 and 19 January 2000, specifically whether as ERG contends, the effect of those telexes was to vary the laytime provision of the Frame Contract so that either laytime never commenced at all or only commenced on berthing of the vessel. Either way, no demurrage would be due.

The Liano

10. The issues in relation to the LIANO shipment have to be considered by reference to the facts surrounding the presentation and handling of Lia's claim for demurrage, some of which are in dispute between the parties. Lia called Mr German Malyk, its chartering manager to give evidence and ERG called Ms Eleonora De Marchi, the person at ERG who had taken over responsibility for demurrage claims earlier in 1999. It is fair to say that, although I have no doubt each was an honest witness, their evidence as to what happened nearly 8 years ago was inevitably reconstruction as to what they thought had happened by reference to the contemporaneous documentation, rather than specific recollection, as Ms De Marchi candidly accepted. It follows that whilst I have of course borne their evidence in mind, where there are conflicts, I have also had regard to the inherent probabilities of the situation and inferences which can be drawn from documents. That exercise has not been assisted by the fact that Lia's own original files were mislaid during an office move from Moscow to Geneva in 2002. Furthermore, although Mr Macey-Dare sought to persuade me that the only reliable evidence as to what was sent by Lia and received by ERG was what was contained in ERG's files, even they are not always reliable, since it is evident and, indeed, Ms De Marchi accepted, certain documents were not retained.

11. It is accepted by ERG that Lia's claim for demurrage in respect of the LIANO was presented to ERG under cover of a letter dated 10 August 1999, together with a claim for demurrage in relation to another vessel. What is disputed is what documents were enclosed with that letter. Mr Malyk's evidence is that the letter was in effect a covering "covering letter" because it enclosed another letter dated the previous day 9 August 1999, which stated that it was enclosing a series of documents, including those required by clause 14 (the charterparty, or at least the fixture recap, and the owners' demurrage claim and invoice) and other documents, such as "copy of our seller's calculation". That letter is not in ERG's file and Lia was only able to find it in electronic form on one of its computers and print out a hard copy. Whilst it was suggested to Mr Malyk in cross-examination that the letter had not been sent, it would seem to have been generated electronically on the date it bears and I can see no reason for concluding that it was not sent. However that does not answer the question what documents were enclosed with it.

12. This is where some confusion sets in. It was accepted by ERG that what was sent included a fixture recap (albeit the wrong one, a matter to which I return below). It was also accepted that it included a 4 page "Laytime Statement" which concerned laytime at both the load ports and the discharge port. It was suggested by ERG that this was in the format of a Vitol document. Vitol SA Geneva was the seller of the cargo to Lia and also the voyage charterer of the vessel from her owners Fratelli D'Amato SpA, pursuant to an Asbatankvoy charter dated 2 June 1999. Mr Malyk's evidence was that he thought that the vessel was chartered in by Lia from a Vitol subsidiary Madison Oil rather than direct from Vitol itself. ERG's case is that this Laytime Statement is the "copy of our seller's calculation" if it is anything and it was suggested to Mr Malyk that there could not have been any owner's claim or invoice sent, because Lia never had any documents of that description. He denied this and said that there were such documents from Vitol or Madison Oil, although his evidence was that those were different documents from the Laytime Statement. I will return to the status of this Laytime Statement below.

13. What is clear is that the fixture recap sent to ERG was for the LIANO but for a subsequent fixture dated 28 June 1999. Tantalisingly, neither that fixture recap nor the correct one (both of which were produced by Lia's brokers in Genoa, Bravo Tankers) identify the party which was the owner chartering the vessel to Lia. However, on the material before the Court, there would seem to be only two possible candidates, Vitol SA or its subsidiary mentioned by Mr Malyk, Madison Oil. To the extent that it matters I would be inclined to conclude that the vessel was simply sub-chartered by Vitol SA to Lia without interposing any other Vitol subsidiary.

