Neutral Citation Number: [2020] EWHC 1371 (Comm)

Case No: CL-2019-000678

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: 04/06/2020

Before :

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

- -

Between :

MVV ENVIRONMENT DEVONPORT LTD	**Claimant**
- and -	
NTO SHIPPING GMBH & CO. KG **MS 'NORTRADER**	**Defendant**
MV NORTRADER	

- -

Mr Simon Rainey QC and Mr Thomas Steward (instructed by **Simmons & Simmons LLP**) for the **Claimant**
Mr Charles Debattista (instructed by **Winter Scott Solicitors**) for the **Defendant**

Hearing dates: 7 May 2020

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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.

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to bailii. The date and time for hand-down is deemed to be 9:30am on Thursday 4th June 2020.

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

HH Judge Pelling QC :

Introduction

1. This is the hearing of the claimant's jurisdiction challenge brought under s. 67 of the Arbitration Act 1996 against the final award on jurisdiction of Ms Clare Ambrose, Ms Daniella Horton and Mr Clive Aston ("Tribunal") dated 9 October 2019 ("Award") by which the claimant seeks an Order setting aside the Award. Such a challenge proceeds by way of a re-hearing – see Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs of the Government of Pakistan [2011] AC 763 at paras 25-26.

2. The hearing took place on 7 May 2020. I heard oral evidence on behalf of the claimant from (i) Mr Nick Webb, a ships agent employed by Sanders Stevens Limited ("SS"), a shipping agency operated by Victoria Group Holdings Limited, which also owns the Victoria Wharf in Plymouth and (ii) Mr Paul Carey, the managing director of the claimant. I record at the outset my conclusion that their evidence was entirely honest and straightforward and I accept it in its entirety.

The Facts

3. The primary facts are not in serious dispute. I can therefore summarise them relatively shortly.

4. The claimant is a company that specialises in converting waste products to energy in the form of electricity. Its processes create a waste product known as "unprocessed incinerator bottom ash" ("UIBA"). The claimant generates about 60,000 MT of UIBA each year. It disposes of its UIBA under a contract between it and RockSolid BV ("RS") made on 26 November 2013 for the transport by RS of the UIBA to its plant in the Netherlands and for its treatment, recycling and disposal by RS in consideration of a monthly payment by the claimant to RS based on the weight of UIBA removed each month ("IBA Contract").

5. In the IBA Contract, RS is referred to as the "*Contractor*" and the claimant as "*MVV*". In so far as is material, the IBA Contract provides as follows:

> "1.5 **Responsibility for Related Parties**
>
> Subject to the provisions of this Contract, the Contractor shall be responsible to MVV for the acts and omissions of the Contractor Related Parties[1] in respect of their providing any part of the Services as if they were the acts and omissions of the Contractor and MVV shall be responsible to the Contractor for the acts and omissions of MVV Related Parties[2] as if they were the acts and omissions of MVV.

[1] Defined in Schedule 1 of the IBA Contract as meaning " *… the Contractor's agents, Sub-Contractors and employees engaged in providing the Services.*"
[2] Defined in Schedule 1 of the IBA Contract as meaning: *"(A) an officer, servant, employee or agent of MW acting in that capacity; (B) any Contractor or sub-contractor of MW of any tier and their directors, officers, servants,*

…

Principal Obligations of the Contractor

…

5.3 The Contractor shall arrange for all IBA produced at the EfW Facility its collection, transportation to the Treatment Facility (including interim storage at Victoria Wharf or such other wharf facility), treatment at the Treatment Facility, sale or reuse of the products and disposal of any residues) including the obtaining, payment of all fees and maintenance of all necessary consents, permits and licences required by law and implementation of all infrastructure for interim storage and loading at Victoria Wharf.

5.4 The Contractor shall carry out all activities necessary to reuse/recycle at least 97% of the IBA and prevent it being landfilled in any country, and to divert any remaining materials to landfill if and only if they cannot be crushed to a smaller size or sent to an energy from waste facility in the country of processing in order to reduce their unburnt carbon content in accordance with the Relevant Planning Conditions, Planning Permission as described in Schedule 9.

5.5 Subject to clause 8.5 the Contractor shall, throughout the Service Period remove, treat and recycle the IBA from the EfW Facility at such times, in such quantities and such frequencies as to ensure that the Maximum Storage Capacity at the EfW Facility is not exceeded.

5.6 The Contractor shall ensure that collections from the EfW Facility take place during the permitted Collection Hours.

5.7 The Contractor shall provide a list of vehicle types and registration numbers 2 weeks prior to the Service Commencement Date and shall notify changes 1 Business Day prior to any change of vehicle.

5.8 The Contractor shall ensure that the HGV vehicles carrying the IBA collected are weighed before leaving the EfW Facility at the weighbridge at the EfW Facility.

5.9 The Contractor shall comply with reasonable rules relating to the EfW Facility that are notified to it in writing prior to attending the EfW Facility.

