Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Exercising its Admiralty Jurisdiction

CASE NO: AC 149/10

Name of ship: The bunker barge "Southern Valour"

In the matter between:

CHEVRON SOUTH AFRICA (PTY) LIMITED	Applicant
and	
UNICAL CALULO BUNKER SERVICES (PTY) LTD	First Respondent
ADVOCATE MICHAEL J. FITZGERALD SC N.O.	Second Respondent

JUDGMENT DELIVERED THIS WEDNESDAY, 15 JUNE 2011

Zondi, J

Introduction

[1] This is an application by Chevron South Africa (Pty) Ltd ("Chevron") for an order that the time required to bring suit under a charter party dated July 2007, be extended, pursuant to section 8 of the Arbitration Act 42 of 1965("the Arbitration Act"). The application is opposed by Unical Calulo Bunker Services (Pty) Ltd ("Unical"). The second respondent has not involved himself in this litigation.

[2] Chevron has commenced arbitration proceedings against Unical to enforce a damages claim of R24 412 221.33 arising out of a Shelltime 4 charter party concluded by the parties in respect of barge. Unical has defended the claim and has raised a

special defence to the effect that a significant portion of the claim, being an amount of approximately R18 million, is time-barred. For its special defence Unical relies on the provision of Article 111, Rule 6 of the Hague-Visby Rules which discharges the ship from all liability whatsoever in respect of the goods unless the claim is brought within one year of their delivery or the date when they should have been delivered. Although Chevron disputes that Article 111, Rule 6 applies to the claim it nevertheless seeks an order that in the event of the arbitrator finding it applies to its claim and upholding Unical's special defence, the one year time-bar be extended to the date upon which the arbitrator finds that Chevron validly commenced arbitration proceedings to enforce the claim.

Point in Limine

[3] Before dealing with the merits of the application I must first consider a point in limine taken by Unical.

[4] The point taken by *Mr Stewart*, who appeared on behalf of Unical, was that in the absence of a concession by Chevron that a time-bar applies to its claims, the court does not have jurisdiction to order the relief sought by Chevron. He argued that it is clear from section 8 of the Arbitration Act, which is the section under which Chevron claims relief, that in order for the court to extend the time within which Chevron may commence arbitration proceedings there must be an agreement providing for the referral of future disputes to arbitration and the agreement must provide that any claim to which the agreement applies shall be barred unless the arbitration proceedings are commenced within a stipulated time. In support of his submission he referred to the case of *Willmington (Pty) Ltd v Short & McDonald (Pty) Ltd* [1] in which the court held at 34E-F:

[1] 1966 (4) SA 33 (D)

"*It is only when a dispute actually arises between the parties that arbitration proceedings can be commenced and, accordingly, that some step can be taken to commence such proceedings. It is clear from the wording of Section 8 of Act 42 that, before an order in terms of that section can be made – (a) there must be an arbitration agreement to refer future disputes to arbitration; (b) that agreement must provide that any claim to which the agreement applies shall be barred unless some step to commence arbitration proceedings is taken within a time fixed by the agreement; and (c) a dispute to which the agreement applies must have arisen*".

[5] He pointed out that since Chevron in its founding affidavit and replying affidavit disputes that there is a time-bar which is applicable to its claim this court does not have jurisdiction to order the relief which Chevron seeks. In developing this point *Mr Stewart* argued that the charter party between the parties provides that all claims 'arising out of any loss of or damage to or in connection with cargo shall be subject to the Hague-Visby Rules notwithstanding that the parties have agreed that bills of lading will not be issued for the carriage of the cargo'.

[6] He pointed out that Article 111 Rule 6 of the Hague-Visby Rules excludes liability of the carrier and the ship in certain instances. It discharges the carrier and the ship from all liability in respect of the goods if the suit is not brought within one year of their delivery or the date when they should have been delivered.

[7] In response *Mr Wragge*, who appeared together with *Mr McKenzie* for Chevron, submitted that section 8 of the Arbitration Act does not establish the requirement contended for by Unical. He argued that the suggestion by Unical that the court cannot determine the present application until such time as there is either a concession or a waiver of a right by Chevron to take the arbitration point, is incorrect. He pointed out that in the arbitration proceedings Unical has sought a declaratory order that some of Chevron's claims have prescribed and that any liability of Unical to Chevron as may be

established in due course should be limited as being only in respect of losses of cargo that was delivered one year or less prior to the bringing of suit in respect of those losses. *Mr Wragge* argued that the fact that the one year time-bar has been raised is sufficient to enable the court to determine the issue and in doing so it must proceed on the basis that Unical's defence is a good one.

[8] In my view, the matters raised in the arbitration proceedings are matter which this court cannot go into. The arbitrator, before whom the proceedings are pending, is best suited to deal with them when he hears the arbitration. The present application can, in my view, be disposed of without the need to determine the issues which are for consideration by the arbitrator.

[9] The matter must therefore be considered on the footing that the one year time-bar defence which Unical has raised is a good defence. The question which must therefore be decided is, on the footing that the time-bar applies to the claims of Chevron and that Unical's defence is a good one, whether the time in which to commence arbitration proceedings should be extended. This approach does not force Chevron to forego any defence it may possibly raise in the arbitration proceedings including the one relating to non-applicability of the one year time-bar provision to its claims.

