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Demurrage and the Meaning of Words

K Line PTE Ltd. v Priminds Shipping (HK) Co Ltd. ("*Eternal Bliss*")

Suppose I want to hire a ship to transport cargo from Felixstowe to Rotterdam. The shipowner may (understandably) be concerned about my tardiness when loading and unloading the vessel. As a result, our contract may stipulate a rate at which I need to load and unload the cargo. If I take longer than agreed, I must pay the shipowner some pre-determined monetary sum as liquidated damages ("demurrage"). Now, suppose that my tardiness causes not only a delay in the voyage, but also some other loss, such as damage to some perishable cargo on board the vessel. Is the shipowner limited to recovering the agreed daily sum from me, or are they entitled to recover that agreed sum and also compensation for the cargo damage? In *K Line PTE Ltd v Priminds Shipping (HK) Co Ltd* ("*Eternal Bliss"*),[1] the Court of Appeal held that the shipowner can only recover the agreed daily sum.[2] This note argues that the Court of Appeal's reasoning is flawed.

Facts:
The facts in the *Eternal Bliss* closely resemble the story above. Priminds Shipping (HK) Co Ltd ("Priminds") chartered a vessel from K Line PTE Ltd ("K Line"). Priminds failed to unload the vessel at the contractual unloading rate, thereby breaching the charterparty. It was assumed that this was the only breach for the purposes of this dispute. This delay caused damage to the perishable cargo on board the ship. The owners of the damaged cargo sued K Line and received a settlement of US$1.1 million. As a result, K Line brought a claim against Priminds for demurrage and for compensation for the cargo damage.

Clause 19 of the charterparty provided for "demurrage". In the absence of any agreed definition of "demurrage" in the parties' contract,[3] the question that arose was what damages "demurrage" liquidates. K Line argued that demurrage liquidates only the loss of freight and related costs that the shipowner might otherwise be able to charge, whereas Priminds argued that demurrage liquidates all damages arising from the failure to unload at the contractual rate, including the cargo damage.

In the High Court,[4] Andrew Baker J held that K Line could recover damages for the cargo damage in addition to the agreed demurrage sum.[5] In his Lordship's view, demurrage only

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[1] [2021] EWCA Civ 1712.
[2] A shipowner is entitled to recover damages in addition to demurrage where there is a separate breach and a separate type of loss (*Aktieselskabet Reider v Arcos* [1927] 1 KB 352; (1926) 25 Ll L Rep 513).
[3] *Eternal Bliss* [2021] EWCA Civ 1712, [18].
[4] *Eternal Bliss* [2020] EWHC 2373 (Comm); [2020] 2 Lloyds Rep 419.
[5] Ibid., [61], [88], [145].

liquidates some types of loss, such as the loss of freight and running costs during the period of detention. Cargo damage was a separate type of loss, not covered by the demurrage clause.[6]

The Decision of the Court of Appeal:
The Court of Appeal unanimously reversed the decision of the High Court. Males LJ (with whom Newey LJ and Sir Geoffrey Vos MR agreed) held that, in the absence of any contrary indication,[7] demurrage liquidates all damages arising from the failure to unload at the contractual rate.[8]

The Court of Appeal found that the prior case law and academic commentary on the matter were inconclusive.[9] The prior case law rarely addressed the issue and, where it did,[10] the judgments were equivocal.[11] The academic commentary was undecided, with some commentators favouring each view.[12] Males LJ held that the question of whether demurrage liquidates all losses caused by a failure to load or unload the vessel at the contractual rate, or only some, was "one of principle" rather than one of precedent.[13]