5.10 The Contractor shall allow MVV to remove from the IBA before it leaves the EfW Facility up to 5 tonnes p.a. of metal

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employees or agents acting in that capacity; (C) but excluding in any case the Contractor and any Contractor Related Parties."

materials for the sole purpose of a public work of art and from time to time samples for analysis and experiments.

…

Principal Obligations of MVV

6.1 MVV hereby grants exclusive rights to all IBA produced at the EfW Facility to the Contractor and shall not, without the consent in writing of the Contractor cause or permit any third party to collect or treat or dispose of any IBA produced at the EfW Facility.

6.2 During the Service Period, MVV shall ensure that consignment notes (e.g. appropriate assignments or waste transfer notes) are issued at the EfW Facility to accompany each load of IBA collected under this Contract.

6.3 During the Service Period, MVV shall set up and operate a system of vehicle recognition in respect of the vehicles used by the Contractor to collect IBA from the EfW Facility and shall only permit those vehicles employed by the Contractor access to the EfW Facility to collect IBA.

6.4 MVV shall allow all of the Contractor's vehicles access to the EfW Facility during the Collection Hours throughout the Service Period.

6.5 Throughout the Service Period MVV shall ensure that it operates and maintains a weighbridge at the EfW Facility that has been passed as "fit for trade" by the local Trading Standards authority and continues to be so throughout the term of the Contract and shall regularly maintain the same and provide certificates of calibration to the Contractor on demand. Weighbridge tickets will be issued in accordance with schedule (Weighbridge). Where the weighbridge is unavailable, MVV shall provide a suitable alternative weigh facility or suitable measurement arrangements shall be agreed between the Parties (e.g. weighbridge at the Treatment Facility).

…

Ownership of IBA

9.1 Risk and title in respect of IBA shall pass to the Contractor once the same are loaded onto the Contractor's vehicle(s) at the EfW Facility.

9.2 MVV will provide training in respect of loading IBA to the Contractor's drivers responsible for the collection of IBA as nominated by the Contractor. The Contractor confirms and

> acknowledges that its drivers shall comply with the training instructions given to them by MVV when loading IBA at the EfW Facility.
>
> …
>
> **Facilities**
>
> 10.1 MVV shall give the Contractor access to loading facilities and equipment at the EfW Facility for the purposes of loading the IBA onto the Contractor's vehicles (the "Central Loading Facilities") throughout the Service Period.
>
> …
>
> **13. Equipment**
>
> The Contractor shall from the Services Commencement Date provide, repair, maintain and replace all plant, equipment and vehicles necessary for the provision of the Services. For the avoidance of doubt this does not include the loading equipment for IBA of the EfW facility operated by the contractor.
>
> …
>
> **Entire agreement**
>
> 52.1 **Prior Representations etc. Superseded**
>
> Except where expressly provided in this Contract, this Contract constitutes the entire agreement between the Parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings concerning the subject matter of this Contract."

6. The sum payable by the claimant to RS was calculated in accordance with a formula set out in Schedule 2. The formula is complex and I need not take up time in describing it in detail. However, in summary it provided that the claimant would pay a fixed sum per ton referable to RS's fixed costs less a contribution from the revenues generated by RS from re-processing the UIBA. Fixed costs were broken down into part denominated in sterling and the other part denominated in Euros. RS's fixed costs denominated in sterling were defined as being costs " *… due to loading and transportation of the IBA from the EfW Site to Victoria Wharf (Plymouth), storage and shipment of the IBA at Victoria Wharf and shipping to the Netherlands*".

7. The points that emerge from the IBA Contract that are relevant to this dispute are that the contract was not an agency agreement but was a principal to principal contract. It was not one of sale but of disposal of a waste product for which the claimant paid RS a fee. Subject to that, the obligations of the parties were closely akin to an *Ex Works* sale agreement: (a) RS was under an obligation to collect the product in its own vehicles from the claimant's plant – see clause 5.3 and 6.4; (b) risk in and title to the UIBA

passed from the claimant to RS as soon as it was loaded onto RS's vehicles by RS's drivers at the claimant's plant – see clause 9.1; (c) the drivers of the collection vehicles were RS's drivers – see clause 9.2 and paragraph 22 of Mr Carey's witness statement and (d) the payment due from the claimant to RS was based on a contribution to RS's transportation and storage costs – see Schedule 2.

8. All of this is consistent only with the UIBA becoming the property and responsibility of RS from the moment that it was loaded onto its vehicles at the claimant's plant and the claimant having no commercial or proprietary interest in the material thereafter. The claimant was not responsible in any way for transporting the material from its plant in Plymouth to Victoria Wharf, or for its storage at Victoria Wharf or for its shipment onto vessels for transport to the Netherlands or for its transport by ship from Victoria Wharf to RS's plant in the Netherlands. All this activity was exclusively RS's responsibility for which it was being paid by the claimant. There were residual obligations imposed on the claimant by contracts entered into in order to satisfy European Regulations concerning the movement and storage of waste but those agreements are not material for present purposes.

