Neutral Citation Number: [2020] EWHC 127 (Comm)

Case No: CL-2019-000060

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

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

Date: 31/01/2020

Before:

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

PRIMINDS SHIPPING (HK) CO LTD	**Claimant**
- and -	
NOBLE CHARTERING INC	**Defendant**

Motor Vessel Tai Prize

- -
- -

Mr Alexander Wright (instructed by **Penningtons Manches Cooper LLP**) for the **Claimant**
Mr James Leabeater QC (instructed by **Birketts LLP**) for the **Defendant**

Hearing dates: 17 December 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling QC

Introduction

1. This is the hearing of an appeal by the claimant voyage charterer under s.69 of the Arbitration Act 1996 ("AA") in respect of three questions of law arising out of a final award by Ms Sarra Kay ("Arbitrator") published on 7 January 2019 ("Award") by which the Arbitrator ordered the claimant to pay the defendant disponent owner's claim in the sum of US$500,000, potentially a further £35,000, the defendant's costs of the reference and Arbitrator's fees.

2. These proceedings were commenced by the issue of an Arbitration Claim Form sealed on 29 January 2019 to which the defendant responded by a Respondent's Notice dated 19 March 2019. By an Order made on 18 June 2019, Popplewell J gave leave to appeal under AA, s.69(3)(c)(ii) on the ground that the appeal raised points of law of general public importance and the statutory criteria were fulfilled.

3. Although it was submitted by Mr Leabeater QC on behalf of the defendant that Popplewell J gave permission "*… on the basis that there was a point of general public importance not on the basis that the Award was obviously wrong*" that overstates the effect of what the Judge held. AA, s.69(3)(c)(ii) provides that leave is to be given only if the question is one of general public importance and "*… the decision of the tribunal is at least open to serious doubt*". As Popplewell J said in his reasons for giving leave, in his judgment the appeal raised points of law of general public importance and the statutory criteria were fulfilled, by which he meant (amongst other things) that he was satisfied that the decision of the tribunal is at least open to serious doubt. In those circumstances, I derive no assistance from the basis on which the application for leave was determined.

Background

4. The defendant was at all material times the time charterer of the Motor Vessel Tai Prize ("Vessel") from her owner ("Shipowner"). By a recap voyage charterparty dated 29 June 2012, the defendant as disponent owner agreed to let the Vessel to the claimant for the carriage of a cargo of heavy grains, soya and sorghum in bulk from Brazil to the People's Republic of China ("Charterparty").

5. Pursuant to the Charterparty, the Vessel arrived at Santos and between 24 and 29 July 2012, 63,366.150 metric tonnes of Brazilian soya beans ("Cargo") were loaded onto the Vessel from a silo or silos via mechanical hoppers. A Bill of Lading ("B/L") in the 1994 Edition of the Congenbill form was drafted by the shipper and offered for signature by or on behalf of the Master of the Vessel ("Master") on 29 July 2012. It identified the shipper as being Sucocitrico Cutrale LTDA ("Shipper"), the Port of Loading as Santos and the Port of Discharge as "*Main Port(s) of South China*". Under the heading "*Shipper's description of Goods*" the Cargo was described as being

> "63,366.150 metric tons Brazilian Soyabeans
>
> Clean on Board
>
> Freight pre-paid"

The B/L was executed by agents on behalf of the Master without any reservations stating that the Cargo had been:

> "SHIPPED at the Port of Loading in apparent good order and condition on board the Vessel for carriage to the Port of Discharge …
>
> Weight, measure, quality, quantity, condition, contents and value unknown …"

It incorporated the Hague Rules by operation of clause 2 on its reverse side. The contract of affreightment contained in or evidenced by the B/L was with the Shipowner not the claimant.

