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Case No: LM-2022-000083

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LONDON CIRCUIT COMMERCIAL COURT
SHORTER TRIALS SCHEME

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 August 2022

Before :

HIS HONOUR JUDGE BIRD SITTING AS A JUDGE OF THIS COURT

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Between :

CM P-MAX III LIMITED	**Claimant**
- and –	
PETROLEOS DEL NORTE SA	**Defendant**

MT STENA PRIMORSK

Voyage charter dated 9 March 2019

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Matthew McGhee (instructed by **Hill Dickinson LLP**) for the **Claimant**
Tom Bird (instructed by **Stephenson Harwood LLP**) for the **Defendant**

Hearing dates: 17 and 18 May 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE BIRD SITTING AS A JUDGE OF THIS COURT

His Honour Judge Bird :

Introduction

1. The claimant ("owner") chartered the MT Stena Primorsk, a tanker, to the defendant ("charterer") under the terms of an amended Shellvoy 6 for a single voyage. The contract is set out in, or evidenced by, a recap of 9 March 2019. The vessel was built in 2006, is registered in Bermuda, and has an overall length of 182.9m and a breadth of 40m.

2. This is the owner's claim for demurrage in the sum of US$ 143,153.64. The recap provided for a single allowance of 72 hours of laytime for loading and discharge with demurrage to be paid at the rate of US $22,500 per day pro rata. The charter provides for certain circumstances in which time either does not start to run or, having started to run, is suspended.

3. The charterer defends the claim on the basis that time did not start to run (because the relevant notice of readiness ("NoR") was not valid) and on the basis that time was suspended because the owner was in breach of the charter. The evidence centred on two incidents which are said to have suspended time. First, the owner's decision to leave the discharge terminal within 12 minutes of berthing on 31 March 2019 and secondly, the owner's refusal to comply with the charterer's request to return to berth at 2100 on 1 April.

4. The validity of the NoR falls to be determined by reference to free pratique. The owner avers that the decision to leave the berth on 31 March and the decision to refuse the request to berth and commence discharge on 1 April were decisions based on the safety of the vessel as permitted by the charter and so could not amount to breach or fault.

5. Further, the charterer counterclaims for lightering costs in the sum of $US64,186.60. If I find that the owner is in breach of the charter it is common ground that the counterclaim will succeed. The charterer submits that in any event its counterclaim is made good by clause 7 of the charter.

6. The trial of this matter took place under the shorter trials scheme.

The relevant facts

The charterparty

7. The Shellvoy 6 contract is in 3 parts (numbered as I, II, III but in this judgment as 1, 2 and 3). Part 1 is divided into sections A to O. Part 1(A) deals with the "description of the vessel" and sets out warranties given by the owner. Clause 1(A)(III) contains a warranty by the owner that information set out in any supplied questionnaire is complete and correct and "an integral part of this charter".

8. Part 1 of the charter is paramount. As the preamble makes clear, it trumps any contrary provision in part 2 or part 3. Part 2 sets out the main terms of the charter and part 3 sets out terms specific to identified countries.

Q88

9. Q88 (Intertanko Chartering Questionnaire 88), a standard form questionnaire, was provided to the charterer and so is covered by clause 1(A)(III). It is a comprehensive list of the type of data that the charterer would need to make full and safe use of the vessel. For example, under Question 1 and the heading “general information” it sets out the dimensions of the vessel, her owners and her insurers. Repeating the information set out in the recap, it identifies Northern Marine Management Limited (“NMM”) as the vessel’s technical operator at question 1.10. At questions 1.39 to 1.44 it sets out “loadline information” including summer, winter, tropical, lightship and normal ballast condition drafts for the vessel.

10. Question 1.43 sets out the owner’s “guidelines” for under keel clearance (“UKC”). The answer (insofar as relevant) is:

“*within port limits, fairways berths etc: 10% of the deepest navigational draft*”.

Part 2

11. In the following extracts from Part 2, the emboldened words form part of the amendments added to the contract by the parties.

12. Clause 3(1) provides as follows: “*Subject to the provisions of this Charter the vessel shall perform her service with utmost despatch and shall [having loaded the vessel] proceed as ordered on signing bills of lading to such berths as Charterers may specify, in any port or ports within Part I clause (E) nominated by Charterers, or so near thereunto as she may safely get and there, always safely afloat, discharge the cargo*.”