9. There is no dispute as to what happened once the UIBA had been loaded onto RS's lorries at the claimant's plant. It was transported by RS by road to Victoria Wharf in Plymouth where the material was stored in bunkers prior to shipment on a ship to be chartered by RS for the carriage of the material to its plant in the Netherlands. This part of the process was the subject of a contract between RS and Victoria Wharves Limited ("VW Agreement"). There is no signed version of this agreement available to me. However, both parties were content to proceed on the basis that the draft dated December 2014 is accurate. The claimant was not a party to the agreement and the contrary is not suggested.

10. The VW Agreement includes at Recitals B to D:

> "(B) Rock Solid is engaged, in the transport and shipping of IBA (Incinerator Bottom Ash) from the MVV EfW plant at North Yard, Devonport, Plymouth to its treatment facilities in the Netherlands;
>
> (C) Rock Solid requires the use of VW's facilities at the Port to store and to load the Product;
>
> (D) The Parties have reached an agreement in relation to loading, storage and shipping agency facilities provided by VW for use by Rock Solid at the Port."

These provisions are entirely consistent with the terms of the IBA Contract and with the UIBA collected by RS from the claimant's plant being RS's property as and from the point at which it has been collected. Consistently with this, by clause 3.1 of the VW Agreement it was agreed between RS and Victoria Wharves Limited ("VWL") that:

> "RS shall use VW exclusively to store and load across its quay IBA at Plymouth of all the IBA produced at the EfW of MVV in Plymouth unless VW is in breach of its obligations under this Agreement. It is expected that the EfW will generate

> approximately 60,000 tonnes a year but no right can be derived from this approximation. Based on this the Parties hereby acknowledge that Rock Solid require the Services for a estimated amount of 50,000 tonnes in every 12 month period based on an initial term of 3 years (36 months)."

and by clause 3.3 that RS would "*... appoint [SS] as its shipping agent at the Port to undertake its coordination of Rock Solid's shipping service requirements".* Similarly consistent with this being the position was the agreement contained in clause 3.6 of the VW Agreement that RS would "*... Maintain ownership of the IBA, VW class the material as in transit from vehicle reception to final loading of ships holds.*"

11. In relation to shipping from Victoria Wharf to the Netherlands, it is common ground but in any event I find that RS was responsible for arranging the shipments of the UIBA to its plant. This included chartering a vessel for the purpose, procuring the shipment aboard the relevant vessel of the UIBA and the issue of a Bill of Lading for what had been shipped. It is common ground that prior to the shipment with which these proceedings are concerned, these arrangements had been made a total of 33 times between 25 June 2015 and 12 January 2017. The Bills of Lading for each of these shipments identified the shipper as being the claimant rather than RS and RS as being the consignee. None of the vessels concerned with the 33 different deliveries had been owned or head-chartered by the defendant. Following the incident leading to these proceedings and an investigation by the Marine Accident Investigation Branch, which concluded that the claimant had been wrongly identified in the relevant bill of lading as the shipper, the bills of lading have identified the shipper as being RS and not the claimant. Mr Carey's evidence (which was not challenged on this point) was this was at the request of the claimant. It is not suggested by anyone that SS or RS objected to this change.

12. On each occasion, after the relevant documents had been generated and the shipment of the UIBA aboard whichever ship was being used, SS sent a copy of the shipping documentation to a variety of different addressees under cover of an email that was in standard terms. An example was that sent on 6 August 2015 and was in these terms:

To: brokers@hudigveder.nl[brokers@hudigveder.nl]; gans@ganscargo.com[gans@ganscargo.com]; Gerran McCrea[Gerran.McCrea@mvvuk.co.uk]; h.vancraaikamp@rocksolidbv.nl[h.vancraaikamp@rocksolidbv.nl]; info@rocksolidbv.nl[info@rocksolidbv.nl]; m.keegel@afvalzorg.nl[m.keegel@afvalzorg.nl]; p.schaap@rocksolidbv.nl[p.schaap@rocksolidbv.nl]; p.schaap@rocksolidbv.nl[p.schaap@rocksolidbv.nl]; S.Boer@afvalzorg.nl[S.Boer@afvalzorg.nl]; Simon Nunn[simon.nunn@mvvuk.co.uk]; 'Liam Lynch'[liamlynch@victoriagroup.co.uk]; "Richard Hemmings"[richardhemmings@victoriawharf.co.uk]
Cc: 'Master Frisium'[Master.Frisium@telaurus.net]; Sanders Stevens - Plymouth[sanderssstevens@victoriawharf.co.uk]; 'Dave Crotty'[weighbridge@victoriawharf.co.uk]
From: Nick Webb
Sent: Thur 06/08/2015 5:10:03 PM (UTC)
Subject: RE: MV Frisium Plymouth - Beverwijk
VWL_Sandersstev_018016.pdf
VWL_Sandersstev_018019.pdf

Good afternoon

Vessel completed loading 1700 today 06/08
Cargo loaded 2244.148 tonnes bulk IBA
Vessel sailed 1800
Max draft 4.00m
Passage time Beverwijk 2.1 days wp/agw
Master will update from sea

Please find copy cargo docs attached

Best Regards

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The copy documents attached to the emails included Notices of Readiness, Statements of Facts, a non-negotiable copy Bill of Lading and documentation relating to the transboundary movement of waste.

