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Case No: AD-2023-000022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/01/2025

Before :

ADMIRALTY REGISTRAR DAVISON

- -

Between :

PORT OF SHEERNESS LIMITED **Claimant**

- and –

SWIRE SHIPPING PTE LIMITED **Defendant**

- -
- -

Mr John Kimbell KC and **Mr Michael Nguyen-Kim (**instructed by **Roose & Partners)** for the Claimant
Miss Josephine Davies KC and **Ms Fiona Petersen** (instructed by **Preston Turnbull LLP**) for the Defendant

Hearing dates: 18 – 21 & 25 November 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 3 January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Introduction

1. The MV "KIATING" is a Singapore registered bulk carrier which was sub-chartered to and operated by the defendant ("Swire"). In November and December 2021 the vessel loaded a cargo of plywood and hardwood in China and Malaysia. The plywood was stowed in all five holds with the hardwood placed above in holds 2, 3 and 4. The intention was to discharge at the port of Tilbury. But Tilbury was unable to accept the hardwood because of storage limitations. The hardwood was instead discharged at the Port of Sheerness ("the Port"), owned and operated by a limited company of that name and which is part of the Peel Ports group. KIATING came alongside at Berth 6/7 at the Port at 2155 on Sunday 23 January 2022. On Monday 24 January the hatches were opened and discharge commenced at 0830. There were problems with the stow. This was especially the case in Hold No. 3 where the cargo had shifted. (The vessel had encountered heavy weather during her passage.) But in all holds there were problems in that some packs of hardwood were not pre-slung and/or the slings had not been tied off and had slipped down into the stow making the loops inaccessible. Some packs were on their sides. There were gaps and voids. There was insufficient dunnage under the packs. Elsewhere the dunnage was inadequate or had moved. A Notice of Protest in respect of these matters was lodged with the Master at 1130 on Tuesday 25 January. The Port had internally estimated that discharge would take 3½ days, i.e. until Thursday 27 January. But the state of the stow prolonged the operation. At around 1500 on Friday 28 January discharge was suspended by order of health and safety officers of the Port. By now Berth 6/7 was required for another vessel. So KIATING moved (twice) to vacant berths at the Port, where she remained until the morning of Friday 4 February when she moved to Tongue anchorage in the greater Thames Estuary. She re-berthed at Berth 6/7 at the Port in the very early hours of the morning of Friday 11 February and resumed discharge at 0600. By this time, additional measures were available. These included steel plates (which Swire had obtained from Tilbury) to form a safe working platform on top of the cargo, and a telehandler. Discharge was completed at 1140 on Saturday 12 February.

2. The total time taken to discharge (including setting up time) was 56.16 hours. This substantially exceeded the Port's estimate of 3½ days or 42 hours. (That estimate also incorporated breaks, which the figure of 56.16 does not.) Further, the vessel was alongside, though not discharging, for 8 days (2 of them not full days) at Berths 1 or 3. The Port levied additional stevedoring, shifting and equipment charges, which Swire paid. The Port also sought to impose a 10 day period toll calculated at the rate of £137.80 per linear metre and amounting to £248,026.22 (i.e. £24,802 per day x 10). The invoice (paraphrasing the relevant contractual provision) stated "Where a vessel remains alongside at the docks for a longer period than necessary for loading and discharging of cargo". This invoice Swire have refused to pay. Swire say that such a charge only applies to vessels that outstay their welcome, i.e. remain alongside once loading or discharging has completed. The Port says that the period toll was payable from that point in time where loading or discharging ought to have completed, but did not complete. This is the basic (though not by any means the only) issue between the parties. It is a relatively short point of construction of the relevant contractual provision.

The contractual framework

3. The Port's quote dated 18 January 2022 was from Mr Richard Ward, Sales Delivery Manager for the Port, to Mr Andy White of South Pacific Agencies (UK) Ltd ("Sopac"),

who were Swire's commercial and operational agents in the UK. Materially, it provided as follows:

> "Commodity: Hardwood Timber
> Pre-slung cargo, double packed
> RH&D from ship's hold in to covered warehousing = £17.50 per Tonne
> 7 days warehouse free time from date of completed vessel discharge. Thereafter £1.75 per m3 per week or part thereof
> Costs for any required Re-Banding to be agreed on a case by case basis"

4. The quote was stated to be "subject to company Port of Sheerness – Terms and Conditions of Trading" and that charges "shall be raised in accordance with the applicable terms and conditions and published charges, or as otherwise described in this quotation". It went on:

> "For the sake of clarity, additional charges will apply in certain circumstances (including but [not] limited to the following) and will be charged at a rate determined by Port of Sheerness Limited:
> - Cargo in the vessel has been loaded with insufficient dunnage being in place to allow for the safe passage of slings or other lifting equipment.
> - There is a requirement to carry out the removal of (or lifting of) waste or dunnage, access equipment, other shipowner materials or any other lifts outside the scope of this quote.
> - Additional equipment… plant or labour is required due to poor stow of the cargo or where the customer requires trimming of cargo in the vessel hold..
> - The Customer requires services to be performed outside the Port of Sheerness Limited's normal working hours…
> - There are delays which are outside the control of the Port of Sheerness (e.g. weather stoppages, vessel delays, trimming in vessel hold or lack of provision of customer haulage vehicle etc)
> - Without prejudice to the provisions of our standard terms and conditions, any costs associated with shifting vessels discharging Goods / Cargo are incurred while berthed at the Port, then such charges will be payable by the Shipowner, via the agent."

