COURT OF APPEAL

13 March; 22 May 2007

ERG RAFFINERIE MEDITERRANEE SPA
v
CHEVRON USA INC
(THE "LUXMAR")

[2007] EWCA Civ 494

Before Lord Justice BUXTON,
Lord Justice LONGMORE and
Sir MARTIN NOURSE

Sale of goods (fob) — Construction — Nominated vessel arriving within laycan period — Delay by sellers in loading vessel — Buyers terminating contract for repudiatory breach — Whether termination lawful — Whether buyers entitled to general damages for late delivery.

By an oral contract made on or about 12 May 2004 and later evidenced in writing, the claimant (ERG) agreed to sell to the defendant (Chevron) a quantity of gasoline fob ISAB refinery North side Priolo terminal.

Clause 7 of the written wording of the contract read:

> 7. DELIVERY
>
> FOB ISAB REFINERY NORTH SITE (PRIOLO TERMINAL — AUGUSTA BAY) IN A SINGLE LOT BY M/T "TBN"/SUBS TO BE NOMINATED BY BUYER AND TO BE ACCEPTABLE TO SELLER IN THE PERIOD 27–30/05/2004.
>
> BUYER WILL NARROW SUCH PERIOD TO A TWO DAY LAYCAN LATEST BY 21/05/2004 C.O.B. ITALIAN TIME.
>
> THE LAYCAN IS AN ESSENTIAL ELEMENT OF THE CONTRACT, IN FAVOUR OF SELLER.

Clause 9 specified a period for laytime, and clause 10 provided that any demurrage was payable at the charterparty rate.

On 17 May 2004 Chevron nominated the vessel *Luxmar* to load the cargo. On 21 May the laycan was narrowed to 29/30 May 2004.

The vessel arrived at Priolo at 1000 on 28 May and gave notice of readiness. The cargo was not ready because of technical problems at ERG's plant. The necessary repairs were not completed until 3 June.

On 3 June 2004 Chevron terminated the contract on the basis that ERG's failure to commence loading constituted a repudiatory breach.

ERG asserted that Chevron terminated the contract unlawfully and claimed damages for its breach. Chevron counterclaimed general damages for late delivery in addition to demurrage.

ERG argued that its only obligation under the contract was to load the vessel within the laytime allowed by clause 9, or pay demurrage, if any, in accordance with clause 10. Clause 7 did not impose any other "delivery" obligation on it, and Chevron had no right to terminate the contract.

Chevron contended that clause 7 imposed a delivery period within which ERG was bound to deliver the cargo. Alternatively, Chevron could justify the termination of the contract because (1) the failure to complete delivery within the laytime provisions was a breach of condition entitling Chevron to terminate, and (2) ERG was in breach of an obligation to deliver within a reasonable time, entitling Chevron to terminate. Chevron claimed general damages for late delivery in addition to demurrage.

At first instance Langley J gave judgment in favour of ERG ([2006] 2 Lloyd's Rep 543). He held that clause 7 did not impose a delivery period; it provided for a laycan and no more. Chevron's remedy for the delay was limited to demurrage. There was no obligation on ERG to deliver in a reasonable time, breach of which could justify the termination of the contract. Accordingly, Chevron was liable to ERG for wrongfully terminating the contract. Chevron were not entitled to general damages for delay in addition to demurrage.

Chevron appealed.

———*Held* by CA (BUXTON and LONGMORE LJJ and Sir MARTIN NOURSE) that the appeal would be dismissed.

(1) The concept of the laycan in the second paragraph of the delivery clause was an essential part of the clause as a whole and the word "delivery" had to be construed accordingly. The use of a laydays/cancelling provision in the contract, particularly a provision entitling a vessel to present at any moment up to the end of the delivery period, made the contract a non-traditional fob contract in that time of delivery had become an obligation which was not of the essence of the contract (*see* paras 20 and 21).

(2) Chevron's submission that they were in any event entitled to terminate the contract because the time for loading had been substantially exceeded would be rejected. A provision that a vessel be loaded within a particular time was not treated as a condition of the contract in shipping cases and there was no reason why the position should be any different in other cases, such as sale cases, where the relevant obligation was to load within the laydays. The innocent party could only terminate after a frustrating time had elapsed (*see* para 23);

———*Scandinavian Trading Co AB v Zodiac Petroleum SA (The Al-Hofuf)* [1981] 1 Lloyd's Rep 81 and *Universal Cargo Carriers v Citati* [1957] 1 Lloyd's Rep 174; [1957] 2 QB 401 considered.

