QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

June 18, 1999

MELVIN INTERNATIONAL S.A.
v.
POSEIDON SCHIFFAHRT G.m.b.H.

(THE "KALMA")

Before Mr. Justice CRESSWELL

Charter-party (Time) — Guarantee — Construction — Variation — Defendant guaranteed liabilities of charterers — Addendum extended period of charter — Whether addendum varied terms of charter for purposes of guarantee — Whether defendant's obligation under guarantee covered performance of charterers' obligations under addendum.

By a charter-party on the New York Produce Exchange form as amended, dated June 1, 1994 the claimant agreed to let its vessel *Kalma* to Concept Bulk Carriers (Concept) (the charterers):

> For one time charter trip via safe port(s) safe berth(s) Black Sea to the Far East always afloat within Institute Warranty limits. . . . Charterers guarantee minimum duration 57.5 days within below mentioned trading limits . . .

Clause 13 which provided that charterers were to have the option of continuing the charter for a further period was deleted. The hire rate was to be U.S.$13,250 daily and the cargo was to be steel or steel products only.

By letter of guarantee dated June 1, 1994 the defendant agreed to —

> . . . unconditionally guarantee to you the due performance by Concept . . . of their obligations under the charterparty and without qualification guarantee to you the due and punctual payment by Concept . . . of all and every sum of money . . . becoming due and payable by Concept . . . to the owners in accordance with the provisions of the charterparty . . .
>
> It is further agreed that our obligations under this letter of guarantee are not altered . . . by reason of any extension for payment being given by you to Concept . . . or by any variation in the terms of the charter . . .
>
> This guarantee is to be a continuing guarantee until all the obligations of Concept . . . have been fully performed . . .

The vessel was delivered to Concept on June 8 and performed the voyage from Nemrut Bay via the Black Sea to Keelung, Taiwan.

By addendum 1 dated July 18, 1994 it was agreed between the owners and the charterers that after drydocking there should be a worldwide time charter with the charterers. The addendum provided that delivery was to be in direct continuation of present charter-party, the period was to be about six/about eight months and the hire rate was to be U.S.$8250 daily. The charterers were to pay the owners on delivery into direct continuation U.S.$50,000 in full and final settlement of the hire differential arising from the fact that the present voyage would be completed in less than 57.5 days agreed in the original charter-party.

The vessel completed discharge on July 26, 1994 and entered drydock at Keelung, Taiwan on the same date. She completed repairs and was redelivered to the charterers on Aug. 11, 1994.

By addendum 2 dated Feb. 14, 1995 it was agreed that the charterers had the option to perform another voyage and that if the vessel was not redelivered by May 5, 1995 hire would be adjusted to U.S.$10,500 daily.

On Mar. 3, 1995 the vessel sustained bottom damage while loading a cargo of steel at Providence, Rhode Island, U.S.A.

The vessel was finally redelivered to the claimant on June 30, 1995.

Various disputes arose between owners and charterers following the grounding at Providence and were referred to arbitration. The arbitrators found that the vessel had been ordered to load at an unsafe berth and made awards in favour of the owners.

The charterers defaulted in payment of the awards.

The claimants applied by summons under R.S.C., O. 14A/O. 14 for the determination of the issue whether on a proper construction of the relevant documents, the guarantee given by the defendant to the claimant in respect of the liabilities of Concept Bulk Carriers under a charter-party dated June 1, 1994 extended to cover the liabilities of Concept under addendums 1 and 2.

The claimant submitted that addendum 1 constituted a variation of the charter-party and the guarantee covered Concept's obligations under the charter during both the original period and the extended period.

The defendant argued that addendum 1 was not a variation of the charter but gave rise to a separate contract for the hire of the vessel for a period of six to eight months; alternatively, even if addendum 1 was a variation of the charter it was not a "variation in the terms of the charter" within the scope of the relevant clause of the guarantee.