5. Under the heading "Additional Terms and Conditions" were the following paragraphs:

> "Packs must be pre-slung
> Slings must be tied off
> Slings to be suitably labelled and certified within the last 6 months…
> Slings to be in good order and free from damage
> All packs to be suitably block stowed at a uniform height
> Timber frames to be utilised to avoid gaps, spaces and poorly supported packs."

6. Under the heading "Sufficiency of Scope" was this paragraph:

> "Please ensure you have given us a complete list of required services and all relevant information – the quote above is based on the information you have provided to us. We reserve the right to charge you for any additional services that are subsequently required in order to complete the services, whether advised by you or not. We reserve the right to increase the price to reflect any increase in the

cost to us including but not limited to: [(i) and (ii) omitted] (iii) handling poorly stowed cargo/damaged cargo."

7. The Terms & Conditions of Trading materially provided as follows:

"4.1 Charges and dues for Services performed or provided by the Company shall be payable by the Customer and/or the Shipowner, as appropriate, in accordance with the Company's standard charges, as published and revised from time to time, or at such other rates as shall be agreed from time to time between the Company and the Customer and/or Shipowner, as appropriate.

4.2 The Company's standard charges refer to Services performed or provided during the Company's normal working hours and in the Company's normal manner. If the Company performs or provides Services outside its normal working hours, or if by reason of an emergency or the nature and condition of any Goods, the construction condition and readiness of any vessel or road or rail vehicle, the availability of crew, or for any other reason the Company performs or provides Services that, in its opinion, are beyond or in a different manner to those for which the standard charges and dues refer, the Customer or the Shipowner as appropriate shall pay an additional charge to cover the increased or additional costs thereby incurred by the Company.

5.2 The Company reserves the right:
5.2.1. to charge interest on overdue accounts at 4% above the then prevailing Bank of Scotland Base Rate calculated on a day to day basis;
5.2.2. to recover such legal and other costs incurred in the recovery of monies outstanding to the Company…
5.4. The said charges shall be payable by the Customer or the Shipowner as appropriate on demand unless otherwise agreed by the Company. Interest at the rate of 4 per cent above the prevailing Bank of Scotland Base Rate is payable on charges remaining unpaid twenty-eight days after the date of the Company's invoice.

12.3 Nothing in these Terms and Conditions shall affect the provisions of the Medway Ports Authority Act 1973…

30. PERFORMANCE OF CARGO HANDLING SERVICES

30.5. … when a cargo is exceptionally difficult to work due to unsoundness of the cargo, bad or collapsed stowage, damage to the cargo or the vessel or other matter creating exceptionally difficult working conditions, then the Company may in its absolute discretion elect whether or not to perform or provide Cargo Handling Services and if it should so elect and informs the Shipowner for that vessel thereof then the Company shall not be liable for any loss or damage whatsoever howsoever caused… to the Goods or the vessel… and the said Shipowner shall indemnify the Company against all proceedings claims and expenses arising out of or consequent to any such election by the Company…

30.7. All extra costs charges and expenses incurred by the Company hereby shall be repaid by the Shipowner of the vessel on which the cargo was or was to be consigned.

30.8. The charges for Cargo Handling Services specified by the Company from time to time cover the provision of such of the Services as are specified by the Company in relation to thereto… where the cargo is sound general cargo under normal conditions on a normal vessel such that a reasonable rate of receiving loading discharging or delivering in relation to that particular vessel or cargo is achievable.

30.9. Where cargo is not sound cargo able to be worked under normal conditions on a normal vessel or, at the discretion of the Company, for any other reason such that a reasonable rate of receiving loading or discharging delivering is not achievable… all extra costs charges and expenses incurred by the Company shall be repaid by the Shipowner of the vessel was or was to be consigned."

8. The published charges incorporated the Port's "Port Charges", which provided as follows, (I have corrected where the numbering has gone awry):

"1. **Vessels discharging or loading cargo**

1. Vessels arriving loaded from or sailing loaded to all other ports – £4.42 per GT

5. **Dock Charges**

1. Payment of Dock Charges in respect of any Vessel shall not entitle such Vessel to remain at the Docks for a longer period than may actually be necessary for loading or discharging its cargo, and shall not in any way affect the power of the company to order such Vessel to remove to any other parts of the Docks, whether or not the vessel shall at the time such order is given have completed the loading or discharging of cargo.

[Sub-paragraph 2 omitted]

3. Payment of Dock Charges does not entitle the vessels to the use of a berth except for loading or discharging cargo.

4. Where a vessel remains alongside at the docks for a longer period than necessary for loading and discharging of cargo, a period toll will be charged for each 24 hour period, or pro rata if less than 24 hours. The charge is vessel Length Overall multiplied by £137.80 per linear metre."