13. I have rehearsed this at some length because the defendant relies on the 33 transactions that took place prior to the transaction that is material to this dispute and the transmission of the copy documentation to the claimant as precluding the claimant from arguing as against the defendant that it was not in fact the shipper. This is so notwithstanding that the defendant was not the ship or disponent owner (or for that matter corporately associated to any such owner) in relation to any of the prior shipments and was not aware of any of the prior shipments or the documentation generated in relation to any of them or that such material had been sent to the claimant until after the incident leading to these proceedings.

14. The circumstances that led to the claimant being identified as shipper and being sent the shipping documents for each shipment was explained by Mr Webb in paragraph 10 of his witness statement. He said that SS had drawn up a draft bill of lading for the first shipment of UIBA that named the claimant as shipper on the basis that the claimant was identified as "*exporter-notifier*" in the notification document required to be produced in order to comply with European legislation concerning the cross-frontier movement of waste. In my judgment this was erroneous given the terms of the UIBA Contract and for that matter the VW Agreement. He said and I accept that the bill of lading was sent in draft by SS to RS for approval and that RS approved its terms. RS was wrong to have done so given the terms of its contract with the claimant. It is not suggested that the

draft bill of lading was sent to the claimant either by SS or RS with a request that it be approved or even that there was any contact between SS and the claimant other than the emails enclosing copy documentation referred to earlier.

15. Mr Webb said in paragraph 11 of his witness statement and in his oral evidence and I accept that the first bill of lading was then used as a template for all the others with the only changes being the charterparty date and the ship's name and details pertinent to the material being shipped. He adds in paragraph 12 of his statement and again I accept (indeed it is not in dispute) that "*SS did not consult [the claimant] during this process and [the claimant] did not provide its consent to SS being named shipper on the bills of lading."*. There was no communication of any sort between SS and the claimant prior to the loss with which these proceedings are concerned. This is unsurprising given the terms of the IBA Contract and that there was no contractual or other legally relevant relationship between SS and the claimant.

16. I can now turn to the events leading to the present dispute. On 12 January 2017, a consignment of 2,333.169 tons of UIBA had been shipped on board the MV Nortrader, a vessel chartered by RS from the defendant ("Vessel"), at Victoria Wharf for carriage to the Netherlands and a bill of lading was issued which, as with all the others issued by SS for this trade, named the claimant as shipper, and RS as consignee ("Bill of Lading"). The Bill of Lading incorporated by reference the terms and conditions of a "*… charterparty dated 10.01.2017 including arbitration"*, which the parties understand to be a reference to the voyage charterparty between RS and the disponent owners of the Vessel of that date. The voyage charterparty named RS as charterer, the loadport as Victoria Wharf, the loading agent as SS and the cargo as UIBA. It named the shipper as the claimant. That information could only have come from RS. It is not suggested that RS or SS had obtained the approval of the claimant for this insertion any more than it had obtained it for any of the prior shipments or that the claimant was a party to the charterparty. For reasons that I have explained identifying the claimant as shipper contradicted the terms of the UIBA Contract.

17. On 13 January 2017, an explosion occurred on board the Vessel as a result of which her Chief Engineer was injured and in consequence the defendant suffered losses of €676,561.46, €45,000 and US$840 ("Losses").

18. The defendant claimed the Losses from the claimant on the basis of an alleged contract of carriage to which the claimant was alleged to be a party evidenced by the Bill of Lading and commenced an arbitration on the basis that an arbitration agreement had been incorporated by reference into the Bill of Lading.

19. The claimant denied the claims on the basis that it was not the shipper and was not a party to the contract of carriage evidenced by the Bill of Lading and had been erroneously named as such. The claimant challenged the jurisdiction of the Tribunal on the basis that since it was not the shipper whether actual or contractual and there was no contract of carriage to which it was a party it followed that there was no arbitration agreement between the claimant and defendant. The Tribunal concluded that they had jurisdiction and in consequence these proceedings were commenced.

The Issues

20. The ultimate issue that arises is whether the claimant was party to the contract of carriage evidenced by the Bill of Lading. If it was not then it is common ground that it was not a party to an arbitration agreement with the defendant and the Tribunal had no jurisdiction. In my judgment that issue depends on whether either RS or SS had either express or implied actual or ostensible authority to enter into a contract of carriage as agent for the claimant.

21. The defendant characterises the real issue between the parties as being whether the claimant was "*... a party to the Bill of Lading"*. In my judgment this is mistaken. A contract of carriage comes into existence at a time when the goods are presented for and accepted by the carrier for shipment and thus precedes and is only evidenced by a bill of lading – see Pyrene Co Ltd v Scindia Navigation Co Ltd [1954] 2 QB 402 at 419, where Devlin J held that:

> "the contract of carriage is always concluded before the bill of lading, which evidences its terms, is actually issued. When parties enter into a contract of carriage in the expectation that a bill of lading will be issued to cover it, they enter into it upon those terms which they know or expect the bill of lading to contain."