14. On 6 September 1999, Lia sent a fax to ERG which read as follows: *"In addition to our claim of 09.08.99 please find enclosed copy of pumping log for discharge port. Please let us know if you still require additional documents or you still something missing so we will not be informed afterwards that we did not send you owners claim or their invoice. Your silence will be considered as confirmation that you have fully documented claim at your possession".*

15. Whether prompted by this message or otherwise is not clear, but on 10 September 1999 Ms De Marchi sent Mr Malyk a fax stating:

"With reference to your demurrage claim for $59,937.50 dated 10.8.99 please note that we have just realised that a wrong charterparty (Liano-c/p 28.6.99) was enclosed to your claim.

Please check into your file and let us have the correct supporting documents"

16. After that communication, Mr Malyk came to a meeting with Ms De Marchi at ERG's offices in Genoa on 17 September 1999, at a time when he was attending a shipbrokers' convention or party in the city. His evidence was that in the light of Ms De Marchi's fax, he called in at Bravo Tankers on the way to the meeting and obtained copies of both the charterparty between the owners and Vitol SA (which appears in ERG's files) and the charterparty between Vitol SA and Lia (which does not). There is some dispute on the evidence of Mr Malyk and Ms de Marchi as to the ambit and purpose of the meeting, which is particularly relevant to the issue of whether section 29(5) of the Limitation Act is applicable. I consider that, despite suggestions in Mr Malyk's evidence that the purpose of the meeting was no more than a "general chat" about demurrage claims and ERG's documentary requirements, it was intended that specific claims would be discussed (including the LIANO claim) with a view to resolving them if possible and that such a discussion did take place. I have reached that conclusion not only as a consequence of Ms De Marchi's evidence to that effect, but also because of the spreadsheet about outstanding claims produced by Lia in 2004. This states in the "ERG Comments" column against all the 1999 claims (including the LIANO) that *"all claims discussed with [German Malyk] during a meeting held in Genoa"* evidently a reference to the meeting on 17 September 1999. This would seem compelling evidence that such a discussion did take place.

17. One of the critical questions is what documents ERG had received from Lia, and, specifically, whether the "supporting documents" required by clause 14 had been received. So far as the requirement for a copy of the charterparty is concerned, although a copy of the charterparty between Vitol SA and Lia does not appear on ERG's files, I am satisfied that Mr Malyk did provide Ms De Marchi with a copy of that charter (as well as of the head charter between Fratelli d'Amato and Vitol). I have reached this conclusion for two reasons. First, since Mr Malyk had received ERG's fax request of 10 September 1999 and must have obtained a copy of the head charter between Fratelli d'Amato and Vitol from the brokers Bravo Tankers immediately prior to the meeting with Ms De Marchi, it is inconceivable that he would not have obtained a copy of the relevant charter between Vitol and Lia from those brokers at the same time. If there had been some problem in obtaining that charter, he would surely have raised it at the meeting, yet there is no evidence he did.

18. Second, Ms De Marchi struck me as a businesslike and efficient person. There is some suggestion that her arrival as the person in charge of demurrage at ERG led to a more rigorous approach than had previously appertained, particularly as regards the documents of which ERG required copies as a condition of accepting any claim. One has some sense of this from the fact that on 3 September 1999, only a fortnight before the meeting and probably prompted by Ms De Marchi, the parties agreed an amendment to clause 14 expanding the categories of documents of which ERG would require copies in support of any demurrage claim. In these circumstances, it seems to me extremely unlikely, given her fax of 10 September 1999, only a week previously, that Ms De Marchi would not have voiced a complaint at the meeting if she had not received a copy of the correct charterparty. Furthermore, at some stage (whether at the meeting or after it may not matter) Ms De Marchi wrote on the 10 September 1999 fax *"OK a mano da Malyk"*, a clear statement that she had received the document sought in the fax (namely the correct charterparty) from Mr Malyk by hand. Again, it is inconceivable that she would have written this and been satisfied unless she did have a copy of the correct charterparty at the time.

