Frustrating Delays

"There can be no frustration if the delay in question is within the commercial risks undertaken by the parties".

In National Carriers v Panalpina, Lord Simon of Glaisdale observed that "frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances......."

The questions of when and in what circumstances a charter party can be frustrated as a result of delay were recently addressed by Mr. Justice Gross in the English High Court.

Facts

The "Tasman Spirit", laden with over 67,000mts crude oil ran aground at Karachi, following which Tsaviris (the "Salvors") entered into a salvage agreement with the owners of the grounded vessel on the LOF 2000 form incorporating the SCOPIC clause.

In order to fulfil its obligations (which essentially was to lighten the casualty) under the salvage agreement, the Salvors chartered the "Sea Angel" from Edwinton Commercial, the owners of the vessel. The charter party was on a Shelltime 4 form for a period of about 20 days. MT Sea Angel was delivered into service under the charter party on 26th August, 2003.

The vessel completed loading her final parcel of cargo from the casualty on 5/6th September, 2003 and completed discharge to the transhipment vessel on 8th September. Accordingly, and on the assumption the vessel would sail from Karachi that day Salvors gave 3 days' notice of redelivery.

However, the vessel did not depart from Karachi until 26th December and was not redelivered until 1st January, 2004.

In the intervening period, between 11th September and 26th December the vessel was unable to depart Karachi because the local port authorities had refused to issue a No Demand Certificate ("NDC"). a condition precedent to port clearance. Subsequently, the High Court of Karachi held the refusal of the Karachi Port Trust ("KPT") to issue a NDC was unjustified and directed it to issue a NDC.

The vessel owner claimed hire in the sum of USD 1,373,320 for the period from 18th September (when the charterers ceased paying hire) to redelivery on 1st January, 2004.

The Salvors denied they were liable to pay hire. They argued the unjustified and unlawful refusal of the KPT to issue a NDC was an attempt to secure its pollution claim against third parties and the consequent delay to the vessel of some 120 days, as a against a charter period of about 20 days, was a frustrating event. Further the risk of delay was not dealt with by the Charterparty, was not assumed by the Salvors, and was neither foreseen by the parties nor reasonably foreseeable.

The owners argued that delay was not a normal incident of maritime adventure and that the detention of Salvors' vessel, whether owned or chartered, was a known risk of the salvage business. Further the delay was not extraordinary and alternatively, if the delay did, otherwise give rise to frustration, the risk of such delay was either assumed by the Salvors or it was self-induced because they had failed to commence timely proceedings in Pakistan to secure the release of the vessel.

So far as relevant the Salvage Agreement provided:

SCOPIC remuneration clause 9(ii):

*The termination provisions contained in sub clause 9(ii) above shall apply only if the Contractor is not restrained from demolishing his equipment by Government, Local or Port Authorities or any other officially recognised body having jurisdiction over the area where the services are being rendered*.

Sub Clause 9(ii) allows the owners of the vessel to terminate their obligation to pay SCOPIC.

Frustration

In The "Super Servant Two" 1 Bingham LJ (as he then was) said:

*1) The doctrine of frustration was evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises .........

as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances.....

2) Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine is not to be lightly invoked, .....\

3) Frustration brings the contract to an end forthwith, without more and automatically.....*

It is well established that if due to an unexpected turn of events, a contract becomes more onerous to perform that alone will not frustrate the contract. Instead, what is required is a change in circumstances, so that the nature of the contract is fundamentally altered or becomes so radically different that performance of the contractual promise would involve a fundamental or radical change from the obligation originally undertaken.

Further, although delay is undoubtedly capable of frustrating a contract, delay will not always do so. There can be no frustration if the delay is within the commercial risks undertaken by the parties. Moreover, as Lord Sumner observed in "Bank Line v Arthur Capes" 2 "Delay even of considerable length and of wholly uncertain duration is an incident of maritime adventure, which is clearly within the contemplation of the parties, such as delays caused by ice or shipping ....... Delays such as these may very seriously affect the commercial object of the adventure, ....... None the less delay is not frustration; the delay is ordinary in character, and in most cases the charterer is getting the use of the chartered ship, even though it is unprofitable to him ...."
Was There a Frustrating Event?

The detention of the vessel made the charter party more onerous for the Salvors as the obligation to pay hire continued considerably longer than anticipated. However, "onerousness" by itself is not sufficient to constitute a frustrating event. All the facts and circumstances, including the contractual arrangements, require consideration. Indeed, although the charter was for a relatively short period a comparatively high rate of hire had been agreed to reflect the intended use of the vessel as part of a salvage operation.

Other relevant considerations were:

1. Whether delay in the salvage context is an ordinary incident of the salvage operations? Although delay would mean the Salvors paid hire for a longer period than initially contemplated that risk was recognised by clause 9iii of SCOPIC so that the Salvors would, at least potentially, recover the additional hire paid as a part of any salvage award. Accordingly, as against the contractual background alone the risk of delay or detention probably did not give rise to a fundamental or radical change in the obligation undertaken.

2. Was the Salvors approach to the detention of the vessel consistent with frustration of the charter party? The owner's position was that when the vessel was first detained the Salvors should have been more aggressive in seeking to challenge the detention in the courts in Karachi. The Salvors had though decided on a commercial approach with the expectation of the vessel sailing before Christmas. While the fact of this decision did not mean that the charter party could not be frustrated, the decision was consistent with an appreciation by the Salvors of a commercial problem that from time to time arose in the course of salvage operations and that had to be solved.

3. On or by what date would the charter party have been frustrated? The Salvors had argued the charter party was frustrated on the 19th September, the day after the date up to which hire had been paid, or the 13th October, by which time they had taken the view that legal action could not be avoided. The earlier date was dismissed out of hand by the Court on the Salvors own evidence; in particular that a commercial solution ought to have been possible before Christmas and a contractual background that recognised the risk of delay. As from mid October though, and ignoring all other relevant factors, there was a reasonable argument that when legal action was contemplated the charterparty could have been frustrated. However, to frustrate the charterparty would require assumptions that either the Pakistan Courts could not grant relief or could do so only after an inordinate period of delay, neither of which was made out on the evidence before the Court. Indeed, the proceedings started by the Salvors in Karachi appear to have had a positive impact on the negotiations that were pursued to release the vessel.

In summary, on the facts of the case Gross J was not convinced that the Salvors had established the detention of the vessel had caused so radical or fundamental a change in the obligations assumed by the Salvors as to frustrate the Charterparty.

1. (1981) AC 675
3. [1990] 1 LLR 1
4. [1919] AC 435