9. Clause 5(4) is central to the case and an explanation is required of its history and genesis. But before coming to this it is necessary to set out some further background as to the circumstances in which KIATING came to move from, and then back to, Berth 6/7.

10. On Thursday 27 January, which was the day before discharging was suspended, there was a TEAMS meeting attended by representatives of the Port and of Swire. What was

discussed was set out in an internal email of that date drafted and sent by Daniel Edwards, the Head of Sales for the Port. This said:

- "All seen the photos and agree its moved a lot and difficult cargo.
- All confirmed that many packs are missing slings.
- AY explained had to hire a telehandler with driver for Friday and CH has just confirmed costs to be charged to them.
- RW will speak with NSG in regards to additional costs to discharge as going to be in the port longer than expected.
- AW is going to confirm if the ships cranes can be used for man riding although its believed this is not the case.
- Agreed that as discharge will not complete Friday evening, the ship will go to deep sea and await a free birth to continue.
- AY explained that unless we find a solution to get people in the hold, will have to wait until it can go back on 6 birth.
- AW asking when can the receivers collect to free up some space but now understands that stock is mixed holds so no complete bills of laden yet for collection.
- All agreed the above that the vessel will need to go back out to sea instead of moving birth as will be cheaper and AW explained that Tilbury cannot yet take the vessel for plywood so should not be a problem.

  Think that covers everything but RW and AY, please add anything I have missed.

  It was also clear they did not want to disagree with anything said and understand the vessel does not meet the 'Subjects To' as per the quote:

- Packs must be pre-slung
- Slings must be tied off
- Slings to be suitably labelled and certified within the last 6 months. Copy certificates to be provided before vessel acceptance.
- Slings to be in good order and free from damage
- All packs to be suitably block stowed at a uniform height
- Timber frames to be utilised to avoid gaps, spaces and poorly supported packs.
- Other co loaded cargoes, if any not to be over-stowed or impacting in anyway on the stowage.
- Declaration and acceptance of carrying vessel.
- Confirmation of vessel draft on arrival."

11. As appears from the email, it was obvious, even before the suspension of discharging on health & safety grounds, that discharging was not going to be completed by the end of the next day and that KIATING would have to move in order to allow another pre-booked vessel to dock. Bullet point 6 above records that it was agreed that she would go out to a deep anchorage. But the evidence of Mr White, the operational and commercial director of Sopac, and Mr Hardy, Swire's regional manager, which I accept, is that towards the end of the meeting, Mr Young, the Port's planning manager, offered the alternative of shifting to a vacant berth. Mr White's evidence was that Mr Young had used the expression a "free berth". Whether that meant "free of charge" or merely "vacant" was never clarified, (though the latter seems more likely). But it is

apparent that no one at the meeting mentioned a period toll for using such a berth whilst awaiting Berth 6/7 to become available. Nor was a period toll mentioned when the Port provided an estimate of the shifting costs from Berth 6/7 to a vacant berth and return, (£20,550 – subsequently revised down to £16,500). That estimate was given to GP Shipping ("GPS"), Swire's appointed port agents and passed on by GPS to Swire via an email timed at 15:22 on 27 January. An hour later GPS emailed Swire again with a second estimate (of which the Port was again the source), this time for the shifting costs from Berth 6/7 to anchorage and return. This cost was £32,615. At this time, it therefore appeared that shifting to a vacant berth was the cheaper option and that remained the case even when on Friday 28 January the Port confirmed that KIATING would have to shift twice – first to Berth No.1 and then to Berth No. 3.

12. The vessel moved to Berth No. 1 at 19:00 on Friday 28 January and then to Berth No. 3 at 21:00 on Sunday 30 January. At 07:12 on Friday 4 February she moved to anchorage. This was at the suggestion of the Port because by that time it had become clear that other commitments meant that the Port could not offer uninterrupted discharge until about 16 February.

13. In the meantime, on Monday 31 January the Port sought and, on 8 February, were given an indemnity under clause 30.5 of the Terms & Conditions of Trading. The Port made it clear that discharge would not resume without this indemnity. The indemnity was expressly based upon an acceptance by Swire that KIATING was "exceptionally difficult to work". In the context of clause 30.5 that meant that the cargo was exceptionally difficult to work.

14. On Wednesday 2 February the Port (Mr Ward) emailed Sopac and Swire (Mr White and Mr Hardy) in the following terms:

> "As previously mentioned the quote for this business was based the presumption of a good stow and 42 hours work (3.5 days) discharge but due to the poor stow and resultant protracted discharge working hours have already exceeded that. With that in mind please be advised that additional hours worked over 42 will incur a charge of £378.00 per hour.
>
> So far we have spent 59 hours working the vessel therefore an additional 17 hours have been worked to date attracting an additional charge of £6426.00.
>
> Once the vessel resumes work the above rate of £378.00 will apply to each hour worked.
>
> Above charges do not cover overtime.
>
> In additional to the charges mentioned above and due to the protracted stay of the vessel brought about by the poor stow a period toll will apply.
>
> Please acknowledge receipt of this email and acceptance of charges mentioned so we can commence working at the next available opportunity."

