Neutral Citation Number: [2019] EWHC 225 (Comm)

Case No: CL-2017-000498

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, Fetter Lane, EC4A 1NL

Date: 19/02/2019

Before :

NICHOLAS VINEALL QC
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

GLOBALINK TRANSPORTATION AND LOGISTICS WORLDWIDE LLP	**Claimants**
- and -	
DHL PROJECT & CHARTERING LIMITED	**Defendants**

- -
- -

Arshad Ghaffar (instructed by Mitchell Simmonds) for the Claimant
Emmet Coldrick (instructed by Barrett Solicitors Limited) for the Defendant

Hearing dates: 29 January 2019

- -

Approved Judgment

Judgment Approved by the court for handing down.

NICHOLAS VINEALL QC:

1. This is an application by the claimant, Globalink Transportation and Logistics Worldwide LLP ("Globalink"), for summary judgment against the defendant, DHL Project & Chartering Ltd ("DHL") pursuant to CPR Part 24. The dispute between the parties relates to the transport of large units of refinery plant between Novorossiysk in Russia and Atyrau in Kazakhstan.

2. DHL admits Globalink's claim, but contends that it has a cross claim of greater value, which is at least arguable, and which, if it succeeds, will provide it with a defence by way of set-off. Globalink says in riposte that its claim is a claim for freight, and that the rule of law which says that a carrier's claim for freight must be paid without set-off should apply to its claim, so that it is entitled to summary judgment even though there is an arguable cross claim. The parties' submissions raise other points, but the main issue is the extent of the no set-off against freight rule.

Procedural History

3. Globalink made its application for summary judgment on 9 February 2018, following DHL's acknowledgement of service, but before it filed a defence. On 12 March 2018 DHL served evidence in response. On 29 June 2018 Globalink served its reply evidence, which was late. The parties therefore agreed to adjourn the application hearing until 05 November 2018. On 17 October 2018 DHL sought to adduce further evidence, but Globalink objected. At a hearing on 5 November 2018, Teare J granted DHL permission to rely on the additional evidence and adjourned the hearing until today in order to allow Globalink to adduce further evidence in reply. So it is that this summary judgment application came on for hearing almost a year after it was issued.

Facts

4. In 2014 one of DHL's clients, Sinopec, was engaged in a construction project at a refinery near Atyrau. Sinopec engaged DHL to arrange the transport of various units of refinery plant from China to the refinery.

5. All the units were carried by sea from China to Novorossiysk. DHL engaged Globalink in relation to the transport from Novorossiysk to the refinery. As eventually planned, 14 of the heaviest units were to be loaded onto two barges and towed through the Volga-Don Canal from the Black Sea to the Caspian Sea, towed across the Caspian for customs clearance in Bautino, and then to Atyrau. Finally the barges were to be towed up the Ural-Caspian Canal to Atyrau River Port, with the units then being discharged there and taken by truck to the refinery.

6. By a contract dated 10 September 2014 ("the Agreement"), DHL engaged Globalink to carry out or arrange forwarding services from Novorossiysk to Atyrau. The Agreement was entitled "Freight-Forwarding Services Contract" and Globalink was referred to as the "Forwarding Agent". The Agreement provided as follows:

1. Subject of the Contract

1.1 The Forwarding Agent shall carry out or arrange the forwarding services of the Client's cargo for remuneration and to the cost of the Client, related to the Client's

cargo transportation by truck, railway, sea, air shipment and/or any other kind of transport, hereinafter referred to as the "Forwarding Service", and the Client shall pay the cost for Cargo Transportation according to the Section 3 hereof.

(…)

1.3 The list of Services, settlement procedure rendered by the Forwarding Agent to the Client shall be specified in the respective Appendix.

1.4 Request for Transportation and the Appendix constitute an integral part of this Contract.

1.5 During implementation of the obligations hereunder the Forwarding Agent shall act on behalf and at the expense of the Client, the Forwarding Agent shall have the right to involve the third Parties to fulfil its obligations under this Contract.

2. Rights and Obligations of the Parties.

2.1 The Forwarding Agent shall be obliged to:

2.1.1 arrange the transportation of Client's cargo according to the Request for Transportation and respective Appendix;

(…)

2.1.6 use all reasonable endeavours to inform the Client in written form about all and any circumstances that adversely affect or could affect the integrity of cargo, timely delivery of cargo and/or the proper fulfilment of the obligations by the Forwarding Agent.

(…)

7. Appendix 1, which is also dated 10 September 2014 provides that the transport of the cargo was to be by "SEA/ROAD". The appendix also provides:

6. List of rendered services:

Barge (two units including all fees by channels and ports from Novo[rossiysk] to Atyrau.

Discharging from the vessel by ship's cranes to the barges to the berth, loading on the barge by floating cranes.

Lashing on the barges and vessels.

Calculation of the voyage project by authorized Maritime Center, documentation and formality.

Shifting of the barge alongside of the ocean vessel/ inside of the port.

Cutting and welding barge's bulwark and rail.

Inland transport charges from Atyrau river port.

Customs transit formalities at all transit points.

Road permits, police escort.

(…)

14. Term of delivery: LI Novorosijsk, Russian – FOT Atyrau

17. Costs of services included to quotation:

Barge (two units including all fees by channels and ports from Novo to Atyrau- $950,000.00.

Discharging from the vessel by ship's cranes to the barges to the berth, loading on the barge by floating cranes- $158,000.00.

Lashing on the barges and vessels - $68,350.00.

Calculation of the voyage project by authorized Maritime Center, documentation and formality - $12,000.00.

Shifting of the barge alongside of the ocean vessel/ inside of the port - $30,000.00.

Cutting and welding barge's bulwark and rail - $30,000.00.