[10] I now proceed to consider the merits of the application. It is common cause that Chevron is a manufacturer and seller of petroleum products, including marine fuel and diesel oils, which marine products are sold to its customers and delivered to vessels at various South African ports, including the port of Cape Town ("the port").

[11] Chevron's marine products are either delivered to vessels in the port via pipeline, or via a bunker barge, which is loaded at a berth in the port and thereafter proceeds to deliver fuel to vessels.

[12] During or about July 2007, Chevron and Unical concluded a Shelltime 4 charter party for the bunker barge 'Southern Valour'. Mr Thor Sellar ("Sellar") of Chevron was not involved in the negotiation and conclusion of the charter party. At that point in time Sellar was employed by Chevron as its Supply Operations Manager for Southern and Central Africa. He became the Bunker and Overland Trading Manager for Chevron on 1 May 2008.

[13] In terms of the charter party Unical agreed to let and Chevron agreed to hire the barge for a period of 60 months commencing from the date of delivery of the barge, for purposes of carrying all lawful merchandise.

[14] Unical delivered the barge to Chevron at the port on 19 August 2008 and the barge commenced bunker deliveries to vessels in the port. Chevron contracted Captain Harris to implement the barge's operations under the charter party on its behalf.

[15] Clause 27 of the charter party deals with exceptions and provides as follows:

"(a) The vessel, her master and Owners shall not, unless otherwise in this charter expressly provided, be liable for any loss or damage or delay or failure arising or resulting from any act, neglect or default of the master, pilots, mariners or other servants of Owners in the navigation or management of the vessel; fire, unless caused by the actual fault or privity of Owners; collision or standing; dangers and accidents of the sea; explosion bursting of boilers, breakage of shafts or any latent defect in hull, equipment or machinery; provided, however, that Clauses 1, 2, and 3 hereof shall be unaffected by the foregoing. 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.

(b) ...

[16] Clause 27(c)(ii) excludes the operation of clause 27(a) in certain instances. It provides:

"(c) Cause 27 (a) shall not apply to or affect any liability of Owners or the vessel or any other relevant person in respect of:

(ii) any claim (whether brought by Charterers or any other person) arising out of any loss of or damage to or in connection with cargo. All such claims shall be subject to the Hague-Visby Rules, excluding the provisions of Article 3 Rule 8 thereof, notwithstanding that the parties have agreed that bills of lading will not be issued for the carriage of the cargo".

[17] Clause 5 of Annexure A to the charter party makes provision for law and arbitration. It provides as follows:

"This charter shall be governed by and construed in accordance with the laws of the Republic of South Africa, without regard to the choice of law principles thereof. Any dispute, whether contractual or not, arising out of or in connection with this agreement (including any question regarding its existence, validity or termination) shall be referred to and finally resolved by arbitration in Cape Town, South Africa according to the then in force rules of the Arbitration Foundation of Southern Africa ("AFSA"). Any arbitration award may be made an order of court by either party and enforced against the defaulting party. The provisions of this clause shall not prevent either party from seeking urgent relief from any competent court".

[18] The delivery of Chevron's marine products (Marine Fuel Oil (MFO) to vessels in the port involves Joint Bunkering Services (JBS), a joint venture between BP, Shell, Engen and Chevron. JBS has a facility within the port managed and operated by BP. Essentially, Chevron supplies marine products via a pipeline to the JBS facility, where the products are stored, pending delivery to vessels via a pipeline directly from JBS, or to the barge at the JBS berth.

[19] The barge 'fills-up' with products at the JBS berth every few days or as and when necessary. JBS has fixed shore meters at the berth which measure the quantity of MFO and Gasoil delivered to the barge. The barge on the instructions of Chevron then delivers the marine products to vessels within the port, and is responsible for ensuring that the correct quantities are delivered.

[20] During this period Chevron monitored the deliveries of marine products to the barge, and from the barge to vessels in the port by way of a number of internally prepared excel spreadsheets created from figures and/or report provided externally from, inter alia, JBS; the barge; Chevron's customers, which were then compared. This involved a reconciliation of the volume of marine products recorded by the JBS facility as having been delivered to the barge; the volume recorded by the barge as having been delivered to vessels, and the volume reflected by the barge as remaining on board at the end of the month.

[21] On 3 September 2008 Captain Harris, Chevron's representative, wrote to Unical pointing out that he had picked up problems reconciling the month end stock sheets for the period commencing 13 August 2008 and asking that the barge masters check their stock sheets.

[22] In an attempt to establish the cause and extent of the loss, on 11 September 2008 Chevron contracted Gazelle Testing Services, who were later replaced by Intertek Testing Services ("ITS"), to monitor stock movements.

[23] Chevron and Unical had, since the inception of the barge's operations in the port, convened a monthly meeting to deal with operational and other issues arising out of the charter party.

