IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
NCN: [2022] EWHC 1114 (Comm)

No. LM-2021-000064

Rolls Building
Fetter Lane
London, EC4A 1NL

Monday 4 April 2022

Before:

HIS HONOUR JUDGE MARK PELLING QC

B E T W E E N :

HOLLEMAN SPECIAL TRANSPORT & PROJECT CARGO S.R.L. — Claimant

- and -

CO UK SHIPPING AND TRADING LIMITED — Defendant

MR D. GRANT appeared on behalf of the Claimant.

MR M. DAVIDSON appeared on behalf of the Defendant.

J U D G M E N T

(v i a M i c r o s o f t T e a m s)

(Please note this transcript has been prepared without access to documentation)

JUDGE PELLING QC:

1 This is the claimant's application for summary judgment in respect of what it characterises as "unpaid freight" and ancillary costs said to be due under what the claimant characterises as a contract for the carriage of goods by road made on 23 June 2020. I record at the outset that it is conceded by the claimant, correctly, that there are various factual issues that arise on the defendant's counterclaim that will require a trial to resolve whatever the outcome of this application.

2 The principles applicable to an application of this sort are well known. They are those set out by Lewison J (as he then was) in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) as approved by the Court of Appeal in *TFL Management Services Ltd v Lloyds Bank PLC* [2013] EWCA Civ 1415. Given the issues that arise on this application turn principally on points of construction and law, I remind myself, in particular, that:

(a) A court should resolve short points of law and construction on the summary judgment application if satisfied that it has before it all the relevant evidence; but

(b) Caution is required before accepting an invitation to deal with single issues in cases where there will need to be a trial on liability involving evidence and cross-examination in any event because of the effect, amongst other things, of appeals causing delay to the final disposal of the claim; and

(c) Difficult points of law, particularly in developing areas, are better decided against actual rather than assumed facts and where such points will benefit from being determined with the benefit of more detailed examination that a trial permits.

3 Turning now to the facts and issues that arise, the claimant entered into a contract by which it agreed to transport some wind turbine components by road between a port and a windfarm site both located in Sweden. The contract was contained in a document entitled "Transport contract". It was expressly made subject to the Convention on Contracts for the International Carriage of Goods by Road ("CMR convention") even though the CMR Convention applies only to transport by road across frontiers.

4 In so far as is material, the contract at cl.5 provided:

> "Obligations of the Carrier:
>
> - Using the agreed transport equipment, Quattro Trailers, pulled by 8 x 4 prime movers. Also, the carrier is providing an escort car performing just the steering of the trailer's axles in curves and in all places where it is necessary;
> - To be available at the loading place and unloading place as planned functional;
> - To drive according to the local legislation being escorted by the special escort vehicles and on cleared routes cleared by special obstacles removing teams. Both the special escort cars, except the steering escort car and the obstacle removing teams and vehicles, are to be provided by the beneficiary;
> - To provide the beneficiary with the necessary transport equipment technically adequate and in safe conditions for driving;
> - The Carrier responsible for the load from loading time until destination point...;

- The Carrier will be at the established place and time as agreed with the beneficiary regarding the loading and unloading place of the goods...

Obligations of the Beneficiary:

- To provide to the Carrier the necessary documentation for the transport;
- The Beneficiary organises the necessary special authorisations and escorts in all the transit countries;
- To confirm in writing and in reasonable time for the Carrier the date and time of loading;
- Pays the transport costs in maxim thirty days from the invoice date. The eventual loss or damage to the goods after the risk has passed from the carrier does not discharge the Beneficiary from his obligation to pay the price unless the loss or damage is due to an act or omission of the Carrier..."

5 So far as pricing is concerned, that was addressed in para.5 of the contract, where prices were given in respect of each of a number of identified tower-based commodities and blades for use in connection with each wind generator by reference to mobilisation costs, demobilisation costs, which for the tower commodities were €11,000 and €11,000 respectively, and provided for a price per day to be paid of €3,850 for the most part for the tower components. In relation to the blade components, mobilisation and demobilisation were specified at €11,000 and the daily price for one truck and a trailer €2,850. In cl.5 and in relation to blades, it was specified that:

> "Standby rate: 80 per cent from the price."

By cl.7 of the contract:

> "Waiting time is considered the time spent by the carrier's vehicles being not used for transport. Each waiting day will be invoiced with the amount of 80 per cent from the price."

6 On this application, the claimant seeks the resolution of two issues which it characterises respectively as "*the construction issue*" and the "*set off*" issue.