15. This was the first mention of the period toll. On Tuesday 8 February Mr Ward chased a response asking Mr Hardy to "confirm acceptance of the charging scale mentioned". By email timed at 17:41 on that day, Mr Hardy replied:

> "Dear Richard,
>
> Further to our email exchange below – I can confirm acceptance to the additional charging scale outlined in your initial email and please invoice this out with our approval.
>
> I really hope we can get a good run on the vessel in the coming days to be able to conclude the remaining timber discharge operations now as safely and quickly as possible.
>
> Please be guided accordingly."

16. In oral evidence, Mr White of Sopac, whilst maintaining that he did not fully comprehend what the period toll was, accepted that it was fair to suggest that it was "clear what was being talked about, which is the period toll among the port charges, in the published port charges". As to Mr Hardy, the relevant passage in his oral evidence was this:

> "Q So, you understood, did you not, at the time, that that was one of the conditions that would apply?
>
> A The email from Richard Ward on 2 February – my focus would have been on the additional costs that we were to absorb to discharge the vessel. The references to period toll, I must admit, had no costs associated to them, and my assumption, whether rightly or wrongly, was that "period toll" referred to the time the vessel would remain on a berth or alongside as a remedial charge for that purpose.
>
> Q So, I think what you're saying is you understood that a charge would be applied and that charge would be the period toll, but you didn't----
>
> A I didn't certainly assume that it would be a charge to the level of what we were discussing in this courtroom.
>
> Q Is that the reason-- So, really, what it comes down to is you assumed that some period charge would apply, but you weren't too concerned about it because you assumed it wouldn't be a very high type of figure. Is that right?
>
> A That's correct."

The period toll

17. The period toll for the Port of Sheerness was devised in September 2019 by Mr Alan Martin, the Port's finance director. (He was not a director in 2019 but in a senior finance position). His role included responsibility for Great Yarmouth Port Company, which was part of the South East Ports Division of Peel Ports Group. Peel Ports took on Great Yarmouth in 2016 and this was Mr Martin's first experience of a period toll. There had been an instance there of a vessel which had been detained for many months by the Maritime and Coastguard Authority thereby substantially reducing the port's capacity. He explained that if that were to happen to Sheerness "it would be pretty catastrophic fairly quickly" and so it was important to introduce a period toll into the tariff to protect the Port of Sheerness. The methodology was to look at the income streams associated with vessel calls at the Port utilising the Port's berths. Three income streams were

taken: (1) cargo handling, (2) rates and dues, and (3) pilotage, mooring and towing. These were aggregated to a figure of £25,391,226 and then divided by the number of berths (5) and the number of days in the year (365) to produce a daily period toll of £13,913. This was then, in turn, divided by an average LOA(m) of three broad categories of vessel using the port (117m) to produce a £/m figure, which in 2019 was £123.73 per metre. (I mention here – somewhat out of place – that the reason that the period toll for KIATING was almost double the daily period toll per berth was that she was a bulk carrier some 200m in length.)

18. There was some tension in the answers that Mr Martin gave to questions about the purpose of the period toll. On the one hand, he stated both expressly and impliedly that the aim was to protect the business from loss:

> "If we can't discharge ships, the vessel can't come alongside, the business is at risk. If a vessel was delayed because it had poor stow or unstable stow or it's been detained by the MCA, you need to protect the business from the front end."

He also said in his witness statement that the period toll:

> "reflects the revenue which is lost whenever a berth becomes "blocked" by a vessel which remains on berth for longer than it should be on that berth."

19. On the other hand, when it was pointed out to him that there might be circumstances when a vessel took longer than expected to load or discharge without putting the business at risk or causing loss, he said that that was not the purpose of the period toll:

> "We put in a very clear tariff and a clear explanation of what will be charged for that vessel if these circumstances arise for all our tariff items. We don't say, "Oh, don't worry about it if we can shift you," or, " If the phone hasn't rung for the vessel on that berth, we might not charge it."

20. On the basis of these answers, the period toll emerges as a hybrid. It was both a protection against loss (its primary function) and an adjunct source of revenue.

21. The period toll was uprated every year by a measure which was a combination of RPI and some bespoke elements to reflect costs that had increased at a rate higher than RPI. The published rate in 2022 (see above) was £137.80 per linear metre. From 1 January 2023 it was £158.47 per linear metre. Importantly, and no doubt reflecting the experience of this case, that version of the published Port Charges contained a further clause, Clause 5(5). Clauses 5(4) and 5(5) now read as follows:

> "4. Where a vessel remains alongside at the docks for a period longer than necessary for loading and discharging of cargo, a period toll will be charged for each 24 hour period, or pro rata if less than 24 hours. The charge is vessel Length Overall multiplied by £158.47 per linear metre
>
> 5. Where a vessel remains alongside at the docks for a period longer than *estimated* as* necessary for loading and discharging of cargo, a period toll will be charged for each 24 hour period, or pro rata if less than 24 hours. The charge is vessel Length Overall multiplied by £158.47 per linear metre

** quotations can only ever be an estimate of dues and the actual charges will be calculated by reference to actual period of time the vessel remained alongside at the docks."*

22. The changes from the 2022 document were to substitute "period longer" for "longer period", which makes no difference at all, and to add sub-clause 5 which is in identical terms to sub-clause 4 save for the parts I have italicised. The effect of this was and is to give the Port a clear and unambiguous right to charge on the ground and in the manner contended for in these proceedings. (Though it is not immediately relevant, I might observe, first, that that right is not coupled with any obligation on the Port to agree, or even disclose, the period estimated as necessary to load or discharge and, second, the drafting of sub-clause 5 renders sub-clause 4 redundant. It seems to me that the drafting has not been thought through.)

