United Kingdom Supreme Court

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Summary

Easter Term
[2016] UKSC 20
On appeal from: [2014] EWCA Civ 403

JUDGMENT

NYK Bulkship (Atlantic) NV (Respondent) *v* Cargill International SA (Appellant)

before

Lord Neuberger, President
Lord Mance
Lord Clarke
Lord Sumption
Lord Toulson

JUDGMENT GIVEN ON

11 May 2016

Heard on 1 December 2015

Appellant	*Respondent*
Simon Rainey QC Daniel Bovensiepen (Instructed by Holman Fenwick Willan LLP)	Timothy Young QC Belinda McRae (Instructed by Skinitis Maritime Law Firm)

LORD SUMPTION: (with whom Lord Neuberger, Lord Mance and Lord Toulson agree)

Introduction

1. The *Global Santosh* was time chartered on terms that the vessel should be off-hire during any period of detention or arrest by any authority or legal process, unless the detention or arrest was "occasioned by any personal act or omission or default of the Charterers or their agents." She was arrested as a result of a dispute between the receiver of the cargo and a party who appears to have been a sub-sub-charterer, and which had nothing to do with the owners or the ship. The question which arises on this appeal is whether the arrest can be regarded as having been occasioned by the time charterer's "agents" in the sense in which that word is used in the proviso. The answer to this question turns on the language of the particular charter-party, but it has wider implications of some importance. Arbitrators appointed under the terms of the time charter have held by a majority that it cannot. The matter comes before the courts on an appeal under section 69 of the Arbitration Act 1996.

The facts

2. The facts can be taken from the arbitrators' award and the agreed statement of facts and issues. By a time charter-party dated 11 September 2008, NYK chartered the vessel *Global Santosh* to Cargill for one time charter trip "intention cement via Sweden to West Africa Nigeria. Intended cargo bulk cement. Duration 35 days without guarantee." The charter was on the Asbatime form, which was a variation of the New York Produce Exchange 1946 form. There were a number of typed additional clauses.

3. Against the side note "Sublet" the charter reads at lines 31-33:

> "Charterers shall have liberty to sublet the vessel for all or any part of the time covered by this Charter, but Charterers shall remain responsible for the fulfilment of this Charter."

By clause 8, NYK undertook that the master would be "under the orders and directions of [Cargill] as regards employment and agency", and Cargill undertook to "perform all cargo handling at their expense".

4. There are no less than three off-hire clauses. The printed form includes an off-hire clause (clause 15) in standard terms covering

> "loss of time from deficiency and/or default and/or strike or sabotage by officers or crew or deficiency of stores, fire, breakdown of, or damages to, hull, machinery or equipment, grounding. detention by average accidents to ship or cargo unless resulting from inherent vice, quality or defect of the cargo, dry-docking for the purpose of examination or painting bottom, or by any other similar cause whatsoever preventing the full working of the vessel."

Typed clause 48 is a further off-hire clause which largely overlaps with clause 15. It relates to

> "loss of time either in port or at sea, deviation from the course of the voyage or putting back whilst on voyage, by reason of breakdown of machinery, collision, stranding, fire or any other accident or damage to the vessel, or dry-docking or periodical survey, or sickness or accident to the Master, Officers, Crew or any person on board the vessel other than persons travelling by the Charterers' requests or by reason of sending stowaway or salvage, or by reason of the refusal of the Master, Officers or Crew to do their duties, or any Owners' matters."

Typed clause 49 is an additional off-hire clause relating specifically to detention resulting from capture, seizure or arrest. It provides:

> "Should the vessel be captured or seizured [sic] or detained or arrested by any authority or by any legal process during the currency of this Charter Party, the payment of hire shall be suspended until the time of her release, *unless such capture or seizure or detention or arrest is occasioned by any personal act or omission or default of the Charterers or their agents*. Any extra expenses incurred by and/or during the above capture or seizure or detention or arrest shall be for Owners' account." (emphasis added)

5. On 18 August 2008, before they entered into the time charter, Cargill had entered into a voyage charter-party as disponent owner with Sigma Shipping Ltd ("Sigma") as charterer, under which the performing vessel was to be nominated. Cargill nominated the *Global Santosh*. Pursuant to Cargill's orders, the vessel carried a cargo of bulk cement from Slite in Sweden to Port Harcourt in Nigeria. The cargo was one of six shipments of cement sold by Transclear SA to IBG Investments Ltd on C & FFO terms under a sale contract dated 14 December 2007. IBG was named as the notify

party in the relevant bill of lading, which also named the discharge port as "Port Harcourt (Ibeto Jetty)". The majority arbitrators held that it seemed likely that Transclear was the sub-charterer of the vessel but, whether by way of charter from Sigma or by a more indirect link, was not apparent.