————*Held*, by Q.B. (Com. Ct.) (CRESSWELL, J.), that (1) it had become a frequent practice to time charter for a period measured by the duration of a certain voyage instead of a stated number of months or days; the voyage was then not merely the measure of the charter but became the subject matter of the contract so that the charterers must send the ship on that particular voyage (*see* p. 379, col. 1);

(2) addenda 1 and 2 were not variations within the purview of the guarantee; they were beyond the purview (or commercial range or scope) of the guarantee; the purview of the guarantee was a time charter trip Black Sea to Far East, minimum duration 57.5 days; the purview did not extend to an about six/about eight months time charter (addendum 1); nor the option to perform another voyage (addendum 2); in context addenda 1 and 2 were not variations "in terms of the (time) charter (trip)"; they were so fundamental that they could not properly be described as a variation at all; the claimant could have sought from the defendant

a variation of the guarantee or a new guarantee but it did not do so; the issues would be answered accordingly; addendum 1 was not a variation in the terms of the charter for the purposes of the guarantee and the defendant's obligations under the guarantee did not cover the performance of the charterers' obligations under addendum 1 (*see* p. 379, col. 2).

The following cases were referred to in the judgment:

Investors Compensation Scheme v. West Bromwich Building Society, (H.L.) [1998] 1 W.L.R. 896;

Nefeli, The [1986] 1 Lloyd's Rep. 339;

Samuels Finance Group Plc v. Beechmanor Ltd., 67 P. & C.R. 282;

Temple Steamship Co. v. V/O Sovfracht, (1945) 79 Ll.L.Rep. 1;

Trade Indemnity Co. Ltd. v. Workington Harbour and Dock Board, (H.L.) [1937] A.C. 1.

The claimant shipowners Melvin International S.A. applied by summons under O. 14A/O. 14 for the determination of the issue whether the defendant Poseidon Schiffahrt G.m.b.H, were liable under addenda 1 and 2 for the liabilities of the charterers Concept Bulk Carriers the defendant having guaranteed performance of the charterers' liabilities under the charter-party dated June 1, 1994.

Mr. M. McLaren (instructed by Messrs. Waterson Hicks) for the claimant; Mr. Jonathan Hirst, Q.C. (instructed by Messrs. Richards Butler) for the defendant.

The further facts are stated in the judgment of Mr. Justice Cresswell.

Judgment was released for publication.

June 18, 1999

JUDGMENT

Mr Justice CRESSWELL: The claimant shipowners apply by summons under O. 14A/O. 14 for the determination of certain issues in this action and for judgment. The central dispute is whether, on a proper construction of the relevant documents, the guarantee given by the defendant to the claimant in respect of the liabilities of Concept Bulk Carriers ("Concept") under a charter-party dated June 1, 1994 extends to cover the liabilities of Concept under addendum No. 1 thereto dated July 18, 1994 and addendum No. 2 dated Feb. 14, 1995.

At par. 5 of the points of claim the claimant pleaded its construction of the documents, namely that addendum No. 1 constituted a variation of the charter-party and, as a result, the guarantee covered Concept's obligations under the charter-party during both the original period and the extended period.

The defendant's contrary construction is pleaded at par. 5 of the points of defence as follows. Addendum No. 1 was not a variation of the charter-party, but gave rise to a separate contract for the hire of the vessel for a period of a further six to eight months; alternatively, even if addendum No. 1 was a variation of the charter-party, it was not a "variation in the terms of the charter" within the scope of the relevant clause of the guarantee.

I refer to the summons, which is in these terms. The claimant applies for a determination pursuant to O. 14A of the issues: (1) whether addendum No. 1 dated July 18, 1994 to the charter-party dated June 1, 1994 pleaded at par. 1 of the points of claim constituted a variation in the terms of the charter-party for the purposes of the guarantee given by the defendant dated June 1, 1994; (2) whether the defendant's obligations under the guarantee cover the performance of the charterers' obligations under addendum No. 1. Further, the claimant seeks judgment pursuant to O. 14A, alternatively O. 14 on the claim.