Inland transport charges from Atyrau river port and from Novorossijsk port to DOOR Atyrau refinery - $1,175,391.00

TOTAL NET/NET: $2,423,741.00

Proposed profit share for Globalink Transportation & Logistics Worldwide LLC is 7% (seven per cent) equal to $155,000.00 (One Hundred and Fifty Five Thousand US Dollars, 00 cents)

Total cost of services- $2,578,741.00 (Two Million Five Hundred Seventy Eight Thousand Seven Hundred and Forty One US Dollars, 00 cents).

(…)

19. Special Notes:

Load/Discharge free time: 5 (five) total days shinc

Demurrage for the barge and tug in port of loading and discharging USD 5,500.00 per day or prorate for each convoy (1 Barge + 1 tug)

Voyage duration Novorossiysk/Atyrau 22-24 days wp agw"

("wp agw" means weather permitting, all going well.)

8. At Novorossiysk, 10 units of cargo were discharged onto barge ARK-1. The remaining 4 units were discharged onto barge SPA-2. ARK-1 arrived at Atyrau on 29

October 2014, within the agreed voyage duration of 22 to 24 days. SPA-2 only reached Atyrau at the mouth of the Ural Canal on 15 November 2014. Critically, barge SPA-2 could not then proceed to Atyrau because the water level in the Ural-Caspian canal was too low for the draught of the loaded barge.

9. On 17 November 2014, the parties met at Atyrau to discuss the best way to proceed. Both parties signed a document entitled "Protocol of the meeting". The document set out the attendees and provided as follows:

> *AGENDA:*
>
> *The project cargo carried jointly by DHL Global Forwarding (hereinafter referred to as "Customer") and Globalink Transportation and Logistics Worldwide herein referred to as "Forwarder" and taking into account the following force majeure situations described as "low water level in Ural-Caspian Canal", which does not permit the SPA-2 barge carrying the following 4 x project cargo units, decided to:*
>
> *1. Relocate the barge SPA-2 + Tug Boat MB-1202 from its current position, i.e. in the Caspian Sea Buoy to Kuryk for the following activities:*
>
> > *a. Offloading all 4 x items from SPA-2 barge;*
> >
> > *b. Arrange 2 (two) or 3 (three) flat barges to enable them to enter Ural-Caspian Canal for further sailing into Atyrau river port.*
> >
> > *c. the C-0701 unit to be arrange for by road transport from Kuryk to*
>
> *Above activities shall all be subject to temperature being above Zero centigrade and open navigation through Ural Caspian Canal*
>
> *2. All costs pertaining to the activities as described above shall be absorbed fully by DHL Global Forwarding.*
>
> *(…)*

10. Following the meeting, on 19 November 2011 an "Appendix 3", which was a new draft appendix to the Agreement, was sent by Globalink to DHL and signed by Mr Huang of DHL. The appendix provided that the 4 units loaded onto SPA-2 would be re-directed to Kuryk and loaded onto two barges. The appendix was not signed by Globalink.

11. As events transpired, on 23 November 2014 the Ural-Caspian canal closed to navigation for the winter. On 24 November 2014, SPA-2 arrived at Kuryk and the four cargo units were offloaded. The smallest of the units was arranged to be carried to Atyrau by road. The remaining three units were stored at Kuryk over winter until the canal was re-opened. DHL consented to this process, and to the storage of the units at Kuryk.

12. In early 2015, the parties commenced negotiations to arrange the transport of the remaining units from Kuryk to Atyrau. The parties agreed estimated costs and

formalised this in an agreement signed by both parties dated 27 April 2015 ("The Supplementary Agreement"). The Supplementary Agreement provided:

> *WHEREAS: continuing services of the Forwarding Agent for the cargo according to the Appendix #1 of the Forwarding agreement GT-448/2-2014 dated 10.09.2014 ("the contract") for delivery of 3 units (…) ('3 x OOG units')*
>
> *WHEREAS: Parties have come to the decision for the Forwarding Agent to resume and complete the services in respect of the 3x OOG Units (…) which are temporarily stored at Kuryk as approved by DHL Project & Chartering (China) Ltd.*
>
> *THUS, DHL Project & Chartering (China) Ltd hereinafter referred to as "Client", represented by Managing Director Mr Steve Huang, acting on the basis of Charter and "Globalink" Transportation and Logistics Worldwide" LLP, hereinafter "Forwarding Agent", represented by its Director Mr Belayevv R.O., acting on the basis of the Charter on the other side, jointly named "Parties", signed this Supplementary Agreement No. 1 (hereinafter called "the Supplementary Agreement") to the above Appendix No.1 of the Freight-Forwarding Services Contract No GT-448/2-2014 dated 10.09.2014 on the following:*
>
> *1. The services in respect of the 3 x OOG Units shall be resumed immediately so that these cargoes shall be carried and delivered at the delivery address (…) specified in clause 9 of the above Appendix No. 1. The Forwarding Agent use all reasonable endeavours that these 3 x OOG Units will arrive at the job site (…).*
>
> *2. Estimated project cost and Payment Plan (…)*
>
> *3. Both parties' rights under the Existing Contract are fully reserved.*
>
> *4. All other conditions and terms not stipulated in this Supplementary Agreement shall be in accordance with the existing Contract which shall remain in force.*
>
> *(…)*

13. Before the Supplementary Agreement was concluded, there was correspondence between the parties as to whether to include a clause to the effect that DHL would indemnify Globalink against claims arising from the force majeure circumstances that had been discussed on 17 November. DHL proposed, and Globalink accepted, that such a clause should be removed and that there would be added an express reservation of rights under the initial Agreement, as contained in clause 3 above.

