Case No 29/94
/mb

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

COBAM NV

APPELLANT

and

AEGEAN PETROLEUM (UK) LTD FIRST RESPONDENT

and

PAN BULK SHIPPING LIMITED SECOND RESPONDENT

NAME OF SHIP: M.V. "PROSPEROUS"

CORAM: CORBETT CJ, HEFER, NESTADT, OLIVIER JJA et
SCOTT AJA

HEARD: 22 AUGUST 1995

DELIVERED: 19 SEPTEMBER 1995

J U D G M E N T

SCOTTAJA/

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SCOTT AJA:

This is an appeal against an order granted in the Durban and Coast Local Division in the exercise of its admiralty jurisdiction authorising the attachment of bunkers on board the motor vessel "Prosperous" at Richards Bay. The order was sought at the instance of the first respondent, Aegean Petroleum (UK) Limited ("Aegean Petroleum") to found or confirm the jurisdiction of the Court in an action which Aegean Petroleum proposed instituting against the second respondent, Pan Bulk Shipping Limited ("the charterers") of Bermuda, for payment in respect of bunkers supplied to another vessel which was also operated by the charterers. Aegean Petroleum is a London based company which carries on business inter alia as a supplier of bunkers and other petroleum fuels. Neither the initial order granted on 24 October, 1992, nor its confirmation on the subsequent return day was opposed by the charterers. The confirmation of the order was,

however, opposed by the appellant, Cobam NV ("Cobam"), a company of

Antwerp, Belgium, which intervened for this purpose. It contended that although the bunkers on board the "Prosperous" had been acquired by the charterers during the subsistence of the charter, the contract of charter had been terminated prior to 24 October, 1992, and that by this time the ownership in the bunkers had passed to it as disponent owner of the vessel. Cobam's opposition was unsuccessful, as was its subsequent application for leave to appeal. The judgment of Levinsohn J confirming the attachment has since been reported (see The MV Prosperous: Aegean Petroleum (UK) Ltd v Pan Bulk Shipping Ltd (Cobam NV Intervening); Cobam NV v Pacific Northern Oil Corporation and Others 1995 (3) SA 595 (D)). Cobam now appeals with leave granted pursuant to a petition to the Chief Justice. The sole question in issue, as in the Court below, is whether at the time of their attachment, the bunkers were the property of the charterers or

the property of Cobam.

Before referring to the various contentions advanced by counsel it is necessary to set out briefly the principal events preceding the attachment of the vessel's bunkers which was effected on 24 October, 1992.

It is common cause that on 5 March, 1990, Cobam, as disponent owner, let the "Prosperous" to the charterers for a period of about 3 years under a time charter in the New York Produce Exchange (NYPE) form with various additions and alterations ("the charter-party"). There were also two sub-charters but these play no role in the dispute and may be ignored. The relevant provisions of the charter-party are the following.

Clause 2 provides:

"That whilst on hire the Charterers shall provide and pay for all the fuel except as otherwise agreed ...."

Clause 3 was deleted and replaced by clause 32 which reads:

"Bunker Price and Quantity

32. Vessel to be delivered with about 400/800 metric tons IFO and about 30/60 metric tons MDO. Vessel to be redelivered with about the same quantities as actually on delivery.

Bunkers price on delivery/redelivery to be as per mean Platts price on day of delivery respectively redelivery for bunkers and MDO at port of delivery respectively redelivery."

(The letters IFO refer to intermediate fuel oil and the letters MDO to medium diesel oil).

Clause 4 deals with the payment of hire and the redelivery of the vessel.

It reads:

"4. That the Charterers shall pay for the use and hire of the said Vessel at the rate of - see clause 80 -, commencing on and from the day of her delivery, as aforesaid, and at and after the same rate for any part of a month; hire to continue until the hour of the day of her re-delivery in like good order and condition, ordinary wear and tear excepted, to the Owners (unless lost) on dropping last outward seapilot safe port in Charterer's option Skaw/Cape Passero, including United Kingdom or passing either point westbound or in Charterer's option Singapore/Japan range including Taiwan, People's

> Republic of China, Philippines, South Korea, unless otherwise mutually agreed. Charterers are to give Owners not less than 30/15/7 days notice of vessel's expected date of re-delivery, and probable port."

