Neutral Citation Number: [2020] EWHC 2030 (Comm)

Case No: CL-2017-000567

**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: 28/07/2020

**Before** :

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

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**Between :**

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|---|---|
| **SEA MASTER SHIPPING INC** | **Claimant** |
| **- and -** | |
| **(1) ARAB BANK (SWITZERLAND) LIMITED** | |
| **YOUSEF FREIHA & SONS SAL** | **Defendants** |

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**Mr Michael Collett QC** (instructed by **Jackson Parton**) for the **Claimant**
**Mr John Russell QC**(instructed by **HFW**) for the **Defendants**

Hearing dates: 20th 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 Tuesday 28th July 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 an appeal by the claimant under s.69 of the Arbitration Act 1996 from the conclusion of an arbitral tribunal ("Tribunal") contained in a Partial Final Award dated 16 May 2019 ("Award") in relation to two questions of law determined by the Tribunal. Permission was granted by Picken J on the basis that " … *the questions identified by the Claimant in Claim Form at paragraph 3 are questions of law which are open to serious doubt and which are also of general public importance*" – see his Order of 4 November 2019.

2. The Claimants ("Owner") are the assignees of the registered owners of the MV Sea Master ("Vessel") who chartered the Vessel to Agribusiness United DMCC ("Charterer") by a voyage charter on the Norgrain 89 form ("Voyage Charter"). The issues of law that arise concern a contract of carriage ("Contract of Carriage") contained in or evidenced by a bill of lading dated 7th November 2016 known in these proceedings as the Second Switch Bill ("Bill"), which incorporated all the " … *terms, conditions, liberties and exceptions* …" of the Voyage Charter – see clause 1 of the Conditions of Carriage endorsed on the Bill ("Incorporation Clause"). The First Defendant ("Bank") was involved in financing the cargo carried under the Contract of Carriage ("Cargo"). The Second Defendant ("Receivers") took delivery of the Cargo.

3. There is no factual narrative included within the Award other than that set out in paragraphs 4-6 of the Award, which are in these terms:

> "4. In June 2016, the vessel "SEA MASTER" loaded various parcels of corn at Rosario in Argentina, for carriage under bills of lading which provided for discharge at named ports in Morocco. She then proceeded to San Lorenzo in Argentina, where she loaded various parcels of soya hull pellets and of soya bean meal under bills of lading which again provided for discharge at named ports in Morocco.
>
> 5. The vessel sailed to Morocco and, in August 2016, the corn cargo and soya hull pellets were discharged at the ports named in the relevant bills of lading.
>
> 6. The parcels of soya bean meal were ultimately discharged at Tripoli in Lebanon, in February 2017. The arrangements that made this possible were complicated and took a substantial period to finalise. They included the issue of two new bills of lading which covered the entire quantity of soya bean meal and which were switched for the previous bills of lading issued for the various parcels of soya bean meal. The soya bean meal cargo was ultimately discharged and delivered by reference to the second of these new bills of lading ("the second switch bill of lading")."

4. Two references give rise to these proceedings, both of which relate to a claim or counterclaim by the Owner for demurrage or damages in lieu of demurrage. In one arbitration reference, the First Defendant commenced a claim against the Owner for damages for mis-delivery and the Owner sought to bring a counterclaim for demurrage or damages in lieu of demurrage. The other arbitration reference is one commenced by the Owner against the Second Defendant for demurrage or damages in lieu of demurrage. The Tribunal is seised of both references.

5. At a directions hearing in both references on 11 February 2019, the Tribunal directed the hearing of the preliminary issues referred to below in both references. There is no factual narrative or findings in the Award that sets out the basis the counterclaim in the First Defendant's reference or that which forms the basis of the claim in the Owner's reference. It follows that, aside from the assumptions to which I refer in the following paragraph, the preliminary issues were decided in a factual vacuum. The Defendants submit that the claim has been pleaded against them as a demurrage claim or at least a claim that they are responsible for delaying discharge without stating what it is alleged they should have done or failed to do that is a breach in particular of what I refer to below as the First Implied Term. It is common ground however that the Charterer is in insolvent liquidation and unable to meet any of its obligations under the Voyage Charter.