The submissions of the parties

23. The submissions of the parties appear sufficiently from the discussion below.

Discussion and conclusions
(A) Express term

24. Mr Kimbell KC for the Port offered four avenues to establishing the Port's contractual or quasi-contractual entitlement to the period toll.

25. The first avenue was a straightforward application of Chapter 1, Part 2, clause 5(4) of the Port Charges, which, to recap, provided that the Port could charge a period toll "where a vessel remains alongside at the docks for a longer period than necessary for loading and discharging of cargo". The Port's case (at the conclusion of the trial and, it should be emphasised, after several refinements) was that the period toll became payable after the expiry of the time objectively necessary to perform the cargo operation assuming the cargo complied with the conditions of the contract. (I quote from Mr Kimbell's closing skeleton argument.) If there was a dispute about the period (i.e. what period was objectively necessary) then that was to be settled by expert evidence. Swire's case was that the period toll was only payable by "overstayers", i.e. vessels which remained alongside after discharge was complete.

26. This is a question of contractual interpretation which I have little hesitation in resolving in favour of Swire. I have the following reasons or groups of reasons for that conclusion.

i) Clause 5(4) is part of a scheme of dock charges which together provide for a fixed sum (£4.42 per GT) for use of the docks, but which restrict that use to loading and discharging cargo, which is to be carried out at the direction of the Port. By clause 5(1) a vessel may not "remain at the Docks for a longer period than may actually be necessary for loading or discharging". In that context, the words "remains alongside" in clause 5(4) seem to me to refer to a vessel which has not departed after that operation of loading or discharging has been completed. "Remains" suggests overstaying. It does not suggest taking longer than estimated or bargained for. And the words in clause 5(1) and clause 5(4) are "actually … necessary" and "necessary". They are not "ought to be necessary".

ii) Although Mr Kimbell's interpretation of clause 5(4) was that the period toll "kicked-in" as soon as the time objectively necessary to perform the cargo operation had expired, he acknowledged that this might in any given case involve expert evidence. This was to concede that the time objectively necessary, unless it were agreed, required a process of evaluation involving examination of records of precisely what was happening at any given time and on any given day of loading or discharging. This would be complex, uncertain and all-too-readily productive of disagreements. Further, the contractual terms do not oblige the Port to complete a discharge within any particular time period or in any particular manner (e.g. as to numbers of stevedores or cranes), both of which would make the process of evaluation uncertain and controversial. Such a broad discretion on the Port's part would sit very uneasily with a corresponding power to impose a period toll for slow loading or discharge. It would be open to misuse, or, at least, the suspicion of that. Finally (and as I have observed in relation to the 2023 terms) clause 5(4) is not balanced by any obligation on the Port to agree or even provide its time estimate. In these circumstances a vessel could be facing very significant extra charges without any clear idea of the point in time at which they would start to be incurred. For all these reasons, Mr Kimbell's interpretation is problematical, uncommercial and improbable.

iii) By contrast, Swire's interpretation would be both practical and easy to apply. After completion of actual discharge a vessel would follow some standard steps (closing of hatches and awaiting pilots) and then depart. The Statement of Fact will usually be uncontroversial on these matters. If a vessel outstays its welcome, that will not, or not usually, be difficult to determine.

iv) Although I have to construe clause 5(4) as it appeared in the Port Charges in 2022, it is nevertheless pertinent that the 2023 version was significantly amended or, to be more precise, added to in order to align it with the Port's preferred construction. That the wording was amended is some implied acknowledgement on the Port's side that the 2022 version was, at the very least, ambiguous. I myself regard it as unambiguously referring to overstayers. But if, contrary to my view, it is ambiguous then it is a well-known rule of contractual construction that where there are ambiguities in a written contract the preferred interpretation is the one that works against the interests of the party that wrote and put forward the contract – here the Port.

v) It is not an answer to the points set out above that the Port devised the period toll for the primary purpose of protecting against "berth-blocking" and to ensure that it was able to rely on its berthing space to generate revenue. KIATING was never a "berth-blocker" of the type the Port evidently had in mind when it devised the period toll. And such aims are equally served by Swire's interpretation when taken in conjunction with the wide powers of the Port to direct both cargo operations and the vessel itself. Relatedly, whilst I accept that it is commercially reasonable for this or any port to "price in" an estimate of how long a loading or discharging operation might take and look to charge extra if that estimate proves wrong, there are many ways to do that. This provision, if interpreted as the Port submits, would be so difficult to apply, would generate

such uncertainty and would be so capable of misuse that any commercial sense in the aim would be far outweighed by those consequences.