Clause 5 contains further provisions dealing with the payment of hire. Of relevance is the provision that

> ".... failing the punctual and regular payment of the hire, or bank guarantee, or on any breach of this Charter Party, the Owners shall be at liberty to withdraw the vessel from the service of the Charterers, without prejudice to any claim they (the Owners) may otherwise have on the Charterers".

Clause 17 makes provision for arbitration in London and it was common cause that the proper law of the charter-party is English law.

The hire payments falling due on 29 September, 1992, and 14 October, 1992, respectively, were not paid by the charterers. On 15 October, 1992, Cobam was advised by the charterers that they had decided that they were no longer able to trade and that they would go into liquidation. The following day, that is to say, 16 October, 1992, a telex

was sent to the charterers by Cobam in which the latter exercised its right under clause 5 of the charter-party to withdraw the vessel from the service of the charterers. The ultimate paragraph of the telex dealt specifically with the question of the bunkers on board. It reads:

> "We acknowledge that under the charterparty you have the property of the bunkers presently on board the vessel. However in view of the above we will take over those bunkers and the property in them shall vest in us against our crediting you with their value. Such credit will be set against the sums now owing to us. We will advise you of the balance due to us in due course."

At the time, the vessel was in ballast off the West-African coast (but not within the territorial waters of any country) and en route from Spain to Richards Bay pursuant to the charterers' instructions. During the subsistence of the charter the Master and crew acted as the servants of Cobam but subject, of course, to the charterers' instructions. Following the withdrawal of the vessel, Cobam elected to have the vessel proceed to Richards Bay to take on a cargo of coal for its own benefit and presumably

instructed the Master accordingly. On 23 October, 1992, Cobam addressed a further telex to the charterers setting out the balance owing to Cobam after crediting the charterers with the bunkers on board as at noon on 16 October, 1992. The following day and after the vessel had arrived at Richards Bay, her bunkers were attached as previously mentioned.

Mr Mamewick, who appeared for Cobam both in this Court and in the Court below, advanced three grounds in support of his contention that the property in the bunkers had passed to Cobam prior to the attachment on 24 October 1992. They were: first, that the transfer and accounting provisions contained in clause 32 were applicable not only upon redelivery of the vessel at the termination of the charter-party by effluxion of time but also in a case such as the present, where redelivery occurs at an earlier stage by reason of a breach of the charter-party; second, that if the property in the bunkers did not vest in Cobam by virtue

of the express provisions of clause 32 then they did so in terms of an implied term which had a similar effect; and third, in the event of neither of the above being correct, that the conduct of Cobam and the charterers prior to the attachment was such as to give rise to a tacit agreement between them for the sale of the bunkers. The argument assumed that in terms of the English Sale of Goods Act of 1979 the property in the bunkers in the case of grounds one and two would pass to Cobam upon termination of the charter-party and in the case of ground three, upon conclusion of the so-called tacit sale.

Grounds one and two were the same as, or similar to, contentions advanced unsuccessfully in the House of Lords in the case of The Span Terza [1984] 1 Lloyd's Law Rep. 119 where the charter-party was similarly in the NYPE form, and much of the argument in the present case was directed at either distinguishing The Span Terza or showing that it was

in point. Before dealing with Mr Marnewick's various submissions, it is convenient, therefore, to set out, as briefly as the circumstances permit, the facts of The Span Terza and the conclusions that were reached.