6. The Vessel arrived of the port of discharge (Guangzhou) on 9 September 2012 for discharge to the receivers of the goods, Guangzhou Green Oil Industrial Co Ltd ("Receiver"). Discharge commenced on 15 September 2012. On 17 September, discharge from two of the Vessel's holds (Holds No.3 and 5) was suspended "*Due to charred Cargo Found*". The remaining cargo was discharged without complaint and the cargo in Holds Nos 3 and 5 was discharged but the Receiver maintained that the Cargo in those holds had suffered heat and mould damage.

7. On 19 September, the Shipowner's P&I Club provided an Undertaking to the Receiver as security to prevent the arrest of the Vessel. It provided that the dispute under the contract of affreightment contained in or evidenced by the B/L between the Shipowner and the Receivers was subject to Chinese law and the exclusive jurisdiction of the Chinese Courts. Proceedings were commenced by the Receiver against the Shipowner. The Shipowner contested the claim but lost both at first instance and on appeal and was ordered to pay the Receiver a sum equivalent to US$1,086,564.70.

8. On 15 June 2016, the Shipowner commenced an arbitration in London against the defendant under clause 38 of the time charter between the Shipowner and the defendant for a contribution of 50% to the sum it had to pay to the Receiver (US$543,282.35). By a settlement agreement between the Shipowner and the defendant, the defendant agreed to pay and has paid US$500,000 to the Shipowner in full and final settlement of the Shipowner's claim. In the arbitration giving rise to these proceedings ("Arbitration") the defendant claimed from the claimant the right to be indemnified for the amount they paid to the Shipowner and the costs of defending that claim. There is no express provision under which the defendant is entitled to the indemnity it seeks.

The Award

9. The Arbitrator found as fact that:

   i) the relevant part of the Cargo suffered from two types of damage being (a) heating caking and discolouration of some of the beans and (b) mould in some places (Award, para. 37);

   ii) in relation to the heating caking and discolouration, the damaged beans had been loaded in a pre-existing heat damaged condition (Award, para. 44);

iii) the mould damage was due to the cargo being loaded in a pre-damaged condition (Award, para. 47);

iv) the damage from which the beans were suffering was not reasonably visible to the Master or crew or the stevedores or the attending surveyors or any agent of the claimant at or during loading (i.e. when being shipped) (Award, paras. 52, 54 and 56); but

v) the shippers would have been able to discover the condition of the beans by reasonable means (Award, para. 55) because some of the damaged beans were or would have been discoloured at or before loading (Award, para. 84).

10. At para. 80 of the Award, the Arbitrator held that the phrase "*Clean on Board*" meant the same as "… *apparent good order and condition* …" and at para. 81 that although the phrase "*Clean on Board*" was an express representation made by the shippers, neither party had argued for that conclusion. The Arbitrator concluded that because the discolouration of the beans would have been visible on reasonable examination by the shipper it followed that the cargo was not in apparent good order and condition when shipped notwithstanding her earlier conclusion that the damage from which the beans were suffering was not reasonably visible to the Master or crew or the stevedores or any agent of the claimant at or during loading.

11. The Arbitrator rejected the defendant's claim to be entitled to the benefit of a general implied indemnity from the claimant applying The George C Lemos (Third Party Proceedings) [1991] 2 Lloyds. Rep. 107 (Mustill J as he then was) (Award, paras. 87-90). However, the Arbitrator held the claimant liable to the defendant because:

i) The shipper was the claimant's agent and thus the claimant had impliedly warranted the accuracy of any statement as to condition contained in the B/L and/or had impliedly agreed to indemnify the defendant against the consequences of the inaccuracy of any such statement (Award, paras. 115-125) on the basis that the claimant was liable for the consequences of the shipper's acts since otherwise the defendant would be left without recourse for the "... *wrongs of parties who were on the (claimant's) side of the line*" (Award, para. 124);

ii) The claimant by its agent the shipper had warranted that the Cargo was " .... *SHIPPED at the Port of Loading in apparent good order and condition*…" by inviting the Master or his agent to sign the B/L containing the statement as to apparent condition; and

iii) The Cargo was not shipped " … *in apparent good order and condition*…" because the discolouration to which the Arbitrator had earlier referred would have been visible on reasonable examination by the shipper even though it was not reasonably visible to the Master or crew or the stevedores or any agent of the claimant at or during loading.