6. The Tribunal was invited to assume for the purposes of determining the issues of law that arose and it is common ground that I should similarly assume that:

> "(1) The Receivers were the holders of the [Bill] and took delivery of the cargo to which it related at the discharge port. Pursuant to section 3(1) of COGSA 1992, they became subject to the same liabilities under the [Contract of Carriage] as if they had been a party to that contract.
>
> (2) Although the Bank's status is disputed, for the purposes of these Preliminary Issues only, it is to be assumed that the Bank was either (i) the original contracting party to the Bill or (ii) the party who pursuant to section 3(1) of COGSA 1992 became subject to the same liabilities under that Contract of Carriage as if it had been a party to that Contract, and questions 1 and 2 are to be answered for each of those assumptions."

- see Award, paragraph 24.

7. The questions of law that the Tribunal decided as preliminary issues were those set out in paragraph 25 of the Award, being:

> "The Preliminary Issues
>
> 1. As a matter of contractual construction are the following liable for discharge port demurrage under the Contract of Carriage:
>
> 1.1 The Bank?
>
> 1.2 The Receivers?

> 2. If answer to 1.1 or 1.2 is no, was it an implied term of the Contract of Carriage, sounding in damages for delay for the Owners, that the Bank and/or the Receivers would:
>
> 2.1 Take all necessary steps to enable the cargo to be discharged and delivered within a reasonable time; and/or
>
> 2.2 Discharge the cargo within a reasonable time?"

I refer hereafter to the implied term referred to in paragraph 25.2.1 of the Award as the "*First Implied Term*" and that referred to in paragraph 25.2.2 as the "*Second Implied Term*".

8. The Tribunal answered Questions 1.1 and 1.2 in the negative. There is no appeal from that conclusion. The basis for that conclusion was the acceptance by the Tribunal of the Defendants' submissions summarised at paragraph 44 of the Award in these terms:

> "The Bank and the Receivers said that clause 20[1] of the [Voyage Charter] was critical and must not be ignored. They said that, taken as a whole, the laytime and demurrage provisions in the Voyage Charter had the effect that, in the context of the Voyage Charter, the Charterers had the exclusive responsibility for paying demurrage; and that the general incorporation clause in the second switch bill of lading had the effect that the same result applied in the context of the second switch bill of lading."

This led the Tribunal to:

> " … ask ourselves what the relevant parties intended, when they agreed to incorporate the terms of the Voyage Charter, and in doing so we are obliged to assume that those parties could have consulted the Voyage Charter. If they had done so, they would have understood its laytime and demurrage regime as resulting in demurrage at the discharge port to be payable exclusively by the Charterers, i.e. Agribusiness, not by the Bank or the Receivers. It seems to us that, by incorporating the provisions of the Voyage Charter, they must be taken to have intended to achieve the same result, i.e. that demurrage should be payable by Agribusiness, not by the Bank or the Receivers."

I return to the express terms of the Contract of Carriage below.

9. The Tribunal answered Question 2 in the negative. It is from that conclusion that the Owner appeals, contending that the answer should have been in the affirmative. The Defendants maintain (as they did before the Tribunal) that:

> "… the Owners entered into contracts pursuant to which their only remedy for delay in discharge was a claim in demurrage against the Charterers. Due to the Charterers' subsequent

[1] Clause 20 of the Voyage Charter is set out in paragraph 11 below.

> insolvency, the Owners are out of pocket. They now, illegitimately, seek to pin liability on the Cargo Owners, despite that being inconsistent with the express regime they entered into, and the credit risk which they took."

- see paragraph 12 of the Defendants' written submissions.

## The Terms of the Contract of Carriage

10. It is common ground that the effect of the Incorporation Clause was as stated by the Tribunal namely to incorporate into the Contract of Carriage the terms of the Voyage Charter " … *in so far as they are appropriate and relevant for such incorporation, and subject to the legal principles set out in the decision of the House of Lords in Miramar Maritime Corp v Holborn Oil Trading ("The Miramar") [1984] AC 676; [1984] 2 Lloyd's Rep. 129; and in the subsequent authorities that have developed the law in this area*".