14. The remaining three units were successfully transported from Kuryk to the refinery in Atyrau in accordance with the Supplementary Agreement.

Globalink's claim and DHL's defence and counterclaim

15. DHL had made payments in 2014, and made two payments pursuant to the Supplementary Agreement, but has failed to pay two further sums: USD $830,000 (which fell due within 45 days of delivery) and USD $739,000 (which was the balance of the estimated costs expected to be settled "after Globalink provides DHL

with all relative supporting docs requested within 120 days after delivery"). Neither has DHL paid the storage charges incurred by Globalink whilst the units were at Kuryk, amounting to USD $ 78,780. Globalink's claim is for these sums, totalling USD $1,647,780 net of interest.

16. As was made clear by Mr Coldrick, who appeared before me for DHL, the Defendant admits Globalink's claim. But DHL relies on a counter-claim against Globalink for failure to perform the initial Agreement. It maintains that it is entitled to set off the counterclaim against Globalink's claim.

17. The loss said to be suffered by DHL is the difference between the cost of transporting the cargo under the original Agreement (in 2014) and DHL's actual liability to Globalink (including the services rendered under the Supplementary Agreement and the storage costs incurred at Kuryk). This amounts to USD $2,364,976.05. Allowing for set off, once Globalink's claim has been extinguished DHL's counterclaim is worth USD$717,196.05 net.

18. Therefore, whilst in form this is the Claimant's application for summary judgment, in substance I am being asked to give reverse summary judgment against the Defendant's counterclaim.

19. There are two main issues to address on this application:

(1) Does DHL's counterclaim have a real prospect of success?

(2) If so, can it operate, or perhaps does it have at least a reasonable prospect of operating, as a defence to the Claim?

Legal principles

20. The legal principles for summary judgement are well known and well established.

21. CPR part 24.2 provides:

The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –

(a) it considers that –(i) that claimant has no real prospect of succeeding on the claim or issue; or (ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial.

22. Recently in European Union v The Syrian Arab Republic [2018] EWHC 1712 (Comm) at [66], Bryan J summarised the applicable principles as follows:

(1) The Court must consider whether the defendant has a realistic, as opposed to a fanciful prospect of success;

(2) A realistic claim is one that carries some degree of conviction. This means a claim that is more than merely arguable;

(3) In reaching its conclusion, the Court must not conduct a 'mini trial' (see for example *Swain v Hillman* [2001] 2 All ER 91);

(4) This does not mean that the Court must take at face value and without analysis everything that a party says in its statements before the Court. In some cases it may be clear there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents;

(5) The Court must take into account not only the evidence actually placed before it but also the evidence that can reasonably be expected to be available at trial;

(6) The Court should hesitate about making a final decision where reasonable grounds exist for believing that a full investigation into the facts of the case would add to or alter the evidence and so affect the outcome of the case;

(7) If the application gives rise to a short point of law or construction and the Court is satisfied it has before it all the evidence necessary for its proper determination, it should grasp the nettle and decide it.

23. I was also invited by Globalink to consider making a conditional order. As explained by paragraph 5.2 of the Part 24 Practice Direction, a conditional order is an order which requires a party: (1) to pay a sum of money into court, or (2) to take a specified step in relation to his claim or defence, as the case may be, and provides that that party's claim will be dismissed or his statement of case will be struck out if he does not comply. Paragraph 4 of Practice Direction 24 establishes the circumstances in which such an order should be made:

> *Where it appears to the court possible that a claim or defence may succeed but improbable that it will do so, the court may make a conditional order, as described below.*

Prospects of the counterclaim succeeding

(a) Merits of the cross claim

24. DHL relies on a draft defence and counterclaim which is exhibited to the witness statement of Mr Barrett, the solicitor with conduct of this matter on behalf of DHL.

25. In its draft defence, DHL pleads, inter alia, that there were implied terms requiring Globalink to exercise reasonable skill and care in the arrangement of the transportation of the cargo and to use all reasonable endeavours, and/or reasonable skill and care, to arrange the transportation so as to avoid and/or mitigate the effects of any circumstances that would or could adversely affect the timely delivery of the cargo.

26. Mr Coldrick relies on two categories of breach of the Agreement: firstly, matters relating to the slow progress of SPA-2 prior to 15 November 2014 (when it arrived, late, at Atyrau); secondly matters relating to the draught of SPA-2 and its inability to pass through the Ural-Caspian Canal on the final leg of the intended journey.

27. In relation to the slow progress of SPA-2 prior to 15 November 2014, DHL claims that SPA-2 took far in excess of the stipulated 22-24 days even to reach Atyrau sea

buoy. This is to be compared with ARK-1 which comfortably completed the voyage within that time. That, says DHL, is because the SPA-2 barge was underpowered. DHL make the point that the water depth data exhibited by Mr Bariev shows that SPA-2 could have made the passage up the Ural-Caspian Canal as late as 09 November 2014. Therefore, had the barge not made slow progress prior to arriving at Atyrau sea buoy, it would have been able to pass before the canal closed for the winter.

28. In relation to the draught of SPA-2 Mr Coldrick for DHL makes the following points:

i) The laden draught of SPA-2 was 1.58m, requiring a minimum water depth of 1.7m to make the passage up the Ural Caspian canal from Atyrau sea buoy to Atyrau port.

ii) Based on the water level data exhibited to the witness statement of Mr Bariev, there was less than the required 1.7m depth of water in the Ural-Caspian Canal (i) between 13 October and 21 November 2012, and on all but a small number of days after this in November 2012 (ii) for entire periods of over three weeks and two weeks between 01 September 2013 and 30 November 2013; and (iii) in the whole month leading up to the execution of the Agreement in September 2014. So, he submits, it was obviously foreseeable that low water levels might cause problems in late 2014.

iii) In advance of the contract, and with a view to determining the best method of transporting the equipment, Globalink procured a report dated 19 September 2014 from Digital Marine Technology of Odessa. They are described by Mr Bariev as being Globalink's technical consultants. That report, although it considers carefully the draughts required for the inland waterway passage from Rostov-on-Don (on the Sea of Azov) to Astrakhan (the last major city on the Volga before it reaches the Caspian Sea), makes no reference to, and fails at all to analyse, the short final leg from the Caspian Sea to Atyrau via the Ural Canal which in the event, proved to be the stumbling block for the operation in 2014.