19. As for the owners' demurrage claim and invoice, ERG essentially relies upon three pieces of evidence to demonstrate that no such documents were provided by Lia to ERG within 100 days of the bill of lading date:

(1) The fax of 6 September 1999 from Mr Malyk with its curious reference to ERG not complaining afterwards that the owners' claim and invoice had not been sent. Mr Macey-Dare submits with considerable force that Mr Malyk would surely not have said this unless he knew that the supporting documents sent had not included the owners' demurrage claim or the owners' invoice. Furthermore, although Mr Malyk denied this in his evidence, his explanation was confused and unconvincing, not least I suspect because in reality he could not remember this long after the event what documents were sent.

(2) Ms De Marchi's evidence that at the meeting on 17 September 1999, she told Mr Malyk that ERG had not received the owners' claim or invoice. This was denied by Mr Malyk.

(3) The absence of any document in ERG's file corresponding to "owner's demurrage claim and invoice".

20. On the other hand, what is in ERG's file is the so-called "Laytime Statement" probably emanating from Vitol. I agree with Mr Kenny that it is difficult to construe this document as being only "our seller's calculation" because it included loadport demurrage which would hardly be charged by a FOB seller. It is much more akin to an owners' laytime statement. Mr Macey-Dare accepted that the status of the document is to be judged objectively. Doing so, I conclude that it does amount to an "owners' demurrage claim" for the purposes of clause 14. I also conclude that the first page of it which sets out the total demurrage claim calculation at the charterparty rate of US$12,500 per day of US$89,618.06 amounts to an "owners' demurrage invoice" for the purposes of clause 14. I reject Mr Macey-Dare's submission that it cannot be an invoice because it makes no demand or that what is required is some "formal claim document". The Frame Contract contains no restriction on the form that the invoice should take. As a matter of language and business commonsense, all that is required is a document setting out the sum which is due, which this page does.

21. My conclusion in this regard seems to me to be supported by the contemporaneous materials. As I have said, Ms De Marchi was careful and efficient. It seems to me that, even though her "Demurrage Check-List" does not contain ticks for the "owners' calculation" and "owners' invoice" boxes, she must have thought that in the Laytime Statement she had received, she had the information needed for the purposes of clause 14 of the Frame Contract. Were it otherwise, it is inconceivable that her fax of 10 September 1999 would not have also said, we have not received the owners' claim and invoice as required. In context, this fax is referring only to the wrong charterparty and the reference to "the correct supporting documents" in the last line should not be construed as a reference to anything other than the charterparty.

22. As for Mr Malyk's fax of 6 September 1999 whilst I accept that the reference to owners' claim and invoice is odd if he had sent them, the explanation may well be that this was sent only days after the amendment of clause 14 at a time when Ms De Marchi was very insistent upon Lia producing all the required supporting documents. In any event, even if Mr Malyk had thought that he had not sent the owners' claim and invoice, that could not affect the conclusion that the Laytime Statement constituted an owners' claim and invoice for the purposes of clause 14, which is an objective question.

23. I reject Ms De Marchi's evidence that she told Mr Malyk at the meeting on 17 September 1999 that ERG was still missing the owners' claim and invoice, for two reasons. First, if she had said this, I can see no reason why Mr Malyk would not have obtained such documents or re-sent the Laytime Statement, since the 100 days had not expired at that stage. Second, the spreadsheet produced in 2004 contains against this demurrage claim only the words *"ERG counter 9505.21. Not agreed by us"*. The reference below that to *"as per ERG is time barred as owner's invoice missing but GM had sent the owner's calculation with the claim"* on the face of the document relates to another claim on the vessel ERIKA, not to this claim. If she had made the same complaint about the LIANO, the spreadsheet would in all probability have recorded that.

24. Accordingly, I find that Lia did provide the necessary supporting documents for the purposes of clause 14 of the Frame Contract within the 100 day period. In those circumstances, it is not necessary to consider Lia's alternative estoppel case. All I need say is that I would not have concluded that the fax of 10 September 1999 was a sufficiently clear and unequivocal representation that ERG had all the requisite documents to found an estoppel by representation.