6. The FO element of the sale terms stands for "free out". Under free out sale terms, the buyers/receivers (here, IBG) undertake to perform, or procure and pay for the performance of, the unloading of the cargo from the carrying vessel. By the sale contract between Transclear and IBG demurrage was payable by IBG to Transclear for delay in discharge beyond the laytime agreed in that contract and Transclear was purportedly granted a lien over the cargo in respect of unpaid demurrage.

7. The contractual position as regards cargo handling was accordingly as follows. By clause 8 of the time charter Cargill undertook to perform all cargo handling at their expense. It follows that, as between Cargill and NYK, it was for Cargill to perform the discharge operation at its expense. As between Cargill and Sigma, it was for Sigma to do so. In fact, neither Cargill nor Sigma themselves carried out any discharging obligations. They were left to others. It appears that it was ultimately IBG's obligation, owed to Transclear under the contract of sale, to carry it out.

8. The vessel arrived at Port Harcourt on 15 October 2008 with a cargo of 30,324 metric tons of cement in bulk ("the cargo") and tendered notice of readiness at 0635 hours local time on the same date. However, as the majority arbitrators held at para 9 of their reasons, due to congestion at Port Harcourt, she was instructed to remain at Bonny Town Anchorage. The congestion was caused at least in part by the breakdown of IBG's off-loader. No discharge operations took place at the anchorage, and the vessel did not proceed to a berth until 18 December 2008. During that period the vessel remained on hire under the charter and Cargill continued to pay hire.

9. The vessel did not in fact berth on 18 December because she was turned away by the port authority and ordered to return to Bonny Town inner anchorage. The authority gave those instructions pursuant to an order dated 17 December 2008 (the day before) made by the Federal High Court of Nigeria. The majority arbitrators did not spell the facts out in any greater detail than to say at para 11 of their reasons (as amplified in para 36) that the order arose from an application brought by Transclear to secure a claim for demurrage against IBG, that what should have been arrested was the cargo, but that by an obvious mistake the order directed the arrest of the vessel. The arbitrators added that the order and subsequent notice of arrest of the same date expressly prohibited any and all persons from interfering with and/or attempting to discharge the cargo. Accordingly, the master returned to the anchorage and waited for the arrest to be lifted. On 18 December 2008, Cargill gave these orders to the master in writing:

> "Dear captain Good Day. Pls do not commence cargo disch until you get written confirmation from us. Pls call me back once you receive this message. Best Regards. Ritesh Chandra."

10. Subsequently, an agreement in respect of the outstanding demurrage was reached between Transclear and IBG which allowed the vessel to berth and discharge her cargo. Following the issuance of an appropriate order by the presiding judge of the Court of Nigeria authorizing the cargo's release, discharging operations began at 2230 hours (local time) on 15 January 2009 and were completed at 2235 hours (local time) on 26 January 2009.

11. Cargill withheld hire for the period of arrest but recommenced the payment of hire when actual discharge began. Cargill relied on clause 49 of the charter to justify non-payment of hire but, in answer, NYK relied on the proviso

> "unless such capture or seizure or detention or arrest is occasioned by any personal act or omission or default of the Charterers or their agents."

The majority arbitrators held that the proviso did not apply and that the vessel was off-hire during the period when she was under arrest. On 23 May 2012, Hamblen J granted NYK leave to appeal under section 69 of the Arbitration Act 1996 on the question "whether the arrest or detention of a time chartered vessel by or because of the acts or omissions of sub-contractors, involved to perform the time charterer's charter-party obligations, fall within the meaning of an off-hire clause excluding time from off hire if 'occasioned by any personal act or omission or default of the Charterers or their agents'".