11. The Voyage Charter was a recapitulation of an earlier charterparty relating to another vessel, the MV Sea Honest. In so far as is material, the Voyage Charter and the Sea Honest Charterparty provided respectively as follows:

> "21.- LAYTIME TO COMMENCE AT ALL PORTS (LOADPORTS AND DISPORTS) NEXT WD AT 8AM. TIME NOT REVERSIBLE. FRESH NOR TO BE TENDERED AT ALL PORTS BENDS AND NOR WILL BE ACCEPTED ONLY UPON VSL PASSING LOCAL AUTHORITIES INSPECTIONS.
>
> …
>
> 23.- DEMURRAGE USD 8,750 pdpr/HALF DESPATCH WORKING TIME SAVED BOTH ENDS DEMURRAGE/DISPATCH IF ANY TO BE SETTLED 35 DAYS AFTER SUBMISSION OF DOCUMENTATION AND OWNS/CHRTRS INVOICE
>
> …
>
> 36.- OWISE AS PER EXECUTED CP OF MV SEA HONEST AND BLW CP DTLS AS AGREED"

The Sea Honest Charterparty provided:

> "10(a) Cost of loading and discharging
>
> …
>
> Cargo is to be discharged free of expense to the vessel …

> 11 Stevedores at Loading Port(s) and Discharging Port(s)
>
> …
>
> Stevedores at … discharging port(s) are to be appointed and paid for by Charterers/Receivers
>
> In all cases, stevedores shall be deemed to be the servants of the Owners and shall work under the supervision of the Master.
>
> …
>
> 18(a) Notice of Readiness
>
> …
>
> Notification of vessel readiness to discharge at the discharge Port to be tendered by master or vessel agents shall be delivered by Email or by fax or by telex during official office working hours Mondays through Fridays between the hours of 0800-1700 hours. …
>
> Demurrage/Despatch
>
> 20. Demurrage at loading and/or discharge ports is to be paid at the rate of [blank] per day or pro rata for part of a day and shall be paid by Charterers in respect of loading port(s) and by Charterers/~~Receivers~~* in respect of discharge ports. Despatch money to be paid by Owners at half the demurrage rate of all working laytime saved at loading and/or discharging ports.
>
> Any time lost for which Charterers/Receivers are responsible, which is not excepted under this Charterparty, shall count as laytime, until same has expired, thence time on demurrage."

12. The Voyage Charter was varied twice. The first variation is immaterial to the issues that arise on this appeal. The second variation dated 7 November 2016 included the following provision:

> "(e) Charterers shall have three days FHEX laytime at the discharge port in Lebanon."

**Implied Terms – General Principles**

13. 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, Ukraine v. The Law Debenture Trust Corp. PLC [2018] EWCA Civ 2026 and UTB LLC v. Sheffield United Limited [2019] EWHC 2322 (Ch). In summary and in so far as is material for present purposes:

i) Terms are to be implied only if to do so is necessary in order to give the contract business efficacy or to give effect to what was so obvious that it goes without saying and only if and to the extent that without the terms contended for the contract would lack commercial or practical coherence;

ii) It is a necessary but not a sufficient requirement that the term that a party seeks to have implied appears fair or is one that the court considered that the parties would have agreed if it had been suggested to them;

iii) The terms to be implied must be capable of clear expression and not contradict the express terms of the contract concerned; and

iv) In most, possibly all, disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered because it is only after the construction exercise has been undertaken that the necessity question and the allied question whether the terms sought to be implied contradict the express terms of the contract concerned can be answered – see the judgment of Males LJ in Equitas Insurance Limited v. Municipal Insurance Limited [2019] EWCA Civ 718; [2019] 3 WLR 613. In the circumstances of this case, to the extent that exercise has been carried out by the Tribunal in the part of the Award from which there is no appeal, that construction is binding between the parties and on me for the purposes of this appeal.

14. 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 (ibid.) 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*".

## Discussion

15. Both parties approached the issues that arise by making submissions concerning the Second Implied Term before turning to the First Implied Term. In those circumstances I adopt a similar approach.

*Second Implied Term*

16. As I have said already, the Owner maintains that it was an implied term of the Contract of Carriage that the Defendants would discharge the cargo within a reasonable time. The Owner submits that in deciding that question, the first issue to be resolved is whether, as a matter of construction of clauses 10 and 11 of the Voyage Charter, the "*Charterers/Receivers*" are responsible for performing the task of discharging the Cargo from the Vessel. I agree that is the first issue to be resolved.

