Neutral Citation Number: [2007] EWCA Civ 547

Case No: A3/2006/1831 & A3/2006/1831 (A)

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM the Queen's Bench Division, Commercial Court
The Honourable Mr Justice Gross
[2006] EWHC 1713 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/06/2007

Before :

LORD JUSTICE RIX
LORD JUSTICE WALL
and
LORD JUSTICE HOOPER

- -

Between :

(1) Edwinton Commercial Corporation **(2) Global Tradeways Limited**	**Claimants/ Respondents**
- and -	
Tsavliris Russ (Worldwide Salvage & Towage) Ltd ***(The "Sea Angel")***	**Defendents/ Appellants**

- -

(Transcript of the Handed Down Judgment of
WordWave International Ltd
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7421 4040 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Mr Nicholas Hamblen QC & Mr Timothy Hill (instructed by Messrs Eversheds LLP) for the Appellants
Ms Elizabeth Blackburn QC & Mr Mark Jones (instructed by **Messrs Duval Vassiliades**) for the Respondents

Hearing dates : 6, 7 & 8 March 2007

- -

Judgment

Lord Justice Rix :

1. Frustration of a charterparty is the subject matter of this litigation. In particular, the issue is whether a delay of some three or so months towards the end of a short (20 day) time charter, caused by reason of the unlawful detention of the vessel by port authorities, in a salvage context, has frustrated that charter.

2. Ultimately, the detention of the vessel was ended as a result of successful legal proceedings against the port authority, coupled with the threat of contempt of court proceedings and a commercial deal.

3. The judge, Mr Justice Gross, after a seven day trial found that the charter had not been frustrated. The charterers appeal on the ground, in essence, that there was no good reason why the judge should not have recognised the frustrating effect of an indefinite delay which, by a critical stage in the negotiations for the vessel's release, promised to last some three months as a minimum. When a comparison was made between the contractually agreed length of the charter, which was 20 days, and the actual and prospective delay, which amounted to many times that period, principle and authority mandated a conclusion that the charter had been frustrated. The judge himself accepted that there was a realistic argument to that effect, a fortiori because at the time when the detention began the charter had been all but performed and what remained was merely a short redelivery voyage of a few days. His reasons for rejecting that argument, which centred on the risks inherent in the salvage context, the sphere of responsibility under the charter, and the availability of recourse to legal action, are said by the charterers to be flawed. The owners of the vessel, on the contrary, say that the judge's decision was correct, not only for the reasons which he gave, but for many other reasons besides.

The basic facts

4. I am indebted to the judge's full and careful findings of fact for the following material, very little if any of which is in dispute, even if the analysis which proceeds from them is.

5. The vessel concerned was the *Sea Angel*, a small vessel of 3,789 grt (the "vessel"), owned by Edwinton Commercial Corporation ("Edwinton") and in the disponent ownership of Edwinton's in some sense linked company Global Tradeways Limited ("Global"). Edwinton and Global were claimants at trial and in this court are the respondents.

6. Her charterers were Tsavliris Russ (Worldwide Salvage & Towage) Limited, who were defendants at trial and are here the appellants ("Tsavliris"). Tsavliris needed the *Sea Angel* to assist in the salvage operations concerning the *Tasman Spirit*, a tanker laden with 67,537 tonnes of light crude oil which on 27 July 2003 grounded in or near the approaches to the port of Karachi (also, the "casualty"). On 13 August the *Tasman Spirit* broke in two. The casualty amounted to a major pollution incident, and gave rise to great local sensitivity on the part of the local port authority, Karachi Port Trust ("KPT"), and other authorities within the Islamic Republic of Pakistan ("Pakistan").

7. Tsavliris are one of a small number of internationally known salvors. On 30 July 2003 Tsavliris entered into a Lloyd's Standard Form of salvage agreement with the owners of the *Tasman Spirit* on the LOF 2000 form ("LOF") to salve the casualty. To fulfil their obligations under the LOF, Tsavliris engaged a number of sub-contracted craft, among them the *Sea Angel* whose task was to act as a shuttle tanker, lightening the *Tasman Spirit* and carrying crude oil from her to a larger, storage tanker, the *Endeavour II*, which was a sister-ship in the same ownership as the casualty, but also sub-contracted by Tsavliris for the salvage operation. Tsavliris also hired two tugs, and the *Fair Jolly*, which had been used as a shuttle tanker before the arrival of the *Sea Angel*. I shall refer as necessary to the *Sea Angel* and the other sub-contracted vessels as the "Tsavliris vessels".

8. Tsavliris chartered in the *Sea Angel* on 25 August 2003 from Global, on the same day as Global chartered her from her owners, Edwinton. The Edwinton head-charter was at the rate of $5,000 a day, and the Global sub-charter was at the rate of $13,000 a day. In other respects the two charters (the "head-charter" and the "charter" respectively) were essentially back to back. They were for "up to 20 days" for transhipment of crude oil from the forward and aft sections of the broken casualty. The *Sea Angel* was delivered into service on 26 August 2003, and therefore her due redelivery date was 15 September 2003.

9. On 9 September, after discharge to *Endeavour II* of *Sea Angel's* final transhipment cargo, Tsavliris gave a three day definite notice of redelivery at Fujairah, the contractual redelivery port which was three days steaming away. In other words, Tsavliris expected that the vessel would leave Karachi that day. In the event, the vessel was unable to leave Karachi until 26 December and was not redelivered until 1 January 2004. In the intervening period the vessel had been unable to depart because KPT had refused to issue the necessary "No Demand Certificate" ("NDC"), a certificate that no outstanding port dues were required and a prerequisite to port clearance. In the event, therefore, the vessel was detained at Karachi for some 108 days, at a time when the anticipated outstanding period of the charter was 3 days, and the permitted outstanding period before redelivery was 6 days: so that in all the 20 day charter period was exceeded by about 108 days.

10. During the period of detention, the main events were as follows. On 9 September 2003, MM Marine Services (Pvt) Ltd ("MMM"), Tsavliris's Karachi general agents whose executive director was Rear Admiral (Retd) Khalid, applied for *Sea Angel's* NDC. There were a number of meetings in which Admiral Khalid sought to identify the port dues chargeable to *Sea Angel* and to the two tugs. On 17 September there was a demand by KPT, based however in the main on charges claimed as due against *Tasman Spirit*, in the sum of Rs 650 million, the rough equivalent of $11 million. This could only reflect some kind of payment, or guarantee for payment, of pollution and clean-up expenses or damages.

11. This led to a series of meetings and communications between not only KPT and Tsavliris but also the casualty representative of the owners of the *Tasman Spirit* (Mr Gregory) as well as representatives of their P&I Club, the American Club (the "Club"). Legal representatives were also involved, Messrs Clyde & Co (Mr Hall) on behalf of Tsavliris and Messrs Eversheds (Mr Moloney) on behalf of the Club. On 18 September, the Tsavliris salvage master and Mr Gregory agreed that the Tsavliris

share of KPT's Rs 650 million claim was only about Rs 21 million (some $354,000) and that only Rs 923,184.36 (or $15,916.97) related to the *Sea Angel* herself.

12. On the same day, the Pakistani Ministry of Foreign Affairs wrote to the Embassy of Greece in Pakistan suggesting that there might be difficulties in the repatriation of the Master and crew of the *Tasman Spirit* in the absence of undertakings including a Club guarantee "to meet all losses including consequential losses".

13. On 19 September MMM reported to Tsavliris that the "general impression here is that unless the total amount of Rs 650,000,000 is either paid, by you or guaranteed by some one, no movement is likely to take place": and that, therefore, no remittance in respect of port dues solely relating to Tsavliris vessels could be relied on as a final settlement.

14. Tsavliris paid no hire for the *Sea Angel* beyond 18 September. At trial, the primary case of frustration run by Tsavliris was that in the light of this last communication from MMM there had been a frustration of the charter by 19 September. However, that case was not accepted by the judge, and has not been resurrected on this appeal. I need say nothing further about the counter-submissions of the parties relating to that earlier date.

15. On 24 September Mr Hall of Clydes gave instructions to a Karachi law firm, Messrs Orr Dignam, to prepare, but not issue, an urgent application to the Karachi court seeking an order that Mr Pappas, the Tsavliris salvage master, be allowed to depart along with the Tsavliris vessels. Orr Dignam had been retained somewhat earlier in relation to other matters (viz the *Endeavour II* and the withdrawal of the passports of the salvage personnel). Consideration was also given to whether a claim in damages should be brought against KPT for the detention of Mr Pappas and the vessels. Orr Dignam's advice that day was to proceed in the first instance by issuing a legal notice as a precursor to the commencement of any proceedings.

16. Up to now, the strong preference was to find a commercial solution rather than take the route of litigation, on the basis that the former was the speedier, safer and more productive route. As the judge found on the basis of Mr Hall's evidence: his preference remained for a commercial solution but he was now exploring legal options in case of need. He did not think that the legal route would be quick and he still had no definite explanation as to why the Tsavliris vessels had not been released.

17. Meanwhile, Mr Moloney of Eversheds, on behalf of the casualty and the Club, was holding meetings with KPT and other interested Pakistani authorities on 26/27 September. Among matters discussed and reported on by him to his clients was the question of wreck removal, where Smit Salvage had been identified as a preferred contractor. The Pakistani authorities were very interested in securing the costs of future pollution claims, especially as Pakistan was not a signatory to the International Convention on Civil Liability for Oil Pollution Damage 1969 or its 1992 Protocol (the "CLC") with its regime of strict liability, liability insurance and limitation liability. Therefore, absent agreement, any prospect of satisfying claims for pollution damage rested on the security of those vessels or assets within the jurisdiction of Pakistan. Mr Mohoney's report to his clients concerning his discussions with KPT was that the position was still fluid and that the meetings had done some good.

18. On 30 September there was a meeting with KPT's general manager operations, Admiral Bashir. He apparently agreed, or was thought to agree, that the total KPT invoices to be allocated to Tsavliris amounted then to no more than Rs 28,012,668.46 (or $482,977.04). MMM asked Tsavliris to transfer to them the requisite extra funds, and this was done. This apparent agreement gave a glimmer of hope, although Mr Hall said that a "pivotal moment" came when Admiral Bashir refused to sign a memorandum reflecting this agreement.

19. On 2 October, among other events, Mr Paracha of Global spoke to Mr Hall and indicated that he had instructed his lawyers to commence proceedings against both KPT and Tsavliris. On the same day Mr Hall instructed leading counsel to advise on the question of frustration of the charter. Tsavliris declined to waive privilege in respect of that advice.

20. On 9 October, in a meeting attended inter alios by Mr Hall and Mr Moloney, the view expressed was that KPT would not allow the Tsavliris vessels to leave even when their port dues had all been paid, and that Tsavliris would have to bring proceedings.

21. On 11 October, KPT's lawyers, Usmani & Iqbal, wrote by fax to Eversheds seeking to remove any misunderstanding about any agreement having been reached between KPT and Tsavliris with respect to payment of dues such as would permit the Tsavliris vessels to depart without the balance of any disputed amounts being at least secured by the Club through a bank guarantee. Even so, the letter also went on to emphasise that the payment of dues, which were payable by the local agents of the vessels in question, were separate from the removal of the wreck which "was admittedly the responsibility of the Owners…"

22. On the same day, Global began proceedings which were ultimately, but after many twists and turns, to lead to the resolution of the dispute. Those proceedings were in the first instance brought against both Tsavliris and KPT. They were brought in the High Court of Sindh at Karachi.

23. On 13 October Eversheds passed on to Clyde & Co KPT's lawyers' in one sense uncompromising fax of 11 October. At trial it was Tsavliris's alternative case that the charter was frustrated from this date, on the ground that it was now clear that all attempts at a commercial solution had failed. On appeal, this became Tsavliris's primary case. However, the judge was to find that if there had been a frustration – he found that there was none – the unsuccessful conclusion of the original attempt at a commercial solution did not arrive for a few more days, not until 17 October.