The Issues of Law Arising On This Appeal

12. As set out in the Arbitration Claim Form, the issues of law identified by the claimant are:

i) Did the words "*Clean on Board*" and the words " .... *SHIPPED at the Port of Loading in apparent good order and condition*…" in the draft B/L presented to the agents for signature on behalf of the Master amount to a representation or warranty by the shippers and/or the claimant as to the apparent condition of the cargo observable prior to loading or were they an invitation to the Master to make a representation of fact in accordance with his own assessment of the apparent condition of the Cargo;

ii) In light of the answer to (i), whether on the findings of fact made by the Arbitrator any statement in the B/L was inaccurate as a matter of law; and

iii) If so, are the claimants obliged to indemnify the defendants against any consequences of that statement being inaccurate whether pursuant to an implied indemnity arising by operation of law or an implied contractual warranty or term.

The defendant submits that there is no proper basis for interfering with the Award; that it is "*... very well established ...*" that where an owner has incurred liability as a result of an inaccurate statement in a bill of lading presented for signature to the master of a ship by a charterer or shipper, the owner may recover an indemnity from the charterer so long as the master did not have reasonable means of discovering the statement is inaccurate and that on this basis and in light of the facts found by the Arbitrator, the Award is "*... entirely orthodox and correct*".

13. The claimant's central submission is that the Arbitrator erroneously conflated information provided by the shipper with the standard form wording contained in the B/L, which invited the Master to carry out his own assessment of the apparent condition of the Cargo. The claimant submits that the standard wording could not give rise to any representation by the claimant or for that matter the shipper and should not give rise to any implied warranty or indemnity against inaccuracy.

14. The defendant argues that this central submission is misplaced because the presentation of the draft B/L was both a representation by the claimant to the defendant that the cargo was in apparent good order to the shipper's and claimant's knowledge and an invitation to the Master to make a representation as to the apparent condition of the Cargo for the benefit of the consignee or any other lawful holder of the B/L. At paragraph 2.5 of his written submissions, Mr Leabeater QC submits that if the claimant is correct then a charterer or shipper who "*...knows of either (a) latent defect in cargo or (b) a patent defect which a Master would not be able to identify could properly draft a bill describing the cargo as clean on board and in apparent good order because ... that representation in the mouth of the Master would be correct. That cannot possibly be the right answer: if the shipper or charterer knows of a defect in the cargo he is bound to declare it to the Master and if he chooses not to do so he is liable for the consequences*".

Discussion

Issues (i) and (ii)

15. It is necessary to start with a summary of the purpose and effect of a ship's master's statement as to apparent condition. When the charterer or shipper on his behalf tenders

a bill of lading for signature by the Master that contains a statement as to apparent condition in the same or similar terms to the wording in the B/L, the charterer or shipper is inviting the shipowner by its agent the Master to make a representation of fact as to the apparent condition of the goods on shipment – see The David Agmashenebeli [2003] 1 Lloyds Rep 92 *per* Colman J at 103 RHC. It is not a warranty as to the accuracy of the represented facts, nor is the statement in the bill (once it is signed by the Master) a representation as to the actual condition of the goods shipped. As Colman J put it in The David Agmashenebeli (ibid.) at 105:

> "…the master should make up his mind whether in all the circumstances the cargo in so far as he can see it in the course and circumstances of loading , appears to satisfy the description of its apparent order and condition in the bills of lading tendered for signature … the shipowner's duty is to issue a bill of lading which records the apparent order and condition of the goods according to the reasonable assessment of the master. That is not, as I have indicated, any contractual guarantee of absolute accuracy as to the order and condition of the cargo or its apparent order and condition."

