FTCC184/18 2018 G. NO.19

IN THE HIGH COURT OF SIERRA LEONE
(COMMERCIAL AND ADMIRALTY DIVISION)
FAST TRACK COMMERCIAL COURT

BETWEEN:

GMI CHARTERING APS - PLAINTIFF

AND

BCM INTERNATIONAL SIERRA LEONE - DEFENDANT

COUNSEL:

A S Sesay Esq - for the Plaintiff/Applicant
B. Koroma Esq

I S Yillah Esq - for the Defendant/Respondent

JUDGMENT DELIVERED THIS 9th DAY OF FEBRUARY 2022 BY THE HON JUSTICE F. BINTU ALHADI J.A. (Sitting as a High Court Judge)

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JUDGMENT

(A) On the 16th of December 2019 an application was made to the FTCC by way of notice of motion dated the 21st day of March 2019 by GMI Chartering APS, the Plaintiff/Applicant against BCM International (Sierra Leone) Limited, the Defendant/Respondent pursuant to Order 17 rule 1(1) of the High Court Rules of 2007 for the determination of the following questions of law:

1. Whether there was a valid Contract of Carriage between Plaintiff/Applicant and the Defendant/Respondent?

2. If the answer to question 1 above is in the affirmative, whether upon the true construction of the terms of the agreement contained in the email correspondence between the parties, the contract was a voyage charterparty?

3. That if the contract was a voyage charterparty, whether upon true construction of the terms of the voyage charterparty it was a berth charterparty or a port charterparty?

4. That if it was a port charterparty, does lay time begin when the vessel arrived at the ports of Abidjan and Takoradi respectively and a valid notice of readiness had been tendered?

5. If the answer to paragraph 4 is in the affirmative, that judgment be entered for the Plaintiff granting the following reliefs sought in the writ of summons:-

    a. Payment of demurrage in the sum of EUR97,902 (Ninety-Seven Thousand, Nine Hundred and Two Euros).

    b. Damages for breach of contract.

    c. Interest on the said sum of EUR97,902 (Ninety-Seven Thousand Nine Hundred and Two Euros) at such rate and for such period as the court thinks fit assessed pursuant to Cap 19 of the Laws of Sierra Leone 1960.

6. Any further Order/s or other relief/s that the court may deem fit and just.

7. That the costs of and incidental to this application be borne by the Defendant.

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(B) The application was supported by an affidavit sworn to on the 21st of March 2019 by Brima Koroma Esq, a Solicitor of No 65 Siaka Stevens Street, Freetown in the Western Area of the Republic of Sierra Leone.

(C) Counsel for the Defendant/Respondent, Ibrahim Sorie Yillah Esq, filed an affidavit in opposition sworn to on the 29th day of March 2019.

(D) I have considered the affidavits together with the exhibits attached thereon of counsel for the Plaintiff/Applicant and for the Defendant/Respondent. I have also reviewed the submissions made between 16th December 2019 and 25th January 2021 and wish to make the following decision. But before I do that, let me give an analysis of the salient laws as they apply to the evidence adduced in court.

Analysis of the law and evidence

(E) The first question that arises is whether there is a contract of carriage and what is it? A contract of carriage has been identified as having four (4) possible sources; namely, the contract itself, a bill of lading, a charterparty and/or a bill of lading incorporating charterparty terms; Prof. Y Baatz (ed) 'Maritime Law' [2014] Informa Law from Routledge Publishers, at 199. I shall discuss the contract itself and a charterparty agreement since these are two pertinent issues that are in contention.

(F) The contract itself is where for instance, a cargo claim is brought by a non-charterer shipper of goods who has concluded the contract of carriage with the carrier, where the terms of the contract of carriage are contained in the agreement which they have concluded. The contract pre-exists and is not exclusively contained in any bill of lading which may later be issued; 'Maritime Law' (supra)at p 200. The bill of lading is issued after the goods are shipped, performing its role as a snapshot of shipment.

(G) The shipment occurs in performance of a contract which already exists and some of whose terms will already have been agreed, such as freight and time of shipment. Such terms will be contained in a variety of exchanges and possibly documents, such as telephone and email exchanges, published schedules or booking notes. In other words, the shipper's contract is in the contract evidenced by, but not contained in the bill of lading. The contract therefore exists before the issue of the bill of lading, and this is what is a contract of carriage.

