

## HAPPY DAY - Court of Appeal rules in favour of owners

You may recall that we reported on the High Court decision in the HAPPY DAY in Issue 2 of Soundings early last year. This was an appeal from a tribunal's decision concerning the counting of laytime when:

- The charterparty provides for Notice of Readiness to be given at the discharge port to trigger the commencement of laytime
- Notice of Readiness is given prematurely by the owners and is therefore invalid
- No further Notice of Readiness is served
- The ship discharges and the time taken exceeds the number of laydays provided in the charterparty

In London arbitration the tribunal held that in these circumstances the owners were still entitled to demurrage. The charterers had taken some three months to discharge the ship's cargo. They held that laytime would commence as if the notice had been correctly

given at the time when the discharge commenced. The laytime regime in the charterparty would then apply.

On appeal, the High Court disagreed. The judge held that, without a valid notice to trigger laytime, it would not commence at all. On the contrary, the charterers would be entitled to despatch, the whole laytime period having been "saved". The fact that discharge commenced to the knowledge of the charterers and without protest or reservation by them was not, in itself, sufficient to start laytime.

In circumstances where the bulk of the delay at the discharge port was due to non-production of original bills, this was a controversial decision that surprised many in the shipping community.

The owners appealed the High Court decision. The question put to the Court of Appeal was:

["Can laytime commence under a voyage charterparty requiring service of a notice of readiness when no valid notice of readiness is ever served? If so, when does it commence?"](#)

This was the question left open by the judge in the case of the MEXICO I, where, in similar circumstances, the charterers made a specific concession that laytime should commence when discharge commences. No such concession was made in the HAPPY DAY.

The Court of Appeal found that the doctrine of waiver applied to this case. All three judges found that silence in response to receipt of an invalid notice can, in combination with some other step, amount to a waiver of that invalidity or acceptance of the notice as complying with the charterparty. In the HAPPY DAY, at the time discharge commenced, the charterers did not reject the NOR, and later assented to commencement of discharge. The Court of Appeal found it was sufficient for a reasonable shipowner to conclude that the charterers had waived reliance on any invalidity in the NOR and any requirement for a further notice. After all, if the charterers had made such a reservation, the shipowner would immediately have served a fresh notice to protect his position.

The conclusions of the tribunal have therefore been restored by the Court of Appeal and laytime held to commence as if a valid

notice had been served at the start of discharge.

The MEXICO I case has long established that subsequent events cannot validate an invalid notice of readiness. The Court of Appeal's decision in the HAPPY DAY does not change this. The NOR given was still invalid but the charterers, by their conduct, waived the necessity for a further valid notice.

The Association's advice given previously therefore remains unchanged. Members should continue to take care that:

- Any Notice of Readiness given is valid at the time it is tendered
- If there is any doubt as to validity of Notice of Readiness, a new notice should be given marked "without prejudice to preceding Notice(s) of Readiness"
- In cases where there is any delay in berthing, Members should tender a further notice marked as described above on berthing and/or on commencement of discharge

The words of Mr Justice Donaldson in the TIMNA back in 1970 are still good advice. All masters should:

"...go on giving such notices in order that, when later the lawyers are brought in, no one shall be able to say: "if only the master had given notice of readiness, laytime would have begun and the Owners would now be able to claim demurrage"

### MASS GLORY - A different result now?

Whilst the HAPPY DAY case does not directly involve a Member of the Association, the earlier High Court decision had been influential in a number of cases involving Members. In particular, the decision was relied upon in an earlier appeal to the High Court from a tribunal's decision, the MASS GLORY.

The MASS GLORY was chartered by disponent owner Members, Navios, to Goldbeam, for the carriage of a cargo from South America to China. Goldbeam, in turn, sub-chartered her on substantially the same terms to Glencore (who were also the charterers in the HAPPY DAY).

The ship loaded at Rio Grande and sailed for Xiamen, South China, which Glencore had declared as the first discharge port. She arrived there on 14th

June. Although the ship was ready to go to a discharge berth on arrival, the charterers ordered that she remain at anchor. The Master gave NOR from the anchorage on the 15th June. The ship eventually berthed on 9th August. No further NOR was served. The cargo was completely discharged within the laytime period.

Disputes between the parties over the delays and the commencement of laytime at Xiamen were referred to London arbitrations. These were heard concurrently.

Navios (and, in turn, Goldbeam) accepted that the charter was a berth charter and that they therefore had no entitlement to demurrage for the delay off Xiamen. They did however claim damages for detention.

For further information on any matters covered by Soundings, please contact the Managers. On this aspect the tribunal found that the charterers were in breach of their duty to act with reasonable despatch to enable the ship to become an arrived ship and berth promptly at Xiamen. The owners were awarded damages for detention of over \$500,000.

As to laytime (and as in the HAPPY DAY) Glencore argued that, in the absence of a valid NOR, laytime did not commence at all. Glencore claimed to be entitled to despatch for the laytime period.

The tribunal, which had before it the High Court's decision in the HAPPY DAY, found that the NOR given at Xiamen was invalid. However, the tribunal found that laytime for the MASS GLORY started to run, in any event, from when discharge began.

The tribunal's majority decision on this aspect distinguished the HAPPY DAY on its facts. In the HAPPY DAY tidal restrictions had prevented the ship from berthing. The invalid NOR was therefore due to a fault on the ship's side in tendering it prematurely. In contrast, in the MASS GLORY, when the NOR was tendered, a berth was available. However, the owners had been prevented from berthing and serving a valid NOR by reason of the charterers' breach.

The tribunal found that the charterers were estopped by their breach from denying that time counted from the start of discharge. The charterers

appealed the tribunal's award to the High Court.

One question put to the High Court in the MASS GLORY was:

*"Where a vessel on a voyage charter is detained at the discharge port by charterers in circumstances where no valid notice of readiness is ever served prior to completion of discharge are the charterers entitled to credit for laytime, or alternatively full despatch? If so, by reference to what principles of law is such credit to be calculated?"*

Mr Justice Moore-Bick upheld the owners' claim to damages for the charterers' breach in preventing the ship from reaching the berth. However, he overturned the tribunal's majority decision on the running of laytime. Relying on the HAPPY DAY, he considered that without a valid NOR, laytime could not begin. In his view there were no findings to support a waiver argument. He did not consider that Glencore benefited from their own breach but instead from the owners' independent failure to tender a fresh NOR once the ship had reached the berth.

In view of the Court of Appeal's recent decision on this point in the HAPPY DAY, the MASS GLORY now seems to have been wrongly decided by the High Court. A charterers' silence, coupled with discharge starting, has now been judged sufficient to amount to a waiver of the right to a valid NOR. The charterers in the MASS GLORY had not in fact been silent following the tender of the invalid notice. They had actively continued to request that the ship remain at anchorage.

As the law now stands, it seems reasonable to conclude generally that charterers who do not reject an invalid notice, actively prevent a ship from berthing, then order her to berth and discharge, must similarly waive their right to a valid NOR.