29. Therefore, says DHL, it is well arguable that Globalink breached its duty to use reasonable skill and care in arranging the transportation of cargo and avoiding circumstances that could adversely affect the timely delivery of the cargo, and such a case has at least a reasonable prospect of success.

30. Mr Ghaffar, who appeared for Globalink, submitted that these claims have no reasonable prospect of success. Mr Ghaffar maintained there was no evidence that, absent bad weather and low water levels, the tugs employed were insufficiently powered to complete the voyage in a timely manner. He submitted that 2014 was an exceptional year so far as water levels in the Ural Canal were concerned, and that this could not have been anticipated by Globalink at the time of the initial Agreement.

(b) Force Majeure

31. The argument pressed most strongly by Globalink is that the low water levels in the Ural-Caspian canal constituted a force majeure event, such that it is released from any liability for failing to fulfil and/or the delayed fulfilment of its obligations under the

Agreement. On this basis, it contends that DHL's counterclaim is bound to fail. Globalink relies on Clause 8 of the Agreement, which provides:

> *8. Force Majeure*
>
> *8.1 The Parties shall be released from liability for full or partial failure to fulfil their obligations hereunder, and for the delayed fulfilment of obligations under this contract, if such failure resulted from the acts of God (hereinafter referred to as the "Force Majeure")*
>
> *8.2 The Force majeure include: wars, social disorders, strikes, natural disasters including the storms, earthquakes, volcanic explosion, gales, mudslides, floods, poor traffic - climatic conditions, adoption of the legislative and normative legal acts by the national regulatory and administrative authorities of the countries to provide the respective cargo transportation which impede the fulfilment of the Contractual obligations by the Parties, delayed fulfilment of obligations by the contracts, if such delay was caused due to circumstances above, provided that such circumstances directly and immediately affected the fulfilment of obligations by the Parties hereunder.*
>
> *(…)*
>
> *8.5 If duration of force majeure is longer than 30 (thirty) calendar days, the Parties shall be obliged to negotiate in order to make the mutually acceptable decision. If within the next 2 (two) weeks, Parties fail to come to any agreement, then each of the Parties has the right to terminate the Contract provided that the Parties return all material and monetary assets to each other, received under the existing Contract.*

32. Globalink also relies on the terms of the 17 November 2014 "Protocol of the meeting" which I have set out above. Mr Ghaffar draws my attention to the use of the words "decided to" in the document. Firstly, Mr Ghaffar submits that the protocol amounted to a contractual agreement to treat the low water levels in the Ural Canal as a force majeure event. Alternatively, he submits (i) that DHL is estopped from resiling from the position recorded in the protocol, or has waived any rights under the Agreement to assert the events did not amount to force majeure; (ii) in any event, evidentially the protocol establishes that the low water levels in the Ural Canal were properly regarded as a force majeure event, such that it is not open to DHL to go behind this.

33. Additionally, Mr Ghaffar argues that DHL gave up any right to argue that Globalink had failed to fulfil its obligations under the Agreement when it signed the Supplementary Agreement, which superseded the original delivery obligations by providing that services under the initial Agreement would be resumed.

34. Lastly, Globalink rely on a document dated 30 November 2015 issued by the Kazakhstan Chamber of Commerce certifying that the events in the Ural Canal constituted force majeure. Mr Ghaffar accepted this was of evidential weight only and that the court is not bound by the findings in the certificate.

35. DHL makes the following points in response:

i) The low water levels did not constitute force majeure under the terms of the Agreement.

ii) In relation to the 17 November 2014 "Protocol of the meeting", there is at least a strongly arguable case that the document is not a contractual document and does not contain an agreement reached by the parties. Firstly, Mr Huang's evidence is that the document was not intended to be an agreement, but simply an agenda for the meeting. Secondly, the document is headed with "Agenda" and does not have the typical appearance of a contractual document. Thirdly, the parties did not act on the basis that a binding agreement had been reached, but instead sought to agree Appendix 3 (which was signed by DHL, but overtaken by actual events).

iii) Similarly, there is nothing in the Supplementary Agreement which precludes the counterclaim from being brought. In fact, DHL negotiated to remove a term requiring them to indemnify Globalink for claims arising from the force majeure circumstances, and the parties expressly agreed that their rights under the initial Agreement were reserved.

iv) More generally, it is not correct to characterise DHL as having simply accepted that the low water levels in the Ural Canal amounted to force majeure. This can be seen from two emails:

a) First, in an email of 11 March 2015 Mr Huang said:

> *Whatever the reason it is, the truth is GK failed to bring those 3pcs in time, and the reason was not belong to force majeure, believe you also checked with your lawyer. At current situation how can we work together to play with Sinopec?*

b) Second, in an email of 23 April 2015 Mr Yang of DHL said:

> *The final Force Majeure circumstances could be determined after all the documents and information are fully provided as well as all parties [sic] agreement. And in the worst scenario, the Judge from the English Court will give the professional judgment. DHL, as reliable company, will definitely follow the legal result thereafter.*

v) The low water levels in the Ural canal were foreseeable and Globalink's failure to fulfil its obligations was brought about by its failure to arrange a suitable barge and ascertain whether there were circumstances that would affect the timely delivery of the cargo. In particular, DHL relies on *Great Elephant Corporation v Trafigura Beheer BV* and others ("*The Crudesky*") [2013] EWCA Civ 905 at [34] where Longmore LJ found that it would have been absurd if a party could excuse itself from the consequences of a breach by reference to force majeure when the force majeure was caused by the party's own breach. In response to this, Mr Ghaffar referred me to *SHV Gas Supply & trading SAS v Naftomar Shipping & Trading Co Ltd Inc* [2005] EWHC 2528 (Comm) at [29] where Clarke J (as he then was) found in obiter that on the facts of that case, a party was not precluded from relying on a force majeure

clause simply because the force majeure event was foreseeable. Mr Ghaffar makes the point that clause 8 of the Agreement does not require the force majeure event to be unforeseeable, or outside the control of the parties.

vi) In any event, regardless of whether the low water levels constituted force majeure, DHL's counterclaim is made on the additional alternative basis that the slow progress made by SPA-2 prior to 15 November 2014 (which has nothing to do with the low water levels in the Ural Canal) amounted to a breach of the Agreement by Globalink.

(iii) Limitation of liability

36. Globalink also submits that, pursuant to clause 4.2 of the Agreement, DHL's counterclaim is limited to 5% of the total cost of the services provided under the Agreement, such that DHL's counterclaim is limited to USD $129,000.

37. Clause 4.2 provides:

> *In case of the delayed delivery of cargo hereunder, the client may to charge to the Forwarding Agent penalty at a rate of 0.1% of the total cost of services under the appropriate Appendix for each calendar day of delayed delivery of cargo but not exceeding 5% of the total cost of services under the appropriate Appendix.*

38. Mr Ghaffar sought to categorise DHL's entire counterclaim as a claim for damages for delay, with the result that clause 4.2 takes effect. In response, Mr Coldrick argues that the counterclaim is not a claim for delayed performance, but in fact a claim for Globalink's failure to perform contractual obligations at all. Therefore, he contends that clause 4.2 does not apply to the counterclaim.

Whether the counterclaim has a reasonable prospect of success

39. I am satisfied that DHL's cross claim is well arguable and has a reasonable prospect of success. Globalink expressly agreed to arrange the transportation, and Mr Ghaffar rightly accepted that it was at least arguable that Globalink was obliged to exercise reasonable care and skill in doing so. The arguments advanced by DHL as to breach by Globalink are clearly arguable: whether they will succeed will depend on what evidence is available at trial but I certainly cannot say at this stage that they have no realistic prospects of success. As to the force majeure argument advanced by Mr Ghaffar, I am satisfied that the contrary arguments made by Mr Coldrick are well arguable. It seems to me at least doubtful that force majeure can provide any answer to DHL's claim: DHL's criticism is that Globalink failed to plan for the contingency of a force majeure event, not a criticism that a force majeure event happened. As to the limitation of liability I am not persuaded that the claim which DHL wishes to advance is properly characterised as a claim for damages for delay. It seems to me better characterised as a claim for damages to reflect the additional transportation and storage costs which were caused by breaches of duty by DHL. If that is right the limitation of liability does not apply.

40. All of these points therefore seem to me to be amply arguable both ways and I am satisfied that DHL does have a real prospect of succeeding on its cross claim.

41. I therefore need to consider Mr Ghaffar's submission that I should nevertheless enter judgment on the claim because the cross claim cannot operate as a defence by way of set-off.

The No Set-Off Arguments

42. Mr Ghaffar for Globalink advances two arguments. The first is that the cross claim is not sufficiently connected with the claim for it to operate as a set off, as matter of general principle. This submission is hopeless. The cross claim arises out of the self-same contract as the claim and is intimately connected to it. It would not in any way be unjust to permit the cross claim to operate by way of set off, in the absence of some special rule of law preventing such a defence.

43. Mr Ghaffar's second argument is that DHL's claim is a claim for freight, and therefore the rule in *The Aries* [1977] 1 WLR 185 applies, so that no deduction can be made by way of set-off.

44. I have considered whether I need to decide anything more than that it is arguable that the rule in *The Aries* does not apply. I was initially attracted by this course. However I consider it better to "grasp the nettle" in the words of Bryan J given that the point was fully argued, and given that neither party suggests that there is relevant evidence which might be available at trial but is not available now. I note that merely deciding that the point is arguable would in practice give the same result as deciding that the rule does not apply. If I merely decided that it is arguable that it does not apply, then the Claimant would have to wait for its money even if the cross claim eventually fails. It would be too late then for the Claimant to get the benefit of early payment – the very thing the no set off rule is intended to achieve – if it transpired at trial that I should in fact have given effect to the no set off rule.

The Rule in *The Aries*

45. The basic rule and its history was described by Lord Wilberforce in *The Aries* [1977] 1 WLR 185 in these terms:

> That a claim in respect of cargo cannot be asserted by way of deduction from the freight, is a long established rule in English law. It dates at least from *Sheels v. Davies* (1814) 4 Camp. 119 : it received authoritative approval in 1864 from an eminent court in *Dakin v. Oxley*, 1.5 C.B.N.S. 646 and again from the same court in *Meyer v. Dresser* (1864) 16 C.B.N.S. 646 where the rule was called "settled law." As a rule it has never been judicially doubted or questioned or criticised; it has received the approval of authoritative text hooks. It could have been attacked, but was not, by eminent commercial counsel in *Bede Steam Shipping Co. Ltd. v. Bunge y Born* (1927) 27 Ll.L.Rep. 410 (incidentally a case of a time bar). It has reaffirmed after full consideration by the Court of Appeal in *The Brede* [1974] Q.B. 233 , and though it has not the full authority of this House, it was referred to by Lord Atkinson as the law in *Kish v. Charles Taylor, Sons & Co.* [1912] A.C. 604 612.
>
> It is said to be an arbitrary rule — and so it may be, in the sense that no very clear justification for it has ever been stated and perhaps also in the sense that the law might just, or almost, as well have settled for a rule to the opposite effect. But this