7 The construction issue is whether the "*price per day*" or "*daily price*" was payable on days when the claimant's trucks were travelling unloaded to the load port or were waiting to load a further consignment at the load port.

8 The set off issue is whether the claimant is entitled to receive the "*price per day*" or "*daily price*" and ancillary costs free of deduction or set off. In this connection, the claimant characterises the price per day or daily price payable under the contract as "*freight*" in order to take advantage of the rule of English law that precludes set off or common-law abatement being asserted against a claim to recover freight payable under contracts of carriage - see *Aries Tanker Corp v Total Transport Ltd* [1977] 1 WLR 185; *R H & D International Ltd v IAS Animal Air Services Ltd* [1984] 1 WLR 573, where the general rule was applied to contracts for the carriage of goods by road governed by the CMR Convention; and *United Carriers Ltd v Heritage Food Group (UK) Ltd* [1996] 1 WLR 371, where May J (as he then was) extended the principle to include contracts for the carriage of goods by road but obviously and expressly very reluctantly.

9 The defendant submits that the applications should fail because it has a real prospect of establishing at trial:

(a) On true construction that the claimant is not entitled to recover the daily rate when:

(1) the trucks were performing a half-day's work or less;

(2) performing empty return journeys from site to the load port; or

(3) were delayed by drivers taking an unreasonable time on return journeys; and

(b) That the common-law rule against set off does not, in any event, apply to any of the sums claimed by the claimant.

10 If the set off point is to be answered in the way submitted for by the defendant, then the defendant has a complete defence even if the construction point is resolved against it because its counterclaim exceeds the amount of the claim. It is common ground that the counterclaim raises triable issues, as I have said, which are unsuitable for summary determination. Although it was submitted by the defendant that since there had to be a trial of the counterclaim, both issues but in any event the construction issue should be left to trial. I reject that approach in this case. The construction issue is one that is suitable to resolve applying the summary judgment principles referred to earlier. The position is the same in relation to the no set off issue. That of itself means that I should resolve both on this application. The construction issue will or at least could have an impact on the way in which the set off issue is to be resolved. Given the impact of the construction issue at least potentially on the no set off issue it would be more logical to determine it first. However, Both parties argued the no set off issue first and I adopt that approach for that reason.

11 Before turning to the no set off issue, there is one point I should mention concerning governing law. Neither party addressed this issue in their written submissions. The contract was made between a Romanian company and an English company. It concerned the transport of goods

by road from a load port in Sweden to a site in Sweden. In relation to the governing law, cl.9 of the contract states:

> " • Any kind of litigation will be solved in an amiable way;
>
> • When this is impossible, the litigation will be submitted to the court;
>
> • The transport is governed by the CMR rules and Swedish specific legislation..."

Neither party has relied on any provision within the CMR Convention nor has either party sought to rely on or adduce evidence of Swedish law or legislation. In those circumstances, by default, I must apply the English law principles of construction to the construction issue and the common law set off rule in accordance with its terms - see *FS Cairo (Nile Plaza) LLC v Brown lie* [2021] UKSC 45.

12 I turn first to the set off issue. This part of the application must be determined on the basis that the defendant has at least a realistic prospect of establishing its counterclaim and on the basis that it is common ground that but for the common law no set off point, if it applies, the claim would have to proceed to trial. It follows that the sole issue I have to decide is whether, as a matter of law, the no set off rule applies in the circumstances of this case. Notwithstanding the constraints that apply to determining points of law on summary judgment applications summarised earlier, it is common ground that I must resolve the no set off issue at this stage in this case for the reasons identified in *Globalink Transportation and Logistics Worldwide LLP v DHL Project & Chartering Ltd* [2019] EWHC 225 (Comm); [2019] Bus LR 2012 at [44] where the judge, Mr Vineall QC, held as follows:

> "I have considered whether I need to decide anything more than that it is arguable that the rule in *The Aries* does not apply. I was initially attracted by this course. However, I consider it better to 'grasp the

> nettle' in the words of Bryan J given that the point was fully argued, and given that neither party suggests that there is relevant evidence which might be available at trial but is not available now. I note that merely deciding that the point is arguable would in practice give the same result as deciding that the rule does not apply. If I merely decided that it is arguable that it does not apply, then the claimant would have to wait for its money even if the cross claim eventually fails. It would be too late then for the claimant to get the benefit of early payment - the very thing the no set off rule is intended to achieve - if it transpired at trial that I should in fact have given effect to the no set off rule."

