

CA on appeal from Commercial Court (HHJ Mackie QC) before Buxton LJ; Rix LJ; Scott Babker LJ. 5th July 2006

Lord Justice Rix :

1. What happens if charterers require a vessel to tender her notice of readiness, to berth, and to begin loading, all before the contractual commencement of the laydays? If her owners accept those orders without obtaining the charterers' consent to an express stipulation that laytime is to start counting before the contractual commencement of the laydays, do the charterers obtain a period of free loading time? Those are the background questions which have arisen in a dispute where the parties' charterparty contains special clauses apparently, but unsuccessfully, designed to resolve just such issues by express provision.
2. The owners are Tidebrook Maritime Corporation, disponent owners of the *Front Commander*, a huge tanker of 299,998 metric tonnes. The charterers are Vitol SA of Geneva. Both parties are leaders in their field. The owners are claimants, and in this court the appellants. The charterers are defendants, and here the respondents. The judge at trial was HHJ Mackie QC, sitting as a high court judge in the commercial court.
3. On 17 December 2003 the owners and charterers agreed a tanker voyage charter party on the Asbatankvoy form as amended, for the carriage of a cargo of crude oil from West Africa to Europe. A signed charterparty was never executed, but the parties have agreed a statement of facts and issues which has enabled them to dispense with pleadings. Certain documents are annexed to the agreed statement, including a form of charter "as drawn up to reflect the Recap". Litigation concerning charterparties is comparatively rare these days, since most disputes are referred to arbitration. However, the special clause agreed by the parties in their charterparty provided that any disputes involving amounts in excess of US\$50,000 should be subject to the jurisdiction of the English High Court.

The charterparty terms

4. The charterparty terms selected for discussion in this court have undergone some changes from those included in the agreed statement, but at all times charterers' additional clauses 31 and 33 (see below) have figured dominantly, if with varying emphasis.
5. The charterparty was made up of three separate sections of clauses. There were the standard clauses, somewhat amended, of the Asbatankvoy form itself. There were then Vitol's "special provisions" for the instant charterparty. Thirdly, there were Vitol's general "voyage chartering terms" (amended 1 November 1999), again somewhat amended. The apparent demarcation lines between the three sets of clauses were not logically and scrupulously maintained. Thus, the laytime allowance of 72 hours applicable to this charterparty was not contained, as one might have thought in the "special provisions" but in the "voyage chartering terms", and even then amended from the standard 96 hours to the instant 72 hours. Amendments of the various types of standard clauses are indicated by italics.
6. (a) *The Asbatankvoy terms.*

"B. Laydays:

Commencing: 9th January 2004 Cancelling: 10th January 2004

H. Total Laytime in Running Hours: See Vitol Voyage Chartering Terms 1(c) attached

I. Demurrage per day: US\$95,000.00 or pro rata

1. **WARRANTY – VOYAGE – CARGO.** *The vessel...shall, with utmost despatch, proceed as ordered to Loading Port(s) named in accordance with Clause 4 or so near thereunto as she may safely get (always afloat), and being seaworthy, and having all pipes, pumps and heater coils in good working order, and being in every respect fitted for the voyage, so far as the aforesaid conditions can be achieved by the exercise of due diligence, perils of the sea and any other cause of whatsoever kind beyond the Owner's and/or Master's control excepted, shall load (always afloat), from the factors of the Charterer, a full and complete cargo, of petroleum and/or its products in bulk, not exceeding what she can reasonably stow and carry...and being so loaded shall forthwith proceed, as ordered on signing Bills of Lading direct to the Discharging Port(s), or so near thereunto as she may safely get (always afloat), and deliver said cargo. If heating of the cargo is requested by the Charterer, the Owner shall exercise due diligence to maintain the temperatures requested.*
5. **LAYDAYS.** *Laytime shall not commence before the date stipulated in Part I, except with Charterer's sanction...*
6. **NOTICE OF READINESS.** *Upon arrival at customary anchorage at each port of loading or discharge, the Master or his agent shall give the Charterer or his agent notice by letter, telegraph, wireless or telephone that the vessel is ready to load or discharge cargo, berth or no berth, and laytime, as hereinafter provided, shall commence upon the expiration of six (6) hours after receipt of such notice, or upon the vessel's arrival in berth...whichever first occurs. However, irrespective of whether the berth is reachable on arrival or not where delay is caused to Vessel getting into berth after giving notice of readiness for any reason over which Charterer has no control, such a delay shall not count as used laytime or demurrage. In any event, Charterer shall be entitled to six hours notice of readiness at loading and discharging ports, even if the vessel is on demurrage.*
7. **HOURS FOR LOADING AND DISCHARGING.** *The number of running hours specified as laytime in Part I shall be permitted the Charterer as laytime for loading and discharging cargo...Time consumed by the vessel in moving from loading or discharge port anchorage to her loading or discharge berth, discharging ballast water or slops, will not count as used laytime or time on demurrage.*

