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Case No: A4/2021/0009 & A4/2021/0010

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

QUEEN'S BENCH DIVISION

COMMERCIAL COURT (QBD)

Mr Justice Andrew Baker

[2020] EWHC 2373 (Comm)
Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 18/11/2021

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS

LORD JUSTICE NEWEY

and

LORD JUSTICE MALES

- -

Between:

K LINE PTE LIMITED — **Responde** / **Claiman**

- and -

PRIMINDS SHIPPING (HK) CO LIMITED — **Appellan** / **Defenda**

"ETERNAL BLISS"

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Christopher Hancock QC and Alexander Wright (instructed by **Penningtons Manches Cooper LLP**) for the **Appellant**

Simon Rainey QC and Tom Bird (instructed by **Reed Smith LLP**) for the **Respondent**

Hearing date: 27th October 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be Thursday 18th November 2021 at 10.30 a.m.

Lord Justice Males delivered the judgment of the court:

1.
Demurrage, as every shipping lawyer knows, is "a sum agreed by the charterer to be paid as liquidated damages for delay beyond a stipulated or reasonable time for loading or unloading, generally referred to as the laydays or laytime" (Scrutton on Charterparties, 24th edition (2020), Art 170). The issue arising on this appeal is whether demurrage is liquidated damages for all the consequences of the charterer's failure to load or unload within the laytime, as Mr Justice Potter held in The Bonde [1991] 1 Lloyd's Rep 136, or only some of them, as Mr Justice Andrew Baker held in this case.

2.
That issue arises because, in circumstances where the charterer committed no other breach of the charterparty, the delay in discharging a cargo of 70,133 mt of soybeans caused it to deteriorate. This led to a claim by the receivers, reasonably settled by the shipowner, who now seeks to recover its outlay from the charterer as damages for failure to complete discharge within the laytime. These, in outline, are the assumed facts on which the court was asked to determine a question of law pursuant to section 45 of the Arbitration Act 1996.

3.
Mr Justice Andrew Baker held (at [61]) that "agreeing a 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 laytime, nothing more". Accordingly, because the present claim was for "a different kind of loss", the shipowner was entitled to recover the sum paid to settle the receivers' claim as unliquidated damages falling outside the scope of the demurrage clause in addition to the demurrage of US $20,000 per day paid by the charterer for the period of delay.

4.
The charterer appeals, contending that demurrage operates as a liquidated and exclusive remedy for all the consequences of its failure to complete cargo operations within the agreed laytime. On that basis, a shipowner wishing to recover unliquidated damages in addition to demurrage must prove a breach by the charterer of a separate and distinct obligation.

5.
Accordingly this case turns on the proper meaning of the term "demurrage" as it is used in the charterparty.

The charterparty

6.
The demurrage clause in question is the standard clause 19 in the Norgrain 1973 form with some minor amendments. It is in the following terms:

"Demurrage at loading and/or discharging ports, if incurred, to be declared by Owners upon vessel nomination but maximum USD 20,000 per day or pro rata / despatch half demurrage laytime saved at both ends for part of a day and shall be paid by Charterers in respect of loading port(s) and by

Charterers in respect of discharging port(s). Despatch money to be paid by Owners at half the demurrage rate for all laytime saved at loading and/or discharging ports. Any time lost for which Charterers/Receivers are responsible, which is not excepted under this Charter Party, shall count as laytime, until same has been expired, thence time on demurrage".

Assumed facts

7.
The voyage was one of a number of voyages performed pursuant to a contract of affreightment dated 30th July 2014 between K-Line as owner and Priminds as charterer. The contract was for the carriage of bulk cargoes of 60,000 mt 10% more or less of heavy grain, soya or sorghum from South American ports to the Far East. The "Eternal Bliss", a drybulk carrier, was nominated for the June 2015 laycan. In the event she loaded 70,133 mt of soybeans at Tubarao in Brazil for discharge at Longkou in China, where she arrived and tendered Notice of Readiness on 29th July 2015. Due to port congestion and lack of storage space ashore she was kept at the anchorage for some 31 days before berthing. Upon discharge, the cargo exhibited significant moulding and caking throughout the stow in most of the cargo holds. Discharge was completed on 11th September 2015.

8.
The damage to the cargo led to a claim by the receivers which the shipowner (or in reality, no doubt, its P&I Club) settled at a total cost of US $1.1 million. It then sought to recover that cost from the charterer in arbitration. The only allegation of breach made against the charterer was that it had failed to discharge the cargo within the laytime allowed (which was calculated by reference to a discharge rate of 8,000 mt per weather working day with weekends excepted: there were other exceptions, such as strikes, but it does not appear that these had any impact on the laytime calculation). That gave rise to the question of law with which we are concerned, which the parties agreed to bring to the court for a decision under section 45 of the 1996 Act.

9.
For this purpose the parties agreed that the following facts should be assumed, although some of them may be in dispute hereafter:

(1)
The vessel was detained at the discharge port beyond the contractual laytime, due to port congestion and a lack of storage.

(2)
The charterer was therefore in breach of its obligation to complete discharge within the permitted laytime.

(3)
The condition of the cargo deteriorated as a result of the detention beyond the laytime, and not due to any want of care by the shipowner.

(4)
The shipowner suffered loss and damage and incurred expense as a result of the detention beyond the laytime, including dealing with and settling the cargo claims brought by the cargo interests and insurers.

(5)
The loss, damage and expense suffered by the shipowner were:

a)
not caused by any separate breach of charter other than the charterer’s obligation to discharge within the contractual laytime;

b)
not caused by any event which broke the chain of causation; and

c)
reasonably incurred.