This has consistently been held to be the effect of the statement in a bill of lading signed by the ship's master – see most recently The Saga Explorer [2012] EWHC 3124; [2013] 1 Lloyds Rep 401 *per* Simon J (as he then was) at paragraph 32.

16. The obligation to record the apparent order and condition of the goods is owed by the shipowner to the shipper – see Cooke, Voyage Charters,4th Ed., para. 85-145. The purpose of the representation is to record the carrier's evidence as to the apparent condition of the goods when placed (shipped) aboard the ship. It can be relied on by the consignee and all subsequent holders of the bill of lading as reflecting the reasonable judgment of a reasonably competent and observant master – see The Saga Explorer (ibid.) at paragraph 33. As Donaldson J (as he then was) put it in The Galatia [1979] 2 Lloyds Rep 450 at 455, RHC:

> The shipowner's prime obligation is to deliver the goods at the contractual destination in the like good order and condition as when shipped. The cleanliness of the bill of lading may give rise to an estoppel …"

precluding the carrier from proving that the goods were not in apparent good order and condition when shipped and therefore from alleging that there were at shipment external defects in them that were apparent to reasonable inspection– see Silver v. Ocean Steamship Company Limited [1930] 1 KB 416 *per* Scrutton LJ at 425. However, as Mustill LJ observed in The Nogar Marin [1988] 1 Lloyds Rep 412 at 421, if:

> " … the defects in the goods are not such as to be apparent on reasonable inspection at the point of shipment … the signature of the bill of lading without qualification does not preclude the owners from establishing the true condition of the goods. "

17. With that background in mind, it is next necessary to consider the Hague Rules ("HR") since, as I have mentioned already and as is common ground, they were incorporated

into the Charterparty and the B/L. The HR draws a clear distinction (which in my judgment is reflective of the common law applicable in non HR cases as I explain further below) between the position in relation to information that appears in the B/L that is provided by the charterer or shipper on the charterer's behalf, which the carrier or master on its behalf is obliged to accept at face value and representations as to the apparent condition of cargo at shipment. HR, Art. III, Rule 3 provides for the inclusion within a bill of lading to which the HR applies of the "*... leading marks necessary for identification of the goods ...*" and "*... the number of packages or pieces or the quantity or weight ...*" of the goods constituting the cargo to which the relevant bill relates, critically, in each case, as that information is "*... furnished in writing by the shipper*". In so far as the bill sets out this information, it is recording information supplied by the shipper. In this case this rule applied to the information that the cargo consisted of "*63,366.150 metric tons Brazilian Soyabeans*".

18. However, again critically, the rule goes on to provide that the bill should also set out "*... the apparent order and condition of the goods"*. However, that is not something that is to be "*... furnished in writing by the shipper*". As I have explained and as is apparent from the rule, it is exclusively an assessment by the carrier (or the Master on its behalf) of the goods – see Aikens, Bills of Lading, 2nd Ed., at para. 4.11 – at the point of shipment - see The Galatia (ibid.) at 455, RHC. As Mustill LJ put it in The Nogar Marin (ibid.) at 422 RHC:

> "Everyone in the shipping trade knows that the master need not sign a clean bill just because one is tendered; everyone knows that it is the master's task to verify the condition of the goods before he signs."

19. By HR, Art. III, Rule 5 a warranty is deemed to have been supplied by the shipper to the carrier in respect of the information "*... furnished in writing by the shipper"* pursuant to HR, Art. III, Rule 3 but there is no such guarantee deemed to be given in respect of the apparent order and condition of the goods – see Carver on Bills of Lading, 4th Ed., at paragraph 9-173. The reason for this is obvious from the terms of the Rules – the guarantee is deemed to have been given in respect of the information supplied by the charterer or shipper which the carrier is entitled and is perhaps obliged to accept at face value. It is not given in respect of apparent condition, because that is a representation by the shipowner or on behalf of the shipowner by the ship's master based on his assessment (or an assessment carried out on his behalf by an appropriate expert) of the apparent order and condition of the relevant goods. In making that assessment, the master does not act on the basis of the information provided to him by the shipper but makes his own independent assessment as I have explained.