8. *DEMURRAGE.* Charterer shall pay demurrage per running hour and pro rata for a part thereof at the rate specified in Part I for all time that loading and discharging and used laytime as elsewhere herein provided exceeds the allowed laytime elsewhere herein specified. If, however, demurrage shall be incurred at ports of loading or discharge by reason of fire, explosion, storm or by strike, lockout, stoppage or restraint of labor or by breakdown of machinery or equipment in or about the plant of the Charterer, supplier, shipper or consignee of the cargo, the rate of demurrage shall be reduced by one-half of the amount stated in Part I...
7. (b) *The Vitol Voyage Chartering Terms.* These contained various amendments to the Asbatankvoy standard terms. The introduction stated "The Clause and sub-section headings contained in this Charterparty are for convenience of reference only and shall not affect the interpretation thereof". Of particular importance for the present dispute were the following Vitol clauses:
"31. Operational Compliance Clause.
Owner shall indemnify Charterer for any damages, delays, costs and consequences of not complying with Charterer's voyage instructions given in accordance with the Charterparty...
The vessel shall not tender Notice of Readiness prior to the earliest layday date specified in this Charterparty and laytime shall not commence before 0600 hours local time on the earliest layday unless Charterer consents in writing.
[There was no clause 32 as a result of a deletion.]
33. Early Loading Clause.
If Charterer permits vessel to tender NOR and berth prior to commencement of laydays, all time from berthing until commencement of laydays to be credited to Charterer against laytime and/or time on demurrage. Saved time to be split 50/50 Owners/Charterers."

The agreed facts

8. The agreed facts were as follows. I interpolate a number of additional matters which were common ground.
9. The laycan or "laydays" agreed in the charterparty were 9/10 January 2004.
10. Pursuant to the charterers' orders, the vessel proceeded to Escravos in Nigeria, where she was to load a cargo of oil.
11. On 6 January 2004, charterers sent the following email to owners, via the brokers, EA Gibson Ltd –
"Charterers confirm NOR to be tendered on arrival Escravos, and to berth/load as soon as instructed by terminal."
12. On 7 January 2004 an email was sent to Owners, via the brokers, as follows:
"Charterers reconfirm that 'Front Commander' to tender NOR on arrival Escravos."
13. On 7 January 2004 a further email was sent to owners, via the brokers, which included the following message:
"Front Commander will tender NOR on arrival ie 08 January 0030 and we want her to berth/ commence loading 08 January."
14. The vessel arrived at Escravos and tendered her NOR at 00.01 hours on 8 January 2004 prior to the first day of the laycan which was 9 January 2004. She initially anchored but she was instructed by the terminal to proceed to berth to load. She weighed anchor at 1018 hours the same day and was all fast at her loading berth at 1200 hours. Hoses were connected at 1312 hours and loading commenced at 1648 hours on 8 January. Loading was completed at 0736 hours on 10 January; hoses were disconnected at 0842 hours and the vessel sailed from Escravos at 1306 hours on 10 January.
15. Demurrage was incurred on the voyage, in respect of which owners sent charterers a timely demurrage claim. In their calculation of the laytime used at the port of Escravos, owners gave charterers credit for 50 per cent of the time between 1200 hours on 8 January (when the vessel was made all fast at her berth at Escravos) and 0001 hours on 9 January (being the commencement of the laydays and the time at which owners considered laytime would otherwise have commenced).
16. Charterers have paid the majority of the demurrage claim but a dispute has arisen concerning part of the claim, since charterers contend that, pursuant to clause 5 of the standard Asbantakvoy form and additional clause 31, laytime should not start to count prior to 0600 on the first day of the laydays, which was 9 January 2004. In this connection charterers also contend that they never gave their consent to laytime commencing prior to 0600 hours on 9 January 2004. Owners contend that such consent was given expressly or impliedly, by the emails sent by charterers or by loading commencing with the knowledge and consent of the charterers.
17. Owners claim US\$ 70,489.71 (net of commission) in respect of demurrage calculated in accordance with an attached statement, whereas charterers' position is that no further demurrage is due.
18. The agreed statement of facts attached: the charterparty as drawn up to reflect the recap; the notice of readiness; the timesheet and statement of facts; the emails from Vitol dated 6 and 7 January 2004 concerning tender of NOR; and the demurrage statement prepared by owners and charterers respectively setting out their calculations of laytime and demurrage. The attached demurrage statements show that, pursuant to charterers' orders, a pilot was already on board by 0742 on 8 January, in preparation for the vessel's move to her berth.

The annexed documents

19. There is some inconsistency between the detail of the terms set out in the agreed statement of facts and the same terms as set out in the annexed working copy of the charterparty. For instance, the detail of the specially added

final sentence of Asbatankvoy clause 6 differs. Of potential importance is that Vitrol clause 33, the early loading clause, differs as found in the form of charterparty. It is there set out as follows:

"33. If Charterer permits vessel to tender NOR and berth prior to commencement of laydays, all time saved from berthing until commencement of laydays to be split 50/50 Owners/Charterers against laytime and/or time on demurrage."