(6)
The loss, damage and expense suffered by the shipowner were consequences of compliance with the charterer’s orders to load, carry and discharge the cargo.

10.
We must also assume, if the question of law is to arise, that the loss claimed in the arbitration is not too remote, that is to say that it was within the reasonable contemplation of the parties when entering into the contract that a failure to discharge within the laytime might cause the shipowner to incur liability for cargo damage. That assumption was not spelled out by the parties or addressed in submissions. The procedure adopted (determination of a question of law under section 45) means that we do not have the benefit of any findings on the point.

11.
The judge noted that the factual basis for the shipowner’s case in the arbitration will be that the cargo was shipped in Brazil with a high moisture content for the anticipated voyage length, although this is not alleged to have involved or resulted from any breach of contract by the charterer.

12.
We would observe that if, as is usually the case, the bills of lading were subject to the Hague-Visby Rules, the shipowner ought not on these facts to have been under any liability to the cargo receivers, particularly if the shipowner is able to make good its allegation about the high moisture content of the cargo. It may be, therefore, that the facts of the present case are unusual. Nevertheless, we must proceed on the basis of the assumed facts set out above.

The judgment

13.
As reformulated in the course of the hearing before the judge, the question of law for decision was whether, on the facts assumed, the charterer is liable to compensate or indemnify the shipowner for the cost of settling the cargo claims by way of (a) damages for the charterer’s breach of contract in not completing discharge within the permitted laytime; and/or (b) an indemnity in respect of the consequences of complying with the charterer’s orders to load, carry and discharge the cargo. The judge held that the charterer was liable by way of damages and that it was therefore unnecessary to decide whether there was a viable indemnity claim. He added, however, that if demurrage was liquidated damages for all the consequences of the charterer’s delay at the discharge port, it would be inconsistent with that element of the parties’ bargain to imply an indemnity rendering the charterer liable for one of those consequences. That aspect of his decision has not been challenged on appeal.

14.
The judge identified the main point of principle as requiring an answer to the question: what is it that demurrage liquidates? This was a question of construction of the demurrage clause in the

charterparty, although the clause in the present case does not provide an express answer to the question. The judge sought an answer to the question in the case law and textbooks, conducting an exhaustive examination of the cases from Inverkip Steamship Co Ltd v Bunge & Co [1917] 2 KB 193 to The Luxmar [2007] EWCA Civ 494, [2007] 2 Lloyd's Rep 542 via AS Reidar v Arcos Ltd (1926) 25 Ll LR 32, [1927] 1 KB 352 and The Bonde; and also of the textbooks, including successive editions of specialised textbooks such as Scrutton, Cooke on Voyage Charters and Carver on Charterparties, as well as more general works such as Chitty on Contracts and McGregor on Damages. Ultimately, however, the judge's view (at [88]) was that "the preponderance of views evident in dicta discussing or describing the nature of demurrage is that it serves to liquidate loss of earnings resulting from delay to the ship through failure to complete loading or discharging within the laytime allowed", but that none of these dicta were conclusive; that "when those in this field speak of damages for detention, or a claim for the detention of the ship, they are referring to" such loss of earnings; and (at [145]) that the only case which had clearly and expressly grappled with the point, namely The Bonde, decided some 30 years ago, was wrong and should not be followed.

The submissions on appeal

15.
For the charterer Mr Christopher Hancock QC submitted (in outline) that the general presumption is that clauses liquidating damages for delay in the performance of contractual obligations are intended to cover all losses flowing from that breach. He pointed in this connection to cases in other fields, such as construction contracts. He emphasised that the purpose of a liquidated damages clause is to achieve certainty, to avoid controversy in the assessment of unliquidated damages and to enable the parties to know where they stand at an early stage, not dependent on the vagaries of litigation or arbitration; this purpose would not be achieved on the judge's approach, which would lead to uncertainty and dispute about whether losses were of "a different kind" from those covered by a demurrage clause. While the principal losses flowing from a failure to load or discharge within the laytime would be the loss of the opportunity to earn freight on future voyages and the incurring of additional running costs, there was nothing in the case law holding that these were the only losses liquidated by a demurrage clause. Mr Hancock submitted also that authoritative statements as to the nature of demurrage suggest that it is intended to cover all losses flowing from a failure to load or discharge within the laytime and that the law was thought to have been settled to this effect by the decision in The Bonde, which held that if unliquidated damages are to be recovered, it is necessary to prove a separate breach.

16.
For the shipowner Mr Simon Rainey QC supported the judge's reasoning. He submitted that the starting point (and the finishing point) is to identify what demurrage is and is intended to be. In its origin it was a payment to compensate the shipowner for the loss of the opportunity to earn freight as a result of not getting its profit-earning vessel back at the end of the laytime, which is payable for each day or part of a day in which the vessel is detained thereafter. The demurrage rate was and is calculated by reference to anticipated future freight rates, albeit that it is ultimately a product of negotiation between the parties. This understanding of what demurrage is did not change as a result of the fact that it came to be recognised that demurrage is not in law a payment for additional laytime but liquidated damages for breach by the charterer of an obligation to complete loading or discharging within the laytime. Judges who have spoken of demurrage as liquidated damages for detention plainly had in mind losses caused by the detention of the vessel as a profit-earning chattel and nothing more. Mr Rainey accepted that there is no case binding on this court which decides the

point, but submitted that the better view of the authorities and textbooks is that the scope of a typical demurrage clause is limited in this way.