13. Clause 3(2) states: “*Owners shall be responsible for and indemnify Charterers for any time, costs, delays or loss including but not limited to use of laytime, demurrage, ... due to any failure whatsoever to comply fully with Charterers’ voyage instructions… .* ***Owners shall adhere to Charterers’ voyage instructions as long as such orders are considered safe by the Master of the ship***.”

14. Clause 4 provides that: “*Charterers shall exercise due diligence to order the vessel only to ports and berths which are safe for the vessel* ***and where the vessel will always be afloat****….*”

15. Clause 7 provides that: “*The cargo shall be loaded into the vessel at the expense of Charterers and, up to the vessel's permanent hose connections, at Charterers' risk. The cargo shall be discharged from the vessel at the expense of Owners and, up to the vessel's permanent hose connections, at Owners' risk. Owners shall, unless otherwise notified by Charterers or their agents, supply at Owners' expense all hands, equipment and facilities required on board for mooring and unmooring and connecting and disconnecting hoses for loading and discharging* ***which meet the most recent Oil companies International Marine Forum (OCIMF) standards. If requested by Charterer, Vessel shall load and/or discharge more than one grade simultaneously if Vessel is technically capable of doing so. Any delay resulting from the failure by Owners to provide such personnel, equipment and facilities shall not count as laytime or, if the vessel is on demurrage, as demurrage***.”

16. Clause 9: “*If at any time before cargo operations are completed it becomes dangerous for the vessel to remain at the specified berth as a result of wind or water conditions, Charterers*

shall pay all additional expenses of shifting from any such berth and back to that or any other specified berth within port limits…. time spent shifting shall count against laytime or if the vessel is on demurrage for demurrage."

17. Clause 13(1)(a) provides that time at the port of discharge will commence to run 6 hours after the NoR has been tendered by the master or Owners' agents to charterers or their agents and or the vessel is securely moored at the specified loading or discharging berth, whichever occurs first. If the owners "*fail to obtain free pratique unless this is not customary prior to berthing…..either within the 6 hours after notice of readiness originally tendered or when time would otherwise normally commence under this Charter, then the original notice of readiness shall not be valid*".

18. Clause 14: "*Time shall not count when: …..(c) lost as a result of: (i) breach of this Charter by Owners…..*"

19. Clause 15 deals with the obligation to pay demurrage. Clause 15(2) provides: "… ***Any delays for which laytime/demurrage consequences are not specifically allocated in this or any other clause of this Charter and which are beyond the reasonable control of Owner or Charterer shall count as laytime or, if Vessel is on demurrage, as time on demurrage. If demurrage is incurred, on account of such delays, it shall be paid at half the Demurrage Rate*."

20. Clause 25(1): "*If the vessel, with the quantity of cargo then on board, is unable due to inadequate depth of water in the port safely to reach any specified discharging berth and discharge the cargo there always safely afloat, Charterers shall specify a location within port limits where the vessel can discharge sufficient cargo into vessels or lighters to enable the vessel safely to reach and discharge cargo at such discharging berth, and the vessel shall lighten at such location.* ***All lightering expenses to be for Charterers' account***."

Loading

21. The vessel loaded a cargo of 54,322.913 tonnes of oil (approximately 366,817 barrels) at Bilbao. It is agreed that 68 hours and 54 minutes of laytime were used at the loading port. Once loaded the vessel headed for her port of discharge, Paulsboro on the Delaware river.

Waiver

22. Before arrival the Master sought a waiver of the UKC policy in order to berth and discharge the cargo. Discussions began with the vessel's technical agents on 25 March. The Master confirmed that depth at berth was 12.19m, the tide expected to be 1.6m and the vessel's freshwater draft 12.15m. On 27 March the Master sent relevant UKC calculations to NMM (on form SFOPS 62) together with a detailed risk assessment (on form SFSAF 28). On 28 March, after considering the calculations and the risk assessment, NMM confirmed that it was prepared to grant a "*one off waiver for the NMM UKC policy for the inboard loaded passage from [the] anchorage to crown point terminal on AM high water of the 31st March 2019*". The waiver therefore covered both the transit from anchorage and the berthing. The waiver was based on the assumptions "*that the vessel draft 12.15m is equal to or less that the declared safe draft of the river 40ft (12.19m) at high water and considered custom of the port. Please ensure that prompt commencement of discharge is discussed with the terminal officials*

during key meeting to ensure draft is reduced to comply with the NMM UKC policy prior to low water PM 31st March 2019."