20. On behalf of the charterers, Mr Timothy Brenton QC, objected to use of the form of charterparty version of clause 33, submitting that the wording of clause 33 had been agreed and inserted in the statement of facts, irrespective of what appeared in the working but unexecuted copy of the charterparty. On behalf of the owners, Mr Tim Young QC was content to proceed on the basis of clause 33 as found in the statement of facts and as had been considered by the judge below.
21. Also annexed to the agreed statements are the parties' respective laytime statements. These help to elucidate the practical difference which flows from the parties' opposing legal positions.
22. The laytime statements show that the parties were agreed that the vessel's notice of readiness was given at 0001 on 8 January, that the vessel completed berthing at 1200 on 8 January, that loading started at 1648 on 8 January and was completed, on disconnection of hoses, at 0842 on 10 January. The parties were also agreed that the effect, or one of the effects, of clause 33 is that the 12 hours between berthing of the vessel at 1200 on 8 January, and the commencement of the contractual laydays on 9 January, is to be split equally between the two parties. In other words the charterers get a credit of 6 hours. However, the parties were not in agreement as to the time when laytime started to count, nor as to the ultimate effect of clause 33.
23. Thus the owners say that the charterers' emails evidence their consent in writing to an early notice of readiness and the early commencement of laytime, prior to 9 January, which otherwise would have been the earliest possible layday. Thus time started to count when the vessel was berthed on 8 January, at 1200, but the time from berthing until the beginning of 9 January, namely 12 hours, was to be split between the parties. In effect the charterers get a 6 hour credit against the laytime which they used between 1200 and 2400 on 8 January. Since the vessel took an overall 44 hours 42 minutes to load, from 1200 on 8 January, to 0842 on 10 January, the net laytime used in loading was 38 hours 42 minutes. The owners' laytime statement is not a legal, but a practical, document, but the effect of its calculations, as it seems to me, is to say that the solution of these events is to be found in clause 33.
24. The charterers, however, say, that although they consented to early tender of the notice of readiness, to early berthing, and to early loading, they did not consent in writing, as required by clause 31, to the separate requirement of the early commencement of laytime. Therefore time did not commence to count until 0600 on 9 January (see clause 31). Clause 33 therefore operated independently of any advance of the commencement of laytime before 0600 on 9 January, and the effect of clause 33 was simply to allow a credit to them of 6 hours (half of 1200/2400 on 8 January) against the time taken to load the vessel, starting as of 600 on 9 January, namely 26 hours 41 minutes. Thus the net overall laytime used in loading was 20 hours and 41 minutes. Again, the charterers' laytime statement is a practical, not a legal, document, but its calculations, as it seems to me, are consistent with a view of clauses 31 and 33 as providing for a situation where an early notice of readiness can be consented to without at the same time there being consent to the advancement of laytime.
25. The difference between the parties in other words is 18 hours, the time between berthing at 1200 on 8 January and 0600 on 9 January. Since the vessel went into time on demurrage before the end of her voyage, that 18 hour difference corresponds to three-quarters of a day at \$95,000 per day, or just over \$70,000.

The agreed issues

26. The agreed statement of facts and issues sets out the following agreed "issues for determination":
 - I. If or when the NOR given at 00.01 on 8 January 2004 became effective for the purpose of the commencement of laytime.
 - II. At what date and time laytime commenced.
 - III. Whether the charterers by their email of 6 or 7 January or by commencing loading consented to laytime commencing prior to the first day of the laycan, which was 9 January."

The judgment below

27. The judge was faced with submissions from the owners that consent to an early NOR under clause 31 meant consent to the advancement of laytime as well (an argument about the charterparty); that consent to early loading implicitly meant consent to the advancement of laytime (an argument about the charterers' emails); that under clauses 5 and 6 of the Asbatankvoy form, consent to berthing resulted in the commencement of laytime; and that laytime commenced by operation of law as a result of the charterers' early use of the vessel. For the charterers it was submitted that the solution had to be found in clauses 31 and 33 which overrode the standard clauses 5 and 6; that under clause 31 there had to be separate consent to the advancement of laytime, and there was none, only to the early service of an NOR; and that authority supported the view that early use of the vessel for loading was irrelevant to the running of laytime.
28. The judge preferred the submissions of the charterers. He said –

"14. Laytime is only to commence before the stipulated date with (Clause 5) "the charterer's sanction" and, more explicitly (additional Clause 31) "charterer consents in writing". The question is whether Owners have shown that

the emails amounted to that consent in writing. In my judgment they did not. The emails do not give consent explicitly. I do not consider that they give consent implicitly either. The emails confirm that NOR is to be tendered on arrival and that Charterers want the vessel to berth/commence loading early...

16. *While the cases cited by Mr Hickey are useful background they are of no direct application. The only question is whether or not the emails constitute consent under Clause 5 and the additional Clause 31. In my view they do not as they are not explicit enough to have the contractual significance claimed by Owners. The points of construction advanced cannot displace what seems to me the clear answer to the central question. It follows that I see no room for the implication of terms as suggested by Mr Davies. The issue is not the terms of the contract but whether there has been consent. His point on berthing fails because of the existence and terms of the additional clauses.*
17. *It follows that the answers to the 3 issues for determination...are as follows. Laytime commenced at 06.00 on 9 January 2004 as provided by additional Clause 31 of the charterparty. Charterers did not either by their emails or by commencing loading consent to earlier commencement of laytime."*
29. The judge went on to discuss an alternative submission of the owners based on clause 33, to the effect that, whenever time started, since all "time saved" was to be split 50/50 between the parties, the owners received nothing unless time was in any event counted before the commencement of laytime, and then credited equally to both sides. The judge, however, preferred the submission for the charterers that –
"the only sensible interpretation to be given to the 50/50 wording is that Charterers are to receive later only half the credit given by additional Clause 33 in its unamended form. I agree. Whatever difficulty this presents it is not a justification for departing from Clause 31 and starting laytime earlier."
30. The judge considered that, once he had decided that laytime could not commence before 0600 on 9 January without the express consent of the charterers, any issue as to the correct construction and working of clause 33 was moot, since it was not directly raised by the agreed issues. That may possibly represent the way the argument was presented to him. On the other hand, one might think that the correct construction of this charterparty could not be arrived at without forming a view as to how clause 33 was intended to work, especially as it appears to be dealing expressly with the very circumstances which arose in this case, namely where *"the Charterer permits vessel to tender NOR and berth prior to commencement of laydays"*.
31. The judge gave permission to appeal himself. Although he thought the answer was clear, he acknowledged, as he was informed, that the point was of wider interest, arose in other cases, and was being disputed in current arbitrations.