The nature of the issue

17.
As we have indicated, the issue before us depends on the meaning of the word “demurrage” as that would be understood by those involved in the shipping business. For that reason it is not helpful to consider how liquidated damages clauses in other fields such as construction law have been construed. In principle, it is open to the parties to agree that a liquidated damages clause should cover all or only some of the losses flowing from a breach of contract. The question is what these parties have agreed by the charterparty in the present case (and because their agreement is in standard terms, what commercial people generally have agreed by using such terms).

18.
The charterparty itself does not expressly address this question. It confirms that demurrage is to be paid at a maximum [1] daily rate of US $20,000 per day or pro rata, and therefore that it is calculated on a time basis, by reference to the days, hours and even minutes during which the vessel is detained beyond the laytime. It provides that, for time saved if the laytime is not used, despatch will be paid at half the demurrage rate. It provides also for various exceptions during which time shall not count as laytime. All this is standard, but does not indicate whether demurrage was intended to cover all or only some of the losses flowing from a failure to complete cargo operations within the laytime. It can be said, however, that if the parties intended demurrage to cover only some such losses, they gave no express indication of which losses were intended to be covered and which were not.

19.
It is helpful to frame the issue by reference to the explanation of “the general nature of the commercial bargain which is contained in voyage charter-parties” by Mr Justice Donaldson in Navico AG v. Vrontados Naftiki Etairia PE [1968] 1 Lloyd’s Rep 379, at 383 lhc:

“They are contracts for the carriage of goods in consideration of the payment of freight. The freight covers the passage between the loading and discharging ports and an agreed conventional period of time for loading and discharging the cargo (the ‘laytime’). I say ‘conventional’ because although this period may have some relation to the time which the parties expect to be spent in loading and discharging, no one would be more surprised than they if this estimate proved completely correct in the event. Almost all charter-parties go on to make provision for adjustment in the payment due from or to the charterers according to whether the processes of loading and discharging take more or less than the laytime. All the overheads and a large proportion of the running costs of a ship are incurred even if the ship is in port. Accordingly the shipowner faces serious losses if the processes take longer than he had bargained for and the earning of freight on the ship’s next engagement is postponed. By way of agreed compensation for these losses, the charterer usually contracts to make further payments, called demurrage, at a daily rate in respect of detention beyond the laytime.”

20.
However, this was no more than a general explanation in the context of a claim for despatch in which the present issue did not arise and could not have arisen.

Demurrage as liquidated damages

21.

It is now established that failure to complete cargo operations within the laytime is a breach of contract by the charterer for which demurrage is liquidated damages and that demurrage is not “money payable by a charterer as the consideration for the exercise by him of a right to detain a chartered ship beyond the stipulated lay days” (The Lips [1988] 1 AC 395 at 422E-F). However, this has not always been understood. In the Scots case of Lilly & Co v D.M. Stevenson & Co (1895) 22 R 278 Lord Trayner, reflecting earlier judicial statements, described days on demurrage as “just lay-days, but lay-days that have to be paid for”. As Lord Brandon pointed out in The Lips, if that view of the meaning of demurrage had prevailed, a claim for demurrage would be a claim in debt and not for damages. As it was, it was not until the Court of Appeal decision in Reidar v Arcos in 1926 that it was finally determined in English law that demurrage is liquidated damages for breach unless the contract provides otherwise.

22.
It follows that the present issue could not have arisen before that decision. If demurrage had been rightly understood as a claim in debt, there could be no damages for failing to complete cargo operations within the laytime, whether liquidated or unliquidated. Even if the delay had caused the shipowner to suffer loss (such as an exposure to a cargo claim which the shipowner reasonably settled, as on the assumed facts of this case), that loss would not have been recoverable in the absence of any other breach of contract by the shipowner.

The case law

23.
It is necessary to examine the cases which have touched on the issue over the last hundred years in order to see to what extent they determine the issue. In summary our conclusions will be that:

(1)
Apart from The Bonde, there is no case that decides as a matter of ratio whether unliquidated damages can be recovered in addition to demurrage when the only breach is a failure by the charterer to load or discharge within the laytime.

(2)
Distinguished judges have struggled, in our view without success, to discern a ratio on this issue in the Court of Appeal decision in Reidar v Arcos.

(3)
Numerous statements can be found in the cases to the effect that demurrage is intended to compensate the shipowner for loss of prospective freight caused by delay in completing cargo operations beyond the laytime. However, none of those cases has held that these are the only losses covered by demurrage and it does not appear that the present issue was in the minds of the judges who made those statements.

(4)
On the other hand, it has also been said in this court, after The Bonde, that demurrage is the sole remedy for failing to complete cargo operations within the laytime and that general damages for delay cannot be awarded as well.

(5)
Accordingly, apart from The Bonde, by which we are not bound, the cases are inconclusive.

Reidar v Arcos

24.
Much of the argument before the judge and on appeal was concerned with the difficult case of Reidar v Arcos. The charterparty required the loading of a full and complete cargo of sawn timber. If loading had been completed within the time allowed, a full and complete cargo would have consisted of 850 standards. However, as a result of the charterer's failure to load within the laytime, the voyage was delayed into the winter season when the vessel was only permitted to arrive at the discharge port with a cargo of 544 standards. The charterer paid demurrage at the stipulated rate, but the shipowner claimed in addition dead freight, being the difference between the freight which it would have earned on 850 standards and the freight actually earned on 544 standards.

25.
The case is authority for three propositions. First, as already noted, that demurrage is liquidated damages and not a payment for additional laydays. Secondly, that what amounts to a full and complete cargo must be determined on the basis that the charterer has fulfilled its obligation to complete loading within the laytime. (This was the majority decision of Lord Justices Atkin and Sargant; Lord Justice Bankes disagreed). Thirdly, that on these facts, the shipowner was entitled to recover the dead freight claimed.