20. In this case there is no finding by the Arbitrator to the effect that the invitation to sign the B/L in relation to apparent condition was (or was understood by either the Master or the agents to be) an invitation to sign without any independent investigation by the Master of the sort referred to in the authorities cited earlier or anything other than an invitation to sign with whatever qualifications concerning apparent condition that the Master considered appropriate. The presentation of the draft B/L must be understood in the commercial context in which it was delivered being that I have summarised above. In particular that context included what Mustill LJ summarised in The Nogar Marin (ibid.) at 422 RHC namely " … *everyone in the shipping trade knows that the master*

need not sign a clean bill just because one is tendered; everyone knows that it is the master's task to verify the condition of the goods before he signs …"

21. There is no finding by the Arbitrator that the Master failed to carry out an independent assessment in the terms contemplated by the caselaw referred to earlier or acted either wholly or in part on any implied representation based on tendering the draft B/L for signature with the statement concerning apparent condition in it. To the contrary, the Arbitrator found the damage from which the beans were suffering was damage that existed prior to shipment but was not reasonably visible to the Master or crew or the stevedores or any agent of the claimant at or during loading. In those circumstances the Shipowner and defendant complied with their prime obligation to deliver the goods at the contractual destination in the apparent good order and condition they were in when shipped. In those circumstances, it is difficult to see how there could be any causal link between the loss suffered by the defendant in settling with the Shipowner and the making of the alleged representation by the claimant because the signature of the bill of lading did not preclude the defendant from establishing the true condition of the goods in the arbitration as between it and the Shipowner.

22. As I explained at the outset the Shipper described the goods in the draft B/L as having been delivered "*clean on board*". The Arbitrator said of this statement at paragraph 81 of the Award:

> "The typed words "clean on board" were located in the box headed "*shipper's description*". I understand that to amount to an express representation made by the shippers, but neither party argued this before me. As to whether this is relevant, it would probably not add anything to my decision … that the [claimant is] to take responsibility for the shippers in the context of this dispute."

I agree with the Arbitrator's observation that the inclusion of the phrase within the shipper's description box on the draft B/L was at least arguably an express representation made by the shippers to the effect that the goods were in apparent good order and condition. It is conceivable that it might have been argued by reference to the inclusion of this representation that the Shipper as agent for the claimant thereby represented that the goods were in apparent good order and condition. However, that was not argued before the Arbitrator and there are no findings to the effect that the Master acted on the truth and accuracy of the representation in signing the B/L without carrying out the reasonable assessments referred to in the caselaw referred to earlier. The Respondent's Notice to which I referred at the outset of this judgment does not seek to uphold the Award on grounds other than those expressed by the Arbitrator in the Award and in those circumstances this point is immaterial.

23. *The Answer to Question (i)*

I conclude that by presenting the draft B/L for signature by or on behalf of the Master, in relation to the statement concerning apparent good order and condition, the Shipper was doing no more than inviting the Master to make a representation of fact in accordance with his own assessment of the apparent condition of the Cargo.

24. *The Answer to Question (ii)*

In light of the finding by the Arbitrator that the damage from which the beans were suffering was not reasonably visible to the Master or crew or the stevedores or any agent of the claimant at or during loading, I answer question (ii) by holding that the B/L was not inaccurate as a matter of law. It contained no more than a representation of fact by the Master as to apparent condition that was not inaccurate because the Master did not and could not reasonably have discovered the relevant defects because they were not reasonably visible to him or any other agent of the claimant at or during shipment.