17. The contractual provisions on which the Owner relies within clause 10 is the provision that "*…Cargo is to be discharged free of expense to the Vessel…"*. The provision within clause 11 on which the Owner relies is that "…*Stevedores at discharging ports are to be appointed and paid for by the Charterers/Receivers"*. The Owner contends that the effect of these provisions is to allocate contractual responsibility for discharge exclusively to the charterers and receivers. This is the springboard from which it launches its case that the Second Implied term is to be implied into the Contract of Carriage. The Defendants deny that this is the effect of these provisions, which, they maintain, are concerned only with the allocation of cost.

18. The Tribunal answered this issue in paragraph 64 of the Award by concluding that " … *the effect of clause 11 of the "Sea Honest" charterparty is that, under the second switch bill of lading, it is the Owners who are responsible for discharging, at any rate as regards the physical task of discharging as performed by stevedores*".

19. In my judgment the Owner's submission on the issue I am now considering is mistaken and should be rejected for the reasons that I set out below.

20. The Owner maintains that at common law responsibility for discharge is shared between the owner of a vessel and the charters or receivers, whereas the Defendants maintain that responsibility for discharge rests with the owner of a vessel in the absence of a contractual provision to contrary effect. I accept the Defendants' submission on this issue – see The Jordan II [2004] UKHL 49; [2005] 1 Lloyds Rep 57 *per* Lord Steyn at paragraphs 11-14. Lord Bingham at paragraph 1 and Lord Nicholls at paragraph 2 agreed with Lord Steyn. The Owners suggest the point was decided on the basis of a concession. That is not apparent from the terms of Lord Steyn's opinion where what he states the law to be appears under the subheading "*The existing rule"* and his language is not qualified by reference to any concession to that effect – see paragraph 11 where he states:

> "Under the common law the duty to load, stow and discharge the cargo prima facie rested on shipowners but it could be transferred by agreement to cargo interests"

Neither Lord Bingham or Lord Nicholls qualified their opinions on the basis that the conclusion was based on a concession. There is no judicial authority to which my attention has been drawn that suggests Lord Steyn's analysis is qualified in any way that is relevant and I follow it.

21. Clear language is required before a court or arbitral tribunal can safely conclude that the general rule has been ousted by agreement – see The Jordan II [2003] EWCA Civ 144; [2003] 2 Lloyds Rep 87 *per* Tuckey LJ at paragraph 9, with whom Waller LJ agreed at paragraph 41 and Black J agreed at paragraph 49. This part of the judgment of the Court of Appeal was wholly unaffected by the decision of the House of Lords in that case. Tuckey LJ added at paragraph 14:

> "I have already referred to the position at common law and the need for clear words if the contract is to transfer the obligation to load, stow and discharge from owners to charterers. There are three facets of the cargo operation which have to be considered. Who is to pay for it; who is to carry it out; and who is liable for

> it not being done properly and carefully? The Judge decided and I agree that there is no presumption that each of these responsibilities should fall on the same party. In other words, if the charterer has agreed to pay for the cargo operation, there is no presumption that he has also agreed to carry it out or be liable if it is done badly."

22. Mr Russell QC submits on behalf of the Defendants that a provision that transfers responsibility for the cost of discharge to a charterer or receiver will not have the effect of also transferring the obligation to carry out the task from the owner to the paying party. I agree that will usually not be the case, not least because, if it had been intended to provide that responsibility for the task was to be transferred from owners to any other party, it would have been easy enough to provide clearly and expressly for that outcome. The most natural inference to be drawn from the inclusion of a provision that provides only for cost to be transferred is that the parties intended that responsibility for discharge should remain where as a matter of general law it rests – that is with the Owners. I qualify Mr Russell's proposition in the way I have only because ultimately every construction exercise depends on the contractual language used by the parties construed in its relevant factual matrix.

23. In my judgment the language of clause 10 is clear – the Cargo was to be discharged free of expense to the Owner. Clause 10 does not imply that responsibility for the task of discharge has been transferred by the Owner to the receiver or charterer. Clause 10 is concerned solely with who is to pay for the operation. That is made clear by the sub heading, which is "*Cost of loading and discharging"*. In my judgment clause 11 is one way in which effect is given to the cost shifting provision within clause 10.