The proviso

12. Loss of time due to the arrest or detention by authority of a time chartered vessel is a long-standing problem, aggravated by the difficulty in obtaining compensation for an arrest or detention which proves to be unjustified or is made in support of a claim which fails. The problem is increasingly dealt with by express provision. Clause 49 of this charter-party is a typed clause, but variants of it are in common use. The main purpose of such clauses is to protect the time charterer. The proviso for cases where the arrest or detention is occasioned by the charterer or its agents is generally narrowly construed, and cases in which it applies are not necessarily expected to arise very often. The classic cases for its application are those in which the vessel is arrested in legal proceedings or detained by authority on account of some characteristic of the cargo that the charterer has caused to be shipped or something that the charterer has ordered the vessel to do under the employment clause. Even these cases will often give rise to difficult questions of causation.

Agency

13. The extension of the proviso to acts of the time charterer's "agents" adds an additional layer of difficulty. There was in this case no personal default on the part of Cargill as time charterers. Their obligation under clause 8 to "perform all cargo handling at their expense" did not import any duty to handle cargo at any particular time, provided that they redelivered the ship at the end of the time charter term with no cargo on board. It follows that to avail themselves of the proviso to clause 49, NYK must rely on an act or omission of Transclear or IBG, as the parties to the dispute which occasioned the arrest.

14. Strictly speaking, an "agent" is a person authorised by the principal to perform some act on his behalf. Neither Transclear nor IBG was an "agent" of Cargill in this sense. They had no contractual or other legal relationship with Cargill. However, neither party to this appeal contends that the proviso applies only to agents in the strict legal sense. Even where a time chartered ship is traded for the time charterer's own account, cargo handling on discharge may be carried out by an independent contractor or a receiver acting for his own account. But the essence of a time charter on these terms is that the vessel will not necessarily be traded for the time charterer's own account. The ship may be sub-let, as lines 31-33 of this time charter envisage. If so, the chain of contracts may

comprise one or more sub-time charters or voyage charters and/or a bill of lading. Their terms will not necessarily be back to back in the relevant respects with those of the time charterer. In such cases, the charter operates as a contract under which rights are enjoyed and obligations performed vicariously. The extension of the proviso to the time charterer's agent is intended to accommodate that state of affairs.

15. The legal implications of such arrangements have more often been assumed than considered. The two decisions which have most fully addressed the point are the decision of the Court of Appeal in *Mediolanum Shipping Co v Japan Lines Ltd (The Mediolanum)* [1984] 1 Lloyd's Rep 136 and the decision of Colman J in *Merit Shipping Co Inc v T K Boesen A/S (The Goodpal)* [2000] 1 Lloyd's Rep 638.

16. In *The Mediolanum*, the question arose in the context of the safe port warranty in the New York Produce Exchange form of time charter. The charterers had contracted to provide and pay for fuel. They ordered her to a safe port but she was directed to an unsafe place in that port by the refinery with whom the charterer had contracted for the supply of bunkers. Kerr LJ, delivering the judgment of the court, said at p 140:

> "Although, in relation to the charterers, the refinery was in the position of an independent contractor, we naturally accept that for the purposes of the charterers' obligation, under clause 2 of the charter-party, to provide the fuel, the refinery was the agent of the charterers as between the charterers and the owners. The reason is that, in that respect, the refinery was used by the charterers in order to perform one of the charterers' obligations under the contract."

The charterer was nevertheless held not to be in breach of the safe port warranty because even on the assumption that the refinery's authority as agent extended to designating a bunkering place, it was not at fault in designating this particular bunkering place.

17. In *Trade Star Lines Corp v Mitsui & Co Ltd (The Arctic Trader)* [1996] 2 Lloyd's Rep 449, the legal status of the shipper was considered in the context of an argument about the implication of terms. The details of the argument do not matter. Evans LJ, delivering the judgment of the court, observed at p 459:

> "It is clear, in our judgment, that when the time charterer instructs the master, pursuant to the employment provisions of clause 8, to receive certain cargo on board, and the cargo is loaded at the charterer's expense, although under the supervision and maybe at the risk of the shipowner, then the cargo is loaded by or on behalf of the charterer for the purposes of the charter-party, and a third party shipper should be regarded as the charterer's agent accordingly."