The reason why the defendant formulates the issue in this way is because it places very substantial if not total reliance of the fact that the claimant is named as shipper in the Bill of Lading and was so named in bills of lading relevant to the 33 prior shipments of UIBA from Victoria Wharf. It is an unhelpful formulation because it distracts attention from (a) the fact that the contract of carriage was entered into by the parties to it before the Bill of Lading on which the defendant relies was issued; (b) that the naming of a party as shipper in a bill of lading is not decisive as I explain further below; and (c) whether either SS or RS was either expressly or implied authorised, or SS had ostensible authority, to enter into a contract with the defendant on behalf of the claimant, it being common ground that the claimant did not itself enter into any contract with the defendant.

Discussion

22. It is common ground that in a dispute of this sort the starting point is that the parties to a contract of carriage evidenced by a bill of lading are the persons named in the bill of lading as respectively shipper and carrier – see Carver on Bills of Lading 4th Ed. At 4-001. However, it can be no more than that for the reasons already noted - the contract of carriage is always concluded before the bill of lading, which evidences its terms, is actually issued. It is common ground that it is open to one who is ostensibly a party to a contract of carriage evidenced by a bill of lading to show that it has been wrongly identified as a party to the contract of carriage – see Aikens, Lord and Bools on Bills of Lading (2nd ed.) at 7.75:

> "... the bill does not always evidence a contract between the carrier and the named shipper. Where an issue arises on this point, the facts, including particularly the evidence of any antecedent contract, must be considered to ascertain the true

> intentions of the parties as apparent from the bill itself and the surrounding circumstances. As discussed below it may be the case that (i) the bill of lading evidences a contract with someone other than the named shipper, for example, the consignee …."

As Hobhouse LJ observed in Cho Yang Shipping Company Limited v. Coral (UK) Limited [1997] 2 Lloyds Rep 641 at 643: " *… the shipper may be shipping as the agent of the consignee in which case the contract will be with the consignee …"* and a little later on the same page, in English law "*… the bill of lading is not the contract between the original parties but is simply evidence of it … (I)ndeed, … it may in the hands of a person already in contractual relations with the carrier (e.g. a charterer) be no more than a receipt.".* Although Mr Debattista submits that the facts of that case are distinguishable from this case that does not detract from the applicability of the general point made by Hobhouse LJ in the part of his judgment from which I quote above.

23. All this being so, the questions that arise are whether SS (or RS) was actually expressly or impliedly authorised by the claimant or had ostensible authority to enter into a contract of carriage with the defendant on its behalf and in its name. Before turning to those issues I need to address some overarching submissions made by Mr Debattista on behalf of the defendant.

24. I do not accept Mr Debattista's submission that this case is not about agency but about whether a contract was made directly between the claimant and the defendant. This is mistaken because it is common ground that there was no contract of any sort at any material time directly between the claimant and the defendant. The only contract this case is concerned with is a contract of carriage with the defendant. The only contract of carriage relevant to the issues I have to determine was made when the consignment of UIBA relevant to this dispute was shipped aboard the Vessel. The only parties to that agreement were the defendant and whoever was represented by SS. Since it is common ground that SS entered into the contract only as agent that begs the question whether SS was either expressly or impliedly authorised by or had ostensible from the claimant to enter into a contract of carriage on behalf of the claimant.

25. Mr Debattista's oral submission that the claimant "*knowingly consented to be made a party*" is similarly unhelpful unless SS had actual or ostensible authority to enter into such a contract on behalf of the claimant as its agent. Likewise his oral submission that the claimant did nothing about it being named as shipper in 33 different and earlier bills of lading "*… makes it impossible for it to avoid being shipper"* does not assist in resolving this dispute unless the effect of that inaction is to give SS actual or ostensible authority to enter into the relevant contract of carriage with the defendant on behalf of the claimant. For reasons that I explain below, in my judgment it does not have that effect.

26. Similarly, his submission that the IBA Contract is of "*limited relevance"* because the defendant did not know about it or its terms at any relevant time does not assist because claimant does not suggest otherwise. The IBA Contract is plainly evidentially and contextually relevant to an assessment of whether RS or SS had been authorised by the claimant to enter into a contract of carriage on its behalf with the defendant.

27. Mr Debattista submitted that this case required a careful construction of the Bill of Lading in order to ascertain who the contracting party was. That is mistaken for the reasons I have given already. The correct focus of attention is on who were the parties to the contract of carriage. It is common ground that the Bill of Lading identified the claimant as shipper. No issue requiring construction of the Bill of Lading arises in those circumstances. It is accepted by the claimant that the starting point is that the parties to a contract of carriage evidenced by a bill of lading are the persons named in the bill of lading as respectively shipper and carrier. However, I understand it to be common ground (and in any event I hold for the reasons given earlier) that a party identified as a party to a contract of carriage evidenced by a bill of lading is entitled to show that it has been wrongly identified as a party.