(B) Unilateral power to charge

27. The second of Mr Kimbell's four avenues to establishing the port's contractual entitlement to the period toll was an alleged unilateral power to make additional charges. The basis for the power was contained in the provisions set out at paragraphs 3 – 7 above, principally (1) the additional terms referred to in the quote dated 18 January 2022 (which included the "Sufficiency of Scope" provision) and (2) clause 4.2 of the Terms and Conditions. To recap, so far as relevant to this avenue, the quote said:

> "Charges shall be raised in accordance with the applicable terms and conditions and published charges, or as otherwise described in this quotation. For the sake of clarity, additional charges will apply in certain circumstances (including but not limited to the following) and will be charged at a rate determined by Port of Sheerness Limited:
>
> - There are delays which are outside the control of the Port of Sheerness (e.g. weather stoppages, vessel delays, trimming in vessel hold or lack of provision of customer haulage vehicle etc)."

And clause 4.2 of the Terms and Conditions said:

> "4.2 The Company's standard charges refer to Services performed or provided during the Company's normal working hours and in the Company's normal manner. If the Company performs or provides Services outside its normal working hours, or if by reason of an emergency or the nature and condition of any Goods, the construction condition and readiness of any vessel or road or rail vehicle, the availability of crew, or for any other reason the Company performs or provides Services that, in its opinion, are beyond or in a different manner to those for which the standard charges and dues refer, the Customer or the Shipowner as appropriate shall pay an additional charge to cover the increased or additional costs thereby incurred by the Company."

28. There are two fundamental difficulties with the alleged unilateral power.

29. First, the parts of the quote relied upon do not confer on the Port, or amount to, a freestanding power to impose additional charges. The quote says that "charges shall be raised in accordance with the applicable terms and conditions and published charges". The quote goes on to refer *"*for the sake of clarity*"* to additional charges that will apply "in certain circumstances". What follows is a series of bullet points (only one of which I have quoted immediately above) which are a summary of what is to be found in more detail in the Terms and Conditions. Similarly, the phrase "We reserve the right to charge you for additional services etc" is a reference to the Terms and Conditions. These phrases are in the nature of cues for or pointers to the Terms and Conditions themselves. Given how comprehensive the Terms and Conditions are, it would indeed be very surprising if the quote was intended to set up some parallel, freestanding right to impose additional charges. I can see no such intention in the language of the quote.

30. Second, those provisions of the Terms and Conditions setting out the circumstances in which additional charges may be levied require that costs and expenses have actually been incurred by the Port. These are the closing words of clause 4.2. These provisions do not entitle the Port to recover a period toll, which is not a cost or expense to the Port but rather (to adopt Mr Kimbell's language) a charge representing the inherent economic value of the berth space.

(C) Supplemental agreement

31. Mr Kimbell's third avenue was that the Port and Swire had entered into a supplemental agreement to pay both the period toll and an additional hourly rate for cargo handling. That agreement was contained in the exchange of the emails dated 2 and 8 February; see paragraphs 14 & 15 above. This, he submitted, was an agreement of the type envisaged by clause 4.1 of the Terms and Conditions which, again to recap, said this:

> "4.1 Charges and dues for Services performed or provided by the Company shall be payable by the Customer and/or the Shipowner, as appropriate, in accordance with the Company's standard charges, as published and revised from time to time, or at such other rates as shall be agreed from time to time between the Company and the Customer and/or Shipowner, as appropriate."

32. There are fundamental difficulties with this avenue also. The chief difficulty is that the supplemental agreement, so far as it concerns the period toll, adds nothing. The period toll is contained in the Port Charges which, it is common ground, formed part of the contract. The exchange of emails was quite clearly a reference to the period toll as found in clause 5(4). Mr Kimbell expressly acknowledged, indeed averred, that this was so. But I have found that the period toll did not apply to the situation that had arisen. It is irrelevant that Mr Ward thought that it did. He was wrong. Mr White and Mr Hardy very evidently never turned their minds to the precise wording of the period toll. But if and to the extent that they agreed that it applied (which I doubt they did in any informed or meaningful way) that is also irrelevant. They too were wrong. Their shared misconception, if such it was, did not alter the contract or its meaning.

33. Clause 4.1, which addresses rates (which it is accepted were agreed by the exchange of emails) takes matters no further.

(D) Quantum meruit

34. Mr Kimbell's fourth avenue was a *quantum meruit* reflecting the reasonable value of the services provided. The Particulars of Claim and Mr Kimbell's skeleton argument were not precisely aligned on this aspect. The Particulars of Claim at paragraph 16 claim a quantum meruit for the "Services" (an expression not properly defined) for which £248,026.22 was said to be a reasonable sum. Mr Kimbell's closing skeleton, at paragraph 44 said:

> "Given that Swire unequivocally agreed to the payment of *a* period toll, any failure to specify the precise value of the toll … would not preclude POS' right to recovery. The Court can simply assess a reasonable sum to which POS will be entitled, with reference to the parties' objective intentions."

35. Lord Hoffmann in *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988 at [17] said:

> "The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls."