The submissions on appeal

32. On behalf of the owners Mr Young submitted, either orally or through his skeleton argument written with junior counsel, Mr Socrates Papadopoulos, as follows. The sole or dominant purpose of an NOR was to act as a contractual trigger to the start of laytime. Thus the two elements of clause 31 which depended on the charterers' consent (the tendering of a notice of readiness prior to the earliest layday date "and" the commencement of laytime before 0600 on the earliest layday) were inextricably linked as two parts of a single whole. Consent to one was consent to the other. The second part was merely the legal consequence of the first: "and" meant "therefore". This was consistent with clauses 5, 6 and 33. Clause 33 was particularly important, as its reference to charterers' permission to an early notice of readiness was a reference back to a situation contemplated in clause 31. It demonstrated, therefore, that consent to an early notice of readiness was the critical matter. That started time counting, and supported the owners' laytime statement. Any other construction (of clause 33) would be absurd since, as charterers' laytime statement demonstrated, it would give charterers a period of free time before the commencement of laytime *and* in addition give them an additional credit of 50% of that free time. The artificial distinction between consent to an early notice of readiness and to the early commencement of laytime was uncommercial and put a premium on a legally correct understanding of the nuances of the communications between the master and the charterers' agents. Mr Young also relied on *The Happy Day* [2002] EWCA Civ 1068, [2002] 1 Lloyd's Rep 487, at any rate by analogy.
33. On behalf of the charterers, on the other hand, Mr Brenton submitted as follows. The appeal concerned the true construction of clauses 31 and 33. The judge was right for the reasons he had given. Laytime only commenced early if the charterers had consented *both* to early tender of the NOR *and* to early commencement of laytime. The owners were wrong to submit that the sole or dominant purpose of a notice of readiness was to act as a trigger for the commencement of laytime, or that NOR and the commencement of laytime were inextricably linked. An NOR had other important functions, viz (i) as a notice that the vessel is ready to load; (ii) as a notice of arrival, with effect on charterers' exceptions for further delay; and (iii) in a trader's contract, as a determinant of the price of the cargo. This was also shown by the fact that, in the absence of the clause 31 prohibition, an NOR can be served in advance of the earliest layday. In any event, even use of the vessel in advance of the earliest layday will not start time running: *Pteroti v. National Coal Board* [1958] 1 QB 469. Clause 5 was to the same effect in calling for "Charterers' sanction". Thus owners had a choice if asked to begin loading early: they could refuse, and say, "Only if you consent to the early commencement of laytime". Similarly, charterers had a choice if asked to begin loading early by the owners: they can say, "Yes, *but without any advance on the commencement of laytime*". That was the commercial reality.
34. As for clause 33, it was no guide to the construction of clause 31, since it only applied where the NOR was given and berthing occurred before the earliest layday, whether or not the charterer had agreed to early commencement of laytime. The owners' construction of clause 31 was not absurd because, if owners wanted to

load early, charterers were entitled to negotiate for extra time. Earlier loading may help owners to finish their charter early; but it could also cause problems to charterers if they are facing a fixed "arrival window" at discharge port.

35. In response to these submissions, Mr Young raised one new point, and gave a mixed message about clause 33. His new point was that there was a requirement, under clause 1 of the Asbatankvoy terms, to sail to the loading port with "utmost despatch", under clause 6 to serve a notice of readiness "Upon arrival", and, reverting to clause 1, to load a cargo: then, under clause 31's first sentence, the owners would be liable to indemnify the charterers if they did not comply with the charterers' loading orders. In the present case, the charterers' orders were to give an early notice of readiness, berth and load. The charterers had the right, under clause 31, to load the vessel early, if they wanted, and owners could not refuse them. Therefore, it must have been intended that laytime should count while they loaded the vessel.
36. As for clause 33, however, Mr Young at one time appeared to be prepared to concede that the charterers' construction of it was literally correct, but led to an absurd remit, too favourable to charterers. In the end, however, he submitted that its effect justified the owners' laytime statement, even if he could not articulate exactly how it did so, as a matter of construction.