The question in issue was whether the bunkers on board the vessel vested in the mortgagees (who stood in the shoes of the shipowners) or the charterers. The vessel was arrested in the port of Liverpool, which fortuitously happened to be within the redelivery range, and was ordered to be sold. Before she was sold together with the bunkers on board, the charterers gave the shipowners notice cancelling the charter-party by reason of the vessel having remained off hire continuously for longer than 25 days. In the Admiralty Court, (see [1982] 2 Lloyd's Rep. 72) Mr Justice Sheen found that the property in the bunkers vested in the owners by virtue of the express provisions of clause 3 of the charter-party. Clause 3 (being the equivalent of clause 32 in the present case) read:

"3. That the Charterers, at the port of delivery, and the owners, at the port of redelivery, shall take over and pay for all fuel remaining on board the vessel, the vessel to be delivered with not less than 125 tons and not more than 175 tons IFO plus 30 tons min/50 tons max DO and to be redelivered with not less than 350 and not more than 400 tons IFO and 50 tons min/70 tons max DO. Prices: current price at port of delivery, on redelivery same prices for the quantity as on delivery market price for balance."

Clause 4, as in the charter-party in the present case, dealt with the payment of hire and the redelivery of the vessel. The redelivery was to take place,

" ... (unless lost) at dropping outward seapilot one port Gib./Skaw range including UK. ... Charterers are to give owners not less than 20 days approximate notice of vessels expected date and range of redelivery 7 days notice of expected port, and 4 days notice of final port."

On appeal both to the Court of Appeal (see [1983] 1 Lloyd's Rep. 441) and to the House of Lords the construction placed on clause 3 by Sheen J was found to be incorrect. Lord Diplock approved the reasoning of Lord Justice

Kerr in the Court below that clause 3 dealt with what was to happen to the bunkers aboard the vessel at the time of the redelivery contemplated in clause 4, that is to say, on the termination of the charter-party by effluxion of time and not on termination by a valid notice of cancellation. He observed that the provisions of clause 3 dealing with the quantities of bunkers that were to be on board upon redelivery were inconsistent with a construction that the clause was to apply in the case of a prior cancellation as in such an event the quantity of bunkers on board when the right to cancel arose "would be a matter of chance and would be unlikely to be within the low limits for which clause 3 provides".

The Court of Appeal, after disagreeing with the reasoning of Sheen J as mentioned above, nonetheless, concluded that on cancellation of the charter-party, the property in the bunkers vested in the owners by virtue of an implied term having an effect similar to clause 3. This, of course,

is the second ground advanced on behalf of Cobam in the present case. On appeal, however, the House of Lords found that there was no need on the facts of the case for the implication of any additional term. Lord Diplock observed that while the owners' right to use and consume the bunkers in terms of the charter-party terminated upon its cancellation, they, nonetheless, remained bailees of the charterers and, as the vessel was within the redelivery range at the moment of cancellation, no problems arose that called for the implication of any terms as to the right of the owners to continue to use the fuel on board. It was accordingly held that the property in the bunkers remained vested in the charterers.

The charter-party in the present case and in The Span Terza refer to the "delivery" and "redelivery" of the vessel. A brief explanation is required. In the case of a time charter, unlike a demise charter, there is, of course, no delivery or redelivery of the vessel in the physical sense. The

vessel remains in the possession of the owners throughout the period of the charter and, generally speaking, the term "delivery" is used to signify no more than the stage at which the vessel, together with the master and crew, are placed at the disposal of the charterers, and the term "redelivery", the stage at which the master ceases to be under the charterers' orders. (See Italian State Railways v Mavrosordatos and Another [1919] 2 K B 305 CA at 311-312.)

In support of his first ground, Mr Marnewick pointed out that the facts in The Span Terza were distinguishable in that clauses 3 and 4 of the charter-party in that case contemplated a redelivery taking place only in port, whereas it is clear from the provisions of clause 4 of the charter-party in the present case that there could be a redelivery at sea (see the phrase, "or passing either point westbound" in clause 4). He submitted that as it was contemplated that a redelivery could take place at sea, it

necessarily followed that the reference in clause 32 to the port of redelivery had to be construed as a reference to the nearest port where fuel was available. He submitted, further, that having regard to the true meaning of "redelivery" in the context of a time charter, as discussed above, there could be no justification for limiting the meaning of that term in clause 32 to the redelivery which occurred upon termination of the charter-party by effluxion of time. He submitted, accordingly, that on 16 October 1992 when Cobam withdrew the ship from the service of the charterers, there had in effect been a sale and take-over of the bunkers in terms of clause 32.