26.
Unfortunately, however, while all three members of the court agreed that the shipowner was entitled to recover dead freight, the reasons why they did so differed and none of the judgments engages with the reasoning of the others. As Lord Justice Diplock commented, somewhat acidly, in Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale [1965] 1 Lloyd's Rep 533 at 541 lhc, the judgments read as if they had been delivered ex tempore (although in fact they were reserved) and it is not easy to discover what the ratio of the case is on this issue.

27.
For Lord Justice Bankes, there was only one breach by the charterer, namely the failure to complete loading within the laytime, as there was no breach of the obligation to load a full and complete cargo. He held, therefore, that the dead freight was recoverable as damages for breach of the laytime obligation, regarding it as "special damage" which was "essentially distinct from any claim for the detention of the vessel". So far as it goes, this is a judgment in the shipowner's favour, but it rests on insecure foundations and does not bear the weight which Mr Justice Andrew Baker placed on it in the present case. First, in the light of the decision of the majority, Lord Justice Bankes was wrong to hold that there was no breach of the obligation to load a full and complete cargo. Secondly, and more importantly, his conclusion was contrary to a concession by counsel for the shipowner, Mr A.T. Miller QC and Sir Robert Aske, that damages for breach of the laytime obligation were fixed by the demurrage clause, but that this clause did not prevent the recovery of dead freight as damages for breach of the obligation to load a full and complete cargo. While Lord Justice Bankes was not bound to accept that concession, if he was going to reject it, he might have been expected to explain why. He did comment that "at one time [he] was inclined to think that where 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", but that he had changed his mind on this point, on which he could find no authority.

28.
Lord Justice Sargant, giving the third judgment, held that the demurrage clause did not provide agreed compensation for the loss which the shipowner had sustained, which was loss of freight caused by the charterer's breach in failing to load a full and complete cargo. This was the charterer's

primary obligation under the contract. The purpose of the demurrage clause was to provide compensation for the detention of the vessel in the course of fulfilling this primary obligation and not to give compensation for its breach. The loss of freight was separate from and independent of any loss arising from mere detention. This is a straightforward analysis that damages may be recovered for breach of a separate and distinct obligation causing loss which is separate from detention of the vessel (and which is therefore not caught by the rule in Inverkip v Bunge, which holds that if the only consequence of breach is the detention of the vessel, the demurrage clause will fix the damages payable). It appears to be implicit in this reasoning that the dead freight could not have been recovered if the only breach had been the failure to load within the laytime. To that extent, this is a judgment supporting the charterer's position in the present case.

29.
Much of the difficulty in analysing Reidar v Arcos has focused on the judgment of Lord Justice Atkin. Did he side with Lord Justice Bankes or (as Mr Justice Andrew Baker held in the present case) with Lord Justice Sargant or, as it has sometimes been put, was he a "one breach" or a "two breach" man? With all respect to an extremely eminent judge, it is in our view impossible to tell. While parts of his judgment appear to refer to a breach of a single binding obligation, he also refers to what appears to be a composite obligation encompassing both the obligation to load a full and complete cargo and to complete loading within the laytime ("The provisions as to demurrage quantify the damages, not for the complete breach, but only such damages as arise from the detention of the vessel").

30.
Many have tried to make sense of Lord Justice Atkin's judgment in order to discern the ratio of Reidar v Arcos. In our view, however, the ratio of the case on this issue is obscure. It is better to recognise that fact than to continue to search for a clarity which does not exist.

Chandris v Isbrandtsen-Moller

31.
Chandris v Isbrandtsen-Moller Co Inc [1951] 1 KB 240 was a claim for damages for the shipment of a dangerous cargo. Because the cargo was dangerous, the vessel was ordered to discharge into barges in the river Mersey, and this took 16 days longer than the planned discharge alongside would have done and 22½ days beyond the expiry of the laytime. Mr Justice Devlin held that although the breach in shipping a dangerous cargo was distinct from the breach in failing to complete discharge within the laytime, the damages (which consisted only of delay in completing discharge) were governed by the demurrage clause, applying Inverkip v Bunge. The argument appears to have focused on the now discredited doctrine of fundamental breach, the issue being whether the demurrage clause could be treated as an exceptions clause which did not apply to the consequences of shipping a dangerous cargo so as to enable the shipowner to recover unliquidated damages at the higher market rate. Mr Justice Devlin rejected this argument, saying that a demurrage clause is merely a clause providing for liquidated damages for a certain type of breach. He described demurrage as being "presumably the parties' estimate of the loss of prospective freight which the owner is likely to suffer if his ship is delayed beyond the lay days", but noted that the rate in the charterparty before him was in fact a good deal lower than the market rate. Nevertheless, a demurrage clause was no different in its nature from an ordinary liquidated damages clause. Accordingly the case was not concerned with the present issue at all.

32.

In the course of his judgment Mr Justice Devlin discussed Reidar v Arcos, and appears to have regarded Lord Justice Atkin as agreeing with Lord Justice Bankes, but it is apparent from the terms in which he did so that he was viewing Reidar v Arcos through the lens of the doctrine of fundamental breach – that is to say, considering whether the obligation to load a full and complete cargo could be regarded as the "primary" or "fundamental" obligation to which a demurrage clause did not apply. While that may have been relevant to the principles applicable to exceptions clauses as they were understood in the 1950s, it has no bearing on what we have to decide.