31 March 2019

23. The vessel arrived at Paulsboro at 2300 on 29 March and anchored at Marcus Hook anchorage. On 31 March she made her way, with a pilot onboard, to Crown Point International as advised. First lines were put ashore at Paulsboro at 2242. The vessel was all fast at 2330.

24. After arrival, the terminal informed the Master that for the first 7 to 8 hours, unloading would need to take place at a reduced rate of 5,000 barrels per hour. The Master's view was that the vessel needed to maintain a discharge rate of 15,799 barrels per hour to keep a safe under keel clearance. He therefore took the decision to leave the berth and return to the anchorage. The berth was cleared at 0130 and the vessel anchored off Marcus Hook at 0500 (see the Master's letter of protest of 31 March 2019). It is important to note that the pilot who had brought the vessel in had not left the ship. Mr Watt (whose evidence I deal with below) felt that the immediate availability of the pilot would have encouraged the Master to take the decision to leave. If the pilot had left the vessel there may have been a substantial wait before the pilot could return.

1 April 2019

25. On 1 April at around 1122 the charterer noted that Crown Point was able to discharge the cargo at the rate of 10,000 barrels per hour and requested that the vessel be permitted to discharge at the next high tide which would be 2100 on 1 April.

26. The port suggested that it would have 2 tanks available for discharge with each able to receive between 4,000 and 5,000 bbls/hr until the roof is floated, giving a combined rate of 8,000 to 10,000 bbls/hr for approximately the first 6 hours of discharge. Each tank required approximately 30,000 barrels to "float the roof". After the roof was floated each tank could take 15,000 to 20,000 bbls/hr.

27. The Master contacted NMM with detailed UKC calculations (the time shown on the email is 1636). On the basis that the vessel was all fast at 2100 with no delays, discharge could commence within 3 hours and in the absence of "*technical failure from terminal or ship*" The Master wrote: "*I believe we can do the discharge*". The height of water at 2100 would be 0.9m increasing to 1.6m at midnight and reducing thereafter back to 0.9m by 0300 on 2 April.

28. Because the depth at berth was 12.19m and the loaded draft was 12.19m compliance with the UKC policy (and the safety of the vessel) depended on the rising water and the decrease in navigational draft as the load was discharged. The calculations (on form SFOPS 62) showed an actual UKC of 0.9m at 2100, 1.6m at midnight, 1.54m at 0300, 1.39m at 0500 and 1.39m at 0600 on 2 April.

29. Because the UKC policy is a function of deepest navigational draft (which decreased during discharge) the required UKC varied. At 2100 the UKC policy would not be met (UKC would be 0.9m when the UKC required 1.22m) and so a waiver, permitting the vessel to berth despite a breach of the UKC policy, would be required. The Master noted in the area of the

calculation reserved for remarks, that his calculations are on the basis of: "*no allowance for delays, berthing, connections or technical failure ship or terminal*".

30. NMM refused the waiver at 1720. The concern was that there would be "*very little margin for safety and ensuring adequate UKC*" if there were any delays (as there had been on 31 March) and if delays were prolonged UKC would be "*severely compromised, with the risk of the vessel touching bottom*". NMM concluded that there were "*insufficient controls to [safely] mitigate the risks*" so that a waiver could not be issued.

31. At 1735 the Master noted that the vessel would need to lighter some 8100 MT of cargo before reberthing.

Discharge

32. Lightering took place as requested on 4 April between 0330 and 1730. The vessel returned to the CPI terminal and her load was discharged by 0812 on 6 April. Laytime began to run at 1718 on 30 March and stopped at 1024 on 6 April. After allowances for stoppage in laytime the claimant seeks demurrage of US$ 143,153.64 being a little over 154.6 hours (a total of 226.63 hours had been used to load and discharge the cargo including 154.63 hours at Paulsboro) at the agreed demurrage rate.

The Issues

33. The real issues between the parties have concerned the events of 1 April. That is because there was broad agreement between the experts (Captain Bowles for the charterer and Captain Soomro for the owner) that on 31 March the Master was in a difficult position and that his decision to leave the berth was a perfectly responsible and sensible one made on safety grounds.