The argument, I think, is unsound. The mere fact that in the present case there may be a redelivery at sea in terms of clause 4 of the charter-party does not preclude clause 32 from being read together with the latter half of clause 4 so that the redelivery referred to in clause 32 is to be construed as a reference to the redelivery upon termination of the charter-

party by effluxion of time. If for no other reason, this is clear, I think, from the limited quantities of bunkers referred to in clause 32. Reference has previously been made to the remarks of Lord Diplock in The Span Terza as to the significance of these limited quantities and the unlikelihood of the bunkers being within the low limits specified when the right to cancel arose. The right of charterers to be able to reduce the bunkers to the limited quantities specified before redelivery is one which cannot simply be ignored. This is well illustrated in the case of The Eurostar [1993] 1 Lloyd's Rep. 106 (QB (Adm Ct)) in which it was held that the shipowners on the termination of the charter-party by effluxion of time were not entitled to acquire the property in the bunkers on board in terms of a clause similar to clause 32 because the charterers, by reason of the vessel having been off hire for several months, "had been deprived of the right to plan the use of the ship so that the amount of fuel remaining in the bunkers on

redelivery would be an amount which they regarded as appropriate" (per Sheen J at 110).

It is perhaps worthy of note that in the present case there appears to have been 1399,5 metric tons of intermediate fuel oil (IFO) on board the "Prosperous" when she was withdrawn from the service of the charterers; in other words an amount significantly in excess of the maximum quantity referred to in clause 32.

The reasoning of Lord Diplock in The Span Terza with regard to the limited quantities of bunkers specified in clause 3 is, in my view, equally applicable in the present case. There are certain differences in the wording of the relevant clauses but these differences, including the fact that in the present case redelivery could take place at sea, are not such as to render the decision of the House of Lords distinguishable. It follows that Mr Marnewick's first ground must fail.

I turn now to the second question in issue, ie whether an implied term is to be imported into the charter-party having effect similar to clause 32 but applying to a termination other than by effluxion of time. There are undoubtedly important distinctions of fact between the present case and The Span Terza in so far as this question is concerned. In the latter case, the cancellation took place while the vessel was in port and after she had been arrested at the instance of other creditors. Eventually, both the vessel and the bunkers on board were sold and there was no question of the vessel having to make for port after the cancellation or the owners being in a position to give directions for the vessel to proceed on her voyage. A further distinction, of course, is that in The Span Terza the cancellation had been effected at the instance, not of the owners but of the charterers and at a time when the vessel was under arrest. Mr Marnewick emphasised the need for the vessel to continue using the bunkers after the

cancellation of the charter-party at sea and the problems that could arise if the owners were required to have the charterers' bunkers pumped out of the vessel after reaching port. In this regard he placed much store on the following dictum of Lord Diplock in The Span Terza at 122,

> "My Lords, it may well be that there will be cases where cancellation takes effect elsewhere than in a port and in circumstances in which it will be necessary to imply some terms as to what are to be (the) rights and liabilities of shipowners and charterers in respect of the bunkers and their consumption after cancellation of the charter;"

and submitted that in all the circumstances an appropriate term had to be implied in order to give efficacy to the charter-party.

The law in England relating to implied terms is to be found in such well known cases as The Moorcock (1889) 14 PD 64 (CA) at 68; Reigate v Union Manufacturing Co (Ramsbottom) Ltd and Another [1918] 1 KB 592 at 605; Comptoir Commercial Anversois v Power. Son and Company [1920] 1 KB 868 at 899; Shirlaw v Southern Foundries (1926)