28. *Express Authority*

On the basis of the evidence and findings set out above, there is no, even arguable, basis for contending that the claimant had authorised either RS or SS to enter into a contract of carriage on its behalf in relation to any UIBA collected by RS from the claimant's plant pursuant to the IBA Contract.

29. As between RS and the claimant it is entirely clear that exclusive responsibility for transportation of all UIBA from the claimant's plant to RS's plant in the Netherlands rested with RS. This is the effect of the IBA Contract and it is not suggested that the relationship between RS and the claimant is governed by any other agreements that are relevant. As I have said already the IBA Contract is not an agency agreement in any sense but is a principal to principal agreement for the disposal by RS of waste for reward, title to the waste being transferred to RS on delivery to RS at the claimant's plant. The evidence suggests that SS tendered the first bill of lading issued in respect of the carriage of UIBA from Victoria Wharf to RS for approval and RS approved it including the reference to the claimant as shipper within it. That does not have the effect of conferring express actual authority on SS to enter into a contract on behalf of the claimant unless RS was itself authorised by the claimant. There is no question of RS being authorised to enter into a contract of carriage on behalf of the claimant by the only contract between the claimant and RS in evidence (the IBA Contract) and there is no evidence of any other express or implied agreement by which RS was authorised to enter into contracts of carriage directly or indirectly on behalf of the claimant.

30. Similarly the only relevant express contracts to which SS was a party were with the defendant as owner of the Vessel and as RS's unpaid agent as contemplated by clause 3.3 of the VW Agreement. There was no express contract between the claimant and SS at the time material to the events I am concerned with.

31. The only issue that remains under this head is whether there was an implied agreement between the claimant and SS by which authority to enter into contracts of carriage was conferred on SS. It is well established that an agreement between a principal and agent may be implied where the putative principal (here the claimant) has conducted himself towards the putative agent (here SS) in such a way that it is reasonable for the putative agent to infer from that conduct assent to an agency relationship – see Bowstead & Reynolds on Agency (21st Ed.) ("Bowstead"), Art. 8. The sole question in this case is whether it was reasonable for SS to think that it had been appointed or authorised to act as agent for the claimant.

32. The contents of the Bill of Lading were taken from a template created at the outset and approved by RS not the claimant. The decision to name the claimant as shipper was taken entirely unilaterally by SS acting by Mr Webb. It is not suggested by Mr Webb that RS suggested that he should do so. There was no contact of any sort between the claimant and SS apart from the emails, which the claimant understood had been sent to them for information purposes. There is nothing therefore to support a reasonable inference that the claimant had conferred actual authority on SS apart from the fact that SS copied the emails to which was attached the shipping documentation on 33 occasions prior to the occasion giving rise to these proceedings, that on each occasion a copy bill of lading was attached that named the claimant as shipper and the claimant had not objected.

33. Thus the only conduct that the defendant can rely on is the claimant's silence. However, assent is not to be inferred from silence, unless there is further indication that the putative principal acquiesces in the agency – see Bowstead, Paragraph 2-032. The reasons for this are close to obvious. Authority to enter into a contract on behalf of another is authority to commit that other to legal obligations to a third party without qualification and thus is not lightly to be inferred when there is no express agreement to that effect. Further, silence or inactivity is inherently equivocal and thus requires something else in the surrounding circumstances to negative that equivocality.

34. In my judgment there is nothing in the surrounding facts that has that effect. There is no evidence that the claimant thought or even considered whether it had given the alleged authority to SS and SS has not asserted that it considered it had such authority. Indeed, Mr Webb was not even asked if that is so. Throughout, SS acted exclusively for the defendant as owner and as unpaid agent for RS. It had not been appointed to act on behalf of the claimant. In those circumstances, the claimant's approach to the emails (which were entirely unsolicited and did not seek a response or reply) – that they were being sent and received for information purposes and had no legal significance – was one that was understandable in the circumstances. Although it was submitted on behalf of the defendant that the claimant was " … *clearly content to see itself described as shipper on bills of lading in respect of transactions with [RS] for the same commodity, without raising the slightest objection* …" (see paragraph 21 of its written opening submissions) that assertion was not put to Mr Carey. It was suggested in closing oral submissions that there were potential advantages for the claimant in being named as shipper. Those supposed advantages were not put to Mr Carey in cross examination nor was the suggestion that these supposed advantages were known or ought reasonably to have been known to him or otherwise by the claimant. In those circumstances, none of these points are ones that the defendant can rely on. Mr Carey's evidence as to his understanding of why the emails were sent to the claimant was not challenged in cross examination. No reason for the emails being sent to the claimant was identified and the relevance of the contents to the claimant was very limited because it had passed risk and title to the material to RS at the point when the material was loaded onto RS's road transport at the claimant's plant.

35. Although it was submitted on behalf of the defendant that a duty to speak had arisen by the time the 33rd email had been received, I do not agree, given the circumstances I have summarised. It is also relevant to note that following the incident giving rise to these proceedings, Mr Carey's evidence was that the claimant requested that SS cease identifying it as shipper and that request was acted on without complaint either from

SS or RS. Whilst the test is objective, the absence of either the supposed principal or the supposed agent asserting an understanding that the supposed agent was authorised to do the act complained of would be surprising and unusual if an implied agency agreement was found to exist and that would be all the more the case where there had been no course of dealing between them or contact of any sort between them other than the unsolicited sending and receipt of the 33 emails.