34. The key issue (assuming the NoR was valid) is whether the decision made on 1 April not to return to the berth for 2100 was a decision that put the owner in breach of the charter because the vessel could safely reach the discharging berth and discharge the cargo there always safely afloat.

35. Further, the charterer argues that the NoR (required by clause 13(1)(a)) was not valid because free pratique had not been granted despite it being customary at the port of discharge to do so.

36. They also raise an issue as to the correct demurrage rate.

37. The final point is the counterclaim for lightering costs. The parties agree that if on 1 April (or 30 March) the owner was in breach of the charter then the counterclaim will succeed. The charterer argues that even if the owner was not in breach it is entitled to claim lightening costs by reason of clause 7.

The Evidence

The agreed evidence

38. The parties have helpfully agreed what is likely to have happened if the vessel had discharged her load at or about 2100 on 1 April. The agreement takes account of three variables:

    a. the time of arrival (2100 or 2200),
    b. the delay between arrival and the commencement of discharge (2, 3 or 4 hours)
    c. and the rate of discharge.

39. The agreement takes the tide levels to be the predicted tide levels and takes a constant decrease in draft per hour for a given discharge rate. I am concerned with the charterer's instruction to berth at 2100. It is not therefore necessary to consider what would have happened if the vessel had berthed at 2200.

40. The parties' agreement (assuming the vessel was all fast at 2100) can be summarised as follows:

    a. The UKC policy would have been breached between 2100 and 2200 in every case regardless of discharge rate and length of wait for discharge to begin.

    b. A wait for discharge of up to 3 hours would have caused no further UKC policy breach if the discharge rate was 8,000 bbl/hr. A lower discharge rate of 3,000 bbl/hr would put the vessel in breach of her UKC policy between 0300 to 0800.

    c. A wait for discharge of 4 hours would have led to a further UKC policy breach no matter what the rate of discharge. A rate of 3000 bbl/hr would put the vessel in breach between 0300 and 0800 and a rate of 8000 bbl/hr would put her in breach between 0400 and 0600

41. I note that these conclusions appear to reflect the conclusions reached by NMM on 1 April. There was little room for slippage. If the discharge rate was lower than expected or the time to commence discharge was longer than expected there were clear safety concerns because the UKC policy would be breached.

<u>The witness evidence</u>

<u>Mr Watt</u>

42. I heard from Mr Alexander (Sandy) Watt of NMM.

43. When asked about the potential of returning to the berth on 1 April at 2100, Mr Watt emphasised that the decision was made in the context of what had happened on 31 March. He said: "*having already been [to the berth] once and seen the circumstances of the berth, [and being aware of] the delays that were encountered and the number of other factors that we had taken into account…. we were trying to understand how these 10,000 barrels were suddenly available now and it was not the day before…..there was nothing really to indicate that anything had changed. There was nothing to substantiate the claim that 10,000 barrels could actually be obtained*." He noted that the discharge rate of 10,000 barrels "*seemed lower than the terminal could theoretically take*".

44. He expressed the view that it was “*unlikely*” that the vessel would be able to commence discharge quickly. As an example of potential delay he noted that there had been no survey of the tanks or of the cargo and those steps “*take time*”. When it was pointed out to him that the actual time between being all fast and the commencement of discharge when the vessel did actually discharge her load was exactly 2 hours on 5 April 2019, he pointed out that took no account of the cargo survey (or in fact the tank survey) which were carried out at the anchorage prior to lightening.

45. In summary, Mr Watt’s evidence was that he was concerned about the time it would take to commence discharge, and in particular how long the cargo survey would take, whether the discharge rate would in fact commence at 10,000 bbls/hr or if the port would need to commence at a lower rate and then “*ramp up*”. He was concerned that the vessel would need to have enough water to be able leave the berth safely if there was “*any kind of issue*”. He pointed out that once the hoses were connected and discharge had commenced it would take time to disconnect the hoses which would first need to be emptied and that a pilot would need to be called before the vessel could leave the berth.

46. I formed the clear view that Mr Watt had real and genuine doubts about the safety of berthing at 2100 and being able to safely discharge thereafter. In my view those concerns were entirely justifiable. His evidence was: that he and the Master “*came to the conclusion that, based on the information that was available to us at the time, that we did not believe that there [were] enough mitigating factors to allow the vessel to berth again and commence with discharge*”.