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(H) A charterparty agreement on the other hand, has been described as where a charterer of a ship would agree on the terms and conditions with a shipowner which would form the 'charterparty agreement.' It is a detailed document which contains information such as: when and where the vessel is required to be, the freight agreed, who needs to pay the broker if one was used and so on. Even though shipowners primarily deal with the charterer, it does not mean that the shipowner would have no relation with the shipper. The shipper and the shipowner are connected by the 'Carriage of Cargo at Sea Act (COGSA). In fact, another important point is that a shipowner is required to issue the bill of lading to the shipper for the cargo loaded on board. And with that, each shipper has entered into an agreement with the shipowner which is called, a 'contract of carriage.'

(I) A contract of carriage therefore is governed by various laws and regulations such as the 'Hague-Visby Rule,' whilst a charterparty agreement is a formal agreement which supplements the contract of carriage and could sometimes be found mentioned in the bill of lading.

(J) It can be deduced from the facts of the case, the affidavits filed, and the exhibits attached thereon and from the submissions made by counsel that the plaintiff, GMI Chattering APS is the owner of the vessel, with Frederick representing OBT Logistics (SL) Limited the charterer; whilst the Defendant, BCM International (SL) Limited represented by Jeremy is the shipper of the freight. It also appears clear to me that the contract itself is Exhibit G2 attached to the affidavit of Brima Koroma sworn to on the 21st of March 2019 which is an email dated 14th November 2017 at 10:31 AM from Jeremy of the Defendant to Frederick of OBT Logistics (the charterer) and representing the Plaintiff, GMI Chattering.

(K) By a charterparty agreed via e-mail dated 14th November 2014, the Plaintiff agreed to charter its vessel "MV African Forest" to the Defendant to proceed from Freetown to Abidjan, Ivory Coast with 5 dump trucks 2 dismantled excavators, and to later load cargo of 4 dump trucks for carriage to and delivery to Takarodi, Ghana at a price of Euro 280,000. In the said email, Jeremy also requested regular updates of the schedule for the shipment such as the: arrival time, expected time of delivery, expected time of arrival and so on; to make necessary arrangements to move the equipment into the port.

(L) Exhibit G3 of the affidavit of Brima Koroma (supra), which is another email of the same date of 14th November 2017 at 11:08 AM, is a reply in confirmation of the charterparty above from the plaintiff, GMI Chattering to Frederick of OBT Logistics and Jeremy of the Defendant. It reads inter alia ".....thanks Jeremy....pleased to hear all accepted. I will keep you closely

informed about vessel's ETA in Freetown." (M) The plaintiff then re-stated the agreement in this way inter alia, the name of the vessel as 'M V African Forest', the kind of cargo being 5 dump trucks and 2 dismantled excavators and to load a further carriage of cargo of 4 dump trucks (the cargo) from Abidjan to Takoradi, Ghana., the port of loading being Freetown, Sierra Leone Carriers berth; port of delivery being Abidjan Carriers Berth and Takoradi Carriers berth. That laycan week is 48, 2017, detention fee of Euro 9,500 per day for any time lost due to waiting for cargo, berth, congestion etc. "

(N) The mail also read that the vessel is expected to arrive 01/02 December (wpagw) meaning, weather permitting, all going well. Apparently, it is customary and advisory in the shipping industry, to give a stipulated time to the shipper on a best endeavour only; and the charterer will not be responsible for demurrage incurred by the shipper.

(O) The email/charterparty also confirmed that the cost of the freight will be "Euro 280,000 lumpsum full liner terms hook/hook." This according to shipping dictionary/website sources, implies that the freight amount provided includes both shore based and on-board stevedoring, dunnage materials used inside the vessel's hold, securing and unsecuring and all costs of delivery to/receiving the cargo from alongside, leaving the shippers/receivers just bearing the cost of discharging from/reloading to the transport means, along with the usual port charges/levies/taxes etc.

(P) The email/contract also stated the 'Laycan week' which is an abbreviation for the 'Lay days and cancelling date' clause in a charterparty. This clause defines the time window in which the charterers are obliged to accept the vessel in the loading port. It also means the earliest date on which laytime can commence. Under a standard voyage charter, the vessel must arrive at a nominated load port within an agreed laycan, whether the berth is free or not and whether the vessel will face lengthy delays through port congestion or not. Once at the agreed place, and at the expiry of laytime, the vessel incurs a daily detention charge called a demurrage. This is the normal scenario.