Discussion (1): the legal background

37. These somewhat intricate submissions first require some elucidation of the legal background.
38. "Laydays" are literally the agreed days for loading and discharging and as such a form of synonym for "laytime" (save that the expression "time" is more general and flexible than "days"). As used in this charterparty, however, "laydays" appear to be used to describe what elsewhere are often referred to as the "laycan" days, that is to say (a) the earliest day upon which an owner can expect his charterer to load and (b) the latest day upon which the vessel can arrive at its appointed loading place without being at risk of being cancelled. Hence clause B of the Asbatankvoy form speaks of "Laydays: Commencing 9th January 2004 Cancelling 10th January 2004"; and see clause 5, headed "LAYDAYS", which clarifies the effect of clause B in more precise terms.
39. The importance of such a laycan period is to enable the charterer to know when he has to have his goods ready for loading, and to enable both parties to know when, if the vessel is late in respect of her ETA or expected time of arrival, the charterer can free himself by cancellation from the obligation of chartering the vessel and turn to alternative arrangements. Of course, if a vessel arrives early, the owner may permit her to be loaded before the earliest layday, and if she arrives late, the charterer can still maintain the charter.
40. One question incidentally raised by the arguments on this appeal is whether, if the vessel arrives early and the charterer wishes to load early, he can require the owner to do so. No authority has been cited to the court on this question, but I do not think the charterer can. The charterer is obliged to be ready, if the vessel is ready, by the earliest layday, but he cannot impose on the vessel before the earliest layday. No doubt this is subject to contrary agreement, but I do not regard clause 1 of the Asbatankvoy terms as requiring the vessel to load before the earliest of the laydays. Clause 1 requires the vessel to proceed to her port of loading "with utmost dispatch" (an amendment for the more normal "with all convenient dispatch"), but it does not require, if possible, immediate readiness to load prior to the earliest layday.
41. On the other hand, clause 6 of the Asbatankvoy terms does require the owners to give notice of readiness upon arrival: for "Upon arrival...the Master or his agent shall give" the charterer notice that the vessel is ready to load. I do not think that that means that there is any automatic breach on the part of the owner if he is not immediately ready to load on arrival, but, as it seems to me, if he is ready to load, he is obliged to give notice that he is. It seems to me that, under the standard provisions of the Asbatankvoy charter, an owner is obliged to give notice of readiness to load, if he can, upon arrival, even if he has arrived early. There is commercial good sense in this.
42. Thus it is recognised that a notice of readiness may be given prior to the earliest layday, with the effect that the notice period, here 6 hours, may have already elapsed before the earliest layday begins. This much, the running of the notice period before the commencement of the earliest layday, was common ground between the parties in this case. A submission to this effect is to be found in *Voyage Charters* (by Cooke, Young, Taylor, Kimball, Martowski and Lambert) 2nd ed, 2001, at para 57.2. That is also the majority view among New York arbitrators (*ibid* at para 57.37 and 57.51/56), although the point has not apparently been authoritatively decided by the English courts. On this basis, a notice of readiness given sufficiently before the earliest layday to enable the notice period to have run before the start of the earliest layday will, subject to contrary agreement, enable time (laytime) to start running against the charterer as soon as the earliest layday begins. It seems to me that the parties are correct to understand this to be the English law as well. The notice period is a period of grace given to the charterer to be ready to load from the time of learning of the vessel's readiness to load. There is no reason why, in addition, it should automatically delay the start of the earliest time when loading can be expected of the charterer.
43. What then, absent contrary agreement, is the effect of an early notice of readiness prior to the earliest layday? It cannot oblige a charterer to load, for that obligation cannot start before the earliest layday. Therefore time cannot count against the charterer, without more. What, however, if the charterer orders a vessel, which has given early notice of readiness, to load? Can the owner say: "I have said my vessel is ready to load, but I am not willing, nor obliged, to do so"? I am inclined to think that he cannot. He has presented his vessel, as he was

obliged upon arrival, if he could, to do. He cannot then say that he is not prepared to load. If he could, he would effectively be withdrawing his vessel's notice of readiness to load.

44. In such circumstances, what is the position, absent contrary agreement, of the charterer who receives an early notice of readiness, orders the vessel to load and does in fact load the vessel, all prior to the commencement of the earliest layday? Is this free loading time? Or does laytime start to run, at the end of the notice period, because the time is in fact used (or intended to be used) for the purpose of loading the vessel?
45. This is the issue in this appeal, albeit subject to the express provisions of Vitol's clauses 31 and 33. For the present I put clauses 31 and 33 to one side. Clause 6 appears to say that, irrespective of loading, time will commence to count at the end of the 6 hour notice period, or when the vessel is all fast in berth, whichever is the earlier. Clause 5, however, says that laytime shall not commence before the earliest layday "except with the Charterer's sanction". The combination of those provisions, it seems to me, means that the start of laytime under clause 6 is postponed to the beginning of the earliest layday, unless the charterer sanctions otherwise. Is the charterer's order to or request of the vessel to load before the beginning of the earliest layday such a sanction? Subject to authority, I would be inclined to think so. The charterer is not obliged to commence loading before the earliest layday if he does not want to load, but if he does, he is entitled to, once the vessel is presented as ready to load: and it seems to me that if once he has decided to ask the vessel to load earlier than he, the charterer, was obliged to load, then he has sanctioned the earlier commencement of laytime, the protection of the provision regarding the earliest layday is spent, and clause 6 rules as the clause otherwise governing the commencement of laytime.
46. Does authority require, or point to, a different answer? Mr Brenton submits that it does, relying principally on *Pteroti* and *The Happy Day*.
47. In *Pteroti v. National Coal Board* [1958] 1 Lloyd's Rep 245, the charter provided that time was to commence 24 hours after written notice of readiness to unload. Thus, in addition to the laytime allowed, the charterer there was permitted an additional 24 hours of free time from the giving of notice of readiness. The vessel berthed and started discharging even before notice of readiness was tendered. The owner submitted that laytime commenced from the beginning of the discharge; the charterer submitted that laytime commenced 24 hours after the giving of the notice of readiness. Diplock J agreed with the charterer's submission. There was neither waiver nor agreement permitting laytime to begin earlier than, under the charter, it was due to begin.
48. Diplock J said (at 476):
"...it seems to me that the point is a short one, and I may be wrong but to me it is a simple one. It depends, as points of this kind must depend, on the true construction of the relevant contract...On what seems to me to be plainly the prima facie meaning of the clause, why should it not apply in this case?"
49. Diplock J went on to speak, with regard to the argument that an implied agreement could be inferred contrary to the terms of the charter, of a warning against an easy inference of such agreements (at 477). He also commented on the fact that an earlier discharge might be as much to the advantage of an owner as to a charterer (*ibid*).
50. It does not seem to me that this authority throws any light on the different clauses and facts of this case. At most it says that the charterer's use of the vessel prior to the giving of a notice of readiness and the expiry of the contractual notice time is not, without more, in the charterer's time. An agreement contrary to the terms of the charter could not be inferred; nor could a waiver.
51. Problems have arisen where a notice of readiness has been given on the basis of which loading or discharging has commenced, but the notice has subsequently turned out to be invalid. An NOR may be invalid because it is given prematurely, for instance when the vessel has not in fact arrived, or when she is not in fact ready. When in such circumstances, if at all, does laytime begin to run? One possibility is that a charterer cannot go behind his acceptance of the notice of readiness, where he has knowledge of the defect in question: *The Shackelford* [1978] 2 Lloyd's Rep 154 (CA). In *The Mexico 1* [1990] 1 Lloyd's Rep 507 (CA) a premature NOR was given when the vessel was not ready to discharge the charterer's maize cargo because of other cargo which had been overstowed above it: however, once the overstowed cargo had been discharged and the charterer had started to discharge his cargo beneath, it was accepted that laytime began to run. At such a time, of course, the charterer knew that the NOR, when given, had been invalid, and that the vessel was now ready and was discharging. Mustill LJ mused as follows (at 510):
*"Given that the discharge of the maize cargo kept the ship at the port for more than two months this proposition [that laytime never started at all] was unlikely to be well received by the arbitrators, and Counsel for the charterers prudently did not advance it, conceding that laytime began to run when the discharge of the maize actually commenced. While this makes good sense, it is not easy to work out precisely how the conclusion should be reached. The arbitrators, who had many live issues to discuss, contented themselves with saying that by commencing discharge the charterers plainly waived any entitlement to a fresh notice of readiness. I confess to some difficulty in finding the necessary elements of a waiver in the bare fact that a discharge was carried out. For example in *Pteroti*...Since, however, Counsel in the present case are at one in stating that *Pteroti* sheds no light on the problem now before us I say no more about it, and I am content to accept the charterers' concession without further scrutiny, reserving the point for detailed exploration if it should arise in the future."*
52. The point did arise subsequently, in *The Happy Day* [2002] 2 Lloyd's Rep 487 (CA). There an invalid notice of readiness was given before the vessel was an arrived ship. Nevertheless, discharge commenced and took three months. The charterer said laytime had never commenced and claimed despatch. The argument failed before the