(3) Chevron's submission that they were entitled to general damages for delay in addition to demurrage would also be rejected. Where a demurrage figure was contained in a contract it was intended to cover loss for delay, and general damages for delay could not be awarded in addition (*see* para 24).

The following cases were referred to in the judgment of Longmore LJ:

Bunge Corporation v Tradax Export SA (HL) [1981] 2 Lloyd's Rep 1;

Marbienes Compania Naviera SA v Ferrostaal AG (The Democritos) (CA) [1976] 2 Lloyd's Rep 149;

Scandinavian Trading Co AB v Zodiac Petroleum SA (The Al-Hofuf) [1981] 1 Lloyd's Rep 81;

SHV Gas Supply & Trading SAS v Naftomar Shipping & Trading Co Ltd Inc (The Azur Gaz) [2006] 1 Lloyd's Rep 163;

Tidebrook Maritime Corporation v Vitol SA (The Front Commander) (CA) [2006] 2 Lloyd's Rep 251;

Tradax Export SA v Italgrani di Francesco Ambrosio (CA) [1986] 1 Lloyd's Rep 112;

Universal Cargo Carriers v Citati [1957] 1 Lloyd's Rep 174; [1957] 2 QB 401;

Yelo v S M Machado & Co [1952] 1 Lloyd's Rep 183.

This was an appeal by Chevron USA Inc, the purchasers under an fob sale of a quantity of gasoline, from the decision of Langley J ([2006] 2 Lloyd's Rep 543) in favour of the sellers, ERG Raffinerie Mediterranee SpA, declaring that Chevron had unlawfully terminated the contract for ERG's failure to commence loading before the end of the period provided for in the contractual delivery clause.

Jeffrey Gruder QC and Robert Bright QC, instructed by Fishers, for Chevron; Stephen Males QC, instructed by MFB, for ERG.

The further facts are stated in the judgment of Longmore LJ.

Judgment was reserved.

Tuesday, 22 May 2007

JUDGMENT

Lord Justice LONGMORE:

Introductory

1. This appeal from Langley J [2006] 2 Lloyd's Rep 543 requires the court to decide whether an fob contract which provides for a delivery period to be narrowed to a laycan period (viz a period before which laydays will not start and after which a seller may cancel the contract if the ship which is due to take the cargo has not served a notice of readiness to load) is a traditional fob contract in which the buyer can terminate the contract if the goods are not shipped within the period originally designated for delivery. In a traditional fob contract, time of shipment is of the essence of the contract: see *Benjamin's Sale of Goods*, 7th edn, 2006, paras 20-029 to 20-033. This means that the goods must have been placed on board the ship by the end of the shipment period. This in turn means that the buyer needs to get the vessel to the loading port in sufficient time for such loading to occur. There will often be provisions of the sort seen in *Bunge Corporation v Tradax Export SA* [1981] 2 Lloyd's Rep 1 whereby, if a shipment period is designated, the buyer will have to give a certain number of days notice stating the time of probable arrival of the vessel; this is so as to enable the contractual goods to be loaded by the seller before the end of the shipment period. Just as the requirement that the goods be loaded on board before the end of the shipment period is a condition of the contract, so also a provision that a notice of probable readiness to load be given on or before a certain day is a condition of the contract. I use the word "condition" in its technical legal sense to mean that, if the relevant party does not comply with the obligation, the "innocent" party can treat the "guilty" party as being in repudiatory breach, can accept the repudiation by bringing the contract to an end, and sue for damages if he has suffered any loss.

2. A laycan provision can operate in a not dissimilar way. The seller knows that he has to have his goods available for loading during whatever period the contract specifies but may stipulate for a narrowing of that period by requiring the buyer to nominate a shorter period within which he will make the ship available to take the goods. If, however, that period of availability is close to the end of the delivery period, that narrowing may have the consequence that, if the vessel presents towards the end of the narrowed period, the goods will not be shipped by the end of the shipment period. If this is the case, the natural conclusion might be (as the judge in this case held) that it cannot have been the parties' intention that there would be a breach of condition if the goods have not been shipped by the end of that delivery period.