Males LJ turned to consider seven reasons that his Lordship thought supported a reversal of the High Court judgment. It is worth setting out all of these. First, it would be unusual for commercial parties to agree a liquidated damages clause that only liquidates some damages arising from a particular breach. This would forfeit the legal certainty that is one of the main benefits of a liquidated damages clause.[14] Secondly, contrary to Andrew Baker J's view, demurrage does not cleanly map onto freight rates. As such, demurrage is likely to cover all losses rather than just the loss of freight and related costs.[15] Thirdly, to hold that demurrage liquidates only the loss of freight and associated costs would generate uncertainty as to what counts as a "separate type" of loss that is not covered by demurrage.[16] Fourthly, the shipowner is typically insured against such claims by cargo owners. As such, the parties probably contracted on the understanding that the shipowners were better placed to deal with the risk of cargo claims.[17] Fifthly, *The Bonde*,[18] in which it was decided that demurrage covers all losses arising from the failure to unload at the contractually specified rate, has stood for 30-years without causing dissatisfaction in the market.[19] Sixthly, Andrew Baker J's criticisms of *The Bonde* were unwarranted.[20] Finally, to allow the appeal and hold that demurrage liquidates all damages arising from the failure to unload at the contractual rate would generate legal certainty in the market.[21]

Discussion:

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[6] Ibid., [45].
[7] *Eternal Bliss* [2021] EWCA Civ 1712, [52].
[8] Ibid., [23].
[9] Ibid., [44], [51].
[10] *Aktieselskabet Reider v Arcos* [1927] 1 KB 352; (1926) 25 Ll L Rep 513.
[11] *Eternal Bliss* [2021] EWCA Civ 1712, [30].
[12] Ibid., [51].
[13] Ibid., [52].
[14] Ibid., [53].
[15] Ibid., [54]. Andrew Baker J held that demurrage only covers some loss, in particular the loss of freight and running costs for the period of delay.
[16] Ibid., [55].
[17] Ibid., [56].
[18] *Richco International Ltd v Alfred C Toepfer International GmbH (The Bonde)* [1991] 1 Lloyds Rep 136.
[19] *Eternal Bliss* [2021] EWCA Civ 1712, [57].
[20] Ibid., [58].
[21] Ibid., [59].

The Court of Appeal's reasoning is difficult to follow. It is not always clear why the reasons put forth by Males LJ lead to the conclusion that demurrage liquidates all damages flowing from the failure to unload at the contractual rate. In our view, there are two possible readings of the Court of Appeal's judgment.

The first possible reading is that the Court was prescribing the meaning of demurrage. Instead of looking to the meaning that the contract conveys to a reasonable person in the circumstances, the meaning of the term is prescribed by the court unless the parties choose to derogate from that meaning. "Demurrage", in the absence of any contrary indication, will now be taken to liquidate all damages arising from the failure to unload at the contractual rate. On this view, Males LJ's reasons are simply reasons in favour of one particular meaning of "demurrage".

There are two difficulties with this reading. First, this reading is not always consistent with the Court's language. Males LJ purports to be identifying "what these parties have agreed by their charterparty in the present case."[22] Secondly, in our view, if this is an accurate representation of the view adopted by the Court of Appeal, it is unsound as a matter of principle. This is because the object of contractual interpretation should always be to ascertain the "meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."[23] This involves looking at the particular context in which the parties contracted.[24] Prescribing the meaning of demurrage contravenes these ordinary principles of contractual interpretation – the Court has adopted a meaning without reference to what reasonable people understand the word to mean in the particular context.[25] To be clear, this criticism applies to the Court's reasoning irrespective of which interpretation of "demurrage" the Court adopts.[26]

Sometimes, in the absence of contrary intention, it is permissible for courts to prescribe what words in contracts mean. However, when courts have done so, this has taken effect through a presumption as to the parties' intention.[27] For example, when one party agrees to insure another party against injury, we look to the meaning of "injury" as developed in case law, rather than how the term is understood by the average person.[28] In the absence of any contrary indication, a court may reasonably presume that a contractual reference to "injury" is a reference to this legal meaning of "injury", not the everyday meaning of the word. The Court may be attempting to apply the same approach to "demurrage". Thus, Males LJ may be applying a presumption that the parties intended to refer to the meaning of "demurrage" as developed in prior case-law.