arbitrators, succeeded before the commercial judge (on the basis of what he considered to be the hint given by Mustill LJ in *The Mexico 1*), but failed again in this court. It was held that by discharging the vessel the charterer had waived reliance on the invalidity of the premature notice, which therefore took effect at the time of commencement of such discharge. In essence, a charterer who used the vessel with knowledge of the invalidity of the NOR and of the vessel's later readiness, without reserving his rights expressly, unequivocally demonstrated his acceptance that laytime would run without the need for a further notice. After all, if the charterer had reserved his rights, the owner would have promptly served a further notice (at para 72). Potter LJ observed that a contrary conclusion would have amounted to a "lack of fair dealing" (*ibid*, and see also para 77). *Pteroti* was considered (at para 22) but without any light being taken to have been thrown on the problem by it.

53. It seems to me that these authorities do not assist the charterers in this case. They do not suggest to me that there is any willingness on the part of the courts to view the charterers' use of a vessel in loading or discharging as being free from the running of laytime, once a notice of readiness has been given and the notice time has run. On the contrary, if a charterer uses a vessel, known to be ready at the time of use, which has been tendered to him by a valid notice of readiness, or by an invalid notice whose invalidity is known, he must expect time to run against him, allowing for any relevant notice time, and subject to any express contrary agreement.
54. The question remains whether clauses 31 and 33 amount to express contrary agreement. I have already stated the view, in the situation found in the present case, that the standard clause 5 permits an early commencement of laytime in accordance with clause 6 (see para 45 above). I have found nothing in authority to prevent that interpretation. I merely note in passing that this is the view of New York arbitrators (see *Voyage Charters* at para 56.14).

Discussion (2): the Vitol clauses 31 and 33.