Suisse Atlantique

33.
Although better known for the discussion in the House of Lords of the doctrine of fundamental breach, Suisse Atlantique was in fact an attempt by a shipowner to avoid the consequences of a demurrage clause. As a result of repeated failures by the charterer under a consecutive voyage charter to complete cargo operations within the laytime, the vessel performed fewer voyages during the two-year period of the charter than it would otherwise have done. The shipowner sought to recover as damages the freight which it would have earned on the voyages which would have been completed if the cargo operations had been completed in time. Counsel for the shipowner argued that there were additional breaches by the charterer, but these arguments were rejected by Mr Justice Mocatta [1965] 1 Lloyd's Rep 166, who noted at 173 lhc that their relevance was to afford the charterer "a means of recovering damages other than demurrage". Accordingly this was a "one breach" case, the only breach being a failure to load or discharge within the laytime.

34.
At first instance the charterer argued also that the damage suffered, being the loss of earnings on additional voyages, was damage equivalent to the loss of freight which had given rise to the dead freight claim in Reidar v Arcos, while on appeal the argument appears to have been that demurrage was not an exclusive remedy for a breach of the laytime provisions, but applied only where the claim was for "mere detention", which was not the position in Suisse Atlantique. These arguments were rejected, with some hesitation by Mr Justice Mocatta and more firmly in the Court of Appeal ([1965] 1 Lloyd's Rep 533). The failure to complete cargo operations within the laytime caused no loss apart from the loss of freight on additional voyages, for which the damages were undoubtedly fixed by the demurrage provision. On this ultimately straightforward ground the claim failed. Lord Justice Sellers commented that "it might be said that that is all there is to this case" (538 rhc), while Lord Justice Diplock described it as "a very simple case" (540 rhc).

35.
There was, therefore, no need to consider what the position would have been if the delay had caused "a different kind" of loss. Nevertheless, the judgments discuss Reidar v Arcos, which featured prominently in the argument. Mr Justice Mocatta recognised that Reidar v Arcos was a difficult case in the light of the different reasoning in the three judgments, but did not as we read his judgment express a view whether Lord Justice Atkin had agreed with Lord Justice Bankes or with Lord Justice Sargant. On the contrary, he appears rightly to have recognised that Lord Justice Atkin's reasoning was different from that of either of the other two judges. In the Court of Appeal, Lord Justice Sellers appears to have thought that Lord Justice Atkin was aligned with Lord Justice Sargant, observing that the damages recovered "were for a separate breach of contract and were wholly independent of the detention of the vessel", while also saying that the dead freight claim "was an additional and independent loss unrelated to the loss of use". His view was that Reidar v Arcos did not support an argument that "there is some damage to be assessed on a separate ground or as a separate head by

reason of the detention of this vessel" (539 rhc). Lord Justice Harman held that where the only breach was the detention of the vessel beyond the laytime, the demurrage provision applied and there was no room for saying that damages are at large: that made it easier to assess them as a conventional figure and to say otherwise would be to rewrite the parties' contract (540). Lord Justice Diplock said that demurrage is payable for the fact that during the period of detention the vessel is unable to earn freight. He also thought that Lord Justice Atkin was probably aligned with Lord Justice Sargant, but expressly did not say what the position would have been if there had been loss other than the inability to earn freight on further voyages (541 rhc).

36.
So far as the Court of Appeal judgements in Suisse Atlantique are concerned, therefore, there is some support for the view that the majority in Reidar v Arcos held that there was a separate breach of contract by the charterer and there is no support for the view of Lord Justice Bankes that demurrage comprises liquidated damages for only some of the consequences of a failure to complete cargo operations within the laytime.

37.
The speeches in the House of Lords were mainly concerned with the issue of fundamental breach. However, leaving that issue aside, Viscount Dilhorne, Lord Hodson and Lord Upjohn agreed briefly with the judgments of the courts below and said that Lord Justice Bankes was in the minority in Reidar v Arcos, which had depended on the fact that there was a separate breach in failing to load a complete cargo. Lord Reid and Lord Wilberforce found it unnecessary to add to the reasoning of Mr Justice Mocatta and the Court of Appeal.

38.
It can therefore be said that Suisse Atlantique provides significant support for the charterer's case. However, we do not think that too much weight can be placed on this in circumstances where the only damage consisted of loss of freight earnings and no other kind of damage appears to have been present to the minds of any of the judges who heard the case.

The Dias

39.
In The Dias [1978] 1 WLR 261 at 263H-264A, Lord Diplock, commenting on the nature of demurrage, said that once laytime expires, the charterer's breach is a continuing one until discharge is completed and the vessel is once more available to the shipowner to use for other voyages. But unless the delay is such as to amount to a repudiation, the breach sounds in damages only. Lord Diplock continued that "(t)he charterer remains entitled to complete the discharge of the cargo, while remaining liable in damages for the loss sustained by the shipowner during the period for which he is being wrongfully deprived of the opportunity of making profitable use of his ship. It is the almost invariable practice nowadays for these damages to be fixed by the charterparty at a liquidated sum per day and pro rata for part of a day (demurrage) which accrues throughout the period of time for which the breach continues". There is no distinction drawn here between different kinds of loss sustained during the period when a vessel is on demurrage completing discharge.