All the points made by Mr Vineall in [44] of his judgment apply with equal force in the circumstances of this case and thus, I intend to adopt broadly the approach he identified in the paragraph quoted above.

13 The relevant principles that apply in this area are now well-established. In summary:

(a) The common-law defence of abatement is not available in respect of a claim for freight properly so called - see *Aries Tanker v Total Transport Ltd* (*ibid*.);

(b) In the context of maritime law, there is a fundamental distinction between freight payable typically under a voyage charterparty and hire payable under a time charter with the common-law rule applying to the first but not the second - see *The Nanfri* [1978] 1 QB 927, *per* Lord Denning MR at 973C – G;

(c) The common law rule referred to (a) above applies to claims for freight for the carriage of goods by road to which the CMR Convention applies and to the defence of equitable set off as much as to abatement - see *R H & D International Ltd v IAS Animal Air Services* (*ibid*.) *per* Neill J (as he then was) at 576 - 577;

(d) The rule applies as much to freight payable under inland contracts for the carriage of goods by road as to ones where the CMR applies - see *United Carriers Ltd v Heritage Food Group (UK) Ltd* (*ibid*.) *per* May J at 378F, a conclusion that May J expressly stated was one he arrived at with "*unconcealed reluctance*";

(e) The rule applies as much to a composite contract for multiple deliveries as it does to a contract for a single journey - see *United Carriers Ltd v Heritage Food Group (UK) Ltd* (*ibid*.) *per* May J at 378G-H;

(f) It is realistically arguable that the rule is of no application to payments under a contract of carriage, which are not payable for carriage - see *United Carriers Ltd v Heritage Food Group (UK) Ltd* (*ibid*.) *per* May J at 378H;

(g) The rule does not apply to sums due under freight forwarding contracts unless a freight forwarder, acting as agent for the defendant in entering into a contract of carriage, has become liable to pay freight in the narrow sense identified in *The Nanfri* (*ibid*.), when the forwarder becomes entitled to claim the sums due as freight from its principal - see *Globalink v DHL* (*ibid*.) at [50]; but

(h) The rule would not apply to a freight forwarder who had entered into a road haulage contract on behalf of its principal where the fees charged where expressed to be daily rates for the provision of vehicles - see *Globalink v DHL* (*ibid*.) at [67] - because, as Mr Vineall QC put it in that paragraph, such payments were "*...closer to the land equivalent of a time charter than the land equivalent of a voyage charter...*"

In essence, therefore, the case law establishes that the common law rule is to be confined as applying only to what, in law, is to be regarded as freight in the narrow sense identified by Lord Denning MR in *The Nanfri* (*ibid*.), whether the carriage be by land, sea or air. .

14 I now turn to the facts of this case. The first point the claimant makes is that the defendant is precluded from making the submission it does because it has admitted that the contract between the parties is a contract of carriage, and that the sums payable thereunder is freight - see para.3 of the amended particulars of claim and para.3 of the defence. I reject that argument. The pleading must be read as a whole. The defendant pleaded at para.14 that it

was entitled to rely on set off. In those circumstances, the claimant could be in no doubt that the defendant was relying on the set off defence, which was addressed comprehensively in the evidence filed in support of this application.

15 I now turn to the contract itself. The issue that I am now concerned with is not one that turns on the nomenclature used by the parties. Thus, the distinction between a transport contract and a carriage contract that was drawn particularly in the written submissions is a distinction which is, at best, elusive and does not assist in resolving the real issue that arises, which is a question of substance to be resolved by considering the contract as a whole to the extent that one can on an application of this sort. More significant is the fact that the claimant is described as being the "Carrier" and more significant still is that the parties have chosen to incorporate the CMR Convention into the contract by express reference which would suggest that the parties thought that the contract was at least, in part, a contract of carriage.

16 In reality, however, the issue that arises depends on whether what is payable under the contract is to be treated as freight. In my judgment, the Obligations of the claimant as Carrier set out in the contract (se out above) provide assistance in resolving this issue. The obligation was to make available at the load port and discharge site the specified transport equipment between fixed dates for towers in weeks 25 to 42, and for blades in weeks 27 to 42, in each case extendable to week 45, and for those services the defendant was to pay €3,850 a day, plus mobilisation and demobilisation fees for tower transport, and €2,850 per day plus mobilisation and demobilisation charges for blade transport with accommodation charges for drivers to be paid in addition. Critically for present purposes, on the claimant's case the full daily sum was payable not merely when the components were being carried from the load port to the discharge site but also when the vehicles were being driven empty back to the load port and when the vehicles were waiting, often for up to a day at a time, in order to load further components for onward delivery to the site.