55. It is convenient to set out the critical sentences again:
"31...The vessel shall not tender Notice of Readiness prior to the earliest layday date specified in this Charterparty and laytime shall not commence before 0600 hours local time on the earliest layday unless the Charterer consents in writing.
33. If Charterer permits vessel to tender NOR and berth prior to the commencement of laydays, all time from berthing until commencement of laydays to be credited to Charterer against laytime and/or time on demurrage. Saved time to be split 50/50 Owners/Charterers."
56. On the agreed facts the following is plain. First, the charterers not only consented to an early tender of notice of readiness, berthing, and commencement of loading, but gave orders to that effect. Secondly, those consents and orders were given in writing. Thirdly, in accordance with those orders, the vessel had already received a pilot at 0742 on 8 January in preparation for her move into berth, had weighed anchor by 1018, and was all fast at her berth at 1200. Fourthly, loading actually commenced at 1648, but I would infer that the vessel would not have been permitted to go to berth unless to commence loading, as ordered.
57. What are the legal consequences? First, the charterers had clearly waived their right not to be required to load the vessel prior to 9 January. That is not in dispute. Secondly, the owners were required, if the vessel was ready, to co-operate in the service of a notice of readiness on arrival. That may not be entirely common ground, but it is not in dispute that, even in the absence of an order or request from charterers, owners were entitled to serve a notice of readiness prior to 9 January. Thirdly, upon service of her NOR, the vessel was thereupon tendered to the charterers for service in loading their cargo. Fourthly, as it seems to me, the charterers' order to berth and load their cargo was therefore a valid voyage instruction within the first sentence of clause 31. Fifthly, the owners could therefore not refuse to berth and load the cargo without being liable to indemnify the charterers for any damages, delays, costs and consequences of not complying with those orders. Sixthly, the express prohibition, contained in clause 31, on tendering notice of readiness "prior to the earliest layday specified" in the charterparty, which would otherwise have overridden *Asbatankvoy's* clause 6 obligation to tender NOR on arrival, had been waived with the charterers' consent, and, as required by clause 31, that had been done in writing. Seventhly, clause 33 was in active operation, for the charterers had permitted and indeed ordered the vessel "to tender NOR and berth prior to commencement of laydays".
58. It is nevertheless submitted by Mr Brenton that the effect of clause 31 is that, without a further express written consent to the commencement of laytime before 0600 hours on 9 January, laytime could not commence to count until then; and that the effect of clause 33 is, in addition, to give to the charterers the credit of a further 6 hours in respect of time saved on 8 January.
59. In my judgment, however, both those submissions are in error. I would seek to explain my reasons as follows.
60. First, on traditional principles, clauses 31 and 33 have to be construed as part of a single contract. Each is capable of throwing light on the other.
61. Secondly, for the reasons set out above, the background provisions of the *Asbatankvoy* charter, and the background law, combine to indicate that, absent contrary agreement, a charterer who loads a vessel following a notice of readiness which is either valid or treated as valid should be expected to be doing so in time for which he is accountable, ie laytime. Laytime provisions may of course allow him notice time, or may except weekends and holidays or periods of delay due to force majeure etc: but one would not expect to find that the vessel would be used by a charterer in loading or discharging free of any laytime accountability. After all, the vessel is

working for the charterer. Laytime is the time agreed and allowed for loading and discharging. In the absence of clear contrary expression, why should the charterer load or discharge in free time?

62. Thirdly, the commencement of laytime is intimately connected with the service of a notice of readiness. That is another way of expressing the charterers' accountability for laytime, the time agreed and allowed for loading and discharging. There is usually a notice period allowed, but subject to that or other express exceptions, the notice of readiness is the trigger for the charterers' accountability for laytime. In *The Happy Day* Potter LJ spoke (at para 72) of –
"the commercial context and the purpose of the contractual requirement to serve NOR which is to trigger the charterers' obligation to unload whereby laytime starts to run immediately (in the absence of express provision), or in accordance with a specific regime..."
63. Clause 6 of the Asbatankvoy form is consistent with that thought, in providing that a notice of readiness shall be served "and laytime...shall commence" 6 hours later. I accept Mr Young's submission that the sole or dominant purpose of the notice of readiness was to act as a trigger for the commencement of laytime. The way I would put it is that, in the context of a charterparty, the sole or dominant purpose of a notice of readiness is to tender the vessel for loading or discharging and thus to act as the trigger for the commencement of laytime. Of course a notice of readiness expresses the vessel's readiness, and thus her arrival, but that is because a vessel cannot tender such a notice without being arrived and ready. The purpose, however, is to tender the vessel to the charterer for his duties of loading or discharging with their laytime accountability. Similarly, I accept that the date of a notice of readiness may be used to price a cargo (but by far a more usual pricing mechanism is the bill of lading date): but that is its use under sale contracts, not under the charterparty. I therefore consider that Mr Brenton's reasons for seeking to give to a notice of readiness a life force outside that as the trigger for the commencement of laytime are without material force.
64. Fourthly, once the owners were ordered to berth and to commence loading on 8 January, in advance of the earliest layday of 9 January, the protection of that earliest layday had gone. I refer to my construction of clauses 5 and 6 above. It seems to me that the same is true of clause 31.
65. Fifthly, and semantically, I do not read clause 31, as the judge did, as requiring two separate consents. I accept Mr Young's submission that the words "and laytime shall not commence before 0600...on the earliest layday" as expressing the legal consequence of the prohibition on serving a notice of readiness prior to the earliest layday. Once the earliest layday was waived, which was not done merely by allowing a notice of readiness to be served in advance of it but by ordering the vessel to berth and load in advance of it, the charterers consented to the early commencement of laytime: just as they would have done under clause 5 (see above) which also connects the earliest layday (and its waiver) with the commencement of time.
66. Sixthly, since the owners could not refuse to berth and load, Mr Brenton is in error to suggest that the owners' possible and correct response to the charterers' email orders was to say: "Only if in addition you agree in writing to commence time early – see clause 31". To which the charterers could if their construction were the correct one, reply: "No thank you. Get on with berthing and loading or we will hold you liable under the first sentence of the very clause you have referred us to."
67. Seventhly, I would regard the interpretation of clause 31 espoused by the charterers as unrealistic and uncommercial and a trap for the unwary master or owners' agent. They would not think of responding to orders to serve a notice of readiness, to berth and to load by refusing to do so unless the charterers in addition agreed that time should count in advance of a time (here 0600 on 9 January) which had been expressly linked with a time, the earliest layday, before which NOR could not be served but which for those purposes had been expressly waived. Nor did these experienced owners, who were copied in on the charterers' emails, think of responding as the charterers suggest they should have done. That is, of course, legally beside the point. But it is legally relevant to ask how the reasonable master or owners' agent or owner would have regarded the charterers' emails and clause 31.
68. In this connection, I accept that *if* clause 31 has to be interpreted, as the charterers would submit, as containing the requirement of two entirely separate express consents, then the emails concerned do not quite amount to them. However, that is merely to emphasise the uncommercial nature of the charterers' construction. No one would reasonably expect that laytime would not be running along with and pursuant to a notice of readiness given in immediate anticipation of berthing and loading, in circumstances where the express provision against early notice of readiness and early loading contained in the charterparty had been expressly waived in writing.
69. Eighthly, one has to ask how clause 33 fits into this scheme. Is it inconsistent with it, thus putting the above considerations into flux? In my judgment, no. Clause 33 properly asks the question which follows on immediately from the previous clause that contemplates loading before the earliest layday: How in such a case is time to count? If nothing more were said, time would, in my judgment count in accordance with clause 6 and following of the Asbatankvoy form. That might prejudice charterers where the notice of readiness was tendered in anticipation of early berthing and loading, but the latter operations were then delayed, albeit clauses 7/8 have their own provisions in this respect. Clause 33 appears, however, to cut through clause 6 and provides for two matters: first, that the relevant time to focus on is time from berthing until the commencement of laydays; and secondly, that that time is to be shared.