The Altus

40.
In The Altus [1985] 1 Lloyd's Rep 423 the demurrage rate (which was based on Worldscale) varied according to the quantity of cargo loaded. The charterer failed to load a complete cargo which meant

that the demurrage rate was less than it ought to have been. The shipowner claimed not only dead freight, but also the demurrage which would have been payable if a full and complete cargo had been loaded. Mr Justice Webster was prepared to assume that the dead freight clause in the charterparty operated as a liquidated damages clause, but held on that assumption that it did not prevent the recovery of unliquidated damages for the lost demurrage. He held that this followed by analogy with Reidar v Arcos, while acknowledging that it was not easy to identify the ratio of that case. As to that, he followed the view of Mr Justice Devlin in Chandris that the ratio was to be found in the judgments of Lord Justice Bankes and Lord Justice Atkin, and (at 433) that unliquidated damages were recoverable for breach of the obligation to complete cargo operations within the laytime "if that breach gave rise to damages of a different character" (Mr Justice Webster's emphasis). He regarded Reidar v Arcos as authority for the proposition that a shipowner would be entitled not only to recover demurrage for a failure to load within the laytime, but also to recover "damages flowing indirectly or consequentially from any detention of the vessel" (at 435). However, he acknowledged that the then current textbooks (Scrutton, 19th edition and McGregor, 14th edition) did not support this analysis. Mr Justice Webster did not refer to Suisse Atlantique and it does not appear whether it was cited to him. The case provides, therefore, no real support for the shipowner's argument.

The Adelfa

41.
In The Adelfa [1988] 2 Lloyd's Rep 466 the vessel did not commence discharging until after the laytime had expired. Discharging was then halted because of complaints by the receivers about wet damage to the cargo. The vessel was arrested, further discharge was prohibited, and the shipowner was compelled to settle what was found to be the exaggerated and largely unsubstantiated claim by the receivers. It sought to recover the sum paid from the charterer. An umpire found that the charterparty had been frustrated, that the shipowner's loss was caused by the receivers' arrest of the vessel for which the charterer was not responsible, and that although the charterer had been in breach of its obligation to complete discharge within the laytime, it had not committed any repudiatory breach of the charterparty. Mr Justice Evans held that this reasoning was unassailable, so that the claim failed on the facts. He said that he was prepared to assume that damages could be recovered for a head of loss distinct from loss of use of the vessel, following the view of Mr Justice Devlin in Chandris and Mr Justice Webster in The Altus as to what Reidar v Arcos had decided, but held that the loss was not caused by the failure to discharge within the laytime. Again, therefore, these dicta provide no real support to the shipowner, based as they are on an assumption which did not arise.

The Bonde

42.
The Bonde was concerned with a claim under an FOB sale contract rather than a charterparty. The seller undertook to load the vessel at the rate of 3,000 mt per weather working day and to pay demurrage at the charterparty rate (but subject to a maximum daily rate of US $8,000) if it failed to do so. As a result of delay in loading, the buyer became liable to the seller to pay carrying charges under the contract of sale. The buyer argued, however, that it should not be liable for such charges in respect of any period when loading was delayed through the seller's failure to load at the guaranteed loading rate. The issue arose, therefore, whether the buyer could recover damages (in effect, extinguishing its liability for carrying charges) when the only breach committed by the seller was its failure to load within the time allowed. After a careful review of all the authorities which we have so far considered, Mr Justice Potter held (at 142 lhc) that "where a charter-party contains a demurrage

clause, then in order to recover damages in addition to demurrage for breach of the charterers' obligation to complete loading within the lay days, it is a requirement that the plaintiff demonstrate that such additional loss is not only different in character from loss of use but stems from breach of an additional and/or independent obligation". He went on to hold that the same conclusion applied to an FOB contract into which provisions for laytime and demurrage were imported.

The Luxmar

43.
The decision of Mr Justice Potter in The Bonde was followed by Mr Justice Langley in The Luxmar [2006] EWHC 1322 (Comm), [2006] 2 Lloyd's Rep 543, although it does not appear that the contrary was argued. In the Court of Appeal, however, it does appear to have been argued that the buyer should not be confined to the remedy of demurrage since its loss was considerably more substantial ([2007] EWCA Civ 494, [2007] 2 Lloyd's Rep 542 at [22]). Although Lord Justice Longmore commented at [23] that this argument "did not loom large", and at [24] that it was not clear what loss the buyer had suffered as a result of delay in loading, he did go on to say 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".

Conclusions

44.
As we have already indicated, in our view the cases are inconclusive. However, as will be apparent from what we have said, we do not agree with the judge (at [88]) that "the preponderance of views evident in dicta" is that demurrage "serves to liquidate the loss of earnings resulting from delay" and nothing more. If anything, the balance tips the other way.

The textbooks

45.
The judge conducted a meticulous examination of successive editions of the leading textbooks, principally Scrutton on Charterparties. We were taken in argument to citations from the early 19th century (Abbott, Treatise of the Law relative to Merchant Ships and Seamen (1802), Lawes, A Practical Treatise on Charter-parties (1813)) and (more recently) Carver on Carriage of Goods by Sea (1885). Fascinating as these were, however, they did not shed much light on the issue we have to decide. They were coloured by the view that demurrage is a payment for additional lay days and certainly they did not focus on the issue before us.

46.
The definition of demurrage from Scrutton with which we began this judgment goes back to editions for which Lord Justice Scrutton was himself responsible. In the 13th edition (1931), edited by Mr Porter QC and Mr McNair, Reidar v Arcos was cited as illustrating that there may be "other additional damages" and as holding that the shipowner had been entitled to recover the dead freight "as damages for failure to load in the agreed time". This reflects the judgment of Lord Justice Bankes, but surprisingly there is no discussion even of the possibility that the true basis of the decision may lie in the fact that the failure to load a full and complete cargo was itself a breach of a separate obligation. That only came in the 14th edition (1939).

47.