The factual background

By a charter-party on the NYPE form, as amended, dated June 1, 1994, the claimant agreed to let its vessel, *Kalma*, to Concept ("the charterers"):

> For one time charter trip via safe port(s) safe berth(s) Black Sea to the Far East always afloat, always within Institute Warranty Limits. Charterers guarantee minimum duration 57.5 days within below mentioned trading limits . . . Vessel to be placed at the disposal of the charterers on dropping last outward sea pilot Nemrut Bay.

The standard cl. 13 in the charter which provided that "the charterers shall have the option of continuing this charter for a further period of . . . " was deleted.

The hire rate was U.S.$13,250 daily and the cargo was to be steel or steel products only. The 73 clauses of the charter-party contained numerous detailed provisions.

By letter of guarantee dated June 1, 1994 the defendant agreed as follows:

In consideration of you entering into the charterparty dated 1st June 1994 with Messrs. Concept Bulk Carriers of Hamilton, Bermuda, pursuant to which you have chartered the M V. KALMA for a time charter trip from Nemrut Bay, via the Black Sea to the Far East and for the sum of $... USA receipt of which is hereby acknowledged — we hereby unconditionally guarantee to you the due performance by Concept... of their obligations under the charterparty and without qualification guarantee to you the due and punctual payment of Concept... of all and every sum of money from time to time becoming due and payable by Concept... to the owners in accordance with the provisions of the charterparty and accordingly, whenever Concept... is in default in the payment of any such sums, we will on demand pay in United States dollars the monies in respect of which such default has been made together with all losses, damages and costs and expenses thereby arising or incurred by you.

It is further agreed that our obligations under this letter of guarantee are not altered, nor are we exempted from any liability hereunder by reason of any extension for payment being given by you to Concept... or by anything done, or omitted or neglected to be done by you or by any variation in the terms of the charter or by any course of dealing between you and Concept...

This guarantee is to be a continuing guarantee until all the obligations of Concept... have been fully performed and this guarantee is in addition to and not by way of substitution or limitation on any other rights which you may have under the charter, by law or otherwise or on any other security held by you. Any default under this letter of guarantee shall likewise be deemed to be a material default under the charterparty.

This letter of guarantee shall be governed by and construed in accordance with English law and any disputes arising between the parties shall be referred to the exclusive jurisdiction of the English High Court of Justice.

The vessel was delivered to Concept on June 8 and performed the voyage from Nemrut Bay, via the Black Sea, to Keelung, Taiwan.

By July 18, 1994 it was clear that the time charter trip would be completed in rather less than the guaranteed 57.5 days.

By addendum No. 1 dated July 18, 1994 it was agreed between owners and charterers that after dry-docking there should be a worldwide time charter with the charterers. The addendum provided:

— delivery in direct continuation present charter-party

— vessel to be drydocked at Ulsan after completion discharge present voyage

— clause 48 add at end "deviation for the drydocking at the end of the present voyage is also covered by this clause"

— about six/about eight months time charter

— hire US$8,250 daily including overtime

— charterers to pay owners on delivery into direct continuation US$50,000 in full and final settlement of the hire differential arising from the fact that the present voyage be completed in less than the minimum 57.5 days agreed in the original charterparty

— commission payable on hire and bonus.

As part of addendum No. 1 the vessel was to carry any cargo except those excluded by the new exclusion clause and different geographical exclusions were agreed.

The vessel completed discharge on July 26, 1994 and entered drydock at Keelung, Taiwan on the same date. She completed repairs and was redelivered to the charterers on Aug. 11, 1994.

By addendum No. 2 to the charter-party dated Feb. 14, 1995, it was agreed that the charterers had the option to perform another voyage and that if the vessel was not redelivered by May 5, 1995, hire would be adjusted to U.S.$10,500 daily.

On Mar. 3, 1995, the vessel sustained bottom damage while loading a cargo of steel at Providence, Rhode Island, U.S.A.

The vessel was finally redelivered to the claimant on June 30, 1995.