3. That is essentially the problem in the present case. On or about 11 May 2004 the parties agreed a four day delivery period of 27 to 30 May but also agreed that that period would by 21 May be narrowed by the buyers to a two day laycan. On that day the buyers, as they were entitled to do, gave a two day date range of 29 to 30 May 2004. The buyers say that, if notice of readiness to load was, in fact, given by such time as would permit the vessel to complete the loading of the cargo by 30 May (in other words by 0600 on 29 May) then it was a condition of the contract that loading should be completed by midnight on that date. By contrast the

sellers say that, since no right to cancel could arise until the end of the laycan period, the vessel could serve notice of readiness at any time up to 2400 on 30 May so it could not be a condition of the contract that loading had to be completed by that time, whenever it was that notice of readiness was given.

4. In these circumstances the sellers say that the only obligation is to deliver the cargo within the period allowed for by the laytime provisions of the contract (42 hours). Laytime provisions are never considered to be conditions of the contract since demurrage is intended to compensate the buyer for delay, at any rate until the lapse of time is such as to frustrate the contract. The fact, therefore, that the sellers were unable to provide the cargo by 30 May does not mean that the buyers were entitled to terminate the contract and sail away. The buyers did in fact wait until 3 June but then terminated the contract ordering their vessel away from the port on that day. The market was falling so the buyers suffered no loss by reason of the unavailability of the cargo on 30 May. It was the sellers who suffered loss and they have sued the buyers for failure to take delivery.

The facts

5. At trial there was some limited dispute about the terms of the contract which was made orally, although to some extent evidenced in writing. The judge heard evidence and then found in para 13 of his judgment that discussions began on 6 May when Mr Montefiori of the claimants ERG Raffinerie Mediterranee SpA ("the sellers") told Mr Patterson of the defendants Chevron USA Inc ("the buyers") that he had a parcel of gasoline for loading at the end of May, say 28 to 30 May. Mr Patterson expressed interest in that parcel. On 11 May Mr Patterson suggested that they work on the basis of a previous contract known to them both; they agreed that the price of the cargo should be the average of certain Platt's fob quotations for the period 25 May to 1 June plus US$2.25 per metric ton premium. In their final conversation on 11 May they agreed "loading period 27–30" "to be narrowed to 2 days laycan". Other clauses were to be "as per their previous deal". Both dealers produced their contemporaneous notes or deal sheets and there was no marked dissimilarity between them. Mr Montefiori then sent a written wording as he had said he would. This written wording was never expressly accepted as the contract but it was not disputed that the material terms of the wording accorded with what had been orally agreed.

6. These terms were:

PRICE

IN USD/MT, FOB ISAB REFINERY NORTH SITE (PRIOLO TERMINAL — AUGUSTA BAY) ON B/L WEIGHT CORRECTED IN AIR, CALCULATED AS FOLLOWS:

AVERAGE OF ALL PLATT'S HIGH FOB QUOTATIONS FOR PREM UNL AS PUBLISHED BY PLATT'S EUROPEAN MARKETSCAN UNDER THE RUBRIQUE "FOB MED (ITALY)" EFFECTIVE AND VALID IN THE PERIOD 25/05–01/06/2004,

PLUS 2.25 USD/MT.

7. DELIVERY

FOB ISAB REFINERY NORTH SITE (PRIOLO TERMINAL — AUGUSTA BAY) IN A SINGLE LOT BY M/T "TBN"/SUBS TO BE NOMINATED BY BUYER AND TO BE ACCEPTABLE TO SELLER IN THE PERIOD 27–30/05/2004.

BUYER WILL NARROW SUCH PERIOD TO A TWO DAY LAYCAN LATEST BY 21/05/2004 C.O.B. ITALIAN TIME.

THE LAYCAN IS AN ESSENTIAL ELEMENT OF THE CONTRACT, IN FAVOUR OF SELLER.