[24] On 15 September 2008 the parties' respective representatives held their usual monthly meeting. Chevron's representative advised Unical's representative that Chevron's records indicated that marine products delivered to the barge by the JBS facility were unaccounted for, and that Chevron would have to bill Unical for the loss in accordance with the provisions of the charter party.

[25] Unical's representative denied liability. It contended that any possible discrepancy was the inaccuracy of the JBS shore meters and that if there was a shortage, it was the fault of JBS and not Unical.

[26] According to Mr Burns ("Burns") of Unical Mr Esterhuyse ("Esterhuyse"), who represented Unical at the meeting, insisted that the shore meters be recalibrated against a master meter in the light of the fact that Unical was unaware of when the JBS meters were last calibrated. Esterhuyse informed the meeting that at that time, the equipment to check the vessel's meters was not available in the country but that Unical had valid calibration certificates for the vessel's meters.

[27] Unical conducted its own investigation and in response to Chevron's e-mail of 1 October 2008 advising Unical of its losses, Unical by e-mail dated 23 October 2008 informed Chevron that it was busy putting together a spreadsheet with all the loading and discharging figures to date. The e-mail further pointed out that although Unical was

busy with its investigation, there were, however, clear indications that the JBS meter might *"be out"* and Unical requested calibration certificate of JBS meters.

[28] On 14 October 2008, Unical forwarded an e-mail to Chevron enclosing a spreadsheet produced from all the figures drawn from the file server where it kept all the barge records. The e-mail reported what Unical had discovered. It states:

"*We found that the system works best if the tanks aren't lowered below 10%, as the Cargomaster starts hunting for an accurate level. More often than not, once the tank level drop below 10% the Cargomaster indicates a zero level. This results in the dip indicating that more product had been delivered than indicated by the meter. Empty spectrums still have to be done on the Radar level gauging system to enable us to empty tanks completely and still get accurate readings below 10%. This had already been done on our barge in Durban, with the desired results. It's a simple process for the Krohne instrument technicians, but the tanks have to be completely empty to perform this task. I have to coordinate this with you*".

[29] Unical points out that in the period October/November 2008 it did not know whether the JBS loading meter was accurate or not. It knew that the Cargomaster was inaccurate when the tanks were less than 10% full and believed that the barge's calibrated Krohne delivery meter was accurate but it was not possible for it to prove barge delivery meter as there was no master meter in South Africa at the time capable of proving the barge meter across the entire flow range. Its investigation revealed that the empty spectrums problem could never have caused any losses and did not explain the apparent losses.

[30] Unical alleges that from the time that the empty spectrums problem was addressed by Krohne in November 2008 it heard nothing further from Chevron to

indicate that Chevron considered Unical to be responsible for any product shortages or over delivery to Chevron's customers until June 2009.

[31] This is disputed by Chevron. Sellar alleges that during April and May 2009 he became aware that the losses were more than originally estimated and he made Unical's representative aware of this fact during bi-weekly safety meetings he held with him.

[32] Sellar points out that ITS which Chevron had contracted to investigate the cause of losses reported in June 2009 that there were significant problems with the barge's stock monitoring system, including the use of incorrect density figures for marine products, and inaccurate calibration tables. It recommended that further investigations be conducted. It is disputed whether Unical was provided with a copy of ITS report. Unical alleges that Chevron sent to it an e-mail recording certain observations based on only three monitoring occasions.

[33] Sellar further alleges that at the suggestion of ITS an independent mobile meter was installed between the JBS shore meter and the shore flange from which marine product was pumped onto the barge to verify the accuracy of the JBS shore meters. ITS monitored it on 30 July 2009. But Esterhuyse objected to the use of the mobile meter on the basis that its readings were unreliable since it was not a *"master meter"*. The ITS report was discussed with Unical but the latter disputed its correctness.

[34] Unical's representatives indicated to Chevron's representative that Unical had procured a new Krohne master meter capable of calibrating the discharge flow meter, not the Cargomaster, and further that SGS would perform the calibration during

September 2009 which was the earliest that SGS expected that the Krohne master meter would be available to carry out the test.

[35] On 28 September 2009 SGS performed the calibration of the barge using the Krohne master meter and found that the flow meter was providing correct measurements if the flow rate at the time of reading was within a certain band and that since the meter was designed to measure at flow rates from 80mt/h to 1300mt/h, readings at below 80mt/h could not be guaranteed.

[36] Mr Sharp of ITS met regularly with Unical's representatives over this period in an attempt to trace the cause of Chevron's losses. On 28 September 2009 ITS produced barge monitoring reports for the period July and August 2009.

[37] On 29 September 2009 a meeting was held between Sellar and Mr Hutchinson ("Hutchinson") of Chevron and Esterhuyse and Mr Stuart-Hill ("Stuart-Hill") representing Unical. At the meeting Sellar advised Stuart-Hill that he had given Esterhuyse details of the claim and that Chevron would be proceeding to bill Unical for the losses which it had suffered. Stuart-Hill responded by saying that whilst Unical was aware that Chevron would be seeking to recover the losses from Unical, Chevron should not expect Unical to simply lie down and pay the claim. Sellar understood Unical to contend that JBS meters were at fault and that any claim that Chevron might have had lies against JBS and not Unical.