does not affect its status in the law. A rule is none the less capable of being a rule of law, though not reason can be given for it: as Lord Sumner said, an established rule does not become questionable merely because different conjectural justifications of it have been offered, or because none is forthcoming that is not fanciful (*Admiralty Commissioners v. s.s. Amerika (Owners)* [1917] A.C. 38 , 56). In commercial matters it is all the more important that established rules, unless clearly wrong, should not be disturbed by the courts (see *Atlantic Shipping and Trading Co. Ltd. v. Louis Dreyfus and Co*. [1922] 2 A. C. 250 , 257 per Lord Dunedin). It is said to be inconsistent with the rule laid down in relation to the sale of goods and contracts for work as to which an eminent court in 1841 laid down that claims amounting to a breach of warranty can be asserted by way of deduction — *Mondel v. Steel* (1841) 8 M. & W. 858 , a rule which, as regards the sale of goods was validated by statute (Sale of Goods Act 1893, section 53). And your Lordships were asked to assimilate the rule in the present case to that.

There are two answers to this: first, the two rules have been running in parallel for over a century without difficulty, and indeed in Mondel v. Steel itself Parke B. specifically referred to the existence of a separate rule as regards freight. In this House, that the rule of deduction, or abatement, is one confined to contracts for the sale of goods or for work and labour and does not extend to contracts generally, was recognised in *Modern Engineering (Bristol) Ltd. v. Gilbert-Ash (Northern) Ltd.* [1974] A.C. 689 , 717, per Lord Diplock. There is no case of its having been extended to contracts of any kind of carriage. The rule against deduction in cases of carriage by sea is, in fact, as well settled as any common law rule can be. As to the argument from inconsistency with the rule prevailing in relation to the sale of goods, it is no part of the functions of this House, or the judges, to alter a well established rule or, to put it more correctly, to say that a different rule is part of our law, for the sake of harmonisation with a rule operating in a different field — not unless there is an intrinsic case, I would say a strong case, for altering the former rule. To quote again from Lord Sumner in *Admiralty Commissioners v. s.s. Amerika* (Owners) [1917] A.C. 38 , 56:

> "… nor does it follow, in the case of a legal system such as ours, that a principle can be said to be truly a part of the law merely because it would be a more perfect expression of imperfect rules, which, though imperfect, are well established and well defined."

To do this would be macro-architecture of the law and would be for a particular type of reformer.

But beyond all this there is a decisive reason here why this House should not alter the rule approved in *The Brede* [1974] Q.B. 233 by reversing it. That is that the parties in this case have, I think beyond doubt, contracted upon the basis and against the background that the established rule is against deduction. Such a case as this, in fact, marks out very decisively the possible limits of judicial intervention: for it would be undesirable in this, or in any other case where the same question arose, for the courts to declare that a rule, clearly shown to exist, and shown to be the basis of the contract before the court, ought to be replaced by a different rule which would have to operate on the contract in question. However convinced the courts might be of the latter's merits, to substitute it could be no

part of a judicial process. This is all the less so since the parties themselves, if they dislike the rule, can perfectly well provide otherwise in their contract.

I am therefore firmly of opinion that the rule against deduction has to be applied to this charterparty so that the charterers' claim for short delivery cannot be relied on by way of defence. On any view, therefore, of the time bar, and even assuming the later to be only procedural, it must defeat the claim.

46. Lord Simon said this (at 192h):

> The argument based on the common law, authoritatively stated by Parke B. in *Mondel v. Steel*, 8 M. & W. 858 fails because freight was always an exception to the rule of abatement arising from defective performance of the contractual service. Indeed, freight reflects the original rule. As Parke B. said, at pp. 870–871:
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> > "Formerly, it was the practice, where an action was brought for an agreed price … of work which was to be performed according to contract, to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross-action for breach of … contract … and this course was simple and consistent … But after the case of *Basten v. Butter*, 7 East 479 , a different practice … began to prevail, and being attended with much practical convenience, has been since generally followed; and the defendant is now permitted to show that … the work in consequence of the non-performance of the contract … [was] diminished in value … The same practice has not, however, extended to all cases of work and labour, as, for instance, … an action for freight; *Sheels v. Davies*, 4 Camp. 119."
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> The exception of freight from the new general common law rule was restated in a judgment of profound learning by Willes J. in *Dakin v. Oxley* (1864) 15 C.B.N.S. 646 (see especially 667–668) and again by Erle C.J. in *Meyer v. Dresser*, 16 C.B.N.S. 646. Freight, representing the original rule, stands uneroded, like an outcrop of pre-Cambrian amid the detritus of sedimentary deposits. That freight must, in the absence of stipulation to the contrary, be paid without deduction has been stated in successive editions of Scrutton on Charterparty and Carver's Carriage of Goods by Sea. Charters have always been negotiated in the light of this rule.

47. The rule as set out and affirmed in *The Aries* has since both been extended in terms of the type of carriage to which it applies, and in terms of the type of cross claim which it covers. But its operation has also been limited so as to apply to only some forms of charge which are referable to the transport of goods.