24. What happened between 13 and 17 October was that first, on 13 October itself, even before Eversheds' fax of that date reached Clyde & Co in London that evening, there had been one last attempt by MMM on behalf of Tsavliris to see if the deposit of a further sum of Rs 25.5 million (in addition to the Rs 3,375,000 already deposited), would turn the key to the release of the *Sea Angel*. This amount more than covered the port dues up until 23 September in respect of *all* the Tsavliris vessels (ie not only *Sea Angel* and the two tugs but also the *Fair Jolly* and *Endeavour II*). It was an attempt to put into effect the agreement which it was thought had been arrived at on 30 September. Port clearance was requested for the *Sea Angel* and the two tugs and for Mr Pappas to depart Karachi immediately. Then, on 14, 15, and again on 17 October, MMM sent further chasers to KPT, requesting the necessary NDCs and release.

MMM's letter of 14 October corrected an inconsequential mathematical error made in the figures in the fax of 13 October, to ensure that KPT should have no reason at all for disputing the situation. MMM's letter of 15 October, while recognising that the amount deposited, based as it was on calculations down to 23 September, may already have become out of date, pointed out that the majority of the claim in respect of the Tsavliris vessels related to *Endeavour II*, for which clearance was not being requested at the moment (she was under arrest at the suit of cargo interests involved in the casualty). The funds plainly covered, and had always covered, the relatively small amounts due in respect of the *Sea Angel* herself. However, nothing came from KPT in answer. The vessels were not released.

25. The judge found that 17 October marked the day when Tsavliris had finally to accept that it was clear that the negotiated solution sought thus far had failed, and that it was clear that something more was necessary to obtain *Sea Angel's* release than Tsavliris merely ensuring that there were sufficient funds in the necessary account to cover the port dues of not only *Sea Angel* but of all the five Tsavliris vessels the amount of whose dues had been agreed as of 23 September.

26. However, if mere commercial diplomacy had not so far succeeded, it was considered that there was need now to proceed to court and thus to invoke the pressure of the law. By now Clyde & Co, Orr Dignam and MMM were busying themselves with a draft of a legal notice to be served on KPT. The final draft was available on 18 October. It was served on KPT on 22 October.

27. The judge accepted the following quote from the witness statement of Mr Hall as more or less accurately expressing the situation at this time:

> "Whilst during the first two weeks of October Tsavliris and I had been hoping that matters would be resolved without the need for legal action, particularly following the meeting on 30th September and the Memorandum obtained as a result, by 13th October there was now clearly no alternative to proceed in a more aggressive manner…"

28. The only qualification the judge made to that evidence was that the date for this conclusion was more properly to be delayed to 17 October.

29. On 21 October Clyde & Co wrote a letter to Global, alleging frustration of the charter on or before 13 October. The way that the matter was then put was as follows:

> "It is clear…that the KPT are not releasing the *Sea Angel* and the other vessels and will not release…[them]…until such time as the KPT have received compensation from the owners of the *Tasman Spirit* or their P&I Club for the initial grounding incident and subsequent pollution, even before our clients came on the scene.
>
> …the current detention of the *Sea Angel* and the other vessels is illegal and our clients have written to the KPT to this effect

> demanding release. If no response is forthcoming…our clients will have no alternative but to take appropriate action against the KPT for damages and for an order than the vessels be released.
>
> Indeed, you have already taken such action…
>
> The latest that the *Sea Angel* should have been released in our clients' view was once the port dues for the *Sea Angel* and the other vessels had been paid. As such, our clients regard the charter of the *Sea Angel* as frustrated from that moment…"

which on Tsavliris's present case is 13 October.

30. The next phase, therefore, of the attempt to obtain the release of the *Sea Angel* is in the Karachi court. I have already mentioned that Global began their proceedings on 11 October, and Tsavliris served their legal notice on 22 October. On 25 October, Global served an application in their action for release of the *Sea Angel*, alleging that KPT was detaining their vessel illegally. That application seems to have led, two days later, on 27 October to KPT commencing its own separate action, against a range of defendants which included not only Tsavliris and MMM but also the managers and owners of the *Tasman Spirit.* KPT's action claimed damages for Rs 102,599 million (sic) jointly and severally from all the defendants, on the ground of pollution caused inter alia by Tsavliris's negligence in the performance of their salvage duties.

31. Global's application for the release of the *Sea Angel* came before the court for the first time on 29 October, but was adjourned on a number of occasions. Ultimately, the application was substantively heard on 3 December, by Alam J. "With admirable expedition", as Gross J rightly remarked, Alam J delivered his reasoned judgment on 5 December. It was in favour of Global. He reasoned that each vessel, through her master or owners, was liable for port dues severally, and that liability for one such vessel or her owner could not be enforced against the shipping agents; and that, similarly, the amounts claimed against the casualty, the *Tasman Spirit*, did not relate to the Tsavliris vessels, still less to *Sea Angel* herself. Alam J therefore ordered the release of the vessel.

32. Despite this judgment, the vessel was not released. On 9 December KPT was granted a stay for 7 days on the order for *Sea Angel's* release, to enable KPT to appeal, but only on condition that, if such an appeal failed, then KPT should be liable for each day's detention to the vessel. That stay expired on 16 December, without any notice of appeal on the part of KPT.

33. In the meantime, the Club, through Mr Moloney, had been actively pursuing a negotiated settlement with KPT. The essential features of the proposed deal centred on the release of the Tsavliris vessels, the payment of a sum towards KPT's claims for pollution costs and damage, and the agreement to bring to Pakistan another salvage contractor to undertake the removal of the wreck. KPT accepted this deal on 16 December, the same day as the stay expired. The settled terms included the payment by the Club of port dues for the Tsavliris vessels (save for *Endeavour II*) from 16 October until departure, a contribution by the Club of $1.6 million towards KPT's

charges and expenses in relation to clean up cost, and the Club's undertaking to remove the wreck and to contract with Smit Salvage BV to do so.

34. Even following this settlement, the *Sea Angel* was still not released. There followed further haggling both as to the payment of port dues and as to undertakings from the Club and the owners of the Tsavliris vessels to release KPT from any liability for their detention. By 23 December still further sums had been paid into MMM's account with KPT on account of port dues, and the $1.6 million payment agreed by the Club had been made. On 24 December, Global therefore issued a motion to commit KPT's senior officers for contempt of court, to be heard on 26 December. The motion was never heard, for on that day, 26 December, the Tsavliris vessels including the *Sea Angel* were released.

35. Those are the basic facts of this period of detention. In essence, the detention of the *Sea Angel* began on 9 September and ended only on 26 December 2003. Throughout this period there was a mixture of both clarity and confusion concerning the position of port dues. On the one hand, it was possible for any given period and vessel to itemise with some precision the dues strictly chargeable against each vessel. On the other hand, there was uncertainty and room for negotiation as to whether KPT's position was that the financial status of any single vessel depended on the status of all, or at any rate all within Tsavliris control. In the meantime, as the days passed, further dues kept on being incurred. It is reasonably plain that KPT was always seeking to extract the maximum it could in respect of an indemnity or guarantee for the cost of or damages for pollution and other consequences of the casualty such as the removal of the wreck; but to a certain extent the question of dues was wrapped up with this claim. At any rate with hindsight it is possible to say that KPT's consistent plan was to permit the release of no single vessel until its demands for security for the consequences of the casualty had been met. It continued its game strategy right down to the wire, but it will be observed that until the very end demands for port dues and in respect of pollution remained combined on twin tracks.

36. The players in this drama had to decide how to write its script as it unfolded. The nature of the drama necessarily involved roles not only for Tsavliris and the owners and disponent owners of the *Sea Angel*, but also for the owners of *Tasman Spirit* and in particular their salvage insurers, the Club. English and Pakistani lawyers were at hand to render assistance. The paymaster was ultimately the Club. In the background were the international ramifications of the delayed repatriation of personnel.

37. A critical decision for the protagonists was whether to challenge KPT by legal proceedings, or to pursue a strictly negotiating and diplomatic stance outside the law. For these purposes the following dates, extracted from the above account, may be noted.

38. On 24 September Mr Hall, acting for Tsavliris, instructed Orr Dignam to prepare, but not to issue, an application to the court. Orr Dignam's advice was to start with a legal notice as a precursor to litigation. On 2 October, Global's Mr Paracha told Mr Hall that he had instructed his lawyers to commence proceedings against KPT and Tsavliris. On 11 October those proceedings by Global were issued. By 18 October Orr Dignam had prepared a final draft of the legal notice which could be served on KPT. On 22 October that legal notice was served. In effect, however, Global's proceedings, as the first in time, became the battle-ground. On 25 October Global's application for

the release of the *Sea Angel* was served. KPT's response of 27 October was to sue everybody for damages of Rs 102,599 million (some 150 times as much as its negotiating demand of Rs 650 million). However, Global's application was the catalyst for change. On 3 December that application was heard, and on 5 December the Pakistani court ruled in its favour, ordering the release of the vessel. However, it was still a further 23 days before the vessel was released. In that time, under the pressure of a court order which made any unsuccessful appeal by KPT a potentially expensive matter, a final, or at any rate near to final, deal was negotiated. In the end, it was the combination of Global's court success, the negotiation of a deal which involved the payment by the Club of $1.6 million, further last minute sweeteners, and the imminent threat of committal for contempt of court, which led to the final curtain.

39. The judge's findings on these matters were as follows. He had cited extracts from Mr Moloney's evidence to the effect that the release of the vessels was only achieved by the willingness of the Club to perform the wreck removal operation and to make a payment to the KPT; and that "The effect of any legal proceedings in Pakistan had no bearing whatsoever on that process." The judge also referred to Mr Moloney's evidence that, "from the moment that the *Sea Angel* was detained" or at any rate after his meetings with KPT on 26/27 September, he was convinced that "any legal proceedings would be utterly ineffectual". The judge rejected this evidence, observing (at para 104(iv)):

> "As already noted, this view did not find its way into Mr Moloney's contemporaneous report to his clients. It is manifestly at odds with the expert evidence. It is unwarranted on a fair consideration of the facts. While I have no doubt that the settlement – which Mr Moloney did much to achieve – played a very important role in securing the release of the vessel, I am quite unable to accept that the legal proceedings played no or no material role; to the contrary, I think that the Karachi proceedings did play a material role in securing the release of the vessel. It is striking that even after the settlement was in place, the vessel (together with the other vessels in question) remained unreleased; all the vessels were, however, released following the issue of contempt proceedings…That there had been foot-dragging on the part of the KPT seems unfortunately plain; that both the settlement and the pursuit of legal remedies served to overcome it, is in my judgment established."

40. I said above that a critical decision had been whether to commence legal proceedings or pursue a diplomatic and commercial negotiation. At any rate in retrospect, one can see that there was a continuum in which legal action supplemented commercial negotiation and commercial negotiation supplemented legal action. It may be truer to say, therefore, that the matter for decision was not merely whether but when to bring legal pressure to bear in support of a solution.

41. It remains to put a legal analysis on these facts. It is no longer suggested that there was a frustration of the charter before 13 October. The critical question on this appeal,

therefore, is whether by 13 October (the primary case made by Tsavliris) or at any rate by 17 October (their alternative case), either being the day by which the parties must have considered that no progress could be made without resort to legal proceedings, the delay already experienced plus future delay reasonably to be expected frustrated the charter.

42. Before I turn to that analysis, it is necessary to say something further about the legal and commercial context of the charter of the *Sea Angel* and the salvage operation in which that charter played a role.

The Sea Angel charter

43. I have already said that the head-charter was between in some sense linked companies and that it and the sub-charter were back to back save for the hire rate. It is asserted that the head charter rate of $5,000 was a normal rate and that the sub-charter rate of $13,000 was a special rate to reflect the salvage context. I do not know that there is evidence to support that and there is no finding in the judge's judgment to that effect, but it was not disputed. Plainly linked companies can within any legal requirements to the contrary choose to take their profit where they can, so that I do not know that it can safely be said that the correct comparison is between the $5,000 and the $13,000. However, I will assume, as in any event makes sound commercial sense, that the rate of $13,000 was a special rate to take account of the difficulties and dangers of the salvage context. As will appear below, however, there was a dispute as to how those special risks should be categorised, and in particular whether it could reasonably be foreseen that the *Sea Angel* would be detained by the Pakistani authorities, not for any default of the vessel herself or her salvor charterers, but in order to pursue a payment or guarantee against the consequences of pollution from the owners of the casualty or their P&I Club.