18. In *The Goodpal*, the ship had been time chartered and then sub-chartered for a time charter trip to two successive ports of discharge. The sub-charterer ordered the vessel to discharge a specified quantity of cargo at the first port of discharge, but the receivers ordered him to discharge more than that quantity. As a result, there was a short outturn at the second port, which led to the arrest of the ship at the suit of the consignee there. The question was whether the head charterer was

liable for the short delivery on the footing that the receivers' orders at the first port were given as their "agents". Colman J analysed the position as follows, at pp 642-643:

> "In order to test the frequently repeated assertion that, for the purposes of the incidence of the rights and obligations of the parties to a time-charter, whether on the NYPE or most other forms, the shipper or receiver, as the case may be, is to be treated as the charterers' agent, it is necessary to identify certain basic and, as I believe, long established principles upon which time charters work.
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> …
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> (iv) The process of loading the cargo is usually carried out and paid for by the shippers. In as much as express provision is made for the loading to be under the supervision of the master, he is entitled in his discretion to intervene to require loading to be carried out in such a way that the seaworthiness of the vessel is not put at risk.
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> (v) When the vessel is ordered by the charterers to proceed to a loading port to load a particular cargo and the process of loading is carried out by the shippers, they are availing themselves of the facility contractually derived either directly or indirectly from the charterers of being permitted to place their cargo on board the vessel for carriage to the port of discharge. They are in one sense the 'agents' of the time charterers, as described in the passage cited earlier in this judgment from *The Arctic Trader,* sup, but only to the extent that it is to them that the charterers have delegated the process of loading. Within that limited area their acts or omissions are, so far as the owners are concerned, the acts and omissions of the charterers and their knowledge of the condition of the goods is to be imputed to the charterers.
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> …
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> (viii) Just as the charterer can make available to a third party shipper the facility to load the vessel, so also there can be extended to a third party receiver the facility to discharge the cargo at the designated discharging port. … Once again, the receiver is in the position of a delegate of the charterer and in that limited sense can be described as the charterers' agent. If therefore he permits the vessel to be discharged in such a way as to damage the ship or other cargo on board, the charterers are obliged to indemnify the owners for loss and damage so caused."

Colman J went on to hold that the time charterers of *The Goodpal* were not responsible contractually for the order given by the receivers at the first port of discharge, because their "agency" could not extend to cargo which was not consigned to them but destined for other consignees at the second port.

> "The only relevant instructions were received from the receivers at the first discharge port who could not reasonably have been thought by anybody to be standing in the position of the charterers in relation to the balance of the cargo to be loaded at the second discharge port." (p 644)

19. As these observations, all from experienced specialists in the field, show, references in a time charter to acts of the charterer's "agents" in the course of performance cannot necessarily be limited to persons doing those acts on his behalf in the strict legal sense of the term, or indeed to those standing in any direct legal relationship with him. As between the owner and the time charterer, the rights of the time charterer are made available to those further down the contractual chain, and some at least of the time charterer's obligations are satisfied by the acts of subcontractors. As Colman J put it, the persons ultimately carrying out the relevant cargo handling operation (loading or discharging) are "availing themselves of the facility contractually derived either directly or indirectly from the charterers." They are, to that extent, the "agents" of the time charterers in the sense in which that word is employed in a provision such as clause 49.

The issue

20. Under the time charter of the *Global Santosh*, Cargill enjoyed the facility of directing where and (within the limits of the possible) when to discharge. The parties who were ultimately entitled to the benefit of that facility were those interested in the cargo, namely Transclear and IBG. It is common ground that they were for that purpose "agents" of Cargill.

21. Nobody suggests that the mere fact that they were Cargill's agents for that purpose means Cargill is responsible for anything that they might do which results in the detention of the ship. The reason is that not everything that a subcontractor does can be regarded as the exercise of a right or the performance of an obligation under the time charter. There must be some nexus between the occasion for the arrest and the function which Transclear or IBG are performing as "agent" of Cargill. If, for example, Transclear or IBG had caused the vessel to be arrested in support of a claim to a proprietary interest in it, it is accepted that she would have gone off-hire. The position would have been the same if they had caused her to be arrested in support of a cargo claim in connection with a sister-ship. On the same principle, it was held in *The Goodpal* that the owner's claim against the time charterer failed because, although the receiver at the first port of discharge was the "agent" of the time charterer for certain purposes, those purposes did not extend to the particular acts by which he caused the problem.