48. In relation to voyage charters it is now clear that the rule is not confined to cases where the charterer's claim is in respect of loss of or damage to cargo but extends also, for example, to cross claims for damages for failure to prosecute the voyage with utmost despatch (*A/S Gunnstein v Jensen ("The Alfa Nord"*), 1977 2 Lloyds Rep 425) and failure to prepare the vessel's holds (*Elena Shipping v Aidenfield ("The Elena")*) 1986 1 Lloyd's Rep 425), and the editors of Voyage Charters 4ed 2014 opine that it is

difficult to envisage any unliquidated claims by the charterer which would affect the owner's right to full freight, other than claims going to the validity of the contract itself.

49. The rule applies also to international carriage by road: *RH&D International Ltd v IAS Animal Air Services Ltd* [1984] 1 WLR 573 (Neill J). In *United Carriers v Heritage Food Group (UK) Ltd* [1996] 1 WLR 371 May J unenthusiastically decided that it extended also to carriage of goods by road domestically. Most recently, in *Schenker Ltd v Negocios Europa Ltd* [2018] 1 WLR 718 Moulder J decided, as a preliminary issue, that the rule extended to air freight. She said this:

> 22 It is not the part of the function of judges to alter a well established rule or to say that a different rule is part of our law for the sake of harmonisation. It is the position here that although English authorities have not expressly determined the point in relation to air freight, the approach in the road haulage cases extending the rule from shipping are, in my view, instructive and persuasive. I note the rationale which is advanced in relation to cash flow. However, I do not accept that this alone would justify the extension of the rule into a new area. The rule may well be said to be anomalous when contrasted with other contracts for the supply of goods and services.
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> 23 However, given the clear and uncontradicted expert evidence that this is the basis on which the freight market contracts and the fact that it extends to carriage by sea, international and domestic road haulage, it would, in my view, be anomalous to hold that the common law freight rule did not extend to carriage by air. I, therefore, concur with the conclusion reached in the Hong Kong authorities which, though not binding on me, found that there is no logical or sensible distinction between the three means of transport for the purpose of the common law rule.

50. The rule does not, however, apply to all costs incurred in achieving the carriage of goods from one place to another. In *The Nanfri* [1978] QB 927 the Court of Appeal by a majority (Lord Denning MR and Goff LJ as he then was, Cumming-Bruce LJ dissenting) had to resolve conflicting lines of first instance authority as to whether or not the no set off rule extended to hire payable under a time charter. They decided that it did not. In the course of his judgment Lord Denning said this:

> Freight is payable for carrying a quantity of cargo from one place to another. "Hire" is payable for the right to use a vessel for a specified period of time, irrespective of whether the charterer uses it for cargo or lays it up, out of use... So different are the two concepts that I do not think the law as to "freight" can be applied indiscriminately to time charter "hire".

51. *The Nanfri* went on to the House of Lords, but this point was not reconsidered.

The competing submissions

52. As to the application of the no set off rule, Mr Ghaffar for Globalink says that the total sum that Globalink charged to DHL was charged in consideration for transporting the equipment from one place to another, that it is therefore properly described as freight, and that the rule in *The Aries* should therefore apply.

53. Mr Ghaffar did not advance a case that all freight forwarders, and their customers, always contract on the assumed basis that the rule in *The Aries* applies to them.

54. Mr Coldrick for DHL says that the rule in *The Aries* applies only to contracts of carriage, and that the contract between DHL and Globalink is not a contract of carriage. In any event, he says, the rule should not be extended to freight forwarding contracts, and he relies on observations made by Hirst LJ in an unreported Court of Appeal case, *Shaftesbury International Freight v Bkr Gesellshcaft fur Export und Import MbH*.

55. However, Mr Coldrick does concede, on the authority of *Britannia Distribution v Factor Pace* [1998] 2 Lloyds Rep 420, that, if and to the extent that a freight forwarder has acted as agent in entering into contract of carriage with a carrier, and the carrier charges freight (in the narrow sense as used in *The Nanfri*), then the forwarder is entitled to claim the sums due for that freight from his principal, and the principal must pay without deduction. But, says Mr Coldrick, DHL has not established that any part of the sums it claims are freight within this extension to the rule in *The Aries*.

Discussion

56. In my view the starting point is to consider the nature of the contract between Globalink and DHL.

57. The contract describes itself as a freight forwarding agreement, not as a contract of carriage. By clause 2.1.1 the Forwarding Agent is obliged to arrange the transportation of its client's cargo, so as to achieve the promised delivery. The essential nature of the obligation is not an obligation to carry, but an obligation to procure that carriage is achieved by others. The fact that Globalink can, under clause 4.2, incur a liability for delayed delivery of the cargo does not mean that Globalink is a carrier, nor even that Globalink accepts an obligation on it to deliver on a particular date, it just means that if Globalink does not successfully arrange for others to achieve delivery on that date, Globalink will incur a penalty to DHL.

58. There is no doubt that a freight forwarder may on occasion be a carrier, and, having taken on an obligation to arrange carriage, it is open to it to fulfil the carriage obligation itself. But even that would not, in my view, convert the contract to arrange into a contract of carriage.

59. It follows that if the no set off against freight rule were to be applied to DHL in this case, that would represent an extension of the existing law, extending the ambit of the rule beyond contracts of carriage and beyond freight in the narrow sense established by the authorities.