9. LAYTIME

36 RUNNING HOURS SHINC WEATHER PERMITTING PLUS 6 HOURS NOTICE ALWAYS DUE, (NOTICE OF READINESS MUST BE TENDERED ONLY AFTER THE VESSEL HAS ARRIVED WITHIN THE CUSTOMARY ANCHORAGE) PROVIDED VESSEL CAN RECEIVE THE TOTAL CARGO IN A PERIOD OF TIME EQUIVALENT TO THE TWO THIRDS OF THE AGREED LAYTIME HOURS.

IF THE VESSEL TENDERS N.O.R. AFTER THE FIRM AGREED LAYCAN, LAYTIME SHALL BEGIN UPON BERTHING.

LAYTIME SHALL COMMENCE EITHER 6 HOURS AFTER N.O.R. TENDERED AT LOADPORT OR UPON BERTHING, WHICHEVER IS EARLIER AND EXPIRE AT HOSES DISCONNECTION, OR RECEIPT OF DOCUMENTS, WHICHEVER IS EARLIER. TIME USED FROM HOSES DISCONNECTIONS TILL RECEIPT OF DOCUMENTS ON BOARD SHALL BE EQUALLY SHARED BETWEEN BUYER AND SELLER AFTER THE THREE HRS USUALLY GRANTED BY SHIP.

10. DEMURRAGE

DEMURRAGE, IF ANY, WILL BE REQUESTED BY BUYER ONLY IF SHIPOWNERS ACTUALLY CLAIM IT. DAILY RATE AS PER CHARTER PARTY . . .

7. On 17 May the buyers nominated the vessel *Luxmar* to load the cargo and the sellers accepted that nomination on the same day. On 20 May the vessel gave 28 May as the expected date of arrival at Priolo. The next day the buyers narrowed the laycan period to the two day date range of 29 to 30 May 2004. On 26 May the sellers started to blend the cargo but encountered technical problems with the plant. Repairs at the plant were begun but not completed before 3 June.

8. At 1000 on 28 May the vessel arrived at Priolo and gave notice of readiness, but due to the problems at the plant it could not then load. There was some dispute as to the extent to which the buyers were kept informed about the progress of repairs but the judge held that the buyers had information on 3 June that the vessel would probably berth on 4 June. Nevertheless at 1508 on 3 June the buyers informed the sellers:

> We hereby accept your failure to commence loading . . . as repudiatory of the Sale Contract, which is hereby terminated

and they ordered the vessel to leave Priolo.

9. The sellers claim that the buyers were not entitled to terminate the contract and that it was, therefore, the buyers who were in repudiation by their premature termination.

10. It is not without interest that the buyers focused on the failure to *commence* loading as the sellers' supposed repudiation. In a traditional fob contract, the delivery obligation is that loading must be *completed* within the delivery/shipment period. So on any view the fob contract made between the parties in this case does not look like a traditional fob contract. It must, of course, be construed according to its particular terms.

The judgment

11. Before the judge the sellers contended that the delivery obligation was to load within the contractual laytime if the vessel presented within the narrowed laycan range (as it did). If there was delay beyond the contractual laytime, that was catered for by the demurrage provisions in the contract. Laytime is never a condition of the contract so the buyers were in breach by terminating the contract on 3 June.

12. The buyers maintained that the delivery period was a condition of the contract but counsel had some difficulty in pinpointing the time when, according to the contract, non-compliance entitled the buyers to terminate. The judge was offered five separate possibilities but did not accept any of them. He held that, as the sellers had submitted, the obligation was to load the vessel within the laytime and that, although the obligation had been broken, the buyers were not entitled to terminate the contract until a frustrating time had elapsed which by 3 June had not occurred. He, therefore, held that the sellers were entitled to damages for the buyers' unlawful termination and that the buyers' cross-claim for damages for failure to load within the laytime was limited to the demurrage rate.

Submissions on appeal

13. Mr Gruder QC for the buyers submitted that the judge was wrong and that the obligation was that the sellers should begin to load the vessel at such time as would enable the vessel (all other things being equal) to complete her loading by the end of the delivery period. Since the vessel could be expected to load within the allowable laytime of 42 hours (36 running hours plus six hours' notice), loading had to begin at or before 0600 on 29 May for it to be completed by the end of the delivery period at 2400 on 30 May. Since time of delivery (or shipment) was of the essence of the contract then, provided the vessel gave notice of readiness by 0600 on 29 May, the sellers were obliged to complete loading by 2400 on 30 May and, if they did not, the buyers could treat them as being in repudiation of the contract. Since the vessel was not loaded by that time, the buyers were entitled to terminate at any time thereafter as they did on 3 June.