Various disputes arose between owners and charterers following the grounding at Providence. They were referred to arbitration. The arbitrators found, among other matters, that the vessel had been ordered to load at an unsafe berth and made awards in favour of the owners.

The charterers have defaulted in payment of the awards. All the outstanding items post date the completion of the original time charter trip, save for stevedore damage of U.S.$9,727.77 plus interest from Oct. 1, 1995.

I interpose to record that it is agreed between the parties that the issue as to whether the claimant is or is not entitled to recover in respect of the stevedore damage of $9,727.77 plus interest, is to be dealt with at a separate hearing, if it cannot be agreed in the meantime.

The claimant's submissions

Mr. McLaren for the claimant has presented clear and comprehensive submissions both in writing and

orally. I am grateful to him for his assistance. He submitted as follows.

A separate contract or a rescission would fall outside the terms of the guarantee but here the Court is concerned with a variation. While a "variation" would not encompass the case of an alteration of the charter-party so substantial as to raise an inference that the claimant and Concept agreed to substitute a new contract, that is not this case. Whether there was a variation of the charter-party depends on the intention of the parties thereto, to be gathered from an examination of the terms of the subsequent agreement and from all the surrounding circumstances. The question for the Court is whether the common intention of the claimant and Concept was to "abrogate, rescind, supersede or extinguish the old contract by a substitution of a completely new or self-subsisting agreement" (see Chitty on Contracts (27th ed.) par. 22–025).

On the wording of addendum No. 1 the only plausible interpretation is that it amounted to a variation of the charter-party. The factual background to the conclusion of addendum No. 1 shows that the parties to the charter-party intended to effect a variation of the charter-party.

It is clear from the face of addendum number 1, on a natural reading of it, that it was intended to take effect as a variation extending the existing charter-party, not a separate charter. (Mr. McLaren made detailed submissions by reference to the particular provisions of addendum No. 1.)

As to addendum No. 2, many of the characteristics apparent on the face of addendum No. 1 are also shared by addendum No. 2. It cannot sensibly be suggested that addendum No. 2 is also a separate charter-party. Any conclusion that addendum No. 1 is a separate charter-party would be inconsistent (at least in those respects) with the conclusion that the similar addendum No. 2 was a mere variation. The ordinary meaning of the words does not allow for the interpretation of addendum No. 1 in the manner contended for by the defendant. The terms of addendum No. 1 are wholly inconsistent with it being a separate charter.

If, contrary to primary submissions set out above, addendum No. 1 constituted a variation of the charter-party then that variation is, on any view, caught by the terms of the guarantee. The wording of the guarantee is very wide. The defendant's obligations are not affected by "any variation in the terms of the charter" (underlining added). The variation affects only a very limited number of terms of the charter-party and does not change the nature of the basic liability being undertaken by Concept. This is not a situation where the variations to the principal contract alter it so substantially as to raise an inference that the principal and the creditor have agreed to rescind the main contract and to substitute a new contract. All variations are caught by the very wide wording of the guarantee. The defendant cannot characterize the extension of the charter-party as a fundamental variation of the charter-party not contemplated by the variation clause.

Mr. McLaren further submitted that if addendum No. 1 had been in exactly the same terms, save that instead of the words "about six/about eight months time charter" there had appeared the words "about six/about eight years time charter", this would nonetheless have constituted a variation within the terms of the guarantee and the claimant would have been entitled to recover thereunder.

Mr. McLaren also submitted that if addendum No. 1 had provided for 10 time charter trips to and fro between the Black Sea and the Far East this would have nonetheless constituted a variation within the terms of the guarantee and the claimant would again have been entitled to recover thereunder.

The defendant's submissions

Mr. Hirst, Q.C. for the defendant in his helpful skeleton argument submitted as follows.