In the 18th edition (1974), under the editorship of Sir Alan Mocatta, Mr Mustill QC and Mr Boyd, the position changed. It was said that "(t)he provisions as to demurrage quantify the whole of the damages arising from the charterer's breach of contract in delaying the ship beyond the agreed time and the charterer's liability for such damages is limited to the amount of demurrage", citing Chandris and Suisse Atlantique. Reidar v Arcos was cited for the proposition that "the delay may give rise to breaches of further obligations, e.g. to load a full and complete cargo, for which damages are recoverable in addition to demurrage". At this stage, therefore, Scrutton appears to have favoured the view later taken by Mr Justice Potter in The Bonde, namely that demurrage quantifies "the whole of the damages" caused by exceeding the laytime and not merely some of them, and that in order to recover damages in addition to demurrage a shipowner must prove a breach of a further obligation.

48.
In the 20th edition (1996), edited by Mr Boyd QC, Mr Burrows and Mr Foxton, the position changed again. The statement that demurrage quantifies the whole of the damages arising from the charterer's breach in delaying the ship beyond the agreed time remained. It was joined, however, by a submission that the better interpretation of Reidar v Arcos is that where there is no breach other than the failure to complete loading or discharging within the laytime, but this breach causes damage in addition to the detention of the vessel, such losses can be recovered in addition to demurrage. Both passages have remained in later editions including the current 24th edition (2020), edited by an enlarged team of editors led by Mr Foxton QC, but it is acknowledged that "the position is not clear", with a footnote referring to The Bonde among other cases.

49.
The view of Scrutton, therefore, has changed over time as one team of editors has succeeded another.

50.
Cooke on Voyage Charters (4th edition, 2014) acknowledges the varying reasoning of the members of the court in Reidar v Arcos and interprets Mr Justice Mocatta and the Court of Appeal in Suisse Atlantique as having taken the view that in order to recover damages in addition to demurrage, it is necessary to show a separate breach, as held by Mr Justice Potter in The Bonde. The submission is made that this is the better view. Carver on Charterparties (1st edition, 2017) took the same view, regarding the controversy as having been settled by The Bonde and The Luxmar. The current 2nd edition (2020), published since the judgment of Mr Justice Andrew Baker in the present case, points out that this is no longer the case. It observes also that, despite the discussion in a number of cases, only a handful of them have actually involved a claim for a type of loss different from the loss of freight ordinarily compensated by a demurrage provision.

51.
Other textbooks were cited, but we do not find it necessary to refer to them. Overall, little more can be said than that highly experienced shipping lawyers, some of whom became distinguished judges, have taken different views about what Reidar v Arcos decided and what the right answer ought to be.

Analysis

52.
In circumstances where the cases do not provide a decisive answer and there is no clear consensus in the textbooks, we approach the issue as one of principle. Our conclusion is that, in the absence of any contrary indication in a particular charterparty, demurrage liquidates the whole of the damages arising from a charterer's breach of charter in failing to complete cargo operations within the laytime and not merely some of them. Accordingly, if a shipowner seeks to recover damages in addition to

demurrage arising from delay, it must prove a breach of a separate obligation. Our reasons are as follows.

53.
First, while it is possible for contracting parties to agree that a liquidated damages clause should liquidate only some of the damages arising from a particular breach, that strikes us as an unusual and surprising agreement for commercial people to make which, if intended, ought to be clearly stated. Such an agreement forfeits many of the benefits of a liquidated damages clause which, in general, provides valuable certainty and avoids dispute. There is nothing in the charterparty or in the standard definitions of demurrage (including that from Scrutton which we have quoted above) to suggest that the parties in this case had such an intention.

54.
Secondly, we accept that statements can be found in the case law to the effect that demurrage is intended to compensate a shipowner for the loss of prospective freight earnings suffered as a result of the charterer's delay in completing cargo operations. We have referred already to what Mr Justice Devlin said in Chandris, which was echoed by Lord Justice Diplock in Suisse Atlantique and again (in the House of Lords) in The Dias, and to what Mr Justice Donaldson said in Navico v Vrontados. No doubt this is the loss which is primarily contemplated and, in most cases, will be the only loss occurring. But that does not mean that this is all that demurrage is intended to do. The statements cited were made in cases where the present issue was not being considered. For the same reasons, it would be wrong to place weight on Mr Justice Devlin's comment that the demurrage rate is "presumably the parties' estimate of the loss of prospective freight which the owner is likely to suffer if his ship is delayed beyond the lay days". That appears to have been an assumption on his part which, although it may sometimes be true, cannot be regarded as having anything like the status of a finding of fact as to general market practice. The cases show that demurrage is frequently either higher or lower than an estimated daily freight rate. It is more accurate to say that the demurrage rate is the result of a negotiation between the parties in which the loss of prospective freight earnings is likely to be one factor, but is by no means the only factor. Moreover, it appears that while freight rates move up and down sensitively to market conditions, the same is not necessarily true of demurrage rates.

55.
Thirdly, if demurrage quantifies "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 laytime, nothing more", as the judge held at [61] and again at [88], and does not apply to a different "type of loss" (as he put it at [45]), there will inevitably be disputes as to whether particular losses are of the "type" or "kind" covered by the demurrage clause. Indeed, the judge seems to have recognised that his formulation at [61] was too narrow, as he immediately went on at [62] to refer to the statement of Mr Justice Moore-Bick in The Nikmary [2003] EWHC 46 (Comm), [2003] 1 Lloyd's Rep 151 at 161 rhc that demurrage covers not only the loss of prospective freight, but also "all normal running expenses, including the cost of diesel oil required to run the ship's equipment". An example discussed by one commentator is whether fouling of the hull resulting from a delay in tropical waters and leading to a loss of fuel efficiency would qualify as a normal running expense for this purpose (Gay, Damages in addition to demurrage [2004] LMCLQ 72). Mr Rainey, no doubt concerned to minimise the potential uncertainty of the shipowner's construction, submitted that it would, but this does not seem obvious. Nor would the damages resulting be readily quantifiable.