36. This is a case where the contract did not, on my findings, provide for a period toll in the circumstances which arose. To put that differently, the parties stipulated the circumstances in which additional charges were payable and they did not cover this situation. In my view, that leaves no room for a *quantum meruit*. Mr Kimbell's variation on the *quantum meruit* theme (agreement to *a* period toll) (a) was not, or certainly not clearly, pleaded in the Re-Amended Particulars of Claim, (b) was flatly inconsistent with his earlier assertion that there was "no ambiguity as to what period toll Swire agreed to pay – there is only one period toll which is the one in Section 5(4) of the Port Charges", and (c) is in conflict with my findings. Swire did <u>not</u> agree to pay *a* period toll. Nor was there a failure to specify the precise value of the toll. They agreed to the period toll in clause 5(4). But clause 5(4) did not apply.

37. As a postscript to *quantum meruit* I should make it clear that Swire have paid every additional charge demanded, save for the period toll. The total they have paid is £146,707.72, which was very considerably in excess of the Port's initial quote.

Subsidiary points

38. Having resolved the principal points against the Port, the subsidiary points do not arise for decision. But, in case I should be wrong on my interpretation of clause 5(4) and the other contractual or quasi-contractual "avenues", I will address some, though not all, of the subsidiary points – at commensurate and proportionate length.

Estoppel

39. Swire's case is that the exchange of emails set out in paragraph 11 above gave rise to an estoppel by representation. Swire contended that:

    (i) The Port made a clear representation that the only costs involved in shifting from No. 6/7 berth to No.1 and then No.3 berths and then back to No. 6/7 berth would be the costs involved in the shifting operations and/or that shifting between berths would result in a lower cost to the Vessel's operator than shifting to anchorage.

    (ii) At no stage prior to shifting to No.3 berth on 28 January 2022 was it suggested by the Port that the period toll would apply.

40. The Port's answer to this was that any representation was insufficiently precise and unambiguous and/or was based upon silence (i.e. the period toll simply not being mentioned) in circumstances where there was no duty to "speak out". I do not accept this. The Port was the source of the information passed on to Swire by GPS. The Port

could scarcely have failed to appreciate the reason why the information was required, namely to make a comparison of the costs involved in either shifting to a vacant berth or to a sea anchorage. Cost was, indeed, a factor discussed at the TEAMS meeting on 27 January. In these circumstances, the estimates of cost which the Port provided amounted to a clear representation that these were the only costs. Any other interpretation would defy common sense.

41. The other elements of an estoppel by representation, including reliance, were uncontentious and do not require discussion or analysis. However, Mr Kimbell had a fallback point, which I accept. This was that Swire's reasonable reliance on the representation would have ceased on receipt of the email of 2 February from Mr Ward stating that the period toll would apply. So if, contrary to my findings, the period toll did apply, then, subject to the further points set out below, the Port would be entitled to recover the toll for four days.

Is the period toll "reasonable" within the meaning of section 60 of the Medway Ports Authority Act 1973 and/or is it a penalty?

42. Even though the Port of Sheerness is now in private hands, the Port's power to make charges is contained in section 60 of the Medway Ports Authority Act 1973, which is in these terms:

> (2) (a) The Authority may demand, take and recover in respect of anything done or provided by them or on their behalf such reasonable charge as they may determine.
>
> (b) In this subsection "charge" does not include a ship, passenger or goods due as defined by section 57 of the Harbours Act, 1964, or a charge authorised by subsection (1) of this section.

43. Subsection 2(a) imposes a requirement that the charges be "reasonable". (I refused an eleventh hour application by the Port to amend its Reply so as to plead that the period toll was in fact a "ship due" and therefore subject not to a requirement of reasonableness but to an entirely different mechanism of statutory challenge under section 31 of the Harbours Act 1964.) The Port's case was that reasonableness was to be assessed by reference to the *Wednesbury* standard and Swire were content to assume that that was so. Swire's case was that the period toll as applied to the present situation, i.e. a ship taking longer to discharge than expected, was *Wednesbury* unreasonable. This was because the Port had already imposed extra charges for stevedoring, (which included a substantial profit element). But stevedoring was also taken into account in the calculation of the period toll because it formed part of "cargo handling", one of the three streams of income which made up that toll. Therefore, by imposing a period toll in the situation under scrutiny, the Port was effectively double-charging.

44. In her closing submissions, Miss Davies KC for Swire kept her powder dry on what I might call the more general aspects of *Wednesbury* unreasonableness. This was because Swire only needed to challenge the toll as applied in this case rather than to vessels overstaying after completion of discharge. But I record that they attacked the methodology of calculating the period toll, they described the end result as "outrageous" and "extortionate" and they drew an unfavourable comparison with similar tolls charged by other ports.