[38] Sellar alleges that after the meeting he continued to investigate the cause of the loss and that he continued to work with Esterhuyse to try and find a cause for the discrepancy.

[39] On 25 October 2009 Chevron e-mailed Unical a reconciliation statement reflecting the quantity of marine products lost and the size of the claim and thereafter, on 12 December 2009, Chevron forwarded a letter of demand to Unical demanding payment of the sum of R24 412 219.76.

[40] In a letter dated 17 December 2009 Unical acknowledged receipt of the letter of demand and confirmed that it had referred the matter to its attorneys and to its insurer's attorneys who had advised it not to make any admissions.

[41] Unical sent Chevron a further letter on 12 January 2010 advising that its insurer's lawyers were still busy with investigation. Unical's letter further states:

"*Finally, our interpretation of the charter party is that all cargo claims are subject to the Hague-Visby Rules (Shelltime 4 Clause 27 (c) (ii) and Chevron Rider Clauses 3.1, 3.8 and 5.13. Kindly confirm your schedules are in accordance with these provisions*".

[42] Chevron forwarded Unical's letter of 12 January 2010 to its legal department and requested advice on whether there was anything in the Hague-Visby Rules which should be of concern to it.

[43] In the meantime, at the request of Unical, Sellar met with Burns and Stuart-Hill of Unical at Cape Town on 20 January 2010. A week later after the meeting Sellar contacted Esterhuyse to enquire from him what it is that he was investigating.

[44] On 1 February 2010 Chevron's in-house legal department informed Sellar of the existence of the one year time-bar period in the Hague-Visby Rules. Thereafter Chevron instructed its attorneys of record to provide it with further advice in relation to the application of the Hague-Visby Rules to its claim.

[45] Burns of Unical sent an e-mail to Hutchinson of Chevron on 2 March 2010 advising as follows:

"I left a number of messages on your office voicemail. I'm concerned you have not received them. I was wanting to talk to you regarding the position on the bunker stock position relating to Fumana. We have been asked by Thor to make an offer of settlement before the end of February (and hence my urgency to get hold of you before the month end). The request caught me by surprise as we had agreed to have the whole issue resolved before end May. We are not in opposition to make any form of offer at this stage.
I want to meet with urgently to discuss and seek guidance on how to go forward on this matter but am unfortunately in the east until the 12th March. Can we meet the week beginning the 15 March.
Look forward to your response".

[46] In response thereto and on 3 March 2010 Sellar sent an e-mail to Unical recording Chevron's position and what was agreed at the meeting.

[47] Stuart-Hill responded by an e-mail on 5 March 2010 and expressed his wish to resolve the matter as soon as possible and suggested that they meet on 16 March 2010. The parties met on 16 March 2010 but there is a dispute regarding what was discussed at the meeting in particular whether Unical had indicated that it would invoke the one year time-bar provision in the Hague-Visby Rules as a defence in the event of the parties failing to reach settlement.

[48] Chevron commenced arbitration proceedings on 30 March 2010 in terms of the AFSA's rules for expedited arbitration and when Unical objected thereto, Chevron delivered a request for arbitration on 18 June 2010. Unical is defending the proceedings and has raised a special defence to Chevron's claim in reliance on the one year time-bar period contained in Article 111, Rule 6, of the Hague-Visby Rules. Chevron seeks an extension of the one year time-bar contained in the Hague-Visby Rules.

[49] The issue for determination is whether in terms of section 8 of the Arbitration Act the time period within which to commence arbitration proceedings should be extended.

Legal Principles

[50] Chevron seeks an order in terms of section 8 of the Arbitration Act 42 of 1965 which deals with the court's power to extend time fixed in an arbitration agreement for commencing arbitration proceedings. It provides as follows:

"Where an arbitration agreement to refer future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitration proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the court, if it is of the opinion that in the circumstances of the case undue hardship would otherwise be caused, may extend the time for such period as it considers proper, whether the time so fixed has expired or not, on such terms and conditions as it may consider just but subject to the provisions of any law limiting the time for commencing arbitration proceedings".

[51] The charter party under which the dispute arose was concluded by Chevron and Unical in July 2007. It includes the Chevron Rider Clauses which are contained in Annexure A attached to the charter party. Clause 27 of the charter party deals with exceptions and exclusions of certain losses. In the consideration of the merits of the matter, it is necessary to quote again its provisions in full. Clause 27 (a) states:

"The vessel, her master and Owners shall not, unless otherwise in this charter expressly provided, be liable for any loss or damage or delay or failure arising or resulting from any act, neglect or default of the master, pilots, mariners or other servants of Owners in the navigation or management of the vessel; fire, unless caused by the actual fault or privity of Owners; collision or standing; dangers and accidents of the sea; explosion bursting of boilers, breakage of shafts or any latent defect in hull, equipment or machinery; provided, however, that Clauses 1, 2, and 3 hereof shall be unaffected by the foregoing. 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."