Upon the true construction of the guarantee, it was of the charterers' performance of a time charter trip from Nemrut Bay, via the Black Sea to the Far East. The fallacy of the claimant's case is revealed by the failure in par. 3 of the points of claim to quote the terms of the guarantee fully. They have omitted the introduction:

> *In consideration of you entering into the charterparty dated 1st June 1994 with Concept pursuant to which you have chartered the M. V. KALMA for a time charter trip from Nemrut Bay, via the Black Sea to the Far East.* (Emphasis supplied.)

These introductory words colour the rest of the guarantee. This was the paramount feature of the whole contract: (compare *Temple Steamship Co. v. V/O Sovfracht*, (1945) 79 Ll.L.Rep. 1, per Lord Porter at p. 10). The provisions allowing for variation of the charter allow for variations of the contract for a time charter trip from Nemrut Bay to the Far East, not for some further charter of the vessel. That leaves the variation provision with ample scope in which to operate. In the nature of things it was quite possible that variations would be needed to the terms of the time charter trip.

The claimant's case involves the proposition that Poseidon, by agreeing to be bound by any variation in the terms of the charter-party, effectively gave the claimant and the charterers a blank cheque. As it is, on their case, a time charter trip of 57.5 days guaranteed minimum duration was transformed into

a 13 month worldwide time charter but, if they are right, there is no limit in time to the duration of the time charter that might have been agreed. The claimant's construction leads to unreasonable and unbusinesslike results. That tells against their construction.

The provision allowing variation permits major variation, but there are limits (see Lord Atkin in *Trade Indemnity Co. Ltd. v. Workington Harbour and Dock Board*, [1937] A.C. 1 at p. 21).

Applying the ordinary canons of construction, the contract guaranteed was the time charter trip. The further agreements, whether made by means of a separate contract, or by the way of the rather artificial device of addenda to the original time trip charter, are outwith the contract guaranteed by Poseidon.

ANALYSIS AND CONCLUSIONS

The relevant legal principles

The relevant legal principles are as follows.

1. The principles by which contractual documents are construed are summarized by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 W.L.R. 896 at p. 912H et seq.

2. Contracts of guarantee are to be construed according to the principles referred to above, but in cases of any doubt or uncertainty in favour of the guarantor.

3. Any variation in the terms of the underlying contract between the creditor and the debtor which could prejudice the guarantor will discharge him from liability, unless he consents thereto or the contract of guarantee provides to the contrary.

4. To give a meaning to the word "variation" in such a provision, the Court will look at the context in which it occurred.

5. Where a guarantee contains a clause to the effect that it is not to be affected by "any variation" in the underlying contract: (a) "any variation" does not mean "any minor variation" and will be widely construed (*Samuels Finance Group plc v. Beechmanor Ltd*, 67 P. & C.R. 282 at p. 285, Lord Justice Lloyd); but (b) "variation" does not extend to a novation and changes falling short of a novation may be so fundamental that they could not properly be described as a variation at all (*Samuels* sup. at p. 285).

6. Assent, whether previous or subsequent to a variation to the underlying contract, only renders the surety liable for the contract as varied, where it remains a contract within the general purview (or commercial scope or range) of the original guarantee. In *Trade Indemnity Co. Ltd. v. Workington Harbour & Dock Board* sup. at p. 21 Lord Atkin said:

> The words "any arrangement . . . for any alteration in or to the said works or the contract" are very wide. Probably they would have to be cut down so as not to include such changes as have been suggested as substituting a cathedral for a dock, or the construction of a dock elsewhere, or possibly such an enlargement of the works as would double the financial liability. An author of great authority . . . suggests that such words only relate to alterations "within the general purview of the original guarantee".