24. The words relied on by the Owner set out above cannot be read in isolation from the other words within the clause being "*In all cases, stevedores shall be deemed to be the servants of the Owners and shall work under the supervision of the Master*." In my judgment these words make clear that control of the exercise remains where it is as a matter of general law – that is with the Master on behalf of the Owner. Although Mr Collett QC submits on behalf of the Owner that there is no question of the stevedores being anything other than employed or engaged by the Defendants, that misses the point. The need for the deeming provision arises only because the stevedores were to be "*appointed and paid for by the Charterers/Receivers …"* but discharge was to remain the responsibility of the Owner represented by the Master. If the charterer or receiver was responsible for discharge then no such provision would be necessary. The point is put beyond realistic doubt by the words that follow, which require the stevedores to work under the supervision of the Master (representing the Owner) and is given added force by the entirely practical point that the stevedores will be assisted in discharge by the crew of the Vessel, who are employees of the Owner managed by the Master.

25. I also accept Mr Russell's submission that clause 46 of the Sea Honest charterparty supports this analysis. It provides that:

> "Stevedore's damages, if any to be settled directly between owners and stevedores but charterers to assist Owners at their utmost. Master to notify, if possible, these damages in writing

> latest 48 hours after occurrence to Stevedores but Owners to remain ultimately responsible to settle same with the stevedores."

This provision makes sense only in the context of the appointment of stevedores by the receiver or charterer where the Owner remains responsible for discharge. Such a provision makes no sense if the position was that the receiver or charterer was responsible for discharge.

26. The language used by the parties does not have the effect of shifting responsibility for discharge onto the charterers or receivers or of imposing on the receivers or charterers any obligation beyond appointing and paying stevedores and meeting the other costs of discharge. That obligation is imposed on the receivers and charterers because it is one means by which effect is given to the agreement of the parties contained in clause 10 that the cargo was to be discharged free of expense to the Vessel. There are no words that have that effect of transferring responsibility for discharge onto the charterers or receivers much less the clear words that are required.

27. The Owner relies on a number of authorities that Mr Collett QC submits on behalf of the Owner point to the opposite conclusion. I do not accept that these authorities have the effect for which he contends. First, once the general principles have been identified, authorities are unlikely to assist unless they concern the same language used in a similar context to the words to be construed in the instant case. Aside from the general principles that apply to the construction of and implication of terms into contracts, the relevant general guidance is that of the House of Lords and Court of Appeal in The Jordan II (ibid.).

28. The first authority relied on by the Owner is Government of Ceylon v. Chandris [1965] 2 Lloyds Rep 204. That case was decided before The Jordan II (ibid.) and is a first instance decision. In my judgment therefore it is to be read subject to the general principles set out by the Court of Appeal and House of Lords in their respective judgments and opinions in that case. The contractual language used in the charterparty in Chandris was materially different from that used in the Voyage Charter. It referred to the charterers in that case appointing "*... their own Broker or Agent and Stevedores at the ... port of discharge"*. [Emphasis supplied]. That implies responsibility for discharge not merely the cost of discharge. That case proceeded on the basis of a concession that the Judge accepted was properly made in the circumstances – see page 213 RHC. Whilst there was no argument on the point, the concession was no doubt a proper one to be made given the language used and circumstances of that case. However, there is no general principle of law to be derived from that authority.

29. The next authority relied on by the Claimants is The Sormovskiy 3068 [1994] 2 Lloyd's Rep. 266. In my judgment it does not assist on the issues that arise. First, there is nothing within this authority that affects the general propositions of law to which I have so far referred. It follows that this authority is concerned with the true effect of the provision being considered in that case and in the context applicable in that case. The part of the judgment on which the Claimant relies is in a section of the judgment that starts "*The conclusions which I have reached with regard to the law and practice at Vyborg ..."* It was in that context that Clarke J as he then was concluded at paragraph 10 that the receivers of the cargo were contractually bound to discharge the vessel, as between

themselves and the owners because the contract was on f.i.o.s.t. (Free In and Out Stowed and Trimmed) terms. However, this case was decided before the decision of the Court of Appeal in The Jordan II (ibid.) and therefore without regard to the point made in that case that if the charterer or receiver has agreed to pay for the cargo operation, there is no presumption that it has also agreed to carry it out or be liable if it is done badly and proceeded on the basis of a concession – see paragraph 2 on page 282 RHC. The impact of a provision to the effect that the stevedores were to be considered or deemed to be the servant of the owners was not argued or determined.