22. In the present case, the right under the time charter whose exercise by Transclear and IBG is said to have occasioned the arrest is the right to call for the discharge of the cargo, and the relevant obligation under the time charter was the obligation to carry out the discharge operation. It is not disputed that Transclear and IBG exercised that right and performed that obligation as "agent" for Cargill. The real question concerns the scope of that "agency". To what acts or omissions did it extend?

The scope of the agency

23. This issue is a great deal more difficult than it is in the simple case where the vessel has been arrested because of something that the vessel has been ordered to do under the employment

clause. It is a measure of that difficulty that the courts below have given divergent answers to it.

24. The appeal from the arbitrators' award was heard in the first instance by Field J. In summary, he considered that Cargill were responsible for any "act or omission or default in the course of the performance by the delegate of the delegated task", ie in the course of discharging: [2013] 1 Lloyd's Rep 455, para 19. He held that Transclear's arrest of the cargo and the vessel was not done as part of the performance of the discharging operation, and was irrelevant. However, he considered that IBG's failure to discharge the cargo within the laydays allowed by its contract of sale with Transclear and its failure to pay the resultant demurrage arising under that contract, were omissions in the course of their performance of the discharging operation. This was because "it was Cargill after all who set in train the process of delegation and gave delegating parties a free hand to agree terms with delegates" (para 23). He therefore allowed the appeal, but remitted the award to the arbitrators to determine whether the failure to pay demurrage could be regarded as the cause of the arrest and the resultant delay.

25. Both parties appealed to the Court of Appeal, which dismissed both the appeal and the cross-appeal. The substantive judgment was given by Gross LJ, with whom Gloster LJ and Sir Stanley Burnton agreed: [2014] 2 Lloyd's Rep 103. They substantially affirmed Field J's order, but on different grounds and with a variation to the terms of the remission to the tribunal. Gross LJ rejected the requirement imported by the judge that the act or omission causing the delay must occur in the course of performance of the delegated task. He also disputed the relevance of the demurrage terms agreed between Transclear and IBG. But he took a wider view than Field J of the scope of the "agency" of Transclear and IBG. He sought the answer in the "basic distinction" pointed out by Rix LJ in *Hyundai Merchant Marine Co Ltd v Furnace Withy (Australia) Pty (The Doric Pride)* [2006] All ER (Comm) 188, para 33, between matters such as the management of the vessel and its crew which lay within the owner's sphere of responsibility, and the trading arrangements for the use of the vessel which lay within the charterer's sphere of responsibility. In Gross LJ's view, the delay caused to the vessel in this case fell within Cargill's sphere because NYK was not involved in the dispute between Transclear and IBG, which did not arise out of anything that the ship was alleged to have done or failed to do, but only to IBG's alleged failure to pay demurrage under a contract with which NYK were not concerned. Gross LJ considered that the dispute arose out of Cargill's "trading arrangements concerning the vessel". (para 41). By this I take him to have meant that by sub-chartering to Sigma, Cargill made possible trading arrangements between parties further down the chain of contracts under which such disputes might arise.

26. I regret that I am unable to accept the reasoning of either of these judgments. On the facts found by the arbitrators, which I have summarised, I think that their conclusion was correct.

27. The time charter did not specify what cargo handling operations were to occur, but under clause 8, Cargill was required to perform or procure to be performed whatever cargo handling operations occurred. This imported a right to direct the vessel in accordance with Sigma's requirements and indirectly those of Transclear and IBG. It also imported an obligation to ensure that cargo handling was done properly and to pay for it. But, as I have observed, as between themselves and NYK, Cargill had no contractual obligation to procure the vessel to be discharged at any particular time, and no contractual interest in the timing of the operation. They were obliged to pay hire regardless of when it occurred. That was subject to clause 49, but the off-hire event for which clause 49 provided was the capture, seizure or arrest of the vessel, irrespective of any effect on discharge. Transclear and IBG did have obligations as to the timing of discharge, which arose from the laytime and demurrage provisions of their contract of sale, but neither NYK nor Cargill was

a party to that contract. This state of affairs gives rise, as it seems to me, to two problems for NYK's claim in these proceedings.

