TWENTY ESSEX

The Eternal Bliss: does demurrage really liquidate damages for only some types of loss?

Michael Ashcroft QC

The controversy

The varying reasoning of the members of the court in *Reidar v Arcos*[1] left it in doubt whether, if damages in addition to demurrage are to be recovered, it is necessary to show breach of a separate obligation as well as damage of a different kind from delay in the completion of the loading and discharging operation.

The Eternal Bliss

This issue has been grappled with most recently by Mr Justice Andrew Baker in the important case of The Eternal Bliss[2], where the only breach of contract alleged was a failure to discharge within the laytime.

The owner sought to claim damages at large (in addition to demurrage) in circumstances where it said that by reason of the prolonged retention of the cargo on board due to charterer's breach in failing to discharge within the laytime it deteriorated without fault on owner's part, resulting in the owner being confronted with claims by cargo interests for cargo damage that were reasonably settled. Deciding the case on assumed facts, the Judge held that in principle the owner could claim damages for breach of the obligation to discharge in the laytime in respect of the sum of c.US$1.1m paid to cargo interests in alleged reasonable settlement of the claims for cargo damage, in addition to the demurrage that was payable for the detention of the vessel.

In Andrew Baker J's view, the main point of principle involved asking 'what is it that demurrage liquidates?' and this is a question of construction: what is covered by a demurrage rate?

Following a careful and thorough view of previous authorities[3], the Judge concluded, it is submitted correctly, that the only authority that had decided this issue previously as part of the ratio decedendi was the decision of Potter J in *The Bonde* [1991] 1 Lloyd's Rep. 136. Disagreeing with, and departing from, that decision, he took the view that the demurrage rate is intended only to be an agreed measure of the "value of the ship's lost time" and did not liquidate/fix damages for all consequences of a breach of the obligation to load within the laytime; the demurrage rate "gives an agreed quantification of the owner's loss of use of the ship to earn freight by further employment in respect of delay to the ship after the expiry of the laytime, nothing more" (para 61). In those circumstances, he held that the owner could in principle maintain its claim for damages at large, damage to the cargo being "quite distinct in nature from, and…additional to, the detention of the ship, as a type of loss" (para 45).

1 *Akt. Reidar v Arcos* [1927] 1 K.B. 352.

2 *K Line Pte Ltd v Priminds Shipping (Hk) Co Ltd.* [2020] 2 Lloyd's Rep. 559.

3 Including *Suisse Atlantique Société d'Armement Maritime v N.V. Rotterdamsche Kolen Centrale* [1967] 1 AC 361 (House of Lords), [1965] 1 Lloyd's Rep. 533 (CA), [1965] 1 Lloyd's Rep. 166 (Mocatta J), Akt. Reidar v Arcos [1927] 1 KB 352 (Court of Appeal), [1926] 2 KB 83 (Greer J), The Altus [1985] 1 Lloyd's Rep. 423 and *The Bonde* [1991] 1 Lloyd's Rep. 136.

Permission to appeal to the Court of Appeal was given by Andrew Baker J, recognising the importance of his decision, and it is certainly a point on which clarification from the Court of Appeal (if not from the Supreme Court) would be appropriate.

Is The Eternal Bliss correct?

It is respectfully submitted[4] that there is certainly reason to examine the correctness of the result, for the following principal reasons.

1. Andrew Baker J's judgment places great weight on the judgment of Bankes LJ in *Reidar v Arcos*[5], albeit correctly accepting that this was a minority judgment in justifying the claim as one for damages for breach of the obligation to load in the laytime. Bankes LJ however, seems to have been on something of a frolic of his own. He decided the case in favour of the owner on an unpleaded point that was, apparently, directly contradicted by the argument of the owner's own counsel (AT Miller KC and Sir Robert Aske), who submitted that "For breach of this obligation [to load in a fixed number of lay days], but not for breach of the obligation to load a full cargo, the damages are agreed by clause 3 of the charterparty at 25l a day".

2. Whilst the Judge reasoned that the majority judgments in the Court of Appeal in *Reidar v Arcos* (and of Greer J at first instance) did not indicate disagreement with the minority approach of Bankes LJ, this is highly debatable. Why would they have been reasoned as they were if their authors thought that a mere breach of the obligation to load within the laytime could justify the claim the owner made? A reasonable inference is that they did not think this, particularly in circumstances where the owner was not even arguing for it.

3. The approach of Bankes LJ in *Reidar v Arcos* seems difficult to reconcile with the approach of the Court of Appeal (including Bankes LJ) in *Ethel Radcliffe SS Company Ltd v W and R Barnett Ltd*[6], which was cited by the charterer in *Reidar v Arcos*[7] for the proposition that "the owners cannot recover anything beyond the agreed damages"[8].

4. The learned Judge's approach of regarding demurrage as an agreed quantification *only* of the owner's loss of use of the ship to earn freight is very arguably a circular assumption and, if his focus was really only on the loss of freight, this seems wrong[9]. The cases on which the Judge relied as supporting this view do not, it is submitted, really address the point[10]. There is much to be said for the view that, at least as a starting position, absent clear words indicating a contrary intention, a liquidated damages clause should be regarded (in the interests of certainty) as fixing the compensation that can be recovered for a breach of the particular obligation to which it relates. There seems to be no other area of law (and no case was cited to, or by, the Judge) where a liquidated damages clause has been held to liquidate damages only for some types of loss, but not other types of loss, flowing from the exact same breach of the obligation to which it relates. There are persuasive *dicta* indicating a contrary starting position to that of the Judge[11] and it is difficult to see why the liquidated damages provision should not be regarded as providing agreed compensation for all losses that may be contemplated as flowing from a breach of the obligation to load/discharge within the laytime[12].