[52] Clause 27 (c) provides that clause 27 (a) shall not apply to or affect as liability of Owners or the vessel or any other relevant person in respect of:

"(ii) any claim (whether brought by charterers or any other person) arising out of any loss of or damage to or in connection with cargo. All such claims shall be subject to the Hague-Visby Rules, excluding the provisions of Article 3 Rule 8 thereof notwithstanding that the parties have agreed that bills of lading will be issued for the carriage of the cargo".

[53] Clause 5.1 of the Chevron Rider clauses provides that all disputes under the contract shall be settled by arbitration in Cape Town. For the purposes of this judgment I will assume firstly that, Chevron's claims pursued in the arbitration constitute claims contemplated by clause 27 (c) of the charter party, secondly, that they are covered by the arbitration clause 5.1 of the charter party, thirdly, that Unical's defence that Chevron's claims are subject to a one year time-bar is a good defence and fourthly, that Chevron is correct in approaching this court for an extension of time within which to bring arbitration proceedings in terms of section 8 of the Arbitration Act.

[54] The exercise of the power to extend time under section 8 is a matter of discretion and the approach to be adopted in the exercise of such discretion is to be found in *Administrateur Kaap v Asla Konstruksie (Edms) Bpk*[2] which adopted the English judgments dealing with section 27 of the English Arbitration Act, 1950, the equivalent of section 8 of the South African Arbitration Act.

[2] 1989 (4) SA 458 (C).

[55] In *Administrateur Kaap v Asla Konstruksie (Edms) Bpk*, Tebbutt J adopted and applied the guidelines as set out in *Liberian Shipping Corporation ("The Pegasus") v A King & Sons Ltd*[3] and *(CA) Moscow V/O Exportkhleb v Helmville Ltd (the "Jocelyne")* QB (Admiralty Court)[4].

[56] In the *Liberian Shipping* case (supra) Lord Denning, M R dealt with the meaning of the phrase "Undue Hardship" as used in section 27 of the English Arbitration Act. He disapproved certain earlier decisions in which the phrase had been given a narrow meaning. He went on to state at 938:

"*These time-limit clauses used to operate most unjustly. Claimants used to find their claims barred when, by some oversight, they were only a day or two late. In order to avoid that injustice, the legislature intervened so as to enable the courts to extend the time whenever 'in the circumstances of the case undue hardship would otherwise be caused'. Undue there simply means excessive. It means greater hardship than the circumstances warrant. Even though a claimant has been at fault himself, it is an undue hardship on him if the consequences are out of proportion to his fault.*

Applying this test, it seems to me that if a claimant makes a mistake which is excusable, and is in consequence a few days out of time, then if there is no prejudice to the other side, it would be altogether too harsh to deprive him of all chance for ever of coming and making his claim. All the more so if the mistake is contributed to or shared by the other side. That indeed is this very case. I am quite prepared to accept that the charterers, when they went to the meeting of June 27, did not intend to mislead the owners. They were both under a misapprehension. Neither of them realised that the time had already expired; but it is pretty plain that he conduct of the charterers put the owners off their guard. The owners would not contemplate that they would be barred whilst negotiations were still going on. As soon as they realised that the negotiations were not going to be fruitful, they at once took the necessary steps."

[57] In the same case Lord Justice Salmon, who concurred in the judgment of Lord Denning M R, had this to say at 940I-941A regarding the meaning of section 27:

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[3] [1967] 1 All ER 934.
[4] [1977] 2 Lloyd's Rep 121 at 129.

"That section seems to me to state quite plainly that if, having considered all the circumstances of the case, the court comes to the conclusion that the hardship imposed by the form of the arbitration clause on the claimant is greater than that which, in justice, he should be called on to bear, the time within which to appoint an arbitrator may be extended by the court. I do not believe that the courts are entitled to read words into this section which are not there and which would have the effect of cutting down the power given to the courts by the plain language of the section itself".

[58] The guidelines enunciated in the *Liberian Shipping* (supra) judgment and (the *"Pegasus"* (supra) judgment) were adopted and applied by Brandon J in the *"Jocelyne"* (supra) case and he summarised them as follows at 129:

"(1) the words "undue hardship" in s. 27 should not be construed too narrowly.

(2) Undue hardship means excessive hardship and, where the hardship is due to the fault of the claimant, it means hardship the consequences of which are put out of proportion to such a fault.

(3) In deciding whether to extend time or not, the Court should look at all the relevant circumstances of the particular case.

(4) In particular, the following matters should be considered:-

(a) the length of the delay;

(b) the amount at stake;

(c) whether the delay was due to the fault of the claimant or to circumstances outside his control;

(d) if it was due to the fault of the claimant, the degree of such fault;

(e) whether the claimant was misled by the other party;

(f) whether the other party has been prejudiced by the delay, and, if so, the degree of such prejudice."

(See also *Libra Shipping & Trading Corp Ltd v Northern Sales Ltd (the "Aspen Trade")* [5] and *Evergos Naftiki Eteria v Cargill plc (the "Voltaz")* [6].

[59] With this legal background I now turn to consider whether the extension of time should be granted in terms of section 8 of the Arbitration Act.

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[5] [1981] 1 Lloyd's Rep 273 (CA).