17 Whilst there is an issue between the parties as to whether a standby rate should apply for at least some of the waiting time that occurred, that does not impact on the issue I am now considering. What was payable was a daily rate for the use of the trucks to be supplied by the claimant to the defendant. The trucks were to be used to transport towers, blades, and other components from the port to the site but payment was on a per day basis to include, on the claimant's case, returning the vehicles to the port empty and when waiting. In my judgment, on that basis, the vehicles were being paid for by the claimant not merely when transporting the parts from port to site but generally for the period fixed by the contract to be paid for daily irrespective of use or non-use, which takes this case away from freight in the sense of a payment for carrying a cargo and much more towards the concept of hire being a payment for having vehicles available throughout the period fixed by the contract.

18 Rules which exclude set off can be a source of significant hardship which is why, generally, express exclusion only is permitted. General rules, excluding a right of equitable set off, require justification. In *The Brede* [1974] 1 QB 233, Lord Denning explained the justification for the no set off rule for freight in these terms:

> "I think the rule about freight is to be justified in the same way as the like rule about a sum due on a bill of exchange. The good conduct of business demands that freight should be paid according to the terms of the contract. Payment should not be held up because the goods are alleged to have been damaged in transit..."

In a general sense, this could apply to any sum due under a contract. The bill of exchange exception is usually justified on the basis that bills of exchange should be regarded as the equivalent of cash. If this, in truth, is the justification for the freight rule, then it is submitted that it must be narrowly construed in the way that Lord Denning approached the question in

The Nanfri (*ibid*.). It may be, as Lord Wilberforce said in the *Aries Tanker* case (*ibid*.) at [190], the rule has no clear justification but was to be applied because it was :

> "...as well settled as any common law rule can be."

If that is so, then there can be no justification for extending the rule to apply to payments other than freight as understood in the narrow sense I have referred to. In the result, therefore, I conclude that the rule is of no application to the facts of this case. In any event, I would, if that was wrong, have held that it was at least realistically arguable that the rule did not apply to any ancillary payments due under the contract other than those which could properly be characterised as freight and so would not apply to mobilisation or de-mobilisation costs or accommodation costs for drivers. .

19 I turn now to the construction issue. This issue is academic in the light of the conclusions I have reached concerning the set off point. However, I address it since it has been fully argued and the issue will be material at trial and will have to be resolved either now or then. The principles applicable to the construction of contracts as a matter of English law is not in dispute. In summary:

(1) The court construed the relevant words of a contract in its documentary factual and commercial context assessed the light of:

(a) The natural and ordinary meaning of the provision being construed;

(b) Any other relevant provisions in the contract being construed;

(c) The overall purpose of the provision being construed and the contract in which it is contained;

(d) The facts and circumstances known or assumed by the parties at the time that the contract was executed; and

(e) Commercial common sense; but

(f) Disregarding subjective evidence of the parties' intentions (see *Arnold v Britton & Ors* [2015] UKSC 36; [2015] AC 1619 *per* Lord Neuberger PSC at [15] and the earlier cases he there refers to);

(2) A court can only consider facts or circumstances known or reasonably available to both parties that existed at the time when the contract order was made (see *Arnold v Britton* (*ibid*.) *per* Lord Neuberger PSC at [21]);

(3) In arriving at the true meaning and effect of a contract, the departure point in most cases will be the language used by the parties (see *Arnold v Britton* (*ibid*.) *per* Lord Neuberger PSC at [17]);

(4) Where the parties have used unambiguous language, the court must apply it (see *Rainy Sky SA & Ors v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900 *per* Lord Clarke JSC at [23]);

(5) Where the language used by the parties is unclear, the court can properly depart from its natural meaning where the contact suggests that an alternative meaning more accurately reflects what a reasonable person with the parties' actual and presumed knowledge would conclude the parties had meant by the language they use but that does not justify the court searching for drafting infelicities in order to facilitate such a departure (see *Arnold v Britton* (*ibid*.) *per* Lord Neuberger PSC at [18]);

(6) If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other (see *Rainy Sky SA* (*ibid*.) *per* Lord Clarke JSC at [21]) but commercial common sense is relevant only to the extent of how matters would have been perceived by reasonable people in the

position of the parties at the date the contract was made (see *Arnold v Britton* (*ibid*.) *per* Lord Neuberger PSC at [19]);