36. In these circumstances, it is unarguable to suggest that anyone had actual express authority from the claimant to enter into a contract of carriage with anyone concerning the UIBA uplifted from its plant by RS or that anyone could reasonably have thought that the claimant had authorised SS to enter into a contract of carriage for material that it did not own or retain any interest in. RS should at all times have been described as the shipper. The function of the bills of lading relevant to the shipment of UIBA from Victoria Wharf to RS's plant in the Netherlands was that identified by Hobhouse LJ Cho Yang Shipping Company Limited v. Coral (UK) Limited (ibid.) in the quotation set out above since RS was the charterer of the Vessel and no question of sale of the material by RS prior to delivery and processing at its plant in the Netherlands could arise given the terms of the IBA Contract.

37. *Implied Actual Authority*

The alternative way in which actual authority might be demonstrated is by reference to the doctrine of implied actual authority. This differs from express actual authority because it is actual authority that can be inferred from the conduct of the parties and the circumstances of the case – see Hely-Hutchinson v Brayhead Ltd [1968] 1 QB 549. That case concerned whether the Chairman of the Board of Directors of a company had actual authority to enter into contracts on its behalf notwithstanding that he did not have express actual authority to do so. The lead judgment was given by Lord Denning MR who formulated the applicable principle in these terms:

> ". . . actual authority may be express or implied. It is express when it is given by express words . . . It is implied when it is inferred from the conduct of the parties and the circumstances of the case . . . Actual authority, express or implied, is binding as between the company and the agent, and also as between the company and others, whether they are within the company or outside it."

Lord Wilberforce set out the approach to be adopted in ascertaining whether the Chairman had been cloaked with implied actual authority as being to:

> " … to … consider over and above the powers that he had as chairman, what the actual circumstances of the relationship between him and the board of directors may show."

38. In that case, there was a finding of acquiescence stemming from the fact that the remaining directors had allowed the chairman to take authority to deal with general financial and policy questions and to act as a chief executive without having to consult the board on each occasion and that the remainder of the board had entrusted to him the acquisition and take over activities of the company. It was those factors, together with the fact that the chairman had been expressly authorised in relation to the initial phase

of the project, that led to the contracts in dispute. In reality, therefore, the only principle to be derived from Hely-Hutchinson v Brayhead Ltd (ibid.) is that identified by Lord Denning and Lord Wilberforce in the extracts set out above. All other issues are questions of fact that arise in the particular circumstances of a given case.

39. That this is so is apparent from Gross LJ's summary of the applicable principles in Sino Channel Asia Limited v. Dana Shipping & Trading Pte Singapore [2018] 1 Lloyds Rep 17 at [36]: " *... the focus in the case of implied actual authority is on the "actual circumstances" of the relationship between principal and agent, hence on what may be inferred from the "conduct" of the parties*". This means, inevitably, that the outcome of particular cases are fact sensitive and will at best only be of very limited assistance in arriving at a conclusion in any other case.

40. In my judgment neither RS or SS were given implied actual authority to enter into a contract of carriage on behalf of the claimant for the carriage of UIBA collected by RS from its plant. My reasons for reaching that conclusion are as follows.

41. First, implied actual authority can arise only in relation to someone who has been given some express authority to which the implied authority is appurtenant – see Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Limited [1964] 2 QB 480 *per* Wilmers LJ said at 488. The point is exemplified by the facts of Hely-Hutchinson v Brayhead Ltd (ibid.) where the individual concerned was the chairman of the company concerned and thus the authority it was found that the chairman had was additional or incidental to the authority that he had as chairman and that was accorded to him in relation to the initial stages of the project leading to the contracts in dispute. The importance of this issue was emphasised by Carr J as she then was in Jiangsu Shagang Group Company Limited v. Loki Owning Company Limited [2018] EWHC 330 [2018] 2 Lloyds Rep 359 in the following passage:

> "Implied authority is ordinarily an adjunct to an existing express authority. Article 27 of Bowstead puts it thus (at para 3-019):
>
> > "An agent has implied authority to do whatever is necessary for, or ordinarily incidental to, the effective execution of his express authority in the usual way."
>
> 89. The suggestion of an implied authority on the part of Shagang to enter into guarantees for JSG faced insuperable hurdles, not least given the existence of an established procedure requiring express approval from JSG which is wholly inconsistent with the existence of the implied authority contended for. Nor could any relevant express authority to which the alleged implied authority could attach be identified."[Emphasis supplied]

This point is also emphasised too by the commentary to Article 27 of Bowstead & Reynolds on Agency (21st Ed.), in which it is stated:

> "This Article only refers to actual authority. A good statement of the notion behind it is that:

> 'an authority of this nature necessarily includes medium powers, which are not expressed. By medium powers I mean all the means necessary to be used in order to obtain the accomplishment of the object of the principal power …' ".