(Q) From the above mentioned, it is apparent that there was an agreement/ charterparty agreement/contract of carriage between the parties herein. The terms of the contract are clearly stipulated, and all the parties agreed. Counsel for the Defendant, Mr Yillah, was of the view that Order 17 rule 1 (1) of the High Court Rules of 2007 ought not to be considered in this matter since there are triable issues that ought not to be determined on points of law. I cannot see the reason why not,

because the questions posed are suitable for determination without a full trial of the action, and the determination will finally determine the entire cause or issues subject only to any possible appeal.

(R) On the issue of laytime, what is laytime? Was there an agreement between the parties on laytime? Laytime/Laycan is the number of days and hours or as tons per hours or per day that a vessel would have to wait to load and discharge her freight. Subject to the express terms of the charterparty, laytime/laycan will begin to run when three requirements have been satisfied: first, the ship is an "arrived ship" at the load port; second, notice of readiness has been given in accordance with the charterparty terms; third, the ship is in fact ready; 'Maritime Law' (supra) at 165.

(S) Lord Diplock in E.L. Oldendorff & Co. v Tradex Export S.A. "The Johanna Oldendorff" [1973] 2 Lloyd's Rep. 285 on Laytime, described the voyage charterparty as comprising of 4 stages: - stage 1 is the loading voyage. i.e. the loading port specified in the voyage charterparty. Stage 2 is the loading operation. The loading of the cargo at the port of loading. Stage 3 is the carrying voyage. The voyage from the load port to the discharge port specified in the voyage charterparty. Stage 4 is the discharging operation. The discharging of the cargo from the ship to the port of discharging as specified in the voyage charterparty. The second and fourth stages are where most of the disputes take place. This is because in these two stages, it is the mutual responsibility of the two parties to ensure that the cargo loading, and discharging are done without delay. If the charterer/shipper uses more time for loading and discharging than the allowed lay days as per charterparty agreement, then the charterer/shipper is supposed to pay for extra time used. This additional payment is called a 'demurrage.'

(T) Furthermore, it is not commercially viable/profitable for the shipowner/charterer if the voyage is extended beyond their expectations. Since shipowner's freights and profits cannot depend upon uncertainties, they agree on factors such as number of days allowed for loading and discharging i.e., "Lay days or Lay times/laycan." It could be mentioned as number of days and hours or as tons per hours or per day.

(U) From the facts of the case, it was a term of the agreement that the Defendant would pay a detention rate of Euro 9,500 (Nine Thousand Five Hundred Euros) per day pro rata for any time lost due to waiting for cargo, berth, congestion etc. It was argued that the defendant accrued lost time totalling a period of 10 days, 7 hours, and 20 minutes;

and as such, making it liable to pay demurrage for the said period to the plaintiff as indicated in the agreement. Counsel for the Defendant, Mr Yillah, argued that no laytime was agreed between the parties, a point of argument I do not agree with. Exhibit G 3 attached to the affidavit of Brima Koroma (supra) sets out the terms of the charterparty agreement and included in it is the laytime/laycan as week 48, 2017.

(V) Mr Yillah also argued that the delay was because of force majeure, whilst no evidence of force majeure was produced by him in rebuttal. In exhibit ISY 2 (3) of the affidavit in opposition sworn to on the 29th of March 2019, it was shown that the plaintiff reported that because of bad weather the vessel had not arrived at its expected time, but kept the defendant informed as to when she would arrive. The vessel according to the said exhibit and communication arrived on the 3rd of December and when once it arrived it was communicated to the Defendant.

(W) A notice of readiness was sent to the Defendant that the vessel had arrived and was waiting to be loaded in Freetown and later waiting for the shipper to discharge the cargo at Abidjan and later at Takarodi. These are the delays that were caused. Counsel for the Plaintiff espoused that the onus was on the Defendant to provide a specific berth to load the vessel in Freetown and discharge the cargo whilst in Abidjan and Takarodi. At the expiry of laytime, demurrage automatically kicked in.