44. The charter was encapsulated in a fixture recap telex and otherwise incorporated the terms of the Shelltime 4 form of time charter. The recap telex provided inter alia as follows:

> "Redelivery: Dropping off last pilot Fujairah roads after release by charterers or their authorised representative.
>
> Period/Trading Limits: Up to 20…days in charterer's option…for transhipment(s) of up to a full cargo of crude oil from forward and aft sections of crude oil tanker 'Tasman Spirit' presently lying aground Keamari channel near Karachi, Pakistan for delivery/discharge to one safe berth(s) always afloat Pakistan/Arabian Gulf range in charterer's option or mutually agreed safe port(s) or place(s)…
>
> Charterers to arrange, provide and pay for permits as required by the Pakistan and other authorities in order that 'SEA ANGEL' can perform under this charter.

> Any taxes and/or dues on hire and/or cargo and/or vessel to be for charterers' account and to be settled directly by them.
>
> Contract: Terms 'SHELLTIME 4' time charter party, suitably amended to include the following additional clauses:-
>
> [The so-called "rider clause"]: It is agreed and understood that any responsibility, costs and any expenses which may arise following the removal of the crude oil cargo from the crude oil tanker 'TASMAN SPIRIT' will be for the account of 'TASMAN SPIRIT's'/charterers' interests. It is further agreed and understood that owners of crude oil tanker 'TASMAN SPIRIT'/charterers will provide directly to third party guarantees in relation to any potential cargo claim keeping free from liabilities the M/T 'SEA ANGEL', her master and owners except as a result of wilful neglect on behalf of owners, master or crew."

45. The Shelltime 4 form included the following terms.

> "4. *Period Trading Limits*...Charterers shall use due diligence to ensure that the vessel is only employed between and at safe places…Charterers do not warrant the safety of any place to which they order the vessel and shall be under no liability in respect thereof except for loss or damage caused by their failure to exercise due diligence as aforesaid.
>
> 7. *Charterers to Provide.* Charterers shall…pay agency fees, port charges, commissions, expenses of loading and unloading cargoes, canal dues and all charges other than those payable by Owners in accordance with clause 6 hereof…
>
> 8. *Rate of Hire.* Subject as herein provided, Charterers shall pay for the use and hire of the vessel at the rate of…until the time and date of her redelivery (local time) to Owners.
>
> 20. *Loss of vessel.* Should the vessel be lost, this charter shall terminate and hire shall cease at noon on the day of her loss; should the vessel be a constructive total loss, this charter shall terminate and hire shall cease at noon on the day on which the vessel's underwriters agree that the vessel is a constructive total loss…
>
> 21. *Off-hire.* (a) On each and every occasion on which there is loss of time (whether by interruption in the vessel's service or, from reduction in the vessel's performance, or in any other manner)…

(v) due to detention of the vessel by authorities at home or abroad attributable to legal action against or breach of regulations by the vessel, the vessel's owners, or Owners (unless brought about by act or neglect of Charterers); then

…the vessel shall be off-hire from commencement of such loss of time until she is again ready and in an efficient state to resume her service…

(d) If the vessel's flag state becomes engaged in hostilities, and Charterers in consequence of such hostilities find it commercially impracticable to employ the vessel and have given the Owners written notice thereof then from the date of receipt by Owners of such notice until the termination of such commercial impracticability the vessel shall be off-hire and Owners shall have the right to employ the vessel on their own account…

27. *Exceptions*...Further, neither the vessel, her master or Owners, nor Charterers shall, unless otherwise in this charter expressly provided, be liable for any loss or damage or delay or failure in performance hereunder arising or resulting from act of God, act of war, seizure under legal process, quarantine restrictions, strikes, lock-outs, riots, restraints of labour, civil commotions or arrest or restraint of princes, rulers or people…

32. *Requisition.* Should the vessel be requisitioned by any government, de facto or de jure, during the period of this charter, the vessel shall be off-hire during the period of such requisition, and any hire paid by such government in respect of such requisition shall be for the Owners' account. Any such requisition shall count as part of the charter period."

46. Global relied on the redelivery obligation at Fujairah, and the provisions relating to the payment of port charges (clause 7), and the rider clause, and the safe port warranty of due diligence (clause 4), as either individually or collectively placing on to Tsavliris the assumed risk within a sphere of responsibility or even the express obligation of dealing with the detention by KPT.

47. Neither party expressly relied on or sought to reflect the other provisions recited above, even though they are potentially relevant to questions about frustration and the assumption or risk or sphere of responsibility of the parties under the charter. For instance, clauses 8 and 21 emphasise that risk of delay both during the charter period and until redelivery are upon the charterer, who remains liable for hire throughout, save for specific off-hire exceptions, none of which are said to apply in the present case. Clause 27, albeit dealing with exception from liability rather than off-hire (cf the inapplicable clause 8(a)(v)), appears to cover the present situation. Clauses 21 and 32 deal expressly with potentially contract frustrating circumstances. Clause 21(d) deals

generously with a commercial situation which could lead to disputes between the parties.

The salvage context

48. I have already observed that Pakistan is not a signatory to the CLC regime of strict liability, compulsory liability insurance and limitation of liability relating to oil pollution damage. More, however, needs to be said about the salvage context.

49. Traditionally, services under LOF salvage agreements are rendered on the principle of "no cure no pay" and therefore salvage awards and rewards, where there has been a cure, have had to be fixed with a view to encouraging salvage operations. This is reflected in article 13 of the London Salvage Convention 1989 which has the force of law in the United Kingdom (see section 224(1) of the Merchant Shipping Act 1995). Article 14 of the same Convention is an additional provision to extend this encouragement to the particular problem of the expenses caused to salvors by a concern for the risk of environmental damage posed by marine casualties. It provides the salvor with special compensation where a casualty poses a threat to the environment and the article 13 award is less than his expenses in performing salvage services. It provides for a "fair rate" to be paid for equipment and personnel actually and reasonably used in the salvage operation. However, in practice it has proved deficient, because, as the House of Lords held in *The Nagasaki Spirit* [1997] AC 455, the "fair rate" is confined to a reimbursement of expenditure and does not extend to a profit element. See *Brice on Maritime Law of Salvage* (4th ed) at paras 6-86ff and 8-194ff.

50. Such considerations resulted in the development in 1999 of "SCOPIC" which stands for "special compensation protection and indemnity clause". Parties are free to incorporate a SCOPIC clause into their LOF agreement: it is a matter of the salvor exercising his option to tick the appropriate box. In the present case, Tsavliris opted to include SCOPIC in their LOF agreement. The SCOPIC clause is in fact a bundle of clauses of which the most important for present purposes are clauses 5 and 9. Clause 5 (see *Brice* at para 8-216) governs tariff rates and in general provides for remuneration at tariff rates plus 25% or actual rates plus 10% (whichever is the greater). So, in the present case, the charter of the *Sea Angel* was agreed to be within the tariff rate and Tsavliris were therefore entitled to be compensated for this expense at a profit rate of 25%. As *Brice* observes (at para 8-199) SCOPIC's philosophy is quite distinct from that of article 14 and supersedes it where it applies. It is a safety net. At the end of the day, if the SCOPIC remuneration is greater than the article 13 award, then the salvor gets the former. If, however, the article 13 award is higher than the SCOPIC remuneration, then the article 13 award is discounted by 25% of the difference.

51. Clause 9 needs to be set out in full, for it concerns the situation at termination and provides both parties to the salvage agreement with the option, on certain terms, to terminate the effect of SCOPIC. It provides:

> "(i) The Contractor shall be entitled to terminate the services under this SCOPIC clause and the Main Agreement by written notice to the owners of the vessel with a copy to the SCR [the

> shipowner's casualty representative] (if any) and any special Representative appointed if the total cost of his services to date and the services to fulfil his obligations hereunder to the property (calculated by means of the tariff rate but before any bonus conferred by clause 5(iii) hereof) will exceed the sum of (a) The value of the property capable of being salved; and (b) All sums to which he will be entitled as SCOPIC remuneration.
>
> (ii) The owners of the vessel may at any time terminate the obligation to pay SCOPIC remuneration after the SCOPIC clause has been invoked under sub-clause 2 hereof provided that the Contractor shall be entitled to at least 5 clear days' notice of such termination. In the event of such termination the assessment of SCOPIC remuneration shall take into account all monies due under the tariff rates set out in Appendix 'A' hereof including time for demobilisation to the extent that such time did reasonably exceed the 5 days' notice of termination.
>
> (iii) The termination provisions contained in sub-clause 9(i) and 9(ii) above shall only apply if the Contractor is not restrained from demobilising his equipment by Government, Local or Port Authorities or any other officially recognized body having jurisdiction over the area where the services are being rendered."

52. There is a dispute between the parties about the relevance of clause 9(iii). On 10 September 2003 the Club purported to terminate the obligation to pay SCOPIC remuneration, exercising its rights under clause 9(ii). That was after the completion of the transhipment of the casualty's cargo and when difficulties with the redelivery of the *Sea Angel* were just beginning to emerge. Global argued that clause 9(iii) showed that the salvage industry as a whole contemplated that government or port authorities, such as the KPT, might seek to prevent a salvor demobilising his equipment. That was, they said, in effect a risk which operated in the present case, where Tsavliris were seeking to demobilise at the completion of their salvage services, but were prevented from doing so.

53. On behalf of Tsavliris, however, Mr Nicholas Hamblen QC submitted that clause 9(iii) only contemplated an intervention by the local authorities where either casualty or salvor was seeking to terminate an ongoing salvage adventure. Mr Hamblen suggested that it would not be all that surprising if the local authorities became concerned that a casualty was to be left without salvage assistance before the job was completed, especially in an environmentally sensitive situation. He emphasised the words "where the services are being rendered" as referring to the situation of an interrupted salvage operation.

54. In this connection both parties relied on the commentary at para 8-239 of *Brice* as follows:

> "Sub-clause (iii) provides that the above SCOPIC provisions as to termination shall only apply if the contractor is not restrained by Government, Local or Port Authorities (or any other officially recognised body) having jurisdiction over the area where the services are being rendered. Thus a third party can prevent either of the parties exercising their right to terminate. In that event the services continue and SCOPIC remuneration continues to be earned. Government intervention is commonplace where there is perceived to be a threat to the environment from a particular casualty. This can take the form of the arrest of the casualty, her crew, the salvors' tug(s), crew(s) and salvage officers unless and until the littoral interests are provided with suitable guarantees in the event of pollution. If no such guarantees are forthcoming the relevant authorities are likely to seek to compel the contractors to continue with their services to the extent necessary to obviate the threat."

55. The court was informed that that passage had been written by Geoffrey Brice QC before his death, which preceded the publication of the 2003 4th edition of *Brice*, now edited by John Reeder QC.

56. Mr Hamblen relied in particular on the final sentence of the above passage, which he submitted demonstrated that the anticipated concern of the littoral authorities was the continuation of incomplete services. On behalf of Global, on the other hand, Mrs Elizabeth Blackburn QC relied in particular on the sentence half way through the passage, which states that government intervention is commonplace where a casualty is perceived to threaten the environment.

57. In this context, the parties debated the significance of Tsavliris's personal experience of government intervention. In a company statement from 2003 which anticipated these particular events, the Tsavliris 2003 "Salvage Status Statement", a document prepared for use at salvage arbitrations to provide an evidential basis for the making of awards and which therefore speaks to the salvors' expertise, expenditure and risks, the following passage appeared:

> "On occasions Tsavliris salvage tugs were assisting casualties only to find themselves arrested or detained for lengthy periods through no fault on our part."