Ltd [1939] 2 KB 206 at 227; Romford Ice & Cold Storage Company Ltd v Lister [1956] 2 Lloyd's Rep. 505 (HL) at 515, and more recently, Ashmore & Others v Corporation of Lloyd's (No 2) [1992] 2 Lloyd's Rep. 620 (QB) at 626 - 631, being a case to which both counsel referred in their heads of argument. It is unnecessary to consider these cases in any detail. The earlier cases, in particular, have been quoted both in England and South Africa time without measure. What is perhaps worthy of mention is that in England a distinction has sometimes been drawn between what have been called "implications of fact" on the one hand, which are based on the presumed joint intention of the parties, and terms "implied by law" on the other. See Ashmore & Others v Corporation of Lloyds (No 2), supra, at 626. The distinction corresponds to the one which is drawn in South Africa between "tacit" and "implied" terms. (Cf Alfred McAlpine& Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A) at 532C -

533C). The term which Cobam seeks to import into the charter-party in the present case falls into the former category, that is to say, what in South Africa would be called a "tacit" term. The test to be applied for the implication of such a term has been formulated in various ways, but the principles relevant in the context of a contract such as a charter-party, which emerge from the cases can, I think, conveniently be summed up as follows: (i) it is not sufficient to show that the term sought to be introduced would be reasonable, as it is not for the court to make a contract for the parties; (ii) the implication must be made as a matter of necessity and be founded on the presumed intention of the parties; and (iii) the term must be obvious and capable of precise formulation.

At first blush there may seem something to be said for the implication of a term along the lines contended for by Cobam. But upon reflection, I am unpersuaded that such a term can properly be regarded as

necessary in the sense referred to above. There are also other problems associated with its implication, both as to content and formulation. Mr Wallis, who appeared for Aegean Petroleum, pointed out that the effect of the term sought to be implied would be that in the event of a breach by a charterer who was insolvent, such as would seem to be the situation in the present case, the charterer's creditors would immediately be deprived of the right to participate in certain of the charterer's assets, ie the bunkers. In short, where the charterer was indebted to the shipowner for, say, nonpayment of hire and as in the present case it was sought to set off the cost of the bunkers against the outstanding hire, the consequence of the implication could be to confer on the shipowner what in effect would be a preference, to the detriment of other creditors. Needless to say, a term having such a consequence will not readily be implied.

If an attempt is made to formulate the implied term so as to

include the case of a cancellation by the charterers, as well as by the owners, the matter becomes even more complex. Should the charterers then cancel the charter-party after the vessel had been arrested or at a time when she was about to be arrested and the claims of creditors exceeded the value of the vessel, the effect of the term sought to be introduced would be that the property in the bunkers would immediately pass from the charterers to the shipowners leaving the charterers with a claim for payment in respect of the bunkers which may possibly be wholly unsecured. Such a term could hardly be consistent with the presumed intention of the charterers and Mr Marnewick found himself obliged to concede that the term which he sought to introduce would have to be one-sided in the sense of dealing only with the situation where the cancellation was at the instance of the shipowner and not where it was at the instance of either party. It is, of course, so that in terms of s 8 of the English Sale of Goods Act of 1979 the

question of the price of goods may be left over for later determination on the basis of what is reasonable in the circumstances. This resolves any difficulty that may otherwise have arisen in relation to the price. But it does not resolve the difficulty of formulation associated with an attempt to ascribe to the parties an intention which may well be dependent on such unknown factors as when or where or under what circumstances the cancellation takes place or the quantity of bunkers on board.

In the course of the hearing in the Court below counsel for Cobam suggested the following formulation of the term which he submitted had to be implied:

> "In the event of the charter-party terminating in consequence of a breach or a repudiation by the charterer while the vessel is on the high seas, the ownership in the bunkers on board the vessel shall ipso facto be deemed to have passed from the charterer to the owner subject, however, to the owner being under an obligation to pay to the charterer the price of the bunkers on board."

In this Court Mr Marnewick found it necessary to revise this formulation on more than one occasion in an endeavour to meet some of the difficulties with it that were raised in argument. It is unnecessary to consider these further formulations or all the problems associated with them. A typical example that comes to mind is the question whether it can be said to have been the presumed intention of the parties, and in particular that of the shipowners, that the latter would pay for the bunkers necessary for the vessel to reach port regardless of where on the high seas the vessel may be at the time of the cancellation of the charter-party.