[6] [1997] 1 Lloyd's Rep 35 (C.L.C.Ct).

[60] I will first deal with the length of the delay. It is common cause that Captain Harris of Chevron first detected the alleged losses within two weeks of the first delivery taking place. The first delivery occurred on 20 August 2008 which means that in terms of the Hague-Visby Rules the last day on which the claim for the recovery of this loss was on 19 August 2009. In the period 20 August 2008 to the date of referral of the dispute to arbitration the barge delivered product on a daily basis and the total amount claimed by Chevron for its losses up until September 2009 is R24 412 212.13. Chevron commenced arbitration proceedings on 30 March 2010. At that stage the delay was approximately seven months.

[61] The reason for the delay is that Sellar, Chevron's representative had no maritime experience prior to being employed in the position he held on 1 May 2008. He was first alerted to the relevance of the Hague-Visby Rules on 12 January 2010 when Burns made a reference to them in the letter he addressed to Chevron and which Sellar forwarded to Chevron's legal department for advice on the relevance of the Hague-Visby Rules to Chevron's claims. Sellar became aware of the one year time-bar provision in the Hague-Visby Rules and its potential application to Chevron's claims on 1 February 2010.

[62] Unical contends that ignorance of Sellar of the time-bar provision incorporated in the charter party cannot be a relevant excuse for not commencing suit timeously and that it was patently neglectful of Chevron not to have taken legal advice at an earlier time in respect of a claim of such magnitude and complexity.

[63] It is correct, as the court held in *Voltaz* (supra) at 40, that it is incumbent upon parties to a maritime venture to acquaint themselves with the relevant terms of the

contract since maritime claims are often subject to short time limits and that if those time limits are not strictly observed the claim will prescribe. A delay of seven months is not trivial, but yet not unreasonable. It must depend on what effect, if any, it will have on Unical.

[64] The second aspect to consider is the size of the claim. The claim is for R24 412 221.23 plus interest. It is a very large claim. Should an extension of time within which to commence arbitration be refused, Chevron will be unable to claim approximately R18 million of its R24 million claim. On the other hand should an extension of time be granted Unical will be unable to plead prescription and in the event of Chevron eventually succeeding in its claim, Unical will have to pay the whole amount of the claim plus interest.

[65] The next matter is whether the delay was due to Chevron's fault or to circumstances beyond its control. As I have already pointed out the delay is seven months. The question is why it occurred and why it continued after Sellar was alerted to the provision of the Hague-Visby Rules on 12 January 2010.

[66] Sellar says the delay was due to circumstances beyond Chevron's control and that Unical's conduct significantly contributed to the circumstances in which Chevron now finds itself. He alleges that it is clear that by 30 July 2009 Unical was aware that the problem did not lie with the JBS shore meter. It lay with the barge Krohne meter and that Unical was responsible for Chevron's losses. Sellar contends that in these circumstances it is clear that there was nothing further for Unical to investigate and that Unical's claim that it was investigating the cause of the problem was just a deliberate

strategy to delay the enforcement of the claim by Chevron in an attempt to ensure that a substantial amount of its claim became time-barred.

[67] With regard to the question why the delay continued after Sellar was alerted to the provision the Hague-Visby Rules on 12 January 2010, Sellar says upon receipt of Unical's letter he immediately sought advice from Chevron's legal department on whether the Hague-Visby Rules apply to Chevron's claim. He was advised on 1 February 2010 that the Hague-Visby Rules apply and Chevron instructed its attorneys of record to commence arbitration proceedings which they did on 30 March 2010.

[68] There is no doubt in my mind that the delay was due to Chevron's employee, Sellar in failing to read properly the charter party in terms of which he sought to enforce Chevron's claim against Unical. Sellar did not have to be reminded by Burns of the provisions of the Hague-Visby Rules and their potential application to Chevron's claim.

[69] As regards the degree of fault of Chevron it was submitted by *Mr Wragge* that the degree of Chevron's fault is not substantial and was at least in part attributable to the conduct of Unical's representatives. In developing this submission *Mr Wragge* pointed out that the one year time-bar provision in Article 111, Rule 6 of the Hague-Visby Rules is not expressly set out in the charter party making it difficult for Sellar to identify it bearing in mind that he had not been involved in the conclusion of the charter party and had no marine experience.

[70] Secondly, *Mr Wragge* pointed out that in any event, even if Sellar had noticed the time-bar provision he would not have paid it particular attention because, as far as he was concerned, Chevron and Unical were in the process of determining the precise

cause and extent of the shortage. In other words it is contended that Sellar was made to believe that if Unical had been convinced of its liability it would have paid Chevron's claim and that is what lulled him into the false sense of security.

[71] In response *Mr Stewart* submitted on behalf of Unical that Chevron was entirely at fault with regard to the delay in instituting the proceedings. He argued that had Chevron's representative read the charter party he would have noticed that the provision of the Hague-Visby Rules applies to its claim. He rejected the suggestion that Sellar was lulled into a false sense of security. He argued that it was always Unical's position that it was not liable for Chevron's losses and that the faulty JBS meters were to blame for the losses.