58. Mr Xenophon Constantinides, the managing director of Tsavliris, gave evidence at trial. He was asked about the experiences which this statement addressed. The judge records (at para 94):

> "I asked Mr Constantinides about this passage. He accepted that the risk was significant enough to mention, albeit while suggesting that such occasions were more rare now. He said

> that this was something which happened occasionally. I asked whether that was one of the risks of the industry. Mr Constantinides answered: "Oh, definitely".

59. Mrs Blackburn submitted that this answer was the most important single piece of evidence in the case. Mr Hamblen submitted that a distinction ought to be made between previous events and what had happened in the instant case, which he said was unprecedented. Identifiable Tsavliris incidents in the past had numbered only three. The first went back to 1986 or 1987 and related to the arrest of two tugs in Syria for a period of three months, instigated by the Syrian government as owners of the salved cargo. That, said Mr Hamblen, was essentially a cargo claim, albeit brought against salvors. The second incident arose out of the 1992 arrest of a Tsavliris tug in Marseilles at the behest of the casualty's owners on a claim that salvage services in Korea had been performed negligently. That, said Mr Hamblen, was wholly irrelevant. The third incident occurred in 1995 at Jeddah in Saudi Arabia where a Tsavliris tug was detained by the local port authorities while they insisted that Tsavliris remove the wreck of a casualty which a Lloyds' salvage arbitrator later said was unsalvable. Mr Hamblen said that that third incident was different from the present case since that was a true clause 9(iii) situation where the local authorities were trying to ensure that salvage services continued.

60. I confess for myself that I find it rather harder to distinguish the third case from the present one. Tsavliris may not have been engaged here to perform the wreck removal, that apparently was going to follow and be undertaken by Smit, nevertheless, from the point of view of the local authorities and the problem of pollution, the salvage exercise had only been half performed. Mr Hamblen's point nevertheless was that there was a true and important difference between a complaint that salvage services undertaken by a salvor were being left incomplete and unfinished, as to which the littoral authorities might have some grievance to exercise against the salvor himself, and the present case: which he categorised as one where salvor's chartered in equipment was being detained after completion of the salvage services, not because of any claim against the salvor himself, but merely in support of a claim for pollution damage caused by the original casualty prior to the salvor's involvement. He referred in this connection to the way in which Cooke J had recorded the Tsavliris submission at the time when Global were unsuccessfully seeking summary judgment against Tsavliris (judgment of 19 February 2004, [2004] EWHC 387 (Comm)):

> "41. The defendants say and, in my judgment, have a realistic prospect of success in arguing that the risk of a vessel being detained by port authorities for security in respect of someone else's obligations to pay for pollution damage is not reasonably foreseeable."

61. In this connection there was some additional evidence which Mr Hamblen relied upon. Mr Hall, who could speak of 30 years dealing with salvage matters with Clyde & Co, agreed in cross-examination that in his experience this was the only case of salvors and crew being detained by the port authorities for a claim against the casualty

for pollution. He distinguished this from the case, which he described as common, of port authorities refusing to allow a stricken vessel to enter port without salvage tugs standing by until repairs were completed. On the other hand, Mr Hall also said, by reference to clause 9(iii) itself, that –

> "It is clearly and particularly in the world we are living in now it obviously is a risk and it is probably an increasing risk as the *Tasman Spirit* has demonstrated and when people are negotiating drafting contracts that is something that has to be taken into account. I entirely accept that."

62. Mr Hamblen submitted that, in this salvage context and therefore the context in which the charter of the *Sea Angel* had been entered into, the trial judge had been wrong to categorise the foreseeable risks as broadly as he did so as to encompass the particular circumstances of this case. He said that the risk had to be more accurately and therefore narrowly defined, in the form which Cooke J had reflected in the citation above, and that so defined the risk was unprecedented and unforeseeable.

63. Gross J recorded his conclusions about this aspect of the evidence in the following observations:

> "95. What is the true scope of this evidence? As is it seems to me:
>
> (i) At least in a case involving pollution or the risk of pollution, perhaps *a fortiori* in the waters of a state not party to CLC, a salvage contractor is exposed to the risk of governmental intervention and unreasonable detention of its craft or equipment.
>
> (ii) Such is the inevitable conclusion to be drawn from the Tsavliris 2003 status statement, even allowing for the element of self-promotion in documents of this nature. This conclusion likewise accords with the industry view, found in SCOPIC clause 9(iii) and, for completeness, with the observations in *Brice* (set out above) relating to that clause.
>
> (iii) If this conclusion is well-founded, it can make no difference in the present context whether the craft or the equipment deployed in the salvage operation are owned by the salvor or chartered in. To the port authority, any such distinction will be a matter of indifference.
>
> (iv) The relevant risk is unreasonable detention at the hands of port or other local authorities. While I accept that there is a difference between an unreasonable requirement to remain so as to guard against some asserted (but unfounded) threat and an unreasonable detention to secure a claim against a third party (the casualty interests), these strike me as variants

> on the same theme – rather than as entirely distinct risks. Could it make all the difference to risk allocation here if the port authority capriciously detained the vessel with a view to prolonging the presence of Tsavliris as opposed to capriciously detaining the vessel to secure a claim against the casualty interests? I do not think so. In both cases, the underlying cause of the detention would be local whims, pressures or "politics"; in both cases, the essence of the matter would be the same: the risk of lengthy and, by definition, unreasonable detention of Tsavliris craft or equipment through no fault on its part.
>
> 96. It follows, in my judgment, that nothing in the nature of the detention in the present case leads me to treat it as other than an incident of the salvage operations in which Tsavliris was engaged. Viewed in this light, the risk of unreasonable detention of the vessel at the hands of the KPT must be regarded as, objectively, forming part of the matrix of the charterparty…"

64. Despite Mr Hamblen's attack on these conclusions, it seems to me that they are essentially just. Ex hypothesi, a reasonable and lawful restraint falls into a different category of event. If it is due to the owner's sphere of responsibility under the charter, it will probably place the vessel off-hire, to the contrary if due to the charterer's act or default: see, for instance, clause 21(a)(v) of the charter. However, clause 9(iii) of SCOPIC appears to be designed to cover a restraint by government authorities whether lawful or unlawful, reasonable or unreasonable. Once the bounds of lawfulness and reasonableness have been breached, then I agree with the judge that there are only variants on a theme. The littoral authorities are concerned with environmental integrity: they are not privy to the contractual arrangements of the parties to a salvage adventure. Those parties may be agreed that the contracted salvage services are limited; or to be performed in stages by different contractors; or may be terminated early. But the littoral authorities have other interests, in the prevention or remedying of pollution, and may not distinguish between refinements dependent on particular contractual arrangements. There is no essential difference in this context between an unreasonable detention responding to an early but agreed, or justifiable, termination of salvage services, and an unreasonable complaint made against salvage contractors that the problems caused by the casualty, whose wreck remains a pollution danger, have not yet been addressed. I do not mean to say that there may not be differences, perhaps even important differences for certain purposes, between such variations, only that I do not see that such variations provide an essential dividing line between the reasonably foreseeable and something else.

65. Indeed, it may be observed that in the present case, KPT's complaint, identified in its suit of 27 October 2003, unreasonable as it may have been, was that Tsavliris, as well as the casualty's owners, were responsible, because of errors in the conduct of their salvage services, for the pollution damage and dangers. For instance, it asserts that the

breaking up of the casualty into two parts on 13 August, with consequent spillage, was consequent on the inefficient or dilatory conduct of the salvage.

66. Finally, under this present heading I should mention the actual consequences for the parties concerned of the SCOPIC provisions. Tsavliris maintained to the casualty owners and their Club that they were entitled to payment under SCOPIC for (inter alia) the cost of the *Sea Angel*, plus the 25% mark-up, throughout the period of her detention, at any rate up to any date when the charter was frustrated. The Club reserved its position. On 10 November 2003, however, Tsavliris and the Club came to an agreement which settled, either by payment or in principle, the whole question of salvage remuneration, whether under article 13 or SCOPIC. As for SCOPIC, there was payment in the case of undisputed items. In the area of disputed items, however, which included the *Sea Angel*, Tsavliris agreed to waive their 25% uplift if the Club would take over the obligation to pay the outstanding expense. That is what has happened. Although this litigation is in the name of Tsavliris as defendants, the real party in interest is the Club. Accordingly, Tsavliris's defence and now appeal have been conducted not by Clyde & Co, solicitors to Tsavliris, but by Eversheds, the Club's solicitors. Therefore, Tsavliris are not directly affected by the outcome of this litigation. This factor accords to the evidence of Mr Constantinides the quality of an almost independent witness.

67. Mrs Blackburn relied on the provisions of SCOPIC as not only providing the context in which the *Sea Angel* charter was entered into, but also for the purpose of mounting a more or less direct assault on the allegation of frustration in this case. Since SCOPIC would not only hold a salvor harmless, but even reward him, despite any restraint imposed on his contracted in vessels or equipment, it was fanciful to suppose that the *Sea Angel* charter could be frustrated. Mr Hamblen for his part, as I have mentioned above, sought to escape from SCOPIC by his submission that clause 9(iii) did not cover our circumstances.

68. In my judgment, Mrs Blackburn's submission, as I think she came to accept, was overstated. SCOPIC, where it operated, may well be a highly relevant part of the matrix of any charter of a vessel dedicated to salvage services, but it would not operate until the crack of doom. If such a charter were properly frustrated, then the obligation of the casualty owners (and their insurers) to pay SCOPIC remuneration would to that extent cease.

69. As for Mr Hamblen's submission, it was not, as I understand the matter, a point taken by the Club in its dealings with Tsavliris. The judge plainly considered that clause 9(iii) did cover the instant situation (see paras 95(ii) and 107). I agree. Clause 9(iii) is a limitation on what are otherwise the powers of the parties to a salvage agreement to terminate either the salvage services on the one side or the obligation to pay SCOPIC remuneration on the other side. Whereas, subject to that limitation, the owners of the casualty may expressly operate those powers "at any time" (see clause 9(ii)), they cannot do so if the contractor is restrained "from demobilising his equipment". That, however, is just what happened in the present case. It does not seem to me to matter that demobilisation occurs at the end or in the middle of the performance of those services. If it happens at the end, but before demobilisation, the limitation still bites. Clause 9(iii) is concerned with a restraint on demobilisation. The reference in that sub-clause to "the area where the services are being performed" is a natural one, since

the hypothesis is that until demobilisation is complete the services for which SCOPIC remuneration is payable are themselves uncompleted.

The submissions before the judge

70. Before the judge the parties's submissions (see the judgment below at paras 7/8) were essentially as follows. For Tsavliris it was submitted that the detention by KPT was a frustrating event. It continued until a deal had been done between KPT and the Club. Certainly by 13 October 2003 the parties acting as reasonable commercial men would reasonably have forecast that the period of the delay would be inordinate, in the context of a 20 day charter for limited services. The risk in question, namely detention of the vessel as security for KPT's pollution claims against third parties, had neither been assumed by Tsavliris, nor foreseen by the parties, nor was it reasonably foreseeable by them. Arguments on behalf of Global that terms of the charter excluded the operation of frustration in such circumstances were ill-founded.

71. For Global, it was submitted that detention of salvor's equipment, whether owned or contracted in, was a known risk and that what happened had been foreseeable, if not foreseen. The risk was assumed by Tsavliris under the charter. The delay was extended because Tsavliris had failed to launch timely court proceedings, and thus had failed to avail themselves of the remedy available through an effective local court system. At no time was the prospective delay of such a length as to justify frustration. In any event, the obligation to pay port dues, to deliver the vessel back to Fujairah, and to exercise due diligence to provide a safe port, either separately or cumulatively, excluded the possibility of frustration. As a final fall-back position, even adopting the Tsavliris approach of finding a solution through commercial negotiation alone, there could in any event have been no frustration until 18 October.