(X) On the issue of Notice of readiness, what does it mean in law? It means that the charterer requires notice of the arrival of the ship so that it can arrange to load it promptly. The charterparty may provide that the shipowner is also to give notice of the ship's expected time of arrival, for instance, 72, 48 and 24 hours prior to her estimated time of arrival, so that the charterer/shipper has additional time to ensure that the cargo is ready, and a berth is available as soon as the ship arrives; 'Maritime Law' (supra) at 167.

(Y) For the calculation of laytime, it is important to know when the laytime counting and calculation would start. This information is in the charterparty agreement and in most cases, the laytime would commence to start when the vessel has arrived at the port. The chartering term is "arrived ship." Counsel for the Defendant, Mr. Yillah, argued that the notice of readiness served on the Defendant was an invalid one. Such claim was not justified to the court, nor was it shown how the notice of readiness was invalid.

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(Z) Counsel further espoused that the notice of readiness was served on the Defendant when the vessel was not an arrived vessel. What is an arrived vessel in law? To determine when a ship is an arrived vessel, it will be necessary to see where the charterparty stipulates the ship must proceed to. It may provide for the ship to proceed, for instance, to one safe port or one safe berth or sea mooring buoy. If the charterparty provides that the ship is to proceed to a port, the area of that part may be very large and on arrival the ship may be required to anchor, while she waits for her berth to become available; 'Maritime Law' (supra) at 165.

(AA) She will be an arrived ship when she is within the limits of the port and is at the immediate and effective disposal of the charterer so that when a berth becomes available, the ship can proceed straight to it; 'Maritime Law' (supra) at 165. Thus even if the ship is about 17 miles away from her berth she is an arrived ship if she is at the usual waiting place, provided that she is within the limits of the port. See: EL Oldendorff & Co v Tradax Export SA [1973]; Federal Commerce & Navigation co Ltd v Tradax Export SA [1977].

(BB) Furthermore, a ship is legally considered as an 'arrived ship' only when: (a) a ship has arrived at the port of loading or discharging (port voyage charter) or at the designated berth (berth voyage charter); (b) the ship is ready in all respects to commence loading or discharging of cargo and (c) master has sent the notice of readiness to all parties concerned. The charterparty agreement contains the information, if the voyage charter is a port voyage charter or a berth voyage charter. Irrespective of port or berth voyage charter, it is important that master of the vessel send the notice of readiness.

(CC) From the facts of the case and the evidence adduced, it could be seen that the vessel was not yet an arrived vessel when it was experiencing adverse weather conditions according to exhibit ISY 2 (1-10) of the affidavit in opposition sworn to by Ibrahim Sorie Yillah on the 29th day of March 2019. The expected time of arrival was firstly, 1st of December 2017, then it was 2nd of December and later 3rd of December at 09:00 hours when the Master of the vessel informed the Defendant that everything was ready for loading at the port. That was the notice of readiness. No evidence was produced to the court that the vessel did not arrive and was not ready for loading. However, what was exhibited was exhibit "L" attached to the affidavit of Brima Koroma (supra) showing the email dated 13th June 2018 at 19:49 hours from the Defendant, pleading with the Plaintiff to reach an amicable agreement

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regarding the detention charges in respect of the vessel "MV African Forest" without a need to resort to legal proceedings.

(DD) The Defendant also said that "We have a large fleet of equipment in Sierra Leone which are scheduled to be shipped from Freetown within the coming months, and if can agree to ship these items with GMI, we hope that we can avoid paying the full detention charges outright and also any legal proceedings....." This in my estimation and by implication is an admittance of fault and evidence that the Plaintiff had fulfilled its obligations under the charterparty, and that the Defendant knows that it had incurred charges as a result of its fault.

(EE) It is also clear from the charterparty that the vessel was to proceed from Freetown to Abidjan, Ivory Coast and then to Takarado port, from the email exchanges, that it was a port charter and not a berth charter. At no point was a berth mentioned but only that the vessel should proceed to the ports. In my opinion, she was an arrived ship within the limits of the port when the master sent a notice of readiness to the Defendant.