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[22] Ibid., [17].
[23] *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896, 912; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [39]; [2009] 1 AC 1101, 1119-1120.
[24] e.g. *Mir Steel UK Ltd v Morris & Ors* [2012] EWCA Civ 1397, [35]; [2013] 2 All ER (Comm) 54, 67.
[25] *Bank of Credit and Commerce International v Ali* [2001] UKHL 8, [51]; [2002] 1 AC 251, 272-273; *Transocean Drilling UK Ltd v Providence Resources Plc* [2016] EWCA Civ 372, [15]; [2016] 2 Lloyds Rep 51, 54; *Mir Steel UK Ltd v Morris & Ors* [2012] EWCA Civ 1397, [35]; [2013] 2 All ER (Comm) 54, 67. C.f. *Falkiner v Commissioner of Stamp Duties* [1973] AC 565, 577-578.
[26] Even if the Court of Appeal had applied the same reasoning to hold that demurrage liquidates only some, not all damages arising from the failure to load at the contractual rate, the decision would still be subject to the same criticism. See Peel, '*Liquidated Damages and Termination*' (2019) 135 LQR 530, 534.
[27] Calnan, *Principles of Contractual Interpretation*, 2nd edn (Oxford, 2017), [5.43-5.47].
[28] *Durham v BAI (Runoff) Ltd* [2010] EWCA Civ 1096, [278]; [2011] Lloyds Rep IR 1, 50.

In our view, if this is an accurate representation of the Court's view, it is unsound. As Males LJ held, the prior case law is inconclusive as to the meaning of "demurrage".[29] As such, unlike "injury", there is no established legal meaning of "demurrage" that the parties can have intended to refer to.[30]

On the second possible reading, the Court of Appeal may be understood as applying orthodox principles of contractual interpretation. On this reading, Males LJ reasoned as follows. When interpreting contracts, we are ascertaining what meaning the contract conveys to a reasonable person.[31] One of the tools that courts can use when deciding between alternative interpretations of contractual provisions is "business common sense."[32] The court is entitled to prefer the interpretation that most closely accords with business common sense. The reasons of principle that Males LJ provides are reasons of business common sense. Given that business common sense favours the view that demurrage liquidates all damages arising from the failure to load and unload at the contractual rate, this is likely the meaning that the clause would convey to the reasonable person.

While seemingly supported by authority, this reading also raises some difficulties. First, it is difficult to reconcile with parts of the Court of Appeal's reasoning. If the Court is interested in identifying what meaning the demurrage provision would convey to a reasonable person, it is difficult to understand the relevance of Males LJ's examination of the prior case law on demurrage.[33] An analysis of the 20th century case law on the matter is unlikely to assist us in determining what meaning the demurrage clause would convey to a reasonable person today.[34] In some cases, the judgments of courts may indeed affect what reasonable people understand certain words to mean. However, the disagreement in the academic commentary as to the meaning of demurrage provisions suggests that this has not happened.[35] It is also difficult to characterise all of the reasons of principle that Males LJ gives as reasons to do with business common sense. For example, it is unclear why a commercial party is concerned with certainty in the market as a whole,[36] as opposed to certainty for their particular contract.

Secondly, even if this is an accurate reading of the Court of Appeal's judgment, it is worth questioning whether business common sense can be a decisive interpretive tool in this context. There are, at the very least, strong commercial reasons to prefer the view that demurrage liquidates only the loss of freight and associated costs.[37] For example, it would seem unintuitive for parties to agree for demurrage to also cover personal injury.[38] Where there are strong commercial reasons favouring either interpretation, business common sense is not a helpful tool in interpreting the contract.[39]