70. Mr Brenton submits nevertheless that that time is free to the charterers, and that therefore the effect of sharing it is to increase the laytime available to the charterers, and that in the absence of the sharing amendment to the Vitol standard clause the whole of the time from berthing to the earliest layday would have increased the amount of laytime. In my judgment that is uncommercial and counter-intuitive, for prima facie time used by the charterers for loading and discharging should be time for which they are accountable, but in any event it is not what the clause is saying. The time is to be "credited" (subject to sharing) "to Charterer against laytime and/or time on demurrage". In my judgment that shows that laytime is otherwise running (or, if the vessel is already on demurrage, as it might be at a second loading port or at a discharge port) demurrage time is being incurred. I do not accept the charterers' construction, which is that the time is to be added to laytime allowed, or deducted from laytime used or demurrage time incurred merely as a post-event calculation at the conclusion of the voyage. It is preferable to ask how the time is being treated as it is running. Otherwise, the point at which the vessel exhausts laytime and goes onto demurrage will not be known until the end of the voyage. Moreover, if at the end of the voyage, the charterers have not exhausted their laytime, the "credit" will be irrelevant – there is no provision for despatch.
71. In my judgment, therefore, clauses 31 and 33 together make better and more commercial sense if they are construed as providing that time used in loading or discharging, from berthing, is, as one would expect, prima facie to count against the charterers who are using it for their purposes, but is to be credited back to them to the extent that it occurs before the earliest agreed layday. The amendment agreed to this standard Vitol clause was that the "saved" time concerned should be awarded equally to both parties. Thus charterers are credited with only half the time concerned.
72. The question would inevitably arise, on either party's construction of clauses 31 and 33, as to how time is to count if charterers consent to it counting early, ie before 0600 on 9 January. I have already suggested that, if nothing were said, the charterparty's underlying clauses (clauses 6/8) would operate as from the giving of notice of readiness. In my judgment, however, clause 33 is intended to operate in such circumstances. So the question might arise, although it has not been raised in this appeal, as to how clause 33 would operate alongside clauses 6/8. What, for instance, of time after 6 hours from notice of readiness but before berthing? One possibility is that time counts in accordance with the underlying clauses subject to clause 33. Another, however, is that clause 33 is intended to be the exclusive code in the case of early loading. That is the effect of the parties' agreement that, if the owners' submissions prevail, their laytime statement is correct. I am inclined to think that the latter alternative may well be correct, but it has not been argued and it is not necessary to determine the point.

Conclusion

73. In sum, I would allow the appeal and hold that the owners' construction of these clauses is correct. It follows that, by agreement, the principal sum of \$70,489.71 has to be paid to the owners.

Lord Justice Scott Baker:

74. I agree with both judgments, which I have had the advantage of reading in draft.

Lord Justice Buxton:

75. I agree that this appeal should be allowed.
76. Clause 6 of the ASBATANKVOY charter party introduces a severe and, as it would seem to some, inconvenient regime, in that on arrival at the customary anchorage the vessel must give NOR, berth or no berth, and laytime commences six hours after receipt of such notice. But, as my Lord points out in his §45, by clause 5 the latter consequence cannot in fact follow without the charterer's "sanction". Clause 31 of the Vitol terms would seem to reinforce that protection by requiring the charterer's consent in writing. That then leads to the short question in this case, of whether a charterer's requirement that NOR be tendered (with consequent advancement of berthing and loading) entails his agreement to the early commencement of laytime.
77. There are two very strong reasons why the owners are correct in their contention that clause 31 means that consent to NOR being given early entails consent to the start of laytime being linked to that NOR. The first is that, as the terms mentioned above demonstrate, the commencement of laytime is in the ordinary case closely related to the giving of NOR. It would be very surprising if the draftsman of clause 31 had taken a different approach without making that entirely plain. Secondly, I respectfully and strongly agree with what my Lord says in his §67, that any other solution would be wholly impractical, and would introduce a very inappropriate invitation to legalistic manoeuvring into what should be a transaction driven only by commercial practicality.

Mr Timothy Young QC & Mr Socrates Papadopoulos (instructed by Messrs Davies Johnson & Co) for the Appellant
Mr Tim Brenton QC (instructed by Messrs Ince & Co) for the Respondent