The judge's solution

72. The judge accepted that a focus on the probable length of the delay compared to the unexpired portion of the charter as at 13-18 October 2003 represented "the high water mark" of the Tsavliris case. He proceeded to test that case by reference to (1) delay in the salvage context, (2) the Tsavliris approach to the problem of the detention, (3) the relevance of port dues, and (4) the availability of the Pakistani court (see his paras 89/96).

73. As for (1), delay in the salvage context, the judge founded himself on SCOPIC, *Brice's* commentary, the Tsavliris experience, and the evidence of Mr Constantinides and Mr Hall, in order to make the findings at paras 95/96 of his judgment which I have recorded above, leading to the conclusion that the risk of unreasonable detention at the hands of the KPT must be regarded as part of the matrix of the charter. He said that against that background and Tsavliris's knowledge of that risk, there was a powerful argument for saying that the detention here was not that fundamental and radical change in the obligation originally undertaken required by the doctrine of frustration.

74. As for (2), the Tsavliris approach to the problem of the detention, namely the favouring of a strategy involving the diplomacy of political and commercial negotiation, the judge rejected Global's submission that litigation should have been a first priority, or that Tsavliris were to be criticised for not favouring an earlier recourse to legal action. The impact of that strategy on the question of frustration was therefore to consider whether the charter could be said to be frustrated within a reasonable time frame for such negotiations to bear fruit. In this connection, the judge was impressed by the answer that Mr Constantinides had given in his oral evidence, when he had said that the timescale he had had in mind for a commercial solution was something in the order of three months and "certainly before Christmas". The judge described that answer as realistic and revealing, and concluded that it indicated that justice did not require the charter to be treated as frustrated within that period. He said that the Tsavliris approach "suggested that this was no more than a commercial problem with which salvors are from time to time required to deal."

75. As for (3), the relevance of port dues, the judge addressed himself in particular to clause 7 of the charter, which Global relied on as reflecting an assumption on the part of Tsavliris as charterers of the risk of detention due to a dispute about port dues. The judge reasoned that if there had been a simple dispute about port dues paid and owing, the risk of any resulting delay would have rested with Tsavliris. Since, however, the KPT demand for port dues had been unreasonable, the position was more nuanced. The issue still remained within the charterers' sphere of responsibility, even if clause 7 by itself "may well not preclude frustration", as the judge was content to assume. The judge then broadened the point, saying (at para 101):

> "In commercial and contractual terms, Tsavliris assumed the responsibility of making the arrangements necessary for this sub-contracted vessel to enter Pakistan, operate there, and depart Pakistan; see, apart from cl 7, the various clauses as to permits, taxes and dues found in the fixture recap, set out above."

76. Finally, as for (4), the availability of the Pakistani court, it is first necessary to refer back to his earlier findings made (at para 26) on the basis of the expert evidence on Pakistani law and practice available at trial. The experts were largely agreed, and there was no need of any cross-examination. The judge found (i) the unlawful detention of a vessel by a port authority could be challenged in court; (ii) there could be no certainty as to the timescale of such proceedings, but there was a reasonable prospect of determining an application for the release of the vessel, if such an application stood alone, within 4 to 6 weeks (the judgment records "3-6 weeks" but it is common ground that this was in error); (iii) as for appeal, the experts' views ranged from 6 months or less up to 2/3 years, views which the judge described as "essentially speculative"; (iv) although there was a real risk that KPT might adopt delaying tactics, it could not have ignored the orders of the court: non-compliance could be punished, under the Constitution, as contempt of court. The figure of 4-6 weeks was that of Global's expert, to which Tsavliris's expert deferred. However, Tsavliris's expert also said that an interim order could even be obtained in a couple of days.

77. In the light of this evidence, the judge went on to consider the views expressed by participants in the events as to the utility of legal action. I have already referred (at para 39 above) to his rejection of Mr Moloney's evidence at trial that in his view at the time legal proceedings would be, and in fact were, utterly ineffectual. The judge did not go so far as to say that that evidence was unworthy, but he clearly rejected it as unreasonable and unbalanced, as well as being at odds with the expert evidence.

78. As for the evidence of Mr Constantinides and Mr Hall, the judge reminded himself of what they had said. Mr Constantinides had given evidence that he did not believe that the law would be quicker than his diplomatic strategy; from his general knowledge he did not want to become "tangled" with court proceedings; going to court was the "last resort"; though neither he nor Tsavliris had litigated in Pakistan before, Pakistan was not well-known for the speed of its legal procedure (see para 46 of the judgment below). Mr Hall gave evidence that, as of the time when he instructed Orr Dignam on 24 September 2003, his preference remained for a commercial solution; he was nevertheless exploring legal options in case of need, but did not think that the legal route would be quick (see para 49 of the judgment below). The judge found (at para 104):

> "To conclude as of mid-October that the charterparty was frustrated must involve the assumption that either the Pakistani Court could not grant effective relief or that it could not grant effective relief other than after a period of inordinate delay. It is, with respect, a strong thing to make such an assumption with regard to the Court of a friendly foreign state. In my judgment the evidence does not warrant any such conclusion. Plainly, if effective and timely relief could be anticipated, the charterparty could not yet be regarded as frustrated.
>
> (i) While, as appeared from their evidence, both Mr Hall and Mr Constantinides had made assumptions as to the speed of Pakistani Court proceedings, neither had any firm basis for their views – other than a caution derived from experience of operating internationally. Certainly, no contemporaneous inquiries had been made of Orr Dignam in this regard.
>
> (ii) Against this background, there is no basis for displacing the expert evidence as to Pakistani law and practice, summarised above. While I am unable – at least in the circumstances of this case – to accept the Tsavliris expert's view that an interim order of a mandatory nature could have been obtained within a "couple of days", I see no reason to doubt the view of the Claimants' expert that a timescale of some [4]-6 weeks could be anticipated. Hindsight serves to confirm the realistic nature of this opinion.
>
> (iii) Pausing there, the commencement of proceedings in mid-October 2003, whether by Tsavliris or through the Claimants (if tactical considerations suggested a more favourable wind for proceedings in which Tsavliris were not claimants), could accordingly be anticipated to produce an outcome

> within the timescale contemplated by Mr Constantinides for achieving a commercial settlement. Of course there would be a risk of appeals but the existence of such a risk would not, in my view, have justified the conclusion in mid-October that timely and effective relief was unlikely to be obtained."

79. On this reasoning, I would observe that the critical evidence about the availability of an effective remedy via legal process came (not surprisingly) from the Pakistani law experts; and that the critical evidence about whether a delay stretching some 4-6 weeks into the future from mid-October would produce an inordinate delay justifying a conclusion of frustration came from Mr Constantinides, the managing director of Tsavliris himself: who said that from the beginning of the difficulties he had set himself a strategy of commercial negotiations which he would expect to bear fruit within about three months and certainly by Christmas. On that basis, the prospective delay as of the first half of September would either have justified frustration then and there, subject only to the argument that one might have to wait and see whether the diplomatic approach might possibly bear fruit early in that period; or else not until the combination of commercial and legal pressure had had its chance of working, within a time frame of three or so months. Subject to the argument that the charter was frustrated early, viz by 19 September, an argument which failed at trial and has not survived into this court, this reasoning of the judge was in truth fatal to Tsavliris's case. The judge proceeded to emphasise that this was so in the very next paragraph of his judgment (at para 105), where he distinguished *Tatem v. Gamboa* [1939] 1 KB 132, a case, much relied on by Tsavliris, where a 30 day charter was held to have been immediately frustrated half-way through its period by enemy seizure during war. The judge said:

> "…it is sufficient to underline a key distinction between that case and this. In *Tatem v. Gamboa*, there was no prospect of recourse to any court to obtain the release of the vessel. As discussed, here, the Pakistani Court was available."

80. The judge was then immediately in position to state his conclusion:

> "106. *Conclusion:* I have reached the clear conclusion that Tsavliris, upon whom the burden rests, has not made good its case that there was a frustrating event at any relevant time. There was not so radical or fundamental a change in the obligation assumed by Tsavliris as to establish frustration. In summary:
>
> (i) I accept that the KPT's detention of the vessel resulted in a far more onerous charterparty than Tsavliris had contemplated. By itself, that is insufficient to make good a case of frustration.

(ii) I do not accept that prior to about the 13th – 18th October, there was any realistic case of frustration founded on probable delay. Until then, the prospective length of delay was, at best, speculative.

(iii) I do accept that as of about the 13th – 18th October, there was a realistic argument to be advanced that the probable length of delay, compared to the unexpired period of the charterparty, meant that the charterparty was frustrated.

(iv) However, I regard that important feature of the case as outweighed by other features of the case, especially taken cumulatively: namely, the risk, in the salvage context, of unreasonable port authority detention forming part of the contractual setting; the decision by Tsavliris to opt in the first instance for a negotiated solution; the sphere of responsibility assumed by Tsavliris under the charterparty.

(v) Any remaining doubts, in particular as to the prospective extent of the delay, were to my mind, put to rest by the striking feature of the case that, as of about the 13th – 18th October, no attempt had yet been made to invoke the assistance of the Pakistani Court to obtain the release of the vessel. No basis has been established for the necessary premise underlying the Tsavliris case that effective and timely relief could not be anticipated from the Pakistani Court – not least, taking into account the timescale disclosed by considerations as to delay in a salvage context and Tsavliris's own assumption as to the length of time likely to be required for its preferred commercial solution."

81. As stated at the beginning of this judgment, Tsavliris's appeal involves the submission that the judge was mistaken in each of these reasons given for his conclusion.

82. The judge then went on, in an obiter passage of his judgment, to consider various additional matters relied on by Global as to why frustration was precluded or excluded by provisions of the charter (such as by the so-called rider clause), or by the doctrine of self-induced frustration. He formed the view that none of these matters assisted Global, had a case of prima facie frustration otherwise been established. It will be necessary to revert to these matters only if Tsavliris might otherwise succeed in establishing a case of frustration on this appeal. For the present, it suffices to record the judge's further comments on the question of "A foreseen or foreseeable event?" (at para 116), since these are directly linked to earlier observations. He said first, that it did not follow from the fact that unreasonable detention by a port authority was a "risk of the industry" that it was actually foreseen: he considered that the evidential basis for that conclusion had not been laid. Secondly, however, he confirmed that even so the risk was foreseeable. Thirdly, he confirmed that that fact was "an important contributing factor" in deciding the issue of frustration. Fourthly, he

declined to express a hypothetical view as to whether the foreseeability of the risk would have by itself served to exclude the doctrine of frustration in this case.

The law

83. The parties were not in any essential disagreement as to the fundamental principles in issue. Those principles are well described by the judge at paras 80/85 of his judgment. It will suffice to refer to those authorities and some classic passages within them which were the subject matter of renewed submissions on appeal. The general context is of course an allegation of frustration of a charter by reason of a foreseeable risk giving rise to delay, and the special context is that of a vessel chartered for a short period to assist in providing salvage services.

84. Two classic modern statements of the incidence of frustration are to be found in the dicta of Lord Radcliffe in *Davis Contractors Ltd v. Fareham Urban District Council* [1956] AC 696 at 729 and Lord Simon of Glaisdale in *National Carriers Ltd v. Panalpina (Northern) Ltd* [1981] AC 675 at 700. Lord Radcliffe said:

> "…frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do."[1]

85. Lord Simon said:

> "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; in such case the law declares both parties to be discharged from further performance."

86. The reference by Lord Simon in that latter passage to the role that the concept of justice plays in the doctrine has a distinguished pedigree, which he elaborated at 701:

[1] *Non haec in foedera veni* (see Vergil, Aen. iv.338/9: *nec coniugis umquam praetendi taedas aut haec in foedera veni*). It is ironic that Aeneas's shabby excuse to Dido has become the watchword of the modern doctrine of frustration. Aeneas's desertion of Dido has not played well down the ages. However, there is another view ("*At pius Aeneas*…" Aen.iv.393).