The main thrust of Mr Marnewick's argument, however, was that considerations of practicality and necessity were such that an implied term having the effect of clause 32 had to be imported into the contract and the problems referred to above overcome. He stressed, in particular, that in the absence of an implied term the vessel would have been left stranded

at sea. This argument, I think, overlooks the real issue in the present case. There can be no doubt that following the withdrawal of the vessel from the service of the charterers, Cobam was entitled to use the charterers' bunkers on board the vessel to proceed to the nearest safe port, or, perhaps, even to some other more convenient port. But it is unnecessary to have to determine the precise nature of this right. Nor is there any need to consider whether Cobam is obliged to compensate the charterers for the bunkers used and, if so, to what extent. Considerations relating to expenditure necessarily incurred in consequence of the breach may well be relevant. But the bunkers used by Cobam in proceeding to Richards Bay are not in issue. What is in issue is the ownership of the bunkers still on board the vessel upon her arrival at the port of Richards Bay. These were the only bunkers that were attached. To this extent, therefore, the circumstances relating to the bunkers in issue in the present case are little different from

those relating to the bunkers forming the subject matter of the dispute in The Span Terza. In that case the port in question fortuitously happened to be within the delivery range. But this distinction is of little consequence in so far as the implication of the term in question is concerned.

Applying the ordinary principles referred to above, I am unpersuaded that there is any proper basis for the implication of a term relating to the purchase of the bunkers that were subsequently attached. The earlier termination of the charter-party in consequence of a breach would not have been beyond the contemplation of the parties to the contract. Had they wished to provide for such a contingency in so far as the bunkers in question are concerned, they no doubt could have done so. (Cf The Saetta [1993] 2 Lloyd's Rep. 268 [QB (Adm Ct) at 270.) But having not done so, perhaps deliberately, I can see no basis for importing such a term into their contract. Quite apart from any other consideration,

the implication cannot be justified on the ground of necessity. Mr Marnewick submitted that in the absence of an implied term a shipowner may find himself having to pump the charterers' bunkers out of his vessel. Such a possibility seems to me to be remote. Where the vessel is in a position to continue with her voyage or otherwise put to sea the shipowner would ordinarily purchase the bunkers on board, but from whom and at what stage would depend in each case upon the circumstances. One possibility, again depending upon the circumstances, would be for the parties to enter into an agreement of sale after the termination of the charter-party. Indeed, Cobam contends in the alternative that this is what happened in the present case, albeit that the agreement was tacit.

It follows that in my view the second ground advanced by Mr Marnewick must similarly fail.

I turn to the final question in issue and that is, as I have just

mentioned, whether a tacit agreement of sale was concluded between Cobam and the charterers subsequent to the termination of the charter-party resulting in the transfer of the property in the bunkers to Cobam. In arguing this point counsel on both sides proceeded on the basis that the law to be applied was English law. I shall assume this to be the case.

The argument advanced by counsel for Cobam amounted in essence to a contention that the charterers' apparent failure to respond to Cobam's telexes of 16 and 23rd October 1992 referred to above, constituted, in all circumstances, an acceptance by silence of the terms proposed in those telexes. In English law, as in our law, acceptance of an offer will not normally be inferred from silence, save in the most exceptional circumstances (see Chitty on Contracts vol 1 ed 26 at para 81). There is a further difficulty with the argument. The papers are silent on the question as to whether or not there was any response from the charterers

after 23 October 1992. Counsel for Cobam accordingly, found himself obliged to contend that on the probabilities there was no response. In my view there is insufficient evidence on the papers to establish an acceptance by the charterers prior to the attachment on 24 October 1992. It follows that the third ground relied upon by the Cobam must also fail. In the result the appeal is dismissed with costs.

D G SCOTT

CORBETT CJ)
HEFER JA) - Concur
NESTADT JA)
OLIVIER JA)