45. Swire additionally characterised the period toll as a penalty.

46. It seems to me undesirable that I should make findings on these points because they would necessarily be *obiter* and they are better addressed in a case where they would be decisive. In the period from March 2020 to October 2024, 6 vessels have paid the period toll. The Port has also now amended its Port Charges so as to clarify the circumstances in which it is payable. Any findings or remarks I were to make on the toll's reasonableness might potentially have a bearing on these six cases and others. It would be a strong thing to pronounce the period toll levied by a major ports group at one of its ports to be unreasonable and/or a penalty when that is not necessary to resolve the particular dispute before me. All I will say (and this tentatively) is that I am not convinced that double counting (if there is double counting) in this case would necessarily render the period toll unreasonable. The double counting would (a) be quite minor and (b) would not necessarily occur in all the cases where the period toll was in play. I am not convinced that Swire's attacks on the methodology used to calculate the period toll were all justified or, alternatively, justified to the extent that they rendered the period toll *Wednesbury* unreasonable. I consider that a fuller examination of the methodology than the time constraints of this trial have permitted would be desirable before coming to any conclusion.

47. As to penalty, I consider that payment of the period toll was a secondary obligation under the contract and that the penalty rule was therefore engaged. It also seems to me that it was designed to protect a legitimate interest and that the fact that other provisions of the contract might also have had the same effect does not detract from that proposition. Whether it was exorbitant and out of all proportion to the value of the legitimate interest sought to be protected is a matter on which, for the reasons I have given, I consider I should express no view.

Statutory tripling

48. An eye-catching feature of this case is that the Port claims that it can recover three times the value of the period toll under section 64 of the Medway Ports Authority Act 1973, i.e. can recover almost £750,000.

49. The relevant sections of the Act are sections 3, 64 and 68, which provide:

> "3. (1) In this Act, unless the subject or context otherwise requires—
>
> " charges" includes charges, rates, tolls and dues of every description for the time being payable to the Authority under any enactment;
>
> 64. If the owner of any vessel or goods or any other person at any time eludes or evades or attempts to elude or evade payment of, or refuses to pay, any charges payable by such owner or person to the Authority at the time when the same become due and payable, he shall be liable to pay to the Authority a sum equal to three times the amount of such charges, which sum shall be a debt due to the Authority and shall be recoverable by the Authority in any court of competent jurisdiction."

> 68. In addition to any other remedy given by this Act and by the Harbours Clauses Act, 1847, as incorporated with this Act… the Authority may recover any charges payable to them as a debt in any court of competent jurisdiction."

49. The Port says that Swire have "refused to pay" (see section 64) and are therefore liable to statutory tripling. It seems at least debateable whether a party who reasonably disputes a charge (however emphatically that dispute might be expressed) can be said to be "refusing" to pay. However, Swire's response to this aspect of the claim was more basic. They pointed out that "charges" is a term defined in section 3 and every type of charge must, under that definition, be "payable to the Authority under any enactment". The period toll was not payable under an enactment. It was payable under a contract – albeit one where the power to *make* charges was statutorily derived; (see section 60 cited above). Mr Kimbell's answer to this was that the definition was inclusive not exclusive so that its scope was not limited to the particular items or categories specified. But that does not, in my view, meet the point. The closing words were plainly meant to govern the scope of the whole provision. So whilst there might be other would-be charges, these would not be within scope unless they were "payable under any enactment". I do not think that the contrary is seriously arguable. I reach that conclusion with relief because if the Port were correct, the result would be manifestly unfair. There could be no proper justification for a commercial organization claiming a commercial debt being entitled to triple it.

Time required to discharge

50. The final subsidiary point to address concerns "the time objectively necessary to perform the cargo operation assuming the cargo complied with the conditions of the contract". If I had been in favour of the Port on its interpretation of the period toll, a finding on this aspect would be necessary in order to calculate the amount of the toll.

51. As I have already noted, the facts that this has required the evidence of experts (who are a long way apart) and is not an easy exercise are good reasons to reject the Port's interpretation of the period toll provision.

52. The experts were Mr Pope for the Port and Mr Daniells for Swire. Mr Pope's evidence was that the discharge ought to have taken 39 – 40 hours. Mr Daniells' evidence was 60 – 72 hours. This compared with the internal estimate of the Port (through Mr Young) which was 42 hours – though the Port appears to have told GPS that the expectation was 3 days, i.e. 36 hours. The experts were both impressive and well-qualified witnesses. The difference between them was derived from the methodology they employed. Mr Pope employed what I might call a "time and motion" model in which he broke the discharging operation down into its constituent elements and expected durations, making allowance for variable factors. Mr Daniells employed a more general approach based upon experience. This approach was in line with how Mr Young had arrived at his estimate. As he said in evidence: "It's definitely not a science".

53. Notwithstanding that Mr Pope's approach was criticised for being formulaic and theoretical, it was very close to the Port's own estimate of 42 hours. That estimate was a genuine estimate which Mr Young arrived at before there was any dispute and as to which it was in his and the Port's interests to be realistic. Mr Daniells' estimate to discharge a cargo complying with the contract conditions exceeded the time actually taken to discharge the non-compliant cargo, though the latter figure did not include

breaks. I prefer Mr Pope's estimate, but would increase it modestly to reflect the fact that he did not, in my view, make sufficient allowance for the fact that it would not always be possible for each crane lift to comprise 4 packs and for the markedly differing dimensions of the hardwood bundles. I find that the discharge ought to have taken 44 hours (calculated as 40 hours – the top of Mr Pope's range – plus 10%).

Conclusion

54. There will be judgment for the defendant.