5. The conclusion favoured by the Judge may well give rise to considerable uncertainty in trying to determine what is, and what is not, covered by an agreed demurrage rate in any given case, particularly taking into account the factual matrix to the contract[13]. It

4 It has to be acknowledged that Andrew Baker J disagreed with the proposition set out in the 4th edition of *Voyage Charters*, of which the present writer is an author.

5 [1927] 1 KB 352.

6 (1926) 31 Com Cas. 222.

7 Although apparently not cited before Andrew Baker J.

8 Bankes LJ (p. 231) "...the only damages which his owners would be entitled to claim is the named sum of 30s per hour"; Warrington LJ (p. 234) "If the ship is in fact detained waiting for orders then the fixed rate of payment is introduced, and that is all that the charterers have to pay"; and Atkin LJ (p. 235) "In those circumstances it has been agreed what he is to get: he is to get 30s per hour" and (p. 236) "the contract has provided that if he were to commit a breach of his contract the compensation is fixed at a certain rate per hour".

9 It is not clear that the Judge intended to limit what he regarded as the coverage of the demurrage rate precisely as he stated it in para 61. In para 62 he seemingly approved the judgment of Moore-Bick J in *The Nikmary* [2003] 1 Lloyd's Rep. 151, which indicated that, in addition to the loss of freight, demurrage is "deemed to cover all normal running expenses, including the cost of diesel oil". Para 74 does, however, refer again to the demurrage rate being, and being only, "a liquidation of an owners' loss of freight caused by delay to the ship after expiry of laytime".

10 None seem to be considering precisely what is, and is not, covered by an agreed demurrage rate.

11 For example, in *The Luxmar* [2006] EWHC 1322, Mr Males QC (as he then was) submitted, and Langley J accepted, that "the demurrage provided for by the contract is the sole remedy for the seller's breach of contract in failing to load by the end of the laytime"; and in the Court of Appeal [2007] 2 Lloyd's Rep. 542, 547 Longmore LJ stated 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".

12 E.g. the costs/expenses of dealing with bottom-fouling that is a very obviously foreseeable consequence of prolonged stays in certain waters.

13 See p88-92 of Gay, Damages in addition to demurrage [2004] LMCLQ 72, which tries to grapple, it is respectfully submitted not very happily, with various different, and inconsistent ways, of seeking to determine what types of loss demurrage may not be regarded as covering. This

is doubtful that this point can be adequately answered by simply stating that the same difficulties arise come what may because of the Inverkip rule and *Reidar v Arcos* (as Andrew Baker J suggested at para 59(iii) of the judgment); where a claim for loss is made on the basis that it has been caused by a separate breach, the question of construction is different: are the agreed damages for breach of the obligation to load within the laydays (which is not being relied upon) to be taken as precluding a claim for damages at large flowing from a separate breach where the substance of the claim is one for detention of the ship.

6. Notwithstanding the Judge's careful analysis of *Suisse Atlantique Société d'Armement Maritime v N.V. Rotterdamsche Kolen Centrale*,[14] it remains reasonably arguable that both Mocatta J and the Court of Appeal took the view (albeit obiter) that it was necessary to show a separate breach.

sort of exercise is very arguably contrary to the certainty and simplicity of operation which an agreed damages provision is generally intended to produce. Further, at certain times, depending on market conditions and parties' negotiating positions, demurrage rates are fixed at well above market freight rates: see *The Ulyanovsk* [1990] 1 Lloyd's Rep. 425. In these circumstances, it is seriously open to question whether it should be simply assumed/presumed in any case that the agreed demurrage rate is intended to liquidate only "owners' loss of freight caused by delay to the ship after expiry of laytime".

14 The views of Mocatta J and the Court of Appeal received the approval of Lords Dilhorne, Hodson and Upjohn in the House of Lords. The other members of the House did not mention the point.

Finale

On balance, and pending clarification from a higher court, there is much to be said for the view that Bankes LJ initially himself favoured in *Reidar v Arcos*, namely that "where the parties had agreed a demurrage rate, the contract should be construed as one fixing the rate of damages for any breach of the obligation to load or discharge in a given time". With the Court of Appeal due to hear argument on the appeal later this month, it should not be long before those interested in the shipping markets and shipping law get increased clarity on this point. Until then, we wait with bated breath.

This article does not constitute, and should not be relied upon as, legal advice. The views and opinions expressed in this article are those of the author and do not necessarily reflect the position of other members of Twenty Essex.

Michael Ashcroft QC

Michael is an experienced silk with a broad commercial practice, specialising in high value and complex (often highly technical) commercial contractual disputes. He took silk in 2011, at only 38 years of age.

He is very well set-up to work remotely in these challenging times, and successfully represented Trafigura in one of the first applications (for a mandatory injunction requiring payment of US$76m security) dealt with under the COVID-19 Protocol in the Commercial Court.

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