The quotation in the above passage is from the judgment of Eyre CJ in Howard v Baillie (1796) 2 H.Bl. 618 at 619.

42. RS had no actual authority of any sort to act as agent of the claimant. Their contractual relationship was governed exclusively by the terms of the IBA Contract and there is nothing within that contract to which the alleged implied authority to enter into a contact of carriage with the defendant could attach and the contrary is not suggested. As I have said already, that contract is not an agency agreement. SS had no actual authority of any sort from the claimant to which the alleged implied authority to enter into a contact of carriage with the defendant could attach for the detailed reasons set out in the previous section of this judgment. In my judgment this is of itself fatal to the suggestion that SS had implied actual authority to bind the claimant to a contract of carriage with the defendant.

43. In any event, even if that is incorrect, the defendant's case depends on the proposition that implied actual authority can arise from silence – in this case the failure to object upon receiving any of the 33 prior bundles of shipping documents that included bills of lading naming the claimant as shipper of the UIBA. Generally, silence is incapable of giving rise to implied actual authority without more - Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Limited [1964] 2 QB 480 *per* Diplock LJ at 501, where he said:

> "He (that is the first instance judge) proceeded on the basis of apparent authority, that is, that the defendant company had so acted as to be estopped from denying Kapoor's authority. This rendered it unnecessary for the judge to inquire whether actual authority to employ agents had been conferred upon Kapoor by the board to whom the management of the company's business was confided by the articles of association.
>
> I accept that such actual authority could have been conferred by the board without a formal resolution recorded in the minutes … (b)ut to confer actual authority would have required not merely the silent acquiescence of the individual members of the board, but the communication by words or conduct of their respective consents to one another and to Kapoor."[Emphasis supplied]

44. In my judgment, the actual circumstances of the relationship between the claimant and SS clearly negative the suggestion that the claimant had impliedly authorised SS to enter into contracts of carriage to which it was made a party in the role of shipper. My reasons for reaching that conclusion will be apparent from what I have said already concerning the existence of an implied agreement between the claimant and SS conferring on SS authority to enter into contacts of carriage on its behalf. I need not repeat them.

45. *Ostensible Authority*

Unlike the questions concerning actual authority, this issue is concerned with whether the claimant had by its words and conduct to the defendant, held out SS as being authorised to act as its agent. The defendant argues that the claimant had clothed SS with apparent authority to enter into a contract of carriage with the defendant because as I have described already, SS sent copies bills of lading concerning the shipment of UIBA from Victoria Wharf to RS's plant in the Netherlands on 33 previous occasions and in each case the claimant had not made any complaint about it being described in the bills of lading as the shipper. In my judgment this is unarguable. The applicable principle is as summarised in Bowstead & Reynolds on Agency (21st Ed.) at paragraph 8-010:

> "Where a person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of that other person with respect to anyone dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the authority that he was represented to have, even though he had no such actual authority"

As the authors add at paragraph 8-024:

> "The third party must have relied on the representation. This is of course another aspect of the same point. Thus the third party cannot hold the principal liable if he: did not believe that or care whether the agent had authority; knew that the agent did not have authority despite the appearance of authority; or had no dealings with the agent or was not aware of the circumstances giving rise to apparent authority. He may also be unable to do so if he has notice of the terms of the agent's authority: this is discussed under Article 73. A third party cannot rely on a document as creating a representation of apparent authority when he knows that he was not supposed to have seen the document.
>
> Further, it is often said that he must in some way have acted on the representation. Again, if the analogy of common law estoppel by representation is followed, the acting must have been to his detriment, and this requirement is stated in several cases. Others, however, speak simply of alteration of position, or acting on the faith of the representation, and it seems in fact that there need be no more than an entering into a contract in reliance on the representation. This tends to make this aspect of the doctrine merge with the previous one."

46. None of the material on which the defendant now relies (the sending by SS on 33 previous occasions of shipping documentation including bills of lading in which the claimant was described as being the shipper) was known to the defendant at any stage down to the date when the relevant contract of carriage was entered into. Indeed, it would not even have been aware of a representation by SS that the claimant was the

shipper in the Bill of Lading since it would have been issued after the contract of carriage had been entered into. In any event, a representation of authority by an agent is generally never sufficient to give rise to apparent authority – see Bowstead & Reynolds on Agency (21st Ed.) at paragraph 8-020 and the authorities there referred to. There was no holding out to the defendant by the claimant of SS as its agent.

Conclusions

47. For the detailed reasons set out above, I conclude that SS did not have either express or implied actual authority from the claimant to enter into a contract of carriage with the defendant or at all and that the claimant did not confer ostensible authority on SS to do so either. In those circumstances the claimant was not a party to the contract of carriage which was purportedly evidenced by the Bill of Lading on which the defendant relies and, therefore, not a party of the arbitration agreement on which it relies either. In those circumstances, I conclude that the tribunal's conclusions to the contrary effect were wrong. I will hear counsel at the hand-down of this judgment as to the terms of the Order that should follow from these conclusions.