25. The Arbitrator fell into error by asking herself whether as a matter of fact the B/L was inaccurate – see Award, paras. 77-84 – but without reference to either the "*... legal effect of the statement ...*" that was said to be inaccurate or " *... by whom it is made...*". The danger of this approach is apparent from the hypothetical example the Arbitrator gave in support of her conclusion that as a matter of fact the B/L was inaccurate namely that:

> "…if there was fog that disabled the crew (on the deck) from seeing the defective condition of the cargo but others standing by (on the quay or at the loading terminal) such as shippers could see better, the cargo is still not as a matter of fact in apparent good order and condition."

Question (iii)

26. The claimant and defendant's contract was contained in the Charterparty. It incorporated the HR. The HR makes specific provision for what indemnities apply as I have explained already. The scheme of the HR is to impose on a charterer an express indemnity obligation in respect of information furnished by the charterer. The scheme does not provide for such an obligation in relation to statements concerning apparent order and condition of cargo. That was a deliberate omission for the reasons I have explained. In those circumstances there is no room for the implication of an implied guarantee or warranty.

27. The principles applicable to the implication of terms were comprehensively set out by the Supreme Court in Marks and Spencer Plc v. BNP Paribas Securities Services Trust Co (Jersey) Limited [2015] UKSC 72; [2016] AC 742 and applied in Ali v. Petroleum Company of Trinidad and Tobago [2017] UKPC 2; [2017] ICR 531. In summary, terms are to be implied only if to do so is necessary in order to give the contract business efficacy or was so obvious that it goes without saying. As was made clear by all the judgments in Marks and Spencer Plc v. BNP Paribas Securities Services Trust Co (Jersey) Limited (ibid.) and emphasised by Lord Hughes in Ali v. Petroleum Company of Trinidad and Tobago (ibid.) at paragraph 7, the " … *concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient precondition for inclusion*." As he also added:

> " … if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement."

or as Fancourt J put it in UTB LLC v. Sheffield United Limited [2019] 2322 (Ch) at paragraph 203: " … *the principle [is] that (as restated in the Marks and Spencer case) no term may be implied into a contract if it would be inconsistent with an express term*". This is in substance no different from the approach identified some 80 years earlier by Greer LJ – see Dawson Line Limited v. Aktiengesellschaft Adler Fuer Chemische Industrie of Berlin [1932] 1 KB 433 at 440.

28. Finally, recent cases have emphasised the need for particular care when considering implying terms into a sophisticated and professionally drawn and negotiated agreement between well-resourced parties. The reason for this is obvious. Where an issue has been left unresolved, it is much more likely to be the result of choice rather than error. This point was one emphasised in Marks and Spencer Plc v. BNP Paribas Securities Services Trust Co (Jersey) Limited (ibid.) and most recently by Fancourt J in UTB LLC v. Sheffield United Limited (ibid.) who summarised the applicable principle as being that where " … *detailed, professionally-drawn contracts exist, it is more difficult to imply terms because there is a strong inference that the parties have given careful consideration to all the terms by which they agree to be bound (though the test for implying terms remains the same)*". In my judgment this approach applies with equal force to contracts that incorporate standard forms or wordings contained in provisions such as the HR which are the result of careful consideration over a number of years by experienced industry professionals.

29. Applying those principles to the Charterparty leads me to conclude that it would be wrong in principle to attempt to imply into this contract a provision that makes the claimant liable by implication to indemnify the defendant when the drafters of the HR could have but decided not to provide expressly for such a provision.

30. In arriving at the contrary conclusion, the Arbitrator relied on the decision of the House of Lords in Elder, Dempster and Co v. C.G Dunn and Co (1909) 15 Com.Cas. 49, but in my judgment she was wrong to do so for two reasons. First, that case was not concerned with a contract that incorporated the HR and secondly, that case was concerned with marks on a cargo of cotton bales, which had been supplied by the charterers to the master. That is the sort of case where, under the HR, a charterer would be liable to the shipowner. It does not assist in an apparent condition case.