47. I accept Mr Watt’s evidence on these points.

Agreed expert evidence

48. The experts agree the following relevant points:

    a. Dealing with the validity of the NoR that “*Free pratique would be granted before arrival in the USA subject to the Master declaring ahead of arrival that there was no sickness and no deaths had occurred on board. We think that the [coastguard] would not board at the anchorage unless this process had been completed. The vessel would not normally be allowed to berth and commence cargo operations if there was any issue with free pratique*”

    b. A waiver might be granted permitting a reduction in UKC to “*1.5% of breadth*”. The vessel had a breadth of 40m so that the minimum clearance would be 0.6m. This is an industry standard minimum level.

Captain Soomro

49. Captain Soomro made no criticism of the Master for his decision to return to anchorage on 31 March. He accepted that the Master was “*on the horns of a dilemma*”. It was dangerous to return to the anchorage but it was more dangerous to stay at the berth.

50. In evidence he said on the issue of free pratique: "*I can look at the regulations and I can come to an informed position, based on my past experience, and the information which I have found suggests that it is customary not to be provided with an actual time of free pratique being granted…looking at the US Border regulations there does not appear to be any requirement for obtaining free pratique*". His oral evidence confirmed the content of his written report which was that free pratique "*was not required …(and could not be obtained) when the vessel called at Paulsboro in 2019*".

51. His view was that it would take at least 3 hours after berthing on 1 April to reach the discharge rate of 8,000 bbls/hr.

Captain Bowles

52. Captain Bowles expressed the view that the US Coastguard would not board a vessel unless free pratique had been granted. It was pointed out to him that free pratique is not recorded as having been granted on the vessel's statement of facts.

53. He agreed that the UKC policy is a safety measure the point of which is to include a safety margin "*to guard against unforeseeable events such as cuts in tide, as we saw happened at this discharge port, or possibly unknown qualities of the river bed, such as if there were any ridges or any discarded items there*".

54. He accepted that the Master is entitled to operate the vessel in the way he deems to be appropriate as long as the UKC policy is not breached. If the UKC policy is likely to be breached, the Master is expected to seek "*higher authority*". This is a Stena policy but it is operated by other companies too. He said the UKC policy is a "*… trigger point outside which…the Master cannot think alone*".

55. Captain Bowles agreed that it would be reasonable for the vessel to require between 2 and 3 hours after being made all fast at berth. He considered that the Master was right to leave the berth on 31 March if he required a UKC waiver but did not have one. He accepted that the Master "*must have felt very vulnerable*" and accepted that, as Captain Soomro had said, he was "*on the horns of a dilemma*". He also agreed that some time (he put it at 10 minutes) would be needed to reach the full pumping rate of 8,000 bbls/hr.

56. I found the evidence of both experts very helpful. There was a good deal of common ground between them and, given the findings I make below, there is no need for me to deal in any detail with the differences between them.

Discussion

57. The owner submitted that this case is fundamentally about the charterer's refusal to accept safety decisions made by the Master (alone on 31 March and in conjunction with the owner's agent on 1 April) when each decision was made to avoid a breach of the vessel's UKC policy.

58. The terms of the charter underline both the importance of operating the vessel safely and the importance attached to decisions made by the Master. Clause 3(1) sets the tone of the charter by requiring that the vessel, once loaded, proceed with "*utmost despatch*" to the nominated port of discharge and there "*always safely afloat*" discharge the cargo. The requirement to

proceed with "*utmost despatch*" is not therefore absolute but is tempered by the requirement to remain safely afloat. Clause 3(2) sets out an obligation for the owner to comply with the charterer's voyage instructions. Again the obligation is not absolute. An instruction not considered safe by the Master can be disregarded. Clause 4 imposes an obligation on the charterer to exercise "*due diligence*" so that the vessel is only ordered to ports and berths that are "*safe for the vessel*". Clause 9 sets out some of the consequences of the vessel being berthed in dangerous conditions. It is implicit that the vessel will need to shift from the berth and the clause makes it plain that the costs will be met by the charterer. Clause 14 makes it plain that time lost as a result of the owner's breach will not be charged to the charterer.