25. It follows that Lia's claim for demurrage in the sum of US$9,505.21 will succeed unless it is time-barred under the Limitation Act and I turn now to this question. What happened at the meeting on 17 September 1999 is of some relevance to this question. As I have already said, I am satisfied that the meeting was more than a general chat but was intended to involve and did involve a discussion of individual outstanding claims including this one, with a view to arriving at their settlement. As such, although the words "without prejudice" may not have been used, it seems to me that the meeting must properly be regarded as a "without prejudice" meeting. Indeed Mr Malyk accepted this in his evidence albeit somewhat begrudgingly and sarcastically and Mr Kenny realistically was prepared to accept that the meeting was without prejudice.

26. The question which then arises is whether Ms De Marchi produced and handed to Mr Malyk at the meeting the ERG demurrage calculation showing how the figure of US$9,505.21 was arrived at. Her evidence was that she did, but this was not accepted by Mr Malyk. Some months after the meeting on 30 May 2000, he sent her an e mail which stated: *"referring to above mentioned claim we request you one more time to send us your calculation as it seems like you deleted this one from your files and memory. We understand your feeling but we do remember about it. Therefore please come back soon."*

27. This e mail is slightly oddly worded unless there had been some preceding discussion about the calculation, but neither witness could recall any such discussion. What the message does suggest is that, either Mr Malyk had never had the calculation or, even if he had seen the calculation at the meeting, he had not retained a copy. Ms De Marchi responded by fax the same day:

    "Thanks for your e. mail of today…Sorry for the oversight but we thought our calculation were handed to you during the meeting we had on Sept. 1999.

    Attached a copy of our Laytime and Demurrage worksheet for $9,505.21"

28. Doing the best I can with this somewhat contradictory material, it seems to me likely that Ms De Marchi did have the one page calculation document with her at the meeting on 17 September 1999. After all, it bears that date, so that the probability is that she prepared it for the meeting. The likelihood is that she showed it to Mr Malyk at the meeting and explained how it was calculated, specifically by reference to ERG's position (originally pleaded but now abandoned) that if the vessel arrived after the narrowed three day laycan required by clause 8 of the Frame Contract then notice of readiness would be deemed served the same number of days after the vessel's arrival. It may well be that, although she showed it to him, she did not give him a copy. The explanation for the slightly odd wording of his e mail of 30 May 2000 may be that she had said that she would send him a copy but had failed to do so.

29. To the extent that the calculation or worksheet was shown to Mr Malyk at a without prejudice meeting, it cannot amount to the acknowledgment of liability required to recommence the statutory limitation period under section 29(5) of the Limitation Act 1980. It is not on any view an open statement of position as was being considered by Gloster J in the recent case of ***English & American Insurance v Axa Re SA*** [2006] EWHC 3323 (Comm). Rather it is a "counter" as part of a negotiation process as perceived by Lia in its 2004 spreadsheet.

30. Mr Macey-Dare submits that if the document was produced and shown on a without prejudice basis at the meeting on 17 September 1999, it must retain the same status when handed over in May 2000. It seems to me that is not inevitably so: one can conceive of situations where a document produced on a without prejudice basis is subsequently handed over on an open basis amounting to an acknowledgment of liability. It will depend on what is said on the second occasion. Here Ms De Marchi simply sent the "worksheet" without any statement in her letter that could be construed as any sort of acknowledgment. I consider that on the facts of this case, the worksheet was being sent on the same basis as it had been produced at the meeting, namely as part of a without prejudice "counter" and it had not changed its character. I reject Mr Kenny's submission that this was a formal response to a formal claim. It was nothing of the sort.

31. Furthermore, although what is now section 29(5) of the Limitation Act 1980 does not require that the "*acknowledgment*" contain or amount to an implied promise to pay (as was the position at common law) what is required is that *"the debtor must acknowledge his indebtedness and legal liability to pay the claim"* (per Kerr J in ***Surrendra v Sri Lanka*** [1977] 1 WLR 565 at 575). I do not consider that the letter from Ms De Marchi of 30 May 2000 or the worksheet or calculation enclosed with it amount to such an acknowledgment of indebtedness or legal liability.