31. The other authority relied on by the authors of the text book from which the Arbitrator quotes in paragraph 117 of the Award is Dawson Line Limited v. Aktiengesellschaft Adler Fuer Chemische Industrie of Berlin (ibid.) but again that case does not support the conclusions of the Arbitrator for the same two reasons that Elder Dempster (ibid.) does not support it. That case was not concerned with a charterparty to which the HR applied but secondly it was a case concerned with weights as set out in the bills of lading concerned. As Scrutton LJ observed at 439, on the facts of that case "*… the master was required to sign the bill of lading as presented to him, the charterers were bound to present an accurate bill of lading as to the weight shipped. The shippers were the charterers' agent to supply the cargo and present the bill of lading; they presented an inaccurate bill of lading with consequent loss. The charterers must therefore make good that loss.*" That is the same outcome as would occur applying the HR referred to earlier because the issue that arose concerned weights furnished by the shippers as the charter's agent. The key point is that there as under the HR *" … the charterers were bound to present an accurate bill of lading as to the weight shipped …*" [Emphasis Supplied].

As Greer LJ said at 440, having considered earlier cases including Elder, Dempster and Co v. C.G Dunn and Co (ibid.) they meant no more than:

> "… if the charterer or some person for whom he is responsible, presents a bill of lading to the master which the latter is bound to sign as part of the terms of the contract, there may be implied from the act of presenting the bill … taken together with the terms of the contract, a warranty of the correctness of the figures, description, or marks stated in the bill …"

Slesser LJ agreed with Greer LJ – see page 442. The analysis of the majority provides no assistance in an apparent condition case, much less one to which the HR applies, because as I have said more than once, the master is not bound to sign a bill containing a statement as to apparent condition in the terms it is tendered but is obliged to carry out his own reasonable verification of condition.

32. Although the Arbitrator relied on The Nogar Marin [1988] 1 Lloyds Rep 412 – see paragraph 122 of the Award - in my judgment that reliance was misplaced. That case was concerned with a claim by the owner against the charterer for an indemnity in respect of a claim against it by the receiver of goods carried on the owner's ship. The cargo was wire rods in coils and on arrival were found to be rusty. As between the receivers and the shipowner, it was found that the damage occurred before shipment and that the master had been negligent in failing to record that fact on the mate's receipt for the cargo. The owners contended that there was an implied right to an indemnity from the charterer against liability under bills of lading signed at the request of the charterers that stated the condition of the goods on shipment inaccurately. The claim failed before the arbitrators, and at first instance. The Court of Appeal dismissed the appeal. Mustill LJ delivered the judgment of the Court of Appeal. The Court of Appeal rejected the suggestion that there is invariably an implied term of a charterparty that the bill as presented will correctly state the apparent condition of the cargo – see 420 RHC. It added at 421 RHC:

> "… we cannot see the point of the suggested term. Two situations may be envisaged. First the defects in the goods are not such as to be apparent on reasonable inspection at the point of shipment. It is a common place that in such a situation the signature of the bill of lading without qualification does not preclude the owners from establishing the true condition of the goods. Thus there is no enhanced exposure beyond that which existed under the charter and no need for an implied term to protect the owners against it … "

In relation to the claim for an implied indemnity under the charter, that was rejected in these terms at 422:

> "It seems to us plain and the authorities leave us in no doubt that the implication of an obligation to indemnify is not automatic. It must always depend on the facts of the individual case and on the terms of any underlying contractual relationship. The first step is always to [identify] the express or implied request [to the

> person seeking the indemnity to act in a particular way] by the person called upon to indemnify. Here, if the request is to be understood as meaning 'Kindly sign this bill, just as it stands, with its acknowledgement of receipt in apparent good order and condition' the claim for an indemnity must be sound for the agents did precisely what they were asked … In the present case we do not regard this as a correct reading of what happened. Everyone in the shipping trade knows that the master need not sign a clean bill just because one is tendered; everyone knows that it is the master's task to verify the condition of the goods before he signs. This being so, we cannot understand the request implicit in the tender as being more than this: 'The charter requires you to bind your owners to the contract of carriage contained in the bill of lading and please do so. The bill of lading also constitutes a receipt, and please sign it as such, with whatever appropriate qualifications you may think fit'. If this is the right account of the transaction, as we believe it to be, the claim for an indemnity must fail."