30. In those circumstances, I do not accept and in my judgment the Owner is mistaken when it asserts that the Defendants were under an obligation to discharge the Vessel. They were under an obligation to pay but only to pay for the operation and in connection with that obligation to meet the cost of the exercise by appointing stevedores who were then to carry out the exercise on behalf of the Owner. In those circumstances, the further question as to whether the Second Implied Term ought to be implied simply does not arise.

31. Even if this is wrong, the Second Implied Term ought not to be implied for two distinct reasons.

32. First, although some reliance was placed on Clause 20 of the Voyage Charter, which provides that " *(a)ny time lost for which Charterers/Receivers are responsible, which is not excepted under this Charterparty, shall count as laytime, until same has expired, thence time on demurrage*." in my judgment that does not assist the Owner. The purpose of this provision is to enable demurrage to be calculated by attributing any delay for which either the charterer or receiver is otherwise legally responsible first to lay time and critically to provide that any demurrage payable was to paid by the Charterer alone. It does not assist on the question whether the charterer or the receiver is responsible for any delay that occurs. That is provided for expressly elsewhere in the Contract or by narrowly framed implied terms.

33. In any event, the Contract of Carriage does not lack commercial or practical coherence without the Second Implied Term. The contract works perfectly well without the Second Implied Term. As the Tribunal held, it provides that "… *demurrage should be payable by Agribusiness, not by the Bank or the Receivers*." There has been no appeal from that conclusion. As between the Owner and the Charterer, the Owner chose to accept the risk of Charterer insolvency. It is binding therefore on all parties to these proceedings. It follows that to imply the Second Implied Term would be to imply a term that contradicts the express terms of the relevant agreement, which provides that "… *demurrage should be payable by Agribusiness, not by the Bank or the Receivers*." It is not the function of the court or an arbitral tribunal to re-write contracts so as to make them more favourable in the interest of one party by reference to events that occurred after the contract has been entered into, which with the benefit of hindsight suggest that the terms that party agreed to were imprudent.

*First Implied Term*

34. This part of the case is concerned with the Owner's submission that there is to be implied into the contract a term to the effect that the Defendants would take all

necessary steps to enable the cargo to be discharged and delivered within a reasonable time.

35. The Owner contends that there is a distinction to be drawn between discharge and delivery. I agree that there is a such a distinction and the defendants either agree that is so or don't dispute it to be so. Discharge is the landing of the Cargo from the Vessel. Delivery is the transfer of possession of the Cargo from the carrier to the receiver once the Cargo is discharged.

36. In relation to the submission that there is a term to be implied into the Contract of Carriage that the Defendant would take all necessary steps to enable the cargo to be discharged within a reasonable time, in my judgment that should be rejected for at least the following reasons.

37. First, this is an attempt to avoid the difficulty that discharge was an obligation that rested exclusively on the Owner. This was one of the reasons the Tribunal adopted for rejecting the First Implied Term – see paragraph 63 of the Award – applying The Spiros C [2000] 2 Lloyd's Rep. 319. As The Tribunal said at paragraph 63 of the Award: "*it would be anomalous if the Owners could say that it was necessary and reasonable to imply into [Bill] terms that run counter to the structure of the Voyage Charter*."

38. Secondly, it is entirely unnecessary to imply such a wide and generally expressed term into the Contract of Carriage. Although Mr Collett submits at Paragraph 72 of his written submissions that " *a bill of lading contract which gives the owner no rights at all against its counterparties in relation to discharge and delivery is not a workable contract …"* that is not the case here. Discharge is not a collaborative process under the Contract of Carriage other than in one respect – by the Contract of Carriage, the receiver is under an obligation to appoint stevedores by operation of clause 11. However that does not make the implication of the First Implied Term necessary or reasonable because (a) the express obligation to appoint is absolute in its terms and (b) there is an express agreed contractual mechanism contained in clause 20 of the Voyage Charter terms that applies in the event that discharge is delayed by the failure by the defendants to appoint stevedores. It follows that there is no necessity for even a narrow implied term concerning the appointment of stevedores because it has been agreed this will be managed by demurrage to be paid by the Charterer, much less one in the very general and unqualified terms sought by the Owner.