> "In the first place, the doctrine has been developed by the law 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. As Lord Sumner said, giving the opinion of a strong Privy Council in *Hirji Mulji v. Cheong Yue Steamship Co. Ltd.* [1926] A.C. 497, 510: "It is really a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands."…
>
> Secondly, in the words of Lord Wright in the *Cricklehood Property* case [*Cricklewood Property and Investment Trust Ltd v. Leighton's Investment Trust Ltd* [1945] AC 221] at p. 241: "…the doctrine of frustration is modern and flexible and is not subject to being constricted by an arbitrary formula." It is therefore on the face of it apt to vindicate justice wherever owing to relevant supervening circumstances the enforcement of any contractual arrangement in its literal terms would produce injustice."

87. Lord Wilberforce (at 696H) and Lord Roskill (at 712D/E) also referred to the doctrine of frustration as a means for finding just solutions or avoiding injustice.

88. In *The Super Servant Two* [1990] 1 Lloyd's Rep 1, at 8, Bingham LJ on the same subject included the following as a proposition established by the highest authority and not open to question:

> "The object of the doctrine was to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, 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…"

89. The particular problem of delay as a cause of frustration has to be tested as at the time it had to be considered by the parties, but on an objective basis. For these purposes past and prospective delay has to be taken into account. The issue, if disputed, requires an informed judgment and the decision on such an issue by the tribunal of fact cannot easily be upset on appeal (subject of course to any error of law). As Lord Sumner famously said in *Bank Line, Limited v. Arthur Capel & Co* [1919] AC 435 at 454 –

> "The probabilities as to the length of the deprivation and not the certainty arrived at after the event are also material. The question must be considered at the trial as it had to be considered by the parties, when they came to know of the cause and the probabilities of the delay and had to decide what to do. On this the judgments in the above cases substantially agree. Rights ought not to be left in suspense or to hang on the

> chances of subsequent events. The contract binds or it does not bind, and the law ought to be that the parties can gather their fate then and there. What happens afterwards may assist in showing what the probabilities really were, if they had been reasonably forecasted, but when the causes of frustration have operated so long or under such circumstances as to raise a presumption of inordinate delay, the time has arrived at which the fact of the contract falls to be decided."

90. To which has to be added an equally well-known passage from the speech of Lord Roskill (with whom their other Lordships agreed) in *Pioneer Shipping Ltd v. BTP Tioxide Ltd (The "Nema")* [1982] AC 724 at 752:

> "But in others, where the effect of that event is to cause delay in the performance of contractual obligations, it is often necessary to wait upon events in order to see whether the delay already suffered and the prospects of further delay from that cause, will make any ultimate performance of the relevant contractual obligations "radically different," to borrow Lord Radcliffe's phrase, from that which was undertaken under the contract. But, as has often been said, business men must not be required to await events too long. They are entitled to know where they stand. Whether or not the delay is such as to bring about frustration must be a question to be determined by an informed judgment based upon all the evidence of what has occurred and what is likely thereafter to occur. Often it will be a question of degree whether the effect of the delay suffered, and likely to be suffered, will be such as to bring about frustration of the particular adventure in question. Where questions of degree are involved, opinions may and often legitimately do differ. Quot homines, tot sententiae. The required informed judgment must be that of the tribunal of fact to whom the issue has been referred. That tribunal, properly informed as to the relevant law, must form its own view of the effect of that delay and answer the critical question accordingly. Your Lordships' House in *Tsakiroglou & Co. Ltd. v. Noblee Thorl G.m.b.H.* [1962] A.C. 93, decided that while in the ultimate analysis whether a contract was frustrated was a question of law, yet as Lord Radcliffe said at p. 124 in relation to that case "that conclusion is almost completely determined by what is ascertained as to mercantile usage and the understanding of mercantile men."

91. In the light of these principles, it is instructive to consider as illustrations some of the well known cases concerned with the frustration of a charterparty which have been relied on before this court.

92. *Anglo-Northern Trading Company, Limited v. Emlyn Jones & Williams* [1917] 2 KB 78 concerned the frustration of a one year time charter by requisition during the First World War. The requisition occurred within three months from the end of the charter, in July 1916. There was an exception, but no off-hire provision, for restraint of princes. There was no intimation of the length of time for which the vessel was requisitioned. The arbitrator therefore held that there was no frustration, but stated a special case for the court. In finding the charter to have been frustrated, Bailhache J opined that –

> "The main consideration is the probable length of the total deprivation of use of the vessel as compared with the unexpired duration of the charterparty" (at 84).

93. On appeal to this court, that case was heard together with another appeal, see *Countess of Warwick Steamship Company v. Le Nickel Société Anonyme* [1918] 1 KB 372, also concerning the requisition of a one year time charter, in that case occurring some six months from its expiry, in October 1915. Bailhache J's dictum was approved (at 378). However, this court treated the prospective delay, despite the absence of any particular evidence deployed or found upon in the *Anglo-Northern* arbitration, as being the same in that case as in the *Countess of Warwick Steamship* case, namely "it was a question of goodbye to them; that there was no expectation of return" (at 379, 380). A finding of frustration founded on requisition in the middle of the Great War was inevitable. It seems to me that in that context the dictum cited above contributes little insight into different cases.

94. *Bank Line v. Capel* [1919] AC 435 is the most famous of the First World War requisition cases. There another vessel subject to a one year time charter was requisitioned, but the requisition occurred before delivery, in May 1915. The charter as usual made provision for restraint of princes and there was also a special clause giving the charterer an option to maintain or cancel the charter if the vessel could not be delivered "through unforeseen circumstances". Such clauses were relied on for saying that the doctrine of frustration could not apply, but unsuccessfully. By September 1915 the owner was entitled to say that the charter had been frustrated. Lord Sumner qualified Bailhache J's dictum in *Tamplin's Case* by saying that –

> "…I agree in the importance of this feature, though it may not be the main and certainly is not the only matter to be considered" (at 454).

95. He also said –

> "A contingency may be provided for, but not in such terms as to show that the provision is meant to be all the provision for it" (at 456); and
>
> "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 delay caused by ice or neaping, so much so as to be often the subject of express provision. Delays such as these may very seriously affect the commercial object of the adventure, for the ship's expenses and over-head charges are running on and, even with the benefit of Protection and Indemnity Club policies, the margin of profit is quickly run off. None the less this 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…" (at 458/9).

96. *Tatem v. Gamboa* [1939] 1 KB 132, already mentioned above, concerned a 30 day charter of a vessel by the Republicans during the Spanish Civil War. After a fortnight the vessel was seized by a Nationalist ship and detained for just under two months, whereupon she was redelivered to her owner. The charterers claimed that the charter had been frustrated from the moment of seizure, and Goddard J agreed. He was prepared to assume that the parties contemplated that the vessel might be seized and detained, but not for the length of time in question (at 135/6). He said (at 137/8):

> "It is true that in many of the cases there is found the expression "unforeseen circumstances", and it is argued that "unforeseen circumstances" must mean circumstances that could not have been foreseen. But…it makes very little difference whether the circumstances are foreseen or not. If the foundation of the contract goes, it goes whether or not the parties have made a provision for it."

97. Goddard J considered that the requisition cases mentioned above were of assistance to him in this regard, since requisition must have been anticipated there.

98. Mr Hamblen for Tsavliris relied strongly on *Tatem v. Gamboa*, as had his junior counsel, Mr Hill, before the judge. In my judgment, right or wrong, its reasoning proves too much. If the charter was frustrated at once, then that must have been because the prospective delay already as at that time destroyed the contract: as may well have been the case with seizure of a vessel by opposing forces during war-time, even if the issue of prospective delay is not discussed expressly in the judgment. Such immediate frustration, however, is not the case here, for it is no longer said that the charter was frustrated before 13 October 2003. Moreover, as the judge remarked, there was no question in that case of any possibility of recourse to a court to obtain a remedy against unlawful seizure. In my judgment, war-time requisition, seizure or trapping (see, for instance, the subsequent cases arising out of the Iran-Iraq war and the closing of the Shatt-el-Arab waterway) are of uncertain relevance. Some wars, as modern times have shown, may of course be very short: the possibility therefore that an outbreak of war may come to a rapid end may have to be considered: see *The Wenjiang (No 2)* [1983] 1 Lloyd's Rep 400 *per* Bingham J at 404/406. But subject to that possibility, the requisition, seizure or trapping of a vessel in the course of a major conflict are quite unlike the present case. One cannot negotiate or litigate one's way

out of such consequences of war. If in such circumstances the charter has not made express provision for what has occurred (as may yet happen, eg in the case of requisition, or by reference to a war clause: see *Kuwait Supply Co v. Oyster Management Inc (The "Safeer")* [1994] 1 Lloyd's Rep 637), the possibility of frustration, subject to any default by either party, can never be far away.

99. It is certainly true, however, that a contract may be frustrated even though the supervening event was foreseeable or contemplated. That, after all, is what happened in the requisition cases, as it did again in *The Nema*, where the frustrating event was a lengthy strike: even though strikes were of course not only foreseeable, but the subject matter of express provision in the contract in that case.

100. Apart from *Tatem v. Gamboa*, the authority on which Mr Hamblen placed greatest reliance was *Eridania SpA v. Rudolf A Oetker (The "Fjord Wind")* [1999] 1 Lloyd's Rep 307. That, however, was a very different kind of case. The claimants there were cargo owners whose goods were being carried on a vessel whose owners had let her to disponent owners who had in turn voyage chartered her to the buyers of the goods. The vessel had suffered an engine breakdown on the voyage, which led to lengthy delays and prospective further delays for repairs. The judge, Moore-Bick J, found that the voyage charter and bill of lading would have been frustrated, but for the fact that the defendant owners and disponent owners were in breach of contract. His reasons were primarily that –

> "there was a significant risk that after nearly five months in this vessel this cargo would have suffered very serious damage as a result of mould growth. From the point of view of both the cargo-owner and the shipowner a contract for a voyage of about one month which involved no appreciable risk of damage to the cargo resulting from its inherent qualities had been transformed into one which involved both prolonged delay and a significant risk of serious damage. That in my judgment rendered the performance of the contract radically different" (at 333).

101. I am not in general assisted by this authority, which it seems to me turns ultimately on the consequences for the cargo of the prolonged delay in question. However, Moore-Bick J did emphasise the learning of *The Nema*, saying that –

> "As Lord Roskill pointed out in *The Nema*, whether a contract has been frustrated in circumstances such as those of the present case is essentially a matter of judgment. In a case where an unforeseen event has led to a prolongation of the voyage which is sufficient to give rise to a significant risk, or worse, of damage to the cargo, the question whether performance of the voyage has become radically different is essentially one of fact and degree" (at 332).

Although there was an appeal to this court (at [2000] 2 Lloyd's Rep 191), it did not concern issues of frustration.

102. There were lengthy submissions before us from both parties as to the role in the doctrine of frustration of the fact that a risk might be foreseen or foreseeable. We had cited to us numerous passages from a major work of broad, detailed and exceptional scholarship by Professor Sir Guenter Treitel QC, his *Frustration and Force Majeure*, 2nd ed 2004. Similar submissions in reliance on this work were made to the judge. Mr Hamblen's summary of Professor Treitel's thesis as relevant to present purposes is that foreseeability of a risk may be a weak or inconsequential factor to take into account, unless the three tests of *kind*, *extent*, and *degree* are met. As to *kind* and *extent*, both the type and the extent or length of the interference or delay must be foreseeable; as to *degree*, the degree of foreseeability has to be very high.

103. The significance of foreseen or of unforeseen but foreseeable events is in my judgment well, if briefly, summarised in *Chitty on Contracts*, 29th ed, 2004 at paras 23-057/8. Para 23-057 which deals with foreseen events can be seen to make the point that there is no rule of exclusion, at best some prima facie indications. Thus –

> "While an unforeseen event will not necessarily lead to the frustration of a contract, a foreseen event will generally exclude the operation of the doctrine. The inference that a foreseen event is not a frustrating event is only a prima facie one and so can be excluded by evidence of contrary intention."