(7) In striking a balance between the indications given by the language and those arising contextually, the court must consider the quality of drafting of the clause and the agreement in which it appears (see *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 *per* Lord Hodge JSC at [11]). Sophisticated complex agreements drafted by skilled professionals are likely to be interpreted principally by textual analysis unless a provision lacks clarity or is apparently illogical or incoherent (see *Wood v Capita Insurance* (*ibid*.) *per* Lord Hodge JSC at [13] and *National Bank of Kazakhstan & Anor v The Bank of New York Mellon Sa/nv, London Branch* [2018] EWCA Civ 1390 *per* Lord Hamblen at [39] - [40]); and

(8) A court should not reject the natural meaning of a provision as incorrect simply because it appears to be very imprudent (see *Arnold v Britton* (*ibid*.) *per* Lord Neuberger PSC at [20] and *Wood v Capita Insurance Services* (*ibid*.) *per* Lord Hodge JSC at [11]).

20 Returning to the contract the subject of these proceedings, no one could pretend that this was a sophisticated agreement drafted with skill or as anything other than a contract drawn up by commercial people to give effect to a commercial arrangement. It is not complex. It has not been drafted by a legal professional certainly, and it is one that a court is therefore bound to approach by reference to contextual rather than or as well as textual analysis.

21 The claimant submits that references to "*a day*" will generally be taken as a matter of English contractual construction as a calendar day reckoned from midnight to midnight, that this is the ordinary meaning of the word, and that the claimant's trucks were to be paid for every day during the contractually defined period either at the daily rate, or the standby rate when it applied for periods of one day or multiples of one day. It is said that this is the consequence

of the description within para.7 of the waiting time standby rate. It is common ground that on most if not all days trucks would perform three activities in the same day being (1) to unload at the site, (2) to return to the port, and (3) waiting for loading up again. The defendant accepts that the standby rate applied to waiting time, at any rate where the whole of the calendar day was expended in waiting but maintains that otherwise, the full rate was payable.

22 I leave to one side the possibility that on its true construction the contract required prorating as between waiting time and either travelling laden or unladen. Neither party submits that this should be the outcome although I am bound to say it would appear to be one realistically arguable contention applying the principles I have identified above. The difficulty, however, in arriving at any conclusion as to the true meaning and effect of these provisions is that they are likely to be informed, as I have said, by contextual material and there is no, or at any rate not sufficient, evidence of context available on this application to safely arrive at a final conclusion as to the true meaning and effect of the contract.

23 The defendant's case is, first, that a day should run only from the period at which the relevant component was loaded on to one of the claimant's lorries. This is alleged to be unprincipled applying the principles identified earlier in this judgment to the extent that it relies on subjective intention on the part of the defendant. The defendant also relies on the fact that the contract provides expressly for a route "*from port to site*". The claimant maintains that this is immaterial because it specifies merely a route and is not intended to inform the circumstances in which the daily fee identified elsewhere in the contract was to be paid. The defendant maintains that trips back to the port and waiting time was not chargeable but that is not consistent either with the way the service to be provided by the claimant is expressed in the contract or, for that matter, the defendant's case on the no set off issue.

24 Whilst I would probably have concluded that these factors meant that as a matter of construction the *per diem* rate applied irrespective of whether the vehicle was travelling laden

or unladen, and that the standby rate was payable only when the vehicles were waiting when it is likely that running costs would be significantly reduced, I cannot safely reach that conclusion at this stage in the circumstances of this case. The contract, as I have said, is poorly drawn and the defendant relies on an alleged (and disputed) market or industry practice that it maintains justifies the construction for which it contends. If there was a genuine industry practice of the sort alleged by the defendant, that may have an impact on the proper construction of the contract. As I have explained, there must be a trial of the claim in any event to determine what, if anything, is due under the counterclaim.

25 I bear in mind that because the construction issue is likely to depend on contextual issues and what, if any, impact genuine market practice has on the construction issue, it is possible or even likely that the evidence not currently available will become available to the trial judge. That is precisely one of the factors that the *Easyair* criteria requires a court to bear I mind when arriving at conclusions on a summary judgment application.

26 In the result therefore, I conclude, first, on this contract that the no set off rule does not apply but that otherwise, the construction issues should be resolved at a trial when all the material evidence can be made available to the trial judge.

CERTIFICATE

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Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital