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# Shipping update
## Court of Appeal considers Notice of Readiness under Shellvoy 5

July 2010

In *AET Inc Ltd v Arcadia Petroleum Ltd* (The *"Eagle Valencia"*) [2010] EWCA Civ 713, the Court of Appeal has considered the circumstances in which a valid Notice of Readiness can be tendered pending grant of free pratique under the Shellvoy 5 form together with Shell Additional Clauses (February 1999). Clyde & Co acted for the successful charterers in this case.

### The Facts

The claimant owners entered into a voyage charterparty with the defendant charterers dated 18 December 2006. The wording was based on Part II of the Shellvoy 5 form together with Shell Additional Clauses – February 1999.

For ease of reference the Court subdivided Shell Additional Clause 22 (SAC 22) into numbered sentences and the numbers after the number 22 indicate the relevant section of the original (undivided and un-numbered) SAC 22.

SAC 22.1 provided that if owners failed to obtain free pratique within six hours after notice of readiness was tendered, then the notice would be invalid. However, SAC 22.5 provided that the presentation of the notice of readiness and the commencement of laytime would not be invalid *"where the authorities do not grant free pratique or customs clearance at the anchorage or other place but clear the vessel when she berths".* Under those conditions the notice of readiness would be valid unless the timely clearance of the vessel was caused by the fault of the vessel (SAC 22.6).

Notice of Readiness was tendered at the second load port, Escravos, at 11.48 on January 15, 2007. At that stage the vessel was required to wait at anchorage since the berth was occupied. The port health authority representatives boarded the vessel at the anchorage at 07.30 on January 16 and free pratique was granted at 08.30 the same day.

Owners contended that laytime began at Escravos 6 hours after they tendered notice of readiness, namely at 17.48 hours on 15th January. Charterers submitted that laytime did not commence at Escravos until the vessel was all fast at the berth since free pratique was not obtained within six hours as required by SAC 22 and the Notice of Readiness was therefore invalid.

### The High Court

Before Mr Justice Walker in the High Court, owners argued that the Notice of Readiness was valid given that the purpose of SAC 22.5 and 22.6 was to provide that the original notice of readiness was not invalidated where timely clearance within six hours of tender was unobtainable through no fault of the vessel, in particular where timely clearance was not delayed by the fault of the vessel and where the vessel was cleared by, at the latest, the time that she berthed.

Charterers submitted that SAC 22.5 and 22.6 were of much more limited application than that contended by owners. The clauses were only concerned with the position where, at the port in question, the authorities did not grant free pratique at the anchorage but only cleared a vessel once she berthed; that was not the case in Escravos and additionally the vessel was in fact cleared at anchorage.

Walker J upheld the Owners' claim to demurrage on the basis that SAC 22.5 meant that the original notice of readiness was not invalid if free pratique had been granted before the vessel berthed. Charterers were granted leave to appeal.

## The Court of Appeal

By a unanimous decision the Court of Appeal upheld charterers' appeal. The leading judgment was delivered by Lord Justice Longmore.

By way of introduction Longmore LJ noted that nowadays the granting of free pratique is likely to be something of a formality and the need for free pratique will not, at common law, prevent a notice of readiness from being given (see The *"Delian Spirit"* [1972] 1QB 103). However, the parties are of course free to make other arrangements in their contract, an example being the Additional Clauses attached to Shellvoy 5 stating that time is to begin to run 6 hours after the tender of notice of readiness, but only if free pratique is granted within that time.

Turning to the arguments of the parties and the judgment below, he was careful to point out that the whole scheme of SAC 22 in relation to free pratique is to implement a different arrangement from the position as it is under clause 13 of Shellvoy 5. As he put it:

> *"There would otherwise be no point in having a Special Additional Clause at all. If the notice of readiness is to be valid if given at any time before berthing pursuant to SAC 22.5, it is difficult to see how clause 13 will have been altered."*

Longmore LJ then proceeded to address the correct operation of clause 13 in conjunction with additional clause 22. Given that the relevant passage of the judgment so succinctly and clearly summarises what must now be considered the correct interpretation of these widely used clauses, the finding merits quoting in full:

> *"As I see it, nothing in clause 13 prevents a notice of readiness being tendered in the absence of free pratique (which reflects the common law position if free pratique is expected to be a formality). Subject to an argument on the word "fail" to which I will come, SAC 22.1 provides that clause 13 will continue to govern if free pratique is granted within 6 hours of the tender of notice of readiness; but if it is not granted (and is thus, perhaps, less of a formality than expected) within 6 hours of the notice of readiness, then the "original" notice of readiness is not to be valid. That will not, however, prevent a fresh notice of readiness from being tendered once free pratique has been granted (SAC 22.2) and time will then run after 6 hours from the tender of that fresh notice of readiness (SAC 22.3). Up to that point in time, costs and expenses will (as one would expect) be for Owners' account (SAC 22.4). This is an eminently workable scheme and, although not so favourable to Owners as clause 13, at least allows them to start the laytime clock 6 hours after such fresh notice of readiness is tendered. If the port remains congested, laytime will still accrue, although it has started somewhat later than envisaged by clause 13.*
>
> *The only situation where Owners will be heavily disadvantaged will be if free pratique is only granted when the vessel berths. That may happen because it is the practice of the port only to board a vessel and grant free pratique when she has actually berthed or for any other reason. If, in these circumstances, the only notice of readiness which Owners have been able to tender is invalid, they will (unfairly) have borne the risk of congestion which clause 13 provides they do not have to bear. SAC 22.5 then comes into play because it provides that, in those circumstances, the original notice of readiness is not to be invalid but is to take effect in accordance with the terms of the charter unless (SAC 22.6) the delay is in some way the fault of the Owners.*
>
> *This is an entirely understandable and workable scheme."*

It followed that the court proceeded to allow the appeal and to enter judgment for the charterers.

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## Comment

The decision provides useful confirmation that under the widely used Shellvoy 5 form together with Shell Additional Causes (February 1999), no fault by owners is needed in order for a notice of readiness to be invalidated by failure to obtain free pratique within the specified time.

However, the case also highlights two other points that are of real practical significance. First, as Longmore LJ pointed out in his useful summary, there is nothing to prevent owners from tendering a fresh notice of readiness once free pratique has been granted, even if the original has been invalidated by failure to obtain free pratique within 6 hours (SAC 22.2). In such a case, time will then run after 6 hours from the tender of that fresh notice of readiness (SAC 22.3).

Indeed in the present case, it was held that owners had tendered a fresh Notice of Readiness after the granting of free pratique. In an email sent by the Master to charterers at 15.39 on 16 January confirmation was provided that the vessel *"is ready in all respects to load a parcel of Escravos Crude Oil as per terms, conditions and exceptions of the relevant Charter party."* The message concluded by asking charterers to accept the original Notice of Readiness tendered on 15 January.

Longmore LJ noted that this subsequent message, although perhaps not intended by the Master or owners to constitute a new Notice of Readiness, did have that effect given that it contained an accurate statement that the vessel was ready to load. Being an email it also met the additional requirement mentioned in 13.1.a1 of Shellvoy Part 2 that the notice should be in writing. The fact that the notice was not in standard form or headed 'Notice of Readiness' was immaterial. However, notwithstanding this finding, owners' late attempt to rely on the email in question failed and the reason for this highlights the second important practical point: namely the effect of the time bar provisions in Shellvoy 5.

Clause 15(3) of Part II of Shellvoy 5 contains the provision that, if owners fail to submit any demurrage claim *"fully and correctly"* documented within 90 days, Charterers' liability for any such claim *"shall be extinguished"*. Similar provisions to these frequently occur in charterparties and are a regular source of disputes. In this case, the claim submitted by owners was presented in time and included the original Notice of Readiness of 15 January but, crucially, not the subsequent email of 16 January. Indeed, the suggestion that subsequent messages may have constituted a valid notice was not raised by owners until a few days before the hearing. Given that the original Notice had been held invalid, the Court of Appeal found that the demurrage claim originally submitted within the time bar period could not be said to be *"fully and correctly documented"* within the wording of clause 15(3) due to the absence of either a valid Notice of Readiness or any reference to it (such as in a statement of facts) that would enable charterers to verify the calculation and the commencement of laytime. Owner's claim therefore failed.

Worthy of note for similar future cases was Longmore LJ's observation that although the onus remains on an owner to ensure that a claim for demurrage is correctly documented, in such circumstances it is not unreasonable to expect an owner claiming demurrage to include alternative notices of readiness when he submits a claim, on the basis that they may be legally relevant.

### Further information

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