32. It follows that there was no acknowledgment by ERG within the meaning of section 29(5) of the Limitation Act 1980 and Lia's claim for demurrage in the sum of US$9,505.21 is time-barred in the same way as the balance of its claim on the LIANO.

The Kogalym

33. As stated above, the dispute in relation to the KOGALYM raises only issues of construction. Although there was a statement from Mr Aliyev before the Court, it was of limited assistance, since he said no more than that there was no discussion about laytime in his telephone conversations with Mr Mignone. Thus the dispute turns on the construction of the two telexes. Mr Macey-Dare submitted that (1) the 12 January 2000 telex varied clause 12 of the Frame Contract so that laytime would no longer commence 6 hours after tender of notice of readiness; (2) it followed that either when the cargo was off-specification the second time, laytime never commenced running at all or it was an implied term of the agreement in the 19 January 2000 telex that in the events which had occurred, laytime would commence upon berthing.

34. I am unable to accept these submissions. So far as the 12 January 2000 telex is concerned, I agree with Mr Kenny that it related only to what would happen if the cargo was found to be on specification on re-testing. The position as at that date was that the cargo was not compliant with the terms of the Frame Contract and ERG would have had the right to reject it. The *quid pro quo* for its not doing so and agreeing to re-testing at the discharge port was that, if the cargo was then found to be on specification so that ERG had to accept it at that stage, laytime would only commence on berthing, reducing ERG's potential exposure to demurrage.

35. The telex is completely silent as to what would happen if, on the re-test, the cargo was still off-specification, no doubt because at that stage ERG would have a fresh right to reject the cargo. If it did so, the question of laytime and demurrage would be academic. If it did not, then whether laytime would run would depend upon what was or was not agreed at that later stage, and specifically, whether there was some further amendment to clause 12 of the Frame Contract. That seems to me to be the correct answer to the question posed by Mr Macey-Dare as to whether laytime was running on 15 January 2000 (the day when on Lia's case, laytime commenced). Thus, as I see it, clause 12 of the Frame Contract was only amended by the 12 January telex if the cargo proved to be on-specification on re-testing. The Frame Contract was otherwise unamended.

36. Turning to what was agreed on 19 January 2000, when the cargo proved to be off-specification, the difficulty which ERG faces is that the only amendment to the Frame Contract then agreed concerned the price discount. The telex stated expressly that all other terms and conditions were unchanged. Mr Macey-Dare sought to avoid this difficulty by the implication of a term that laytime would not run until berthing, contending that the "officious bystander" test was satisfied. I do not accept that submission. The Court will only imply a term into the contract in circumstances such as these if it is necessary to do so to make the contract work. There is no question of any such implication being necessary here. The contract works perfectly well without the implication.

37. The truth is that ERG is seeking to imply this term to fill a gap in what it chose to agree in the telexes of 12 and 19 January, having now realised that it failed to address the issue of laytime in the event that the cargo remained off-specification at the re-test. It is no part of the Court's function to rewrite the parties' bargain and, even if it were, I am far from satisfied that the discount agreed together with an obligation to pay demurrage was necessarily the bad bargain which Mr Macey-Dare sought to portray. One would need to know a great deal more about the market price of the relevant cargo and ERG's need at the time for such fuel oil before one could reach any sensible conclusion on that question.

Conclusion

38. The claim for US$9,505.21 in respect of the LIANO is dismissed. The claim in respect of the KOGALYM succeeds in the amount of US$63,035.07 together with an appropriate amount of interest. If this cannot be agreed, I will hear submissions from the parties. I also reserve the question of costs, on which I will hear submissions.

Julian Kenny (instructed by Waterson Hicks) for the Claimant
Thomas Macey-Dare (instructed by MFB Solicitors) for the Defendant