[72] Although I am of the view that Chevron was entirely at fault with regard to the delay in instituting the proceedings, I am, however, not satisfied that its conduct, in engaging in further discussions with Unical after the discovery of losses and in allowing the latter to conduct its own investigation into the possible causes of the losses, was grossly unreasonable.

[73] It is clear from the facts which are common cause that although the parties disagreed on what the cause of Chevron's losses was and the party responsible therefor, they both expressed a willingness to meet and see whether they could reach an agreement and they did so with a view to preserving and maintaining their contractual relationship flowing from the charter party.

[74] The next issue to consider is whether Chevron was misled by Unical. It was submitted on Chevron's behalf that it is clear that Unical's representatives were aware of

the one year time-bar provision at a comparatively early stage and misled Sellar into believing that settlement negotiations would bear fruit, notwithstanding the fact that Unical intended to invoke the time-bar provision, as they have done. With regard to this counsel for Chevron made various points.

[75] First, he argued that it is clear by the time Unical addressed its letter to Chevron on 12 January 2010, Unical was aware of the one year time-bar provision in Article 111, Rule 6 of the Hague-Visby Rules. The allegation upon which this argument is based is denied by Burns of Unical, the author of the letter of 12 January 2010.

[76] Burns explains his failure to refer specifically to the one year time-bar in his letter by stating that in bringing the Hague-Visby Rules to the attention of Chevron, Unical was concerned, not only with the time-bar issue, but also with other defences arising out of the Hague-Visby Rules to the extent that it was established that a loss had occurred and that the cause of such loss might be a latent defect in respect of the barge. He says Unical had then recently considered all such defences but had been unaware of the time-bar issue much before then.

[77] Secondly, it was argued on behalf of Chevron that by 12 January 2010, by the very latest, Unical's representatives were aware of the one year time-bar provision and were also aware that, in the event of the time-bar provision being applicable, more and more of Chevron's claim against Unical continued to prescribe.

[78] Thirdly, that Unical convened a meeting on 20 January 2010 at which its representatives requested more time as they were still investigating Chevron's claim. Fourthly, that when Sellar became aware of the one year time-bar provision in the

Hague-Visby Rules he wrote to Unical and demanded full settlement of Chevron's claim by the end of February 2010. In response thereto Mr Stuart-Hill addressed an e-mail, not to Sellar, but to Hutchinson complaining that the request by Sellar for Unical to settle the matter before the end of February 2010 caught him by surprise in view of the fact that the parties had agreed to have the whole issue resolved before the end of May. He requested an urgent meeting with Hutchinson as Unical was not in a position "to make any form of offer at this stage". Chevron acceded to Mr Stuart-Hills' request and its representatives met with Unical's representatives on 16 March 2010.

[79] In my view the suggestion that Unical was aware much earlier than 12 January 2010 that the one year time-bar applied to Chevron's claims, but that it failed to alert Chevron thereto before 12 January 2010 because it intended to rely thereon in defending Chevron's claim, is incorrect. In the first place Unical did not undertake to Chevron that it would not rely on the one year time-bar defence in the event of it being established that the fault in the barge was to blame for Chevron's losses. In the absence of such an undertaking there is no room for the contention that Unical misled Chevron.

[80] Secondly, it is irrelevant when Unical might have become aware of the one year time-bar provision. It is something which is referred to in the charter party to which both parties had access. It is not suggested by Chevron that only Unical had access to the charter party. In any event Unical explains why it raised the Hague-Visby Rules in its letter of 12 January 2010. It says it was concerned not only with the time-bar issue, but also with other defences in those Rules and that it was unaware of the time-bar issue much earlier than 12 January 2010. There is no reason to reject its explanation regarding when it became aware of the one year time-bar defence. Its explanation is not

so far-fetched that it can simply be rejected. (*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd.*[7])

[81] Finally, it remains to consider whether Unical has been prejudiced by Chevron's delay in instituting proceedings and, if so, how seriously. In doing so, I have to consider the prejudice which Chevron is likely to suffer if extension of time were to be refused and compare it with prejudice which Unical is likely to suffer if extension of time were to be granted.

[82] In this regard counsel for Unical submitted that on the assumption that Unical, but for the time-bar defence, may be liable, Uncial will be prejudiced if the time-bar is extended because first, its otherwise good time-bar defence will fail to the potential prejudice of some R18 million; secondly, each day of delay by Chevron in commencing proceedings has led to a corresponding increase in Chevron's claim without Unical knowing where it stood and therefore not knowing the level of importance to accord its investigations, the preservation of evidence and the resolution of the ongoing concern with regard to losses; thirdly, the accumulated losses are huge and are way in excess of the profitability of the bunker barge business; fourthly, Unical will have to pay interest for the period in which Chevron delayed in bringing the proceedings, and at a highly punitive nature. Finally, it was argued on behalf of Unical that because of the delay it has been unable to obtain evidence of fault on the part of JBS meters.