60. The same issue arose, though it appears it was not fully argued, in the case of *Shaftesbury International Freight v Bkr Gesellshcaft fur Export und Import MbH* 1992 WL 12678899. The Claimant was a freight forwarder and had obtained summary judgment against its customer the Defendant. The Defendant appealed. The main point was whether the Defendant had any arguable cross claim. Having decided that point in favour of the Defendant, Lord Justice Hirst (with whom Lord Justice

Balcombe agreed) dealt with the question of whether the rule in the Aries precluded reliance on the cross claim by way of defence. He said this

> *It was contended below that a set-off was not open to the defendants. We were referred to the well known case of The Aries [1977] 1 W.L.R. 185, where the House of Lords affirmed the rule that in a claim for freight under a charterparty the charterer is not entitled to set off counterclaims for damage to the goods, delays or the like against the owner's claim for freight. The House of Lords distinguished freight claims from claims for services where a set-off is available. These plaintiffs are freight forwarders and not carriers. While expressing no final view on the point, I would have thought that it would be extremely difficult for them to show that their claim for services fell within the Aries rule. Mr. Kinsky reserved the point, and I say no more about it other than that it seems to me it would stretching the rule of The Aries rather further than it has been extended hitherto.*

61. In my view the rule in *The Aries* does not extend, and should not be extended, to cover the services provided by a freight forwarding agent, when those services are to arrange the carriage of goods. It is not suggested that parties to freight forwarding contracts invariably contract on the assumed basis that no set off is available, and I see no justification for extending the ambit of a rule which is, in Lord Simon's phrase, a pre-Cambrian outcrop, beyond contracts of carriage and into a new – albeit adjacent - area. To do so would run counter to the general principle of the law which is that a cross claim can in principle operate as a defence by way of set off. I see no basis upon which it could properly be open to me to extend the rule in *The Aries* into a new area. It is of course open to freight forwarders to seek to contract on the express basis that there may be no set off against the sums they charge. But that is a choice for the parties to make, not something which the law imposes.

62. That leaves only the point arising from the decision of Judge Hegarty QC in *Britannia Distribution v Factor Pace* 1998 2 Lloyds Rep 420. That too was a freight forwarding case. The claimant freight forwarders sought summary judgment for the sums which they had paid to carriers in respect of various consignments of goods.

63. Judge Hegarty held firstly that the no set off rule applied to any claim by a carrier for freight. He held that if the Claimant freight forwarder had itself contracted as a carrier, it would be entitled to judgment for freight without any set off being available. He then said this:

> *The freight rule, as I have said, is one which is now established in the clearest possible terms. It is one which has its origins and its justification in the custom of international commerce. It has been extended in recent times from carriage by sea to other forms of carriage, and it is one which is well known within the mercantile community. Assuming as I do for present purposes that the plaintiff arranged contracts of carriage as agent for the defendant, the defendant would thereby become liable to pay freight. Equally, the carrier would be entitled to recover freight from the defendants. In fact, as is common ground, the normal position today is that a freight forwarder contracting as agent will accept personal responsibility to the carrier for the freight and will discharge it personally. And for the avoidance of doubt it seems to me that on the evidence before me the proper inference ... is that they have indeed defrayed those charges*

> *to the carriers. If the carriers had elected to proceed against the defendants personally there could have been no defence. If the plaintiffs had had the right to freight assigned to them, there could have been, as I see it, no defence to a claim by them as assignees. The primary responsibility to pay the freight remains the responsibility of the defendant; and it remains an obligation to pay without deduction or set-off. It seems to me that it would become an anomaly on an anomaly if, in circumstances such as the present, the mere fact that the freight forwarder chose or was compelled in accordance with normal commercial practice to pay the freight, would mean any modification upon or any inroad into the freight rule. I take the view in those circumstances that a freight forwarder who has arranged carriage is within the freight rule and is entitled to recover freight and to pass on any claim to freight without any right on the part of the principal to set up a cross-claim based upon an allegation of breach of duty as agent.*

64. In the present case, Mr Ghaffar contended that the freight forwarders were *not* contracting with the carriers as agents for DHL. Nevertheless Mr Coldrick accepted that the Britannia case meant that, if and insofar as Globalink could show that it had paid freight to a carrier, and that that was a payment falling within *The Aries* rule, then DHL was obliged to reimburse Globalink for that freight, with no set off being available by way of defence.

65. I shall proceed on the basis of Mr Coldrick's concession.

66. Mr Coldrick identified two GenCon voyage charters, under which Globalink was named as charterer, and in relation to which freight of $49,500 and $63,500 was payable. Mr Coldrick accepted that if that freight had been paid Globalink would be obliged to pay that sum to DHL without deduction. But, he said, there was no evidence as to what, if any, sum had in fact been paid: no invoices nor proof payment had been disclosed.

67. Mr Coldrick also identified two road haulage contracts, under which Globalink was customer, but he pointed out that the fees charged were expressed as daily rates for provision of the vehicles that were to be used to transport the equipment, so that these were closer to the land equivalent of a time charter than to the land equivalent of a voyage charter.

68. Mr Ghaffar's submission was that it was inconceivable that none of the sums incurred by Globalink and for which it wished to charge were freight, and in fact it was likely that much of the outstanding balance of $1.7m or so was freight properly so called. However, he was unable to show me documentary evidence of payment of the sums due under the GenCon charters, and he was unable to point to documents showing clearly that sums due in relation to other aspects of the carriage were freight in the narrow sense required to engage the rule in *The Aries*.

69. Where does that leave matters? It seems to me that in relation to sums due under the GenCon charters, the only answer that DHL can produce is that it is possible that the sums due under those charters was not paid – even though the charters were in fact performed. Balanced against that is the fact that it is odd that, despite all the time

available to produce evidence, Globalink has not simply produced proof of payment. I am left feeling that DHL's point is distinctly shadowy and I will make a conditional order requiring Globalink to bring into court the sum of $113,000 as a condition of being able to defend the claim as to that sum. The condition will not extend to defending the balance of the claim.

70. As for the balance I am not persuaded that the sums claimed by Globalink are freight properly so called and therefore not satisfied that they fall within the narrow confines of Judge Hegarty's modest extension of the rule in *The Aries*, and accordingly I decline to make any other order in favour of Globalink on its summary judgment application.