56.

Fourthly, as Lord Justice Newey pointed out in argument, the cost of insurance is one of the normal running expenses which the shipowner has to bear. A standard expense for a shipowner is the cost of P&I cover which is intended to protect it against precisely the loss suffered in this case, that is to say liability to cargo claims, whether justified or not. Thus a shipowner will typically have insurance against cargo claims, while a charterer will not typically have insurance against liability for unliquidated damages resulting solely from a failure to complete cargo operations within the laytime. Rather, the charterer has protected itself from liability for failing to complete cargo operations within the laytime by stipulating for liquidated damages in the form of demurrage. Accordingly the consequence of the shipowner's construction is to transfer the risk of unliquidated liability for cargo claims from the shipowner who has insured against it to the charterer who has not. That seems to us to disturb the balance of risk inherent in the parties' contract.

57.
Fifthly, The Bonde has now stood for some 30 years, apparently without causing any dissatisfaction in the market. There is no previous case in which its reasoning has been criticised, while it was treated as correctly stating the law in The Luxmar even if that was not necessary for the decision. We were referred to brief reports of two arbitrations (although they may have concerned the same vessel in a chain of charterparties) in which it was applied without comment. If the point has arisen in other cases, they have not emerged into public view. We do not know whether this is because cases have been settled on the basis of The Bonde, or because the point has simply not arisen. If the latter, that would tend to confirm our view that a case such as the present, where there is no breach alleged of any other obligation, is likely to be rare. If the former, it is true that assiduous readers of at any rate some of the legal textbooks, or those interested in the kind of legal archaeology undertaken by the judge, may have realised that the point was not finally settled, but that does not appear to have troubled commercial people engaged in the market. This is itself, in our judgment, a powerful reason not to depart from the decision in The Bonde.

58.
Sixthly, that reason would have less force if we agreed with the judge (at [127]) that the reasoning in The Bonde "is clearly faulty" or that the judgment "is explicable only if a non sequitur lies at its heart". With respect, however, we do not accept the judge's criticisms of The Bonde.

59.
Finally, to allow the appeal will produce clarity and certainty, while leaving it open to individual parties or to industry bodies to stipulate for a different result if they wish to do so. If our judgment does not meet with approval in the market, it should not be difficult for clauses to be drafted stating expressly that demurrage only covers certain stated categories of loss.

Disposal

60.
For these reasons we allow the appeal. If the facts are as presently assumed, the charterer is not liable to pay damages in addition to demurrage for its breach of contract in not completing discharge within the permitted laytime.

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[1] The shipowner is required to declare the actual demurrage rate for each voyage under the contract upon vessel nomination, which appears to contemplate that it might choose to declare a lower rate. There is nothing in the charterparty to indicate the circumstances in which such a choice

might be made or that the shipowner may in some circumstances be required to declare a lower rate and nothing was said about this at the hearing.

Appeal Refs. A4/2021/0009 & A4/2021/0010

Claim No. CL-2019-000815

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

COMMERCIAL COURT (QBD)

IN THE MATTER OF THE ARBITRATION ACT 1996

AND IN THE MATTER OF AN ARBITRATION CLAIM

ON APPEAL FROM THE HONOURABLE MR JUSTICE ANDREW BAKER

[2020] EWHC 2373 (Comm)

BETWEEN:

PRIMINDS SHIPPING (HK) CO LTD

Appellant / Defendant

and

K LINE PTE LTD

Respondent / Claimant

mv "ETERNAL BLISS"

COA dd. 30.07.14

ORDER

UPON the hearing of the Appellant's appeal against the Orders of Andrew Baker J ("the Judge") dated 7 and 17 September 2020 made pursuant to the permission to appeal granted by the Judge on 17 September 2020

AND UPON hearing Leading Counsel for the Appellant (Christopher Hancock QC) and Leading Counsel for the Respondent (Simon Rainey QC) at a hearing on 27 October 2021

AND UPON reading the Respondent's written application for permission to further appeal to the Supreme Court

IT IS ORDERED THAT :

1. The appeal is allowed.

2. The Judge's Order dated 7 September 2020 is varied as follows:

(1) The recital "**AND UPON** the Court declining to answer part (b) of the Question of Law, which part is left to be considered within the arbitration" shall be deleted.

(2) Paragraph 1 is varied so as to read as follows: "The answer to each of parts (a) and (b) of the Question of Law is 'No'".

(3) Paragraph 2 is varied so as to read as follows: "The Claimant shall pay the Defendant's costs of the Application, to be the subject of detailed assessment if not agreed…".

3. Paragraph 1 of the Judge's Order dated 17 September 2020 is set aside.

4. The Respondent shall within 28 days repay to the Appellant any costs that have already been paid by it pursuant to the Judge's Orders dated 7 and 17 September 2020, plus interest thereon at 3.5% per annum pro rata and compounded quarterly from the date on which it was paid.

5. The Respondent shall pay the Appellant's costs of the Arbitration Claim, including the costs of this appeal, to be the subject of detailed assessment if not agreed, with a payment on account to be made in the sum of £120,000 within 28 days.

6. The Respondent's application for permission for further appeal to the Supreme Court is refused.

DATED this 18 th day of November 2021