See further Mr. Justice Bingham (as he then was) in *The Nefeli*, [1986] 1 Lloyd's Rep. 339 at p. 345 where he said:

> The second argument is, therefore, important. Even if it be assumed against the defendants that Mr. Napolitano, on their behalf, made the original guarantee agreement alleged and that the agreement to extend the charter was made by ATI with the knowledge and assent of Mr. Tarricone [of the defendants] on their behalf, does the extended charter agreement and does any default under it fall within the purview of the original guarantee? The defendants relied on passages in Rowlatt on The Law of Principal and Surety, 4th ed., in particular:
>
> > A guarantee will only extend to a liability precisely answering the description contained in the guarantee (p. 77) [and] A surety is not discharged by a variation to which he assents afterwards, even though there may be no fresh consideration for the assent. However, it is apprehended that assent, whether previous or subsequent to a variation, only renders the surety liable for the contract as varied, where it remains a contract within the general purview of the original guarantee . . . (p. 91).
>
> The authority cited for this last proposition in the test is *Trade Indemnity Co. v. Workington Harbour & Dock Board*, where at p. 21 Lord Atkin quoted with approval the closing words of this passage.
>
> The terms of the Evdori guarantee, to be treated mutatis mutandis as applied to the Nefeli charter for the purposes of this argument were:
>
> > In consideration of the owners of the MT EVDORI entering into a charter party dated February 8th 1979 in New York with Nominee ATI International Limited, we hereby guarantee due performance in every respect by ATI International Limited of the terms and conditions of the charter party.
> >
> > We undertake to pay and make good all amounts due to the owner of the MT EVDORI

under the charter party immediately upon the same becoming due.

We agree that our liability under this agreement shall be a primary liability and shall in no way be conditional upon the owners the MT EVDORI first proceeding against ATI International Limited.

Had the *Nefeli* charter been for 12 months with an option for the charterers to renew for a further 12 months, a mere exercise of that option might very well not, in my judgment, have taken the extended charter outside the general purview of the original guarantee. But that was not the position. This was a 12 month charter with no option. When the extension was agreed the charter had run for six months only. The effect of the charter was greatly to increase the potential liability of the guarantor, the more so since the charter would last long after the end of the existing sub-charter. The original guarantee did not apply to this, and it makes no difference that the extension was agreed by means of an addendum rather than a separate contract to take effect at a future date.

Application of these principles

I turn to apply these principles to the present case. It has become a frequent practice to time charter for a period measured by the duration of a certain voyage instead of a stated number of months or days. The voyage is then not merely the measure of the duration of the charter, but becomes the subject matter of the contract, so that the charterers must send the ship on that particular voyage (see Time Charters (4th ed.) Wilford and Others, 1995).

In the present case the option "of continuing" in cl. 13 of the charter-party was deleted. The guarantee started with the words:

> In consideration of you entering into the charterparty dated 1st June 1994 with Concept . . . pursuant to which you have chartered the M.V. KALMA for a time charter trip from Nemrut Bay, via the Black Sea to the Far East . . . we hereby unconditionally guarantee to you . . .

I consider that a reasonable person, having the commercial background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract of guarantee would have said that:

1. The commercial adventure contemplated by the guarantee was a time charter trip by *Kalma* from the Black Sea to the Far East, on the terms of the charter-party dated June 1, 1994.

2. There was room for wide variations within the contract for the time charter trip.

3. There was a recognizable distinction between wide variations of the contract for the time charter trip and a new, separate or further adventure.

4. Addendum No. 1 and addendum No. 2 provided for a new, separate and further adventure.

It has to be noted that addendum No. 1 refers to "the end of the present voyage" which I read as meaning "the end of the present time charter trip".

In my judgment, addendum No. 1 and addendum No. 2 were not variations within the purview of the guarantee. They were beyond the purview (or commercial range or scope) of the guarantee. The purview of the guarantee was a time charter trip Black Sea to Far East, minimum duration 57.5 days. The purview did not extend to an about six/about eight months time charter (addendum No. 1); nor the option to perform another voyage (addendum No. 2). In context, addenda 1 and 2 were not variations "in the terms of the (time) charter (trip)", They were so fundamental that they could not properly be described as a variation at all. It makes no difference that the word "addendum" was used. The claimant could have sought from the defendant a variation to the guarantee or a new guarantee, but it did not do so.

Accordingly, for the reasons set out above, I answer question one, no; and question two, no. I order accordingly.

This judgment is released for publication.