[83] The nature of prejudice which Unical alleges it will suffer if extension of time were to be granted in this matter, in my view, is the prejudice which does not necessarily

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[7] 1984 (3) SA 623 (A) at 634D-635C).

result from delay. It is no more than a risk which any defendant faces in a claim for damages. In my view prejudice loses its significance in the present case in view of the fact there had been an ongoing investigation and the evidence has been collected. Uncial was alerted to the problem during the first month that the alleged loss occurred.

[84] Moreover the delay is not inordinate and there is a reasonable explanation for it and being so there can be no basis for Unical to contend that Chevron's delay induced it to believe that Chevron would not pursue a claim for the recovery of its losses. If an extension of time were to be refused Chevron would be more prejudiced as it would be barred from pursuing almost 80% of its R24 million claim, which in my view is a huge amount for a litigant to sacrifice as a result of operation of a time-bar provision in the contract. The delay has not caused problems to Unical and it seems to me that to shut Chevron out from claiming a substantial portion of its claim would involve undue hardship within the meaning of section 8 of the Arbitration Act.

[85] In conclusion taking all the relevant circumstances of the present case I am satisfied that even though Chevron has been at fault, the consequences of its failure to timeously institute arbitration proceedings will be out of proportion to its fault. In the circumstances I will grant the extension of time to prevent undue hardship to Chevron.

[86] The next question is whether I should extend the time-bar for the full period in respect of which Chevron claims or only extend it in respect of that period for which Chevron had demonstrated that it was not at fault. In this regard two different dates were mentioned by both parties as a basis to establish a cut-off date.

[87] The consideration of this question becomes necessary because of Unical's alternative defence. Unical's counsel submitted that in the event that I hold that the time-bar should be extended, I should not grant extension for the full period in respect of which Chevron claims. He argued that it would only be justifiable to extend the time-bar in respect of that period for which Chevron had demonstrated that it was not at fault. In this regard he submitted that 12 January 2010 should be the cut-off date because this is a date on which Unical alerted Sellar to the Hague-Visby Rules. On the other hand counsel for Chevron submitted that should I be inclined to grant an extension of a limited nature, it will be proper to use 1 February 2010 as a cut-off date on the basis that it is the date upon which Sellar became aware that the one year time-bar provision of the Hague-Visby Rules applied to Chevron's claims. He argued that although Unical alerted Sellar to the Hague-Visby Rules on 12 January 2010 it did not refer specifically to the time-bar provision.

[88] I agree with the submission made by counsel for Unical that the grant of an extension of a limited nature is justified in the present case having regard to the reasons furnished by Sellar for Chevron's failure to institute arbitration proceedings within a period of one year from the date of discovery of the alleged losses. Sellar blames failure on his ignorance of the Hague-Visby Rules. He says he had no knowledge of the existence of the Hague-Visby Rules in the charter party until it was brought to his attention by Burns on 12 January 2010. He only became aware of the one year time-bar on 1 February 2010 after receiving legal advice from Chevron's legal department. He does not explain, however, why it took some three weeks for Chevron's legal department to give legal advice.

[89] The fact that there were still ongoing discussions between the parties with a view to identifying the cause of Chevron's losses and who should be held responsible therefor does not, in my view, constitute a reasonable explanation for Chevron's failure to institute arbitration proceedings immediately after 12 January 2010. At that stage Chevron could have sought and obtained permission from Unical to agree to the extension of time pending further discussions.

[90] In my view, the time-bar should not be extended for the full period in respect of which Chevron claims. It was put on notice on 12 January 2010 that its claims are subject to the Hague-Visby Rules and from that date the matter deserved to be treated with some form of urgency. Realistically is should not have taken Chevron's legal department some three weeks to establish that a one year time-bar could be potentially applicable to Chevron's claims. In these circumstances there is certainly no justification for extending the time-bar beyond 25 January 2010. The effect of this finding is that the prescription period in respect of all the claims arising before 25 January 2010 is extended to the date which the arbitrator determines as the date upon which the arbitration proceedings were commenced and the implications thereof is that the prescription only affects that part of the claim arising between 26 January 2010 and the date which the arbitrator determines as the date upon which the arbitration proceedings were commenced.

[91] The next matter to consider is costs. I will order Chevron to pay the costs of this application including costs of Unical's costs of opposition on the ground that it is largely due to its fault that the bringing of this application became necessary. Had it read the charter party, upon which it sought to hold Unical liable, it would have noticed that there is a reference in it to the Hague-Visby Rules and if it was not certain of its relevance it

should have sought and obtained legal advice from its attorneys. In these circumstances Uncial was entitled to oppose the application and its opposition was not unreasonable.

The Order

[92] In the result I make the order in the following terms:

(a) The period of one (1) year within which the applicant was required to bring suit in respect of any claim to which the Hague-Visby Rules apply, which time period is specified in Article 111, Rule 6 of the said Rules and incorporated by reference in clause 27 (c) (ii) of the charter party concluded between the applicant and the first respondent at Cape Town during July 2007, which charter party includes the arbitration agreement, is extended up until 25 January 2010, to the date upon which the arbitrator determines that the proceedings were commenced.

(b) The applicant to pay the costs of this application including costs of opposition by the first respondent.

D H ZONDI
Judge of the High Court