Charterparty interpretation: giving effect to the words actually used?

A recent new shipping case in the London High Court has shed some useful light on the continuing debate about how to interpret contractual wording in the event of a dispute.

Key facts
The claimant Owners let their vessel "ZALIV BAIKAL" to the defendant Charterers under a voyage charterparty based on the well used BPVOY4 form.

In addition to its standard laytime and demurrage provisions, the charterparty incorporated a specifically agreed regime to apply in circumstances where Charterers issued an instruction to the vessel to stop and wait for further orders. If such an instruction was given, the regime provided that waiting time was to count as laytime but, critically, that demurrage was to be payable at enhanced and escalating rates (what the Court referred to as the "Enhanced Demurrage Regime"). NOR was tendered following the vessel's arrival at the discharge port of Rotterdam. However, Charterers gave no discharge orders for more than 64 days. But they had also not issued an instruction to stop and wait under the express clause.

Owners claimed that Charterers were liable to pay demurrage based on the Enhanced Demurrage Regime during this lengthy waiting period. They relied on the leading case of *Rainy Sky v Kookmin Bank* in which the Supreme Court held that where the Court is required to consider two rival constructions of a contract, it should adopt the one which is more consistent with business common sense. Owners said that the clear commercial purpose of the Enhanced Demurrage Regime was to make Charterers pay at the increased rates where they used the vessel as floating storage after tendering NOR. They said it did not matter that no actual instruction to stop and wait was issued under the express clause because commercial sense meant the parties must have intended the Enhanced Demurrage Regime to apply in these circumstances.

Decision
Sir Jeremy Cooke disagreed with Owners. He held that as a matter of construction of the relevant clauses, the Enhanced Demurrage Regime only operated where there was an actual instruction by Charterers to stop and wait for further orders. A failure to give any orders whatsoever plainly could not trigger the Enhanced Demurrage Regime and the ordinary, lower demurrage rate therefore applied.

Owners' secondary argument that they were entitled to the Enhanced Demurrage Regime pursuant to an implied term was also rejected. The charterparty did not lack commercial or practical coherence since it provided a reasonably comprehensive framework for different types of events which might arise during the voyage. As such it was unnecessary to imply the term that Owners sought to rely upon.

Comment
This case (Gard Shipping AS v Clearlake Shipping Pte Ltd 2017) demonstrates that in construing charterparty clauses which are specifically negotiated, and in particular where they are part of a coherent framework, judges are more likely to give weight to the actual words in the contract and less likely to adopt the *Rainy Sky*approach of testing rival interpretations alongside the parties' competing perceptions of business common sense. This may come as a relief to commercial parties who appreciate and value the certainty of knowing that any special regimes or provisions

which they take the time and trouble to negotiate will be respected by the Courts and upheld on their wording, subject of course to those clauses being clearly drafted and capable of interpretation on their face. It may also suggest that *Rainy Sky* is, slowly, becoming less influential than once thought.

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