104. However, there is no finding in terms that the detention by KPT which occurred in this case was actually foreseen (or unforeseen) even by Tsavliris, merely that unreasonable detention by port authorities is a "risk of the industry", and as such foreseeable. In such circumstances it is para 23-058 which is perhaps particularly pertinent, which reads –

> "*Event foreseeable but not foreseen.* When the event was foreseeable but not foreseen by the parties, it is less likely that the doctrine of frustration will be held to be inapplicable. Much turns on the extent to which the event was foreseeable. The issue which the court must consider is whether or not one or other party has assumed the risk of the occurrence of the event. The degree of foreseeability required to exclude the doctrine of frustration is, however, a high one: " 'foreseeability' will support the inference of risk-assumption only where the supervening event is one which any person of ordinary intelligence would regard as likely to occur, or…the contingency must be 'one which the parties could reasonably be thought to have foreseen as a real possibility.' " "

105. The latter quote by *Chitty* is from *Treitel's* work at para 13-09, itself citing the American authority of *Mishara Construction Company Inc v. Transit-Mixed Concrete*

Corp 310 NE 2d 363, 367 (1974). The judge took account of such submissions: see at para 84 of his judgment.

Submissions on appeal

106. The submissions on appeal followed the same pattern as those at trial (see above), but refined to take account of the fact that Tsavliris were no longer contending for a frustration date earlier than 13 October. In particular, Mr Hamblen on behalf of Tsavliris submitted that the judge had erred in his final conclusions at para 106. Thus he erred:

(i) in resisting the compelling case (which the judge had himself described as a "realistic argument" (at para 106(iii)) for the frustration of a charter whose unexpired period was far exceeded by the probable length of delay;

(ii) in being influenced or overly influenced by "the risk in the salvage context" (at para 106(iv)), when that risk was poorly and too broadly defined, and, in the form in which it eventuated, was neither found to have been actually foreseen nor could properly be said to be foreseeable, neither in its type, nor in its extent, and not to the degree of foreseeability required by sound doctrine, at any rate not as "a real possibility" (see *Mishara* and *Treitel*), and was arguably unprecedented;

(iii) in being influenced by "the decision by Tsavliris to opt in the first instance for a negotiated setting" (at para 106(iv)), when that was relevant if at all to negative the complaint by Global of self-induced frustration and otherwise was merely part of the background which led, with the collapse of that strategy, to the frustration of the charter;

(iv) in concluding that Tsavliris had assumed the risk of detention under "the sphere of responsibility" which it had undertaken under the charter (para 106(iv)), when the cause of the detention which took place was not in truth about port dues at all, since from beginning to end the KPT had made it clear that they wanted payment or security for the pollution caused by the casualty and would not release any vessel until that was provided;

(v) in being influenced or overly influenced by the so-called "striking feature of the case" that as at 13 October there was still time, before the charter could be said to be frustrated, to invoke the assistance of the Pakistani courts (para 106(v)), when (a) the charter was already frustrated, and (b) the prospects of a successful outcome within any reasonable time, especially following appeal, were wholly uncertain and speculative, as was shown ultimately by the fact that (c) the litigation did not succeed in obtaining the release of the vessel without further negotiations involving the agreement of and payments by third parties.

107. In sum, Mr Hamblen submitted that the judge had erred in not asking himself the critical question as at 13 (or let it be 17) October 2003: whether the delay which had already taken place added to the prospective delay amounted to a total, ongoing, indefinite delay of such unreasonable and inordinate length, especially when viewed against the short period of the charter and its extremely short unexpired portion, as to

cause performance of the charter in those circumstances to amount to that radically different thing which amounts in law to frustration. If the judge had found what the prospective delay was as at 13 or 17 October, and, in the light of that finding had asked himself the critical question, he would have been bound to say, as this court should say, that the charter was by then frustrated, as Tsavliris had claimed in their letter of 21 October.

108. On behalf of Global, Mrs Blackburn submitted that the judge was right for the reasons which he gave, and, as she had also submitted at trial, for additional reasons (such as self-induced frustration, breach of the safe port warranty of due diligence, the obligation to redeliver in Fujairah, the rider clause) which formed part of the respondents' notice. She singled out Mr Constantinides' evidence, both in relation to his strategy for a negotiated solution at any rate by Christmas, and in accepting the risk of such unreasonable detention by KPT as had occurred in this case as being definitely foreseeable as a risk of the industry, and the generally uncontroversial evidence of the Pakistani law experts, as constituting the critical facts of the case. The assessment of those facts was for the trial judge.

Discussion

109. It is to be observed that Tsavliris's appeal does not amount to an attack on the judge's restatement of the law, but on his application of that law to the facts of the case. To a certain extent complaint is made about his findings of fact themselves, such as his attitude to the uncertainties and length of litigation, particularly on appeal from the Pakistani trial court. Ultimately however the complaint is that the judge weighed the facts, or the various factors which he had to assess, wrongly and was therefore led to the wrong conclusion. He was helped in that error by defining the risk which might have had to be calculated in the parties' contemplation at the time of contracting too broadly, and in failing to consider sufficiently explicitly the future period of uncertainty and delay.

110. In the course of the parties' submissions we heard much to the effect that such and such a factor "excluded" or "precluded" the doctrine of frustration, or made it "inapplicable"; or, on the other side, that such and such a factor was critical or at least amounted to a prima facie rule. I am not much attracted by that approach, for I do not believe that it is supported by a fair reading of the authorities as a whole. Of course, the doctrine needs an overall test, such as that provided by Lord Radcliffe, if it is not to descend into a morass of quasi-discretionary decisions. Moreover, in any particular case, it may be possible to detect one, or perhaps more, particular factors which have driven the result there. However, the cases demonstrate to my mind that their circumstances can be so various as to defy rule making.

111. In my judgment, the application of the doctrine of frustration requires a multi-factorial approach. Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances.

Since the subject matter of the doctrine of frustration is contract, and contracts are about the allocation of risk, and since the allocation and assumption of risk is not simply a matter of express or implied provision but may also depend on less easily defined matters such as "the contemplation of the parties", the application of the doctrine can often be a difficult one. In such circumstances, the test of "radically different" is important: it tells us that the doctrine is not to be lightly invoked; that mere incidence of expense or delay or onerousness is not sufficient; and that there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstances.

112. What the "radically different" test, however, does not in itself tell us is that the doctrine is one of justice, as has been repeatedly affirmed on the highest authority. Ultimately the application of the test cannot safely be performed without the consequences of the decision, one way or the other, being measured against the demands of justice. Part of that calculation is the consideration that the frustration of a contract may well mean that the contractual allocation of risk is reversed. A time charter is a good example. Under such a charter, the risk of delay, subject to express provision for the cessation of hire under an off-hire clause, is absolutely on the charterer. If, however, a charter is frustrated by delay, then the risk of delay is wholly reversed: the delay now falls on the owner. If the provisions of a contract in their literal sense are to make way for the absolving effect of frustration, then that must, in my judgment, be in the interests of justice and not against those interests. Since the purpose of the doctrine is to do justice, then its application cannot be divorced from considerations of justice. Those considerations are among the most important of the factors which a tribunal has to bear in mind.

113. Mr Hamblen submitted that whereas the demands of justice play an underlying role, they should not be overstated. He referred the court to *Chitty* at para 23-008 ("But this appeal to the demands of justice should not be taken to suggest that the court has a broad absolving power whenever a change of circumstances causes hardship to one of the contracting parties…Such a test is too wide, and gives too much discretion to the court"). I respectfully agree. Mr Hamblen also referred to *Treitel* at para 16-009 ("The "theory" does not, in other words, supersede the rules which determine the circumstances in which the doctrine of frustration operates"). I would again respectfully agree, as long as it is not sought to apply those rules as though they are expected to lead one automatically, and without an exercise of judgment, to a determined answer without consideration of the demands of justice.

114. Mr Hamblen further cited two authorities. In *Notcutt v. Universal Equipment Co (London) Ltd* [1986] 1 WLR 641, this court had to consider a contract of employment which the trial judge had found to have been frustrated by the permanent incapacity of an employee. The narrow issue was whether the contract should have come to an end by frustration (without notice) or whether the proper way of ending it was by the employer giving notice, during which period there would have been a statutory requirement of sick pay. The appeal was dismissed. There was a submission, based upon some of the dicta cited above, that an additional condition for the incidence of frustration was that the survival of the contract should be unjust. In his judgment (with which the only other member of the court, Sheldon J) agreed, Dillon LJ said (at 647):

> "I do not for my part see that these references to justice or injustice introduce any further factor. If the unexpected event produces an ultimate situation which, as a matter of construction, is not within the scope of the contract or would render performance impossible or something radically different from that which was undertaken by the contract, then it is unjust that the contracting party should be held to be still bound by the contract in those altered circumstances. I approach the facts of this case on the footing that the test to be satisfied is that explained by Lord Reid and Lord Radcliffe in the passages set out above."

115. In a case in which the contract was overcome by permanent disability and the court considered that it would be unjust for the contract to survive in such circumstances, I see no difficulty with these observations.

116. In *Eridania SpA v. Rudolf Oetker (The "Fjord Wind")* [1999] 1 Lloyd's Rep 307 at 328/9 Moore-Bick J said, with reference to Bingham LJ's reference to the demands of justice in *The Super Servant Two* (see above), that –

> "his intention was clearly to describe the considerations which had given rise to the development of the doctrine rather than to suggest that the Court is entitled to adopt a more liberal approach than would be indicated by Lord Radcliffe's speech. I am unable, therefore, to accept Mr Gee's submission that in this case I ought to have regard to some wider considerations of justice and fairness than the earlier authorities would otherwise suggest."

That reflects the formulation of *Chitty* (above).

117. I turn then to the facts of this case. I agree with Mr Hamblen that the critical question was whether, as of 13 October, (or 17 October, and for present purposes I am content to adopt either date), the delay which had already occurred and prospective further delay would have led the parties at that time to have reasonably concluded that the charter was frustrated. No later date of frustration was relied upon. For these purposes, since on the facts a delay of some 5 weeks had already occurred and the prospective delay involved in a revised strategy involving litigating in the Pakistani courts would involve a further 4 to 6 weeks at least, the first question to consider is whether Mr Hamblen is right in his submission that the Bailhache J test of comparing the probable length of the delay with the unexpired duration of the charter is the critical or main and in any event overbearing test to apply (see *Anglo-Northern*, *Bank Line*, *Tatem v. Gamboa*).

118. In my judgment it is not. It may be an important consideration, but it is, on our facts, only the starting point. In the first place, the development of the law shows that such a single-factored approach is too blunt an instrument. As stated above, a finding of

frustration of a charter of no longer than a year, based on requisition during the First World War, against the view that requisition meant "goodbye to them", was in any event close to inevitable. Secondly, requisition, like seizure in *Tatem v. Gamboa,* could not be rectified; whereas in our case, the consequences of the detention by the port authorities remained very much a matter for enquiry, negotiation, diplomacy, and, whatever the ordering of the tactics, legal pressure. Thirdly, where, as in our case, the supervening event comes at the very end of a charter, with redelivery as essentially the only remaining obligation, the effect of the detention on the performance of the charter is purely a question of the financial consequences of the delay, which will fall on one party or the other, depending on whether the charter binds or does not bind. It is not like the different situation where the supervening event either postpones or, which may be even worse, interrupts the heart of the adventure itself: as, for instance, in *Tatem v. Gamboa* or *The Fjord Wind*. In our case, the purpose for which the *Sea Angel* had been chartered, namely the lightening of the casualty, had been performed.