59. Irrespective of the terms of the charter, it is clear from the authorities (see *The* Fontevivo [1975] 1 Lloyd's Rep. 339) that a charterer needs to establish some "*fault*" on the part of the owner or those the owner is responsible for if time is to be suspended for demurrage purposes. The parties agree that fault is given a wide definition and does not require an actionable breach of contract to be established.

60. Where the owner (or those the owner is responsible for) acts in a way authorised by the charter it is difficult to see that the owner will be at fault. Actions set out in the charter are clearly in the contemplation of the parties and the charterer signs up to the voyage on the clear understanding of the operating rules which will govern decisions made by the Master. For example, if (as here) the charterers direct the vessel to discharge at Paulsboro where at least one berth has a depth equal to the draft of the vessel the charters must be aware that, subject to tides and lightering, there is likely to be a consideration of the UKC policy at some point.

61. The loadline information set out in Q88 makes that point. It rehearses some of the parameters within which the vessel will be expected to operate. Details of the relevant draft coupled with the UKC policy would influence the choice of discharge port or berth within a chosen port and would alert the charterer to the risk that it may be necessary to seek a waiver of the UKC policy. As Captain Bowles put it, the UKC policy represented a fetter on the Master's freedom to decide where the vessel went. If the UKC was to be breached the Master needed to consult with the owner's agent.

62. In my judgment the charter's description of the Q88 information as "*integral*" is entirely apt. It is worthy of note that those familiar with the daily operation of the vessel (the Master and the owner's agents) and those familiar with shipping practice generally (the experts) refer to the need for a "*waiver*" of the UKC policy. This language strongly indicates that the UKC policy is considered to be binding and must not be breached without consent. The fact that there is a need for a careful risk assessment and a UKC calculation before a waiver can be considered underlines the importance of the UKC policy.

63. Its importance is also underlined by the terms of the charter (and so by the parties to it). Not only is the UKC policy "*integral*" to the charter, but it is governed by part 1 of the charter and so takes precedence over part 2 where the general terms are to be found.

64. The charter is silent as to the circumstances in which a waiver might be granted. That is not surprising. The terms of the charter are clear. Whether a waiver is granted is a matter for the owner. In practice, as we have seen in the present case, the decision will be taken by the Master and agents after consultation. There was no suggestion at the trial that that the obvious power to grant a grant a waiver was in any way limited. A capricious refusal no doubt might amount to "*fault*" and so prevent time running for demurrage purposes. There is no suggestion

here of such an approach.

65. I note that the request for a waiver from the Master on 1 April was subject to clear caveats that (a) the vessel was all fast at 2100 with no delays, (b) discharge could commence within 3 hours, and (c) there was no "*technical failure from terminal or ship*". These points were emphasised in the remarks section of the risk assessment where the Master has noted that there was: "*no allowance for delays, berthing, connections or technical failure ship or terminal*". It seems to me that the Master's request was realistic. In terms of risk analysis the Master's request seems to me to be predicated on the discharge being trouble free.

66. NMM's response again is in my view entirely appropriate. In essence it simply rephrases the points put by the Master, noting that there is "*very little margin for safety and ensuring adequate UKC*" if there were any delays and if delays were prolonged UKC would be "*severely compromised, with the risk of the vessel touching bottom*". NMM concluded that there were "*insufficient controls to [safely] mitigate the risks*" so that a waiver could not be issued.

Conclusions on the headline issues

31 March

67. Given the expert evidence I have come to the conclusion that the Master's decision to leave the berth on 31 March was an appropriate one which did not put the owner in breach of the charter. I am satisfied that on 31 March it was "*dangerous for the vessel to remain at the specified berth as a result of wind or water conditions*" so that time runs against the charterer.

1 April

68. In my judgment, NMM were fully entitled to conclude that it was not appropriate to grant a waiver to allow the vessel to berth at 2100 on 1 April. I find that the charterer's request to berth at 2100 is one that the owner was entitled to reject on safety grounds. I find that the UKC policy was a clear and important term of the charter.

69. The decision was a function of an analysis of risk. In risk analysis it is obvious that context is important. The evidence of Mr Watt was that he discussed matters with the Master. In my judgment a key factor for Mr Watt was the fact that the port had earlier in the day and without warning limited the discharge rate to 5,000 bbls/hr when the expectation was that discharge would be at the rate of around 15,799 bbls/hr. He could not understand what had changed to mean that the discharge rate could now be 10,000 bbls/hr.