(FF) Counsel for the Defendant, Mr. Yillah submitted that the demurrage was never contemplated in reaching the agreement. What in law is demurrage? Does it have to be contemplated in reaching an agreement? Demurrage is the agreed amount of damages due to the shipowner if the charterer/shipper is in breach of charterparty because the laytime, i.e. the agreed time for loading or discharging the ship, is exceeded; 'Maritime Law' (supra) at 173. Most standard form voyage charterparties provide for damages at an agreed rate called demurrage. The maxim "once on demurrage always on demurrage" means that time counts for demurrage unless the parties have unambiguously provided otherwise.

(GG) Exceptions to laytime do not constitute exceptions to demurrage unless they are expressly stated to be exceptions to demurrage as well; Dias Compania Naviera SA v Louis Dreyfus [1978] 1 All ER 724; Nippon Yusen Kaisha v Marocaine de L'Industrie du Raffinage (The Tsukuba Maru) [1979] 1 Lloyd's Rep. 459. Also, a general exception clause is unlikely to be specific enough; Ellis Shipping Corp. v Voest Alpine Intertrading (The Lefthero) [1992] 2 Lloyd's Rep. 109. Also, if the wording of the exception is ambiguous, it will be construed against the charterer or the party seeking to rely on it. The burden of proof is on the party seeking to rely on it to show that the terms of the exception apply.

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(HH) Clear exceptions may include fire, storm, strikes or lockouts, the breakdown of loading equipment because of bad maintenance on the part of the operator, who was an independent contractor of the charterer; The Mozart [1985] 1 Lloyd's Rep 239; A. Meredith Jones & Co. Ltd v Vangemar Shipping Company Ltd (The Apostolis) (No 2) [1999] 2 Lloyd's Rep. 292 at pp 300-301; or breakdown of machinery or equipment in or about the plant of the charterer, supplier, shipper or consignee of the cargo; Portolana Cia Nav v Vitol SA (The Afrapearl) [2004] 2 Lloyd's Rep 305. Demurrage will continue to accrue where the delay is not due to the fault of either shipowner or charterer unless an express exception applies; 'Maritime Law' (supra) at 172.

(II) In his submissions to the court, Counsel for the Defendant, Mr. Yillah, espoused that demurrage was never contemplated in reaching the agreement. From the point of view of the court, it is clearly written in exhibit G3 of the affidavit of Brima Koroma (Supra) that the detention fee would be Euro 9,500 per day (pd) for any time lost due to waiting for cargo, berth, congestion etc. No exception has been shown to warrant a change or no payment of demurrage. An agreed rate was provided for. The plaintiff reiterated the terms of the agreement in exhibit G3 aforesaid, and the defendant confirmed and approved the terms as shown in exhibit G2 of the affidavit of Brima Koroma aforesaid.

Conclusion

(JJ) In conclusion, and having considered all of the above, and the court being seised of jurisdiction to determine the questions raised pursuant to Order 17 rule 1(1) of the High Court Rules of 2007, I Hereby make the following pronouncements. That:-

1. there was a valid contract of carriage between the Plaintiff/Applicant and the Defendant/Respondent.

2. That the contract of carriage upon the true construction of the terms of the agreement contained in the email correspondences between the parties, was a voyage charterparty.

3. That upon a true construction of the terms of the voyage charterparty, it was a port charterparty.

4. Yes, the laytime began when the vessel arrived at the ports of Abidjan and Takoradi respectively and a valid notice of readiness was tendered.

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Reliefs/Orders

5 (a) Judgment is entered for the Plaintiff herein, GMI Chartering APS.

(b) Payment of demurrage in the sum of Euro 97,902 (Ninety-Seven Thousand Nine Hundred and Two Euros) or the equivalent in Leones is to be paid to the Plaintiff/Applicant.

(c) Damages of Euro 40,000 (Forty Thousand Euros) or the equivalent in Leones is to be paid to the Plaintiff/Applicant for breach of contract.

(d) Interest at a rate of 12% per annum on the said sum of Euro 97,902 (Ninety-Seven Thousand Nine Hundred and Two Euros).

(e) Costs of Euro 25,000 (Twenty-Five Thousand Euros) or the equivalent in Leones to be borne by the Defendant.

(f) I also order that the security for costs that was granted to the Defendant/Respondent on the 17th of June 2019 be released to the Plaintiff/Applicant.

Signed:_____ Date: 9/2/2022

Hon. Justice F. Bintu Alhadi J.A.
(Sitting as a High Court Judge)

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