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[29] *Eternal Bliss* [2021] EWCA Civ 1712, [44].
[30] Note, the meaning of a word does not have to be exhaustively established. It just has to be sufficiently established to resolve the dispute before the Court.
[31] *Eternal Bliss* [2021] EWCA Civ 1712, [14], [17].
[32] *Rainy Sky KA v Kookmin Bank* [2011] UKSC 50, [21], [30]; [2012] 1 Lloyds Rep 34, 40, 42; [2011] 1 WLR 2900, 2908, 2911; *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [11]; [2017] AC 1173, 1179.
[33] *Eternal Bliss* [2021] EWCA 1712, [23-44]. See *Deeny v Gooda Walker Ltd (No 2)* [1996] 1 WLR 426, 435, per Lord Hoffmann: "No case on the construction of one document is authority on the construction of another, even if the words are very similar."
[34] C.f. *British Sugar Plc v NEI Power Projects Ltd* 87 BLR 42, 50.
[35] *Eternal Bliss* [2021] EWCA Civ 1712, [45-51].
[36] *Ante*, text to fns 16 and 21.
[37] *Eternal Bliss* [2020] EWHC 2373 (Comm), [55-61]; [2020] 2 Lloyds Rep 419, 428-431; Gay, '*Damages in Addition to Demurrage*' [2004] LMCLQ 72, 73.
[38] *Eternal Bliss* [2020] EWHC 2373 (Comm) [58]; [2020] 2 Lloyds Rep 419, 430.
[39] *Cottonex Anstalt v Patriot Spinning Mills* [2014 EWHC 236 (Comm), [57]; [2014] 1 Lloyds Rep 615, 622.

Thirdly, better evidence of what meaning demurrage clauses convey to reasonable people was available. Where, as in shipping, contracts take standard forms and remain unchanged over long periods of time, academic commentary on the matter is likely the best evidence of what meaning a clause conveys to a reasonable person.[40] Males LJ came to the conclusion that the academic commentary on the subject was inconclusive, with different academics favouring different views.[41] Given the absence of much evidence on what the contracting parties intended, it would have been better for Males LJ to determine, on the balance of probabilities, which view was the prevailing view. In our view, on the balance of probabilities, demurrage liquidates only the loss of freight and related costs. A great number of commentators continued to hold this view despite judicial statements to the contrary.[42] This suggests that demurrage liquidating only the loss of freight and related costs is the more natural interpretation of the term.

What are the implications of the judgment for contracting parties moving forward? In practical terms, the judgment of the Court of Appeal will require shipowners and charterers to be more specific in their drafting if they wish to limit the scope of demurrage clauses. Given the gaps in the Court's reasoning above, it may be prudent for all parties to specify what demurrage covers. As both the High Court[43] and the Court of Appeal[44] emphasised, this dispute could have been avoided if the parties had expressly set out a definition of "demurrage" in the charterparty.

Conclusion:
Regardless of our misgivings as to the reasoning of the Court of Appeal, the judgment is likely to stand. The Court of Appeal has denied permission to appeal to the Supreme Court. Moving forward, demurrage clauses will, in the absence of any contrary indication, likely be interpreted as liquidating all damages caused by a failure to load or unload at the contractual rate. This view has already been adopted in some of the academic commentary to have come out since the Court of Appeal's judgment.[45] With this change, it may be that reasonable people will come to understand demurrage as liquidating all damages arising from the failure to load or unload at the contractual rate. We hope that the reason for which future courts will interpret demurrage as such is because reasonable people understand demurrage to carry this meaning, rather than because the Court of Appeal in the *Eternal* Bliss has prescribed so.

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[40] This is on the warranted assumption that academics are reasonable people.
[41] *Eternal Bliss* [2021] EWCA Civ 1712, [45-51].
[42] Ibid.
[43] *Eternal Bliss* [2020] EWHC 2373 (Comm), [28]; [2020] 2 Lloyds Rep 419, 424.
[44] *Eternal Bliss* [2021] EWCA Civ 1712, [18].
[45] e.g. *Scrutton on Charterparties and Bills of Lading*, 1st Supplement to the 24th edn, (London 2021), 15-006.