14. In support of this argument, Mr Gruder emphasised the facts:

> (1) that times of delivery were almost invariably of the essence in mercantile contracts;
>
> (2) that the price was itself to be calculated by reference to the average of prices around the delivery date, here 25 May to 1 June. This reflected the volatility of the market and, in particular, the risk of movement in prices, if the buyers were to be kept waiting for delivery; the right to claim demurrage (which would anyway have to be paid over to the shipowners) was a wholly inadequate compensation for late delivery;
>
> (3) that the delivery clause was just that. It was only the second and third paragraphs of the delivery clause that introduced the concept of the "laycan"; the judge's construction wrongly gave overriding emphasis to the laycan aspect of the clause;
>
> (4) that the oral conversations which constituted the sale contract had expressly agreed loading dates and had then characterised those dates as the loading period.

15. These are all forceful points. There can be little doubt that, if the first paragraph of the delivery clause stood on its own, it would be treated as a condition of the contract, see *Benjamin's Sale of Goods*, 7th edn, para 20-029 and the cases there

cited, particularly *Yelo v S M Machado & Co* [1952] 1 Lloyd's Rep 183 and *Tradax Export SA v Italgrani di Francesco Ambrosio* [1986] 1 Lloyd's Rep 112 at page 117 per Kerr LJ.

16. But the delivery clause has to be read as a whole and, when so read, the "laycan" provisions are important. "Laycan" is a word or phrase often to be found in charterparties and, as Rix LJ observed in *Tidebrook Maritime Corporation v Vitol SA (The Front Commander)* [2006] 2 Lloyd's Rep 251, paras 38 and 39, it is a reference to:

> (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.

He continued:

> The importance of such a laycan period is to enable the charterer to know when he has to have the goods ready for loading, and to enable both parties to know when, if the vessel is late in respect of her . . . 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 day, and if she arrives late, the charterer can still maintain the charter.

All this is elementary in a shipowner/charterer contract, such as a charterparty. It may also be important to observe that a right of cancellation is just what it says. It is a right to cancel which does not carry with it any right to damages for non-performance: see *Marbienes Compania Naviera SA v Ferrostaal AG (The Democritos)* [1976] 2 Lloyd's Rep 149 at page 152 per Lord Denning MR.

17. Sometimes, as in this case, the laycan concept is used in an fob contract. Since, in such a contract, it is the buyer who has the disposition of the vessel, it is the buyer who is in the position of the shipowner and is at risk of the vessel being cancelled if she does not present before the last day of the laycan period. Similarly it is the seller who is in the position of the charterer and is the person entitled to terminate the contract if the vessel has not arrived in time. The seller will not be bound to start loading the vessel before the period starts but will be bound to load as and when, within the laycan period, the vessel is ready to receive the cargo. As Christopher Clarke J put the matter in *SHV Gas Supply & Trading SAS v Naftomar Shipping & Trading Co Ltd Inc (The Azur Gaz)* [2006] 1 Lloyd's Rep 163:

> The term laycan is habitually used in the negotiation of charterparties to refer to the earliest date at which the laydays can commence and the date after which the charter can be cancelled if the vessel has not by then arrived. By extension the term is found in fob sales, so as to provide that the seller can cancel the contract if the vessel, which it is the buyer's duty to procure, does not arrive at the port by the cancellation date.

18. The laycan provision thus gives the fob seller a right to bring the contract to an end in circumstances in which, without a cancelling provision, he may well have no right to do so. The concomitant of that right is that the buyer is entitled to present the vessel at any time up to 2400 on the last day of the laycan spread, here 30 May. If he is entitled to present the vessel at 2300 (or even 2359) on 30 May, the contract cannot be interpreted to mean that the seller must have completed loading by 2400 on that day because that would be a commercial absurdity. In that event, the seller must be entitled (and must also be bound) to load within the laytime provided for by the contract. If he does not do so, he will be in breach of contract. He will not, however, be immediately in repudiatory breach partly because terms as to time of loading a vessel are not traditionally (and for good reason) regarded as conditions of the contract and partly because there would be great practical difficulties if the buyer were able to terminate the contract when the vessel had been partly but not fully loaded.