The reason for this distinction is that identified by the Court of Appeal at 417 LHC – where something is done by one party at the request of another which is not manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to a third party, the person doing the act is generally entitled to an indemnity from the person who requested that it should be done. This test is satisfied by a request in the terms of the first request identified by the Court of Appeal but not the second because in the latter case there is an intervening act between the request and the response (the independent reasonable inspection by the master or the failure of the master to carry out such an inspection as he should) that breaks the causal link between the request and the act of the person requested to act.

33. There is no material difference between the situation referred to by the Court of Appeal and this case. The knowledge of everyone in the shipping trade referred to by the Court of Appeal has not changed. There is nothing in the circumstances of this case that moves the implicit request made by the tendering of the draft B/L towards the first of the requests identified by the Court of Appeal in the quotation set out above. The tenor of the request in cases such as Dawson Line (ibid.) is similar to the first type of request identified by the Court of Appeal but is not so where the shipper or charterer requests a representation as to the apparent condition of the cargo because the request is not to sign a bill that contains a statement furnished by the shipper or charterer but is a request to make a representation as to the apparent condition of the cargo having taken reasonable steps to verify the condition of the cargo.

34. Finally, in paragraph 122 of the Award, the Arbitrator stated first that the Shippers "*... must be taken to be the agents for the [Claimant] for the purposes of supplying the cargo and presenting the bill of lading to the [Master] for signature*" and "*… the [claimant] should therefore be liable for the consequences of the shippers' acts in this situation; it would otherwise leave the [defendant] without recourse and without protection from the wrongs of parties who were on the [claimant's] side of the line*". In my judgment these conclusions are wrong. The conclusion that the Shipper was the agent of the claimant is based on Scrutton LJ's conclusion in Dawson (ibid.) that in that

case the *" ... shippers were the charterers' agent to supply the cargo and present the bill of lading ...*" – see the extract quoted in paragraph 31 above. However, that is not material to the facts of this case. In that case as Scrutton LJ said in the same passage " *… the charterers were bound to present an accurate bill of lading as to the weight shipped ...*". The charterers were liable on the facts of that case because their agent for the purpose of presenting the bill of lading " *… presented an inaccurate bill of lading with consequent loss ...*". That was so because as I have explained above in detail there is a fundamental difference between the responsibility that falls to a charterer in respect of information supplied by or on behalf of the charterer such as the weight of the cargo and the position in relation to apparent condition. In the former case the master is bound to accept what the charterer or its agent the shipper says. That is not so in relation to the apparent condition issue because as Mustill LJ said in The Nogar Marin (ibid.) at 422 RHC namely " *… everyone in the shipping trade knows that the master need not sign a clean bill just because one is tendered; everyone knows that it is the master's task to verify the condition of the goods before he signs …*"

35. The Arbitrator's concern that the defendant would be left without recourse was misplaced because its liability did not and could not arise as a result of the wrongs of anyone on the charterer's "*... side of the line*" because its liability to the Shipowner was the result of its decision to pay the Shipowner rather than defend the claim by reference to the true condition of the goods. There is nothing unfair, unjust, uncommercial or unconscionable about an outcome that leaves ultimate liability with the defendant because there was no misrepresentation, no evidence or finding that the Master had acted on the alleged misrepresentation rather than, or even as well as, attempting to and/or being unable reasonably to verify the condition of the goods before his agents signed the B/L and because it decided to pay the Shipowner.

36. *The Answer to Question (iii)*

It follows from my answers to Questions (i) and (ii) and for the further reasons set out above, that the answer to Question (iii) is "no".