39. The Owner contends that there is an absolute obligation on the receivers to make a berth available. Assuming that to be so does not assist in the implication of the wide ranging general term for which the Owner contends for the reasons already given. First, assuming that such an obligation is to be implied into the Contract of Carriage (it is not necessary for me to decide whether that is so or not) such a duty requires only a very narrowly expressed implied term that requires the receivers to make a berth available and it seems probable that a failure to do so would be subject to the demurrage machinery within the Contract of Carriage. Again however it is not necessary for me to decide whether that is so.

40. Turning now to delivery, there is plainly no need to imply a term in the general and unqualified terms for which the Owner contends in order to give the Contract of Carriage commercial coherence. As I have mentioned in passing already, the basis on

which the Owner seeks to imply the First Implied Term is because it contends at least implicitly that delivery is a collaborative process. The reason why this is an important element of the Owner's case is because it seeks to imply the term relying on the principle summarised by Lord Blackburn in Mackay v. Dick (1881) 6 App. Cas. 251 at 263:

> "I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances." [Emphasis supplied]

However, delivery no more depends on collaboration than does discharge. Following, or perhaps as part of discharge, the carrier offers the goods for delivery to the receiver. If the receiver fails to take delivery the consequences are those provided by the general law by the implication of a long established, much narrower and more nuanced obligation. As was held in The Bao Yue [2015] EWHC 2288 (Comm) [2016] 1 Lloyds Rep 320 by Males J as he then was at paragraph 49:

> "It has been established for many years that if the bill of lading holder does not claim delivery within a reasonable time, the master may land and warehouse the cargo; that in some circumstances it may be his duty to do so; and that as a correlative right, the shipowner is entitled to charge the cargo owner with expenses properly incurred in so doing … "

41. Returning to general principle, there is no necessity to imply the wide, generally expressed and unqualified term contended for by the Owner in this case because (a) to the extent the Defendants were under an obligation to provide a berth, that can be provided by a narrowly expressed implied term focussed exclusively on that assumed obligation, (b) the provision of stevedores is the subject of express provision; (c) the Contract of Carriage contains a demurrage regime that renders the Charterer liable to pay demurrage for any "*… time lost for which the… receivers are responsible which is not excepted under this Charterparty …*" and to the extent that it applies there is no necessity to imply terms imposing similar obligations on other parties and/or any such implied term would be inconsistent with what had been expressly agreed; (d) delivery does not require collaboration between carrier and receiver in any legally relevant sense, (e) the general law already provides a solution where the receiver does not accept delivery and (f) the Contract of Carriage does not lack commercial coherence without the implication of the First Implied Term.

42. The Owner contends that this is a wrong approach and that the correct approach is to imply a term to the effect of the First Implied Term and then leave it to a later stage to determine the nature and extent of the obligation is creates. In my judgment this fails for a number of different reasons. First and at its most general, to the extent the term depends on the idea that either discharge or delivery is a collaborative process engaging the general principle derived from Mackay v. Dick (ibid.) it fails at that point because

neither discharge or delivery at any rate under the Contract of Carriage is collaborative in any legally relevant sense.

43. Secondly, the Owner has not been able to identify what act or omission might constitute a breach of the First Implied Term other than those already considered – that is the duty to provide a berth, Stevedores and take delivery. Thus there is no necessity identified for implying a much wider and generally expressed term in those circumstances. In this regard, Lord Blackburn's statement of principle cited above does not assist the Owner because as he says in the final sentence from the part of his opinion quoted above, "*... What is the part of each must depend on the circumstances ...*". In my judgment it is wrong in principle to separate conclusions as to the width or scope of a term to be implied into a contract to facilitate cooperation without first having made findings that establish the relevant circumstances. As I explained at the outset that simply has not been done. In those circumstances, if and to the extent that the Owner contends there are other implied obligations of an absolute nature going further than those I have noted so far then that will have to await completion of a factual enquiry. Until that has been done it will not be possible to decide whether it is necessary to imply a term that goes beyond providing a berth and accepting delivery when tendered and if so in what terms.

## Conclusion

44. This appeal fails and is dismissed.