119. Fourthly, in general terms the contractual risk of such delay caused by detention by government authorities was firmly on the charterers, Tsavliris. I will develop this below: but in essence it follows from their obligation to pay hire, subject to the off-hire clause, until redelivery. And even the off-hire clause itself expressly provided for "detention by the authorities at home or abroad" but not in terms which were relied on as covering the particular event here. Fifthly, as was even common ground, the risk of detention by the littoral authorities arising out of a salvage situation where there was a concern about pollution was, at any rate in general terms, foreseeable. This remained the case even if, as Mr Hamblen submitted, the particular form in which that risk showed itself in this case was unforeseeable, or only weakly foreseeable, or was even unprecedented. Sixthly, that general risk was foreseeable by the salvage industry as a whole, and was provided for by the terms of that industry: see SCOPIC and *Brice's* commentary on it. Indeed, in my view the particular risk which occurred was within the provisions of SCOPIC. As such, those matters were part of the matrix itself of the charter under enquiry. In this connection, I bear in mind that Global were not themselves part of the salvage industry: but they chartered the vessel to well-known international salvors, to perform salvage services directly to a casualty, at a high price which reflected the emergencies and risks of such services: and therefore the foreseeable risks of the salvage context, and the incidence of those risks subject to SCOPIC, are properly part of the matrix of the charter. In justice, they bear particularly on Tsavliris, the salvors, themselves.

120. Seventhly, it is now common ground, on the particular facts of this case, that, short as the charter was, a mere 20 days, and shorter still as the unexpired period of the charter was, a mere 3 days, there was no frustration until the strategy of commercial negotiation had initially failed (by 13 or 17 October), some five weeks after the detention began. So, in any event, this is not a case like *Anglo-Northern* and *Tatem v. Gamboa*, where the charters were frustrated then and there by the supervening event. Ours is one of those "wait and see" situations discussed in other authorities. In such situations, it is a matter for assessment, on all the circumstances of the case, whether by a particular date the tribunal of fact, putting itself in the position of the parties, and viewing the matter in the role of reasonable and well-informed men, concludes that those parties would or properly speaking should have formed the view that, in all fairness and consistently with the demands of justice, their contract, as something

whose performance in the new circumstances, past and prospective, had become "radically different", had ceased to bind.

121. For these reasons, some of which have been sufficiently grounded above, and others of which I shall elaborate below, it seems to me that the primary point on which Tsavliris have founded their claim to frustration fails. I turn to discuss particular aspects of these reasons.

The test as of 13/17 October

122. Mr Hamblen submitted that the judge had not properly asked himself the right question as of 13/17 October because he did not state in terms what the length of the prospective delay was as of the time in mid-October when the commercial strategy failed and it had become necessary to have recourse to law. In my judgment, that criticism essentially fails. The judge had squarely before him Mr Hamblen's argument, there made by Mr Timothy Hill, Mr Hamblen's junior on this appeal, that "as of the 13th – 18th October…the probable length of delay, compared to the unexpired period of the charterparty, meant that the charterparty was frustrated" (at para 106(iii)). He spoke again of "the prospective extent of the delay" at para 106(v). He had previously for these purposes carefully considered the question of the availability of the Pakistani court and the time-scale within which it might be able or not to grant effective relief (at para 104). I am satisfied that the judge was answering the right question. As he said (*ibid)* – "Plainly, if effective and timely relief could be anticipated, the charterparty could not yet be regarded as frustrated."

123. The judge's conclusion, however, was against the Tsavliris argument, both as a matter of those facts which involved consideration of the evidence of the Pakistani legal experts and as a matter of the judge's overall assessment of the situation. In particular, he had in mind the important evidence that a decision on an application limited to an order for release of the vessel could be achieved within 4 – 6 weeks, as well as the ramifications of any dilatory attempt by the KPT, if so far unsuccessful, to string matters out during an appeal. His view of events, looking forward as of 13/17 October, was justified by the cross-check of events as they unfolded (see Lord Sumner in *Bank Line*). The judge was entitled to view the prospects of such delaying tactics, if KPT should fail at first instance, as merely speculative. In fact there was no appeal.

124. Although, as things turned out, the Pakistani judge's decision was not accepted by the KPT, which continued to use every opportunity allowed it, even in the absence of an appeal, to spin out further negotiations, until an application to commit its senior officers for contempt of court finally brought matters to a head, it was the essential strategy adopted from the beginning by Tsavliris, with the owners of the casualty and their Club acting in tandem, which ultimately bore fruit. The only difference from that opening strategy which emerged over the period was that, whereas resort to law was regarded as something to be avoided for as long as possible, it was in time used, as it had always been contemplated it might be, as part of a combination of pressures to reach a final result. In the meantime, it was not simply a matter for Tsavliris alone to decide whether or not and when to go to law. The casualty owners, whose underwriters, the Club, were also intimately interested, not only because of KPT's

direct claims but also through their SCOPIC obligations, also had to decide if and when to resort to law, as, equally or more significantly, had Global themselves. It was in fact Global's legal suit which became the basis for the parties' legal attack on the KPT. It was for Global, and their linked company the ultimate owners of the *Sea Angel*, as much as anyone to calculate when and if the right moment had arrived for legal action.

125. In effect, one can see the parties moving towards the solution over a period: Tsavliris instructed their lawyers on 19 September to prepare a legal notice; Global instructed their lawyers on 2 October to issue proceedings; the owners of the casualty and the Club's English lawyers, Eversheds, were perhaps more sceptical as to the usefulness of legal proceedings, but the Club's financial power remained part of the solution. In these circumstances, I do not regard the temporary breakdown of negotiations as of mid-October as a turning-point, so much as a staging point in a continuous process. At the outset of that process, Tsavliris's managing director, Mr Constantinides, regarded three months as a likely time for a solution, and he did not regard such a period then as amounting to a frustrating delay.

126. It seems to me that that is essentially what the judge is saying at paras 99 and 104/106 of his judgment.

The foreseeability of the risk

127. In my judgment, the submissions under this heading became over-refined. In a sense, most events are to a greater or lesser degree foreseeable. That does not mean that they cannot lead to frustration. Even events which are not merely foreseen but made the subject of express contractual provision may lead to frustration: as occurs when an event such as a strike, or a restraint of princes, lasts for so long as to go beyond the risk assumed under the contract and to render performance radically different from that contracted for. However, as *Treitel* shows through his analysis of the cases, and as *Chitty* summarises, the less that an event, in its type and its impact, is foreseeable, the more likely it is to be a factor which, depending on other factors in the case, may lead on to frustration.

128. In the present case it was both highly relevant that the unreasonable detention of a vessel participating in salvage services, whether owned or contracted in by the salvors, could be foreseen and was actually provided for in SCOPIC, and also relevant, if it be the case, that the actual circumstances of the detention were comparatively unusual or even unprecedented and lasted for a long time. All such circumstances would need to be taken into account. In Mr Hall's experience the particular circumstances of this detention were then unprecedented but now needed to be taken into account; but in Mr Constantinides's experience, they "definitely" fell at the time within the industry risk. It seems to me that, for the reasons discussed above (at paras 63/65), the judge's treatment of this issue was fair. Once a port authority acts unreasonably, the precise circumstances and consequences must essentially be variants on a theme. The foreseeability of this general risk, recognised within the industry, and provided for in its well-known terms of trade (SCOPIC), provides a special and highly relevant factor against which the issue of frustration needs to be assessed. However, like most factors in most cases, it must not be exaggerated into

something critical, excluding, preclusive: for if, on the special facts of a particular case, the charter is frustrated, then the obligation to reward the salvor under SCOPIC goes – despite his inability to demobilise his equipment.

The sphere of responsibility

129. Under the topic of this factor, the judge mostly had in mind the responsibility for port dues imposed on Tsavliris in clause 7 of the charter form (as well as in the specially adopted terms of the recap fixture). I would prefer myself to put the point more broadly. This is firstly because, on the facts of this case, I think that the charterer's responsibility for port dues can be overstated. The issue raised by KPT was not really about port dues, it was, as Mr Hamblen I think rightly submits, about KPT's determination to protect itself against its fears and the expenses of pollution damage and wreck removal. If the demands for port dues had been reasonable, but wrongly rejected by Tsavliris, then any consequent delay would have been for their account under the charter. I do not see why an unreasonable demand for port dues, a fortiori a demand for port dues as a pretence to cloak a claim against pollution damage caused by the casualty, should be regarded as falling within the charterer's sphere of responsibility. That remains the case even if it takes a little time to grasp the real nature of the reasons for the detention by the local authorities. Moreover, where the demand for port dues is made an unreasonable excuse for the unlawful detention of the vessel, I do not see why the responsibility for trying to extract the vessel from her situation is not prima facie as much that of her owners (and disponent owners) as her charterers. It is not as though her charterers have ordered the vessel into salvage services under some general discretion as to her employment: she has been specifically contracted to such services at a price which is intended to reflect the risks.

130. The way I would therefore prefer to put the factor of the sphere of responsibility under the charter which the judge had in mind is to emphasise that, generally speaking, the risk of delay under the charter was upon Tsavliris as charterers. This is because of the essential structure of a time charter, under which, absent express provision, time runs continuously against the charterer until redelivery. Thus an off-hire clause is the place to find exceptions against the incidence of a continuous liability for hire, but such a clause did not avail Tsavliris in this case, even though clause 21(a)(v) expressly deals with detention by authorities.

131. The point is also illustrated by other provisions of the charter form. Thus clause 27 expressly provides a mutual exception against liability for loss or damage arising from restraint of princes, but that does not avail to stop a liability for hire due to delay caused by such restraint. Restraint of princes is of course of direct relevance in this case. Not of direct relevance, but again illustrative of the general point are specific provisions to deal with other circumstances in which detention of the vessel may arise. Thus constructive total loss of the vessel, which may arise from trapping, is specifically dealt with in clause 20. Requisition, an old cause of dispute, is specifically dealt with in clause 32. Both these clauses are additional off-hire clauses which operate in circumstances of actual or potential frustration. Against this background, where the charterer assumes the general risk of delay, subject to express provision, it necessarily requires something special to frustrate the charter through mere delay: and a fortiori where, as here, the consequences of the delay are purely

financial since the charter is over, save for redelivery, and the delay in question falls within a foreseeable risk of the salvage industry.

The dictates of justice

132. I have referred to this factor above. It is not an additional test, but it is a relevant factor which underlies all and provides the ultimate rationale of the doctrine. If one uses this factor as a reality check, its answer should conform with a proper assessment of the issue of frustration. If it does not appear to do so, it is probably a good indication of the need to think again. The question in this case is whether it would be just to relieve Tsavliris of the consequences of their bargain, or unjust to maintain the bargain, in a situation where they have assumed the general risk of delay, and have done so in a specific context where the risk of unreasonable detention is foreseeable and has at least in general been actually foreseen, as demonstrated by SCOPIC which, subject to the limits of frustration, protects the salvor from the financial consequences of the delay; where from the very beginning a solution was considered to be possible rather than impossible or hopeless, but only after a period of some three months, and where that solution, although not entirely or even mainly in Tsavliris's own control, was achievable with the co-operation of the owners of the casualty and their Club, known to be in principle available, and the assistance of legal action in the local courts; and where the outcome has confirmed the calculations of the objectively reasonable participants in the events.

133. In my judgment, the judge's conclusion, that the charter had not been frustrated by 13 or 17 October, shows the doctrine working justly, reasonably and fairly. At the appellate level, the question is whether the judge's assessment of the various factors involved displays an error of law or of rationality or a failure to appreciate the facts which should call for reversal by this court – in an area where, as Lord Roskill has said, the informed judgment must be that of the tribunal of fact to whom the issue has been referred. For the reasons which I have sought to explain in the course of this judgment, I have concluded that the appellants, Tsavliris, have failed in their burden to show that the judge was in error.

The respondents' notice

134. It is therefore unnecessary to deal with the respondents' detailed notice. I would merely say that, if this appeal had prima facie succeeded thus far, I would be surprised if the additional matters raised in the respondents' notice would have made the difference. We did not ask Mr Hamblen to reply on issues of self-induced frustration or safe port warranty of due diligence.

Conclusion

135. I would dismiss this appeal.

Lord Justice Wall:

136. I have had the advantage of reading Rix LJ's judgment in draft. I am in complete agreement with it, and there is nothing I can usefully add. Accordingly, and for the reasons he gives, I too would dismiss this appeal.

Lord Justice Hooper:

137. I agree.