70. I am satisfied that on 1 April there was no fault on the part of the owners, the Master or NMM. The owners complied with the terms of the charter in acting as they did. I am satisfied that there was no breach of clause 25(1) as a result of the owner's actions (or the actions of others). The owner could not be satisfied, for the reason given by Mr Watt, that the vessel could berth and discharge her load always "*safely afloat*". The safety margins were too slim and the risks too great. In my judgment the decision was made entirely in accordance with clause 3(1).

71. Further, although I need make no finding on this, the charterer would almost certainly have been in breach of clause 4 on 1 April if it had ordered the vessel to berth. The due diligence exercise was carried out by the Master and the owner's agents and reached the clear and permissible conclusion that berthing would be unsafe.

72. With the benefit of hindsight we know that waiting an extra hour (4 hours in total) before discharge began or a slightly lower rate of discharge would result in several hours of UKC policy breach even if the discharge rate continued without a hitch. It is not appropriate to judge the actions of the agents and the Master by the standards of hindsight. In my judgment the data now available provides further justification for the decisions reached by the agent and the Master.

NoR

73. In my view there are 2 ways to analyse the issue of free pratique. First, there is the formal question of whether it was customary to grant free pratique and secondly, there is the question of the mechanism of grant. The clear evidence (agreed to a very large extent) is that the port authorities acted as if free pratique had been granted. In particular the coastguard boarded the vessel as did the port pilot and others. It is in my judgment inconceivable that Paulsboro would have overlooked the importance of free pratique. Yet there is no evidence of an actual grant of free pratique. Indeed, the Master lodged a letter of protest because there was no express grant and there is no record on the statement of facts of any grant. In my judgment the answer to the free pratique issue lies in the second question. The evidence supports the view that there was no formal mechanism for the grant of free pratique. In my view, on the balance of probabilities, it was customary to grant free pratique at the port and it was granted. It seems to me that the port operated a free pratique by default system. Had there been an issue (if for example there was disease on board) the decision not to grant free pratique would have been communicated.

74. If I am wrong about that then I would conclude the free pratique was not customary. However the point is considered, it is clear in my judgment there was no issue with the relevant notice of readiness.

The counterclaim

75. The counterclaim must in my judgment fail.

76. The charter deals specifically with lightering costs at clause 25. The bargain struck by the parties is that the cost of lightering is to be met by the charterer if the vessel required lightering because of an inability to safely discharge at berth. That is the position here.

77. Clause 7 applies to general discharge. It has no application to lightering in the circumstances of the present case.

Rate

78. The final question is one of quantum. Is demurrage properly charged at the full rate or at half rate? The charter provides for half rate to be charged in certain limited circumstances namely where (a) the charter makes no specific provision and (b) the reasons for lightering are

beyond the control of either party. Neither of those preconditions applies.

Concluding remarks and conclusion

79. In effect (and with the exception of the NoR point) I have decided this case on the basis that the owner was entitled to rely on the UKC policy and was entitled not to permit its breach. I have concluded that the refusal to grant a waiver was entirely reasonable. Clause 3(2) provides in my view a complete answer to the charterer's complaints. The Master, having conferred with NMM, concluded that it would not be safe to proceed to berth at 2100 on 1 April. In those circumstances the owner was entitled to disregard the charterer's instructions.

80. The charterer raised the issue of implied terms. I was not taken to the relevant authorities on the point and I do not consider that any implied terms could assist the charterer. The express terms of the charter are clear and cover the present situation.

81. There was also discussion about the need for a waiver during transit to the berth on 1 April. This was not a matter that seemed to have concerned the parties at the time and it is likely that (as had happened on 31 March) if a waiver had been granted it would have covered both transit and berthing. Whether the transit was safe is not a matter I need deal with.

82. The evidence dealt with the minimum UKC that might be granted and put it as 1.5% of beam. I have not found it necessary to deal with that issue in any detail. The range of waivers that might have been granted is in my view not material to the outcome of the claim.

83. I am grateful to both counsel for their assistance and concise submissions in dealing with the claim.

84. The outcome is that there will be judgment for the claimant in the sum claimed and that the counterclaim is dismissed.