19. Mr Gruder submits that the traditional view (that time of delivery is of the essence of an fob contract) can be retained with the laycan provision by holding that, if notice of readiness is in fact given at such time as would enable the ship to be loaded by the end of the delivery period, time of delivery will be a condition; whereas if notice of readiness is given at a later time but within the cancelling period, only then would the obligation be to complete delivery within the laydays. This is an argument which it is not possible to accept. It is not sensible that an obligation relating to time of delivery should be a condition in one factual circumstance but not in another. It is either a condition or it is not. In the context of the present contract with an entitlement on the part of the buyer to present a vessel at any time up to the last moment for contractual delivery, it cannot, in my judgment, be right to hold that the words "DELIVERY . . . 27–30/05/2004" constitute a condition of the contract.

20. It was these considerations that led the judge to hold that the concept of the laycan in the second paragraph of the delivery clause was an essential part of the clause as a whole and that the word "delivery" had to be construed accordingly. The use of a laydays/cancelling provision in the contract (particularly a provision entitling a vessel to present at any moment up to the end of the delivery period) makes the contract a non-traditional fob contract in

that time of delivery has become an obligation which is not of the essence of the contract. That is not a surprise, since traders are constantly adapting and even changing traditional fob contracts in the course of their business. If they want to rely on delivery obligations as they have been traditionally construed, they may well be advised not to employ cancelling provisions but that is, as always, a matter for them.

21. I would therefore uphold the judge on what is the main ground of the appeal.

Other matters

22. In his skeleton argument Mr Gruder sought to develop arguments to the effect (1) that the buyers were in any event entitled to terminate the contract when they did since the time for loading had been substantially exceeded and (2) that the buyers could not be confined to the remedy of demurrage since their loss was considerably more substantial than that.

23. These arguments did not loom large in the oral argument and I would be content to adopt the judge's decision in relation to them. It is, as I have already indicated, axiomatic in charterparty law that failure to load within the laydays is not a repudiatory breach. Mocatta J applied the principle to an fob contract in *Scandinavian Trading Co AB v Zodiac Petroleum SA (The Al-Hofuf)* [1981] 1 Lloyd's Rep 81. In the events that had happened in that case the only relevant obligation on the seller was to load within the laydays and an argument that the buyer was justified in terminating the contract because the vessel would not have loaded within that time was rejected. A provision that a vessel be loaded within a particular time is never treated as a condition of the contract in shipping cases and there is no reason why the position should be any different in other cases (such as sale cases) where the relevant obligation is to load within the laydays. In such cases it would be irrational to treat the obligation as a condition for exactly the same reason as it is irrational in charterparty cases; the innocent party can only terminate after what has been called a "frustrating time" has elapsed, see *Universal Cargo Carriers v Citati* [1957] 1 Lloyd's Rep 174; [1957] 2 QB 401. That may in appropriate circumstances be a comparatively short time but no one has suggested that the lapse of time up to 3 June in the present case could have been a frustrating time.

24. As to the second argument, it has never been made clear what loss the buyers have suffered as a result of the delay. There is no claim for loss of market which is perhaps unsurprising since the market moved in the buyers' favour. The judge has awarded demurrage to the buyers as provided for in clause 10 of the contract. To the extent that the buyers have been rendered liable to the shipowners for demurrage that is no doubt a genuine loss and that has been (or will be) compensated. The judge rightly held that, where a demurrage figure is contained in a contract it is intended to cover loss for delay and general damages for delay cannot be awarded as well.

25. In the context of the argument whether the delivery period was to be treated as a condition of the contract, Mr Gruder made much of the argument that demurrage was an inadequate remedy (particularly if all that had happened was that it was paid to the shipowners) and that, for that reason, a breach of obligation relating to the time of delivery had to give rise to a right to terminate the contract. Once that argument is rejected (as I think it should be) it must follow that the buyers cannot be awarded more than the demurrage rate in respect of any delay which is a breach of the sellers' obligations.

26. For these reasons I would dismiss this appeal.

Sir Martin NOURSE:

27. I agree.

Lord Justice BUXTON:

28. I also agree.