28. The first is that the effect of these arrangements, as between NYK and Cargill, was that such cargo handling operations as occurred, although carried out by IBG, were carried out on Cargill's behalf, at their orders and expense under clause 8 of the time charter. It was the vicarious exercise of a right of Cargill under the time charter, which Cargill indirectly made available to IBG. But the defective performance of cargo handling operations is one thing. An absence of cargo handling operations is another. Whatever its cause, IBG's failure to discharge the cargo between the giving of notice of readiness on 15 October 2008 and the commencement of discharge on 15 January 2009 cannot meaningfully be regarded as the vicarious exercise by IBG of some right of Cargill under the time charter. IBG were doing nothing in this period, as far as the vessel was concerned, and were therefore doing nothing on behalf of Cargill. Their inactivity could be relevant to the question of responsibility posed by clause 49 only if it amounted to the vicarious breach of some obligation of Cargill under the time charter, which it did not. It follows that any responsibility of Cargill under the time charter for IBG's acts or omissions in the conduct of cargo handling operations at the port of discharge, extended only to acts or omissions in the actual performance of those operations while they were in progress.

29. Field J thought otherwise, because the laydays under IBG's purchase contract began with the service of the notice of readiness three months earlier and, by sub-chartering the vessel to Sigma, Cargill had set in train the chain of transactions which culminated in the appropriation of the cargo of the Global Santosh to that contract. Like Gross LJ in the Court of Appeal, I do not think that the terms of IBG's purchase contract have any bearing on the present issue. We are not concerned with the question whether the delay was a breach of the purchase contract. The question is whether IBG, by omitting to discharge at any time before 15 January 2009, were vicariously exercising rights or vicariously infringing obligations under the time charter between NYK and Cargill. That can only depend on the terms of the time charter.

30. The second difficulty in NYK's way is that we are not in this case concerned with responsibility for delay generally, but with responsibility for loss of time caused by the arrest of the vessel. The arrest was occasioned by a dispute between Transclear and IBG about demurrage. Incurring or enforcing a liability for demurrage under a sub-contract could not possibly be regarded as the vicarious exercise of any facility made available to Cargill under the time charter.

31. It remains to consider the wider basis on which the matter was dealt with in the Court of Appeal. Gross LJ asked himself whether the arrest was occasioned by matters lying within the owner's or the time charterer's sphere of responsibility. If it was occasioned by matters lying within the time charterer's sphere of responsibility, ie those relating to the charterer's employment of the vessel, then it was in principle within the scope of the functions delegated down the chain of contracts. I do not find this distinction helpful in the present context. It is no doubt true that the proviso to clause 49 is broadly speaking concerned with matters for which the time charterer may be regarded as responsible. But that does not tell us what those matters are. Where the range of matters for which the time charterer is responsible depends on what functions he has delegated to a subcontractor, it is as I have pointed out necessary to identify the extent of the delegation. Gross LJ seems to have regarded the delegation as extending to everything that arose out of Cargill's "trading arrangements concerning the vessel". The only sense in which the arrest of the Global Santosh can be said to have been occasioned by Cargill's trading arrangements concerning the vessel, is that by sub-chartering her to Sigma Cargill made it possible for Transclear and IBG to become involved

further down the chain. That in turn provided the occasion for their dispute to lead to the arrest and detention of the vessel. What this amounts to is that anything that the sub-charterers or receivers may choose to do which results in the arrest of the vessel, becomes the responsibility of the time charterer if the occasion for doing it would not have arisen but for their having come in at the tail end of a chain of contracts which the time charterer initiated. Such a test is impossible to justify, since it depends simply upon the status of the sub-charterer or receiver, and would not necessarily require any nexus between the acts leading to the arrest and the performance of functions under the time charter. At para 40(ii), Gross LJ thought that the "agency" would not extend to some act of a sub-charterer or receiver which was "wholly extraneous or unrelated to sub-letting under the [sub-charter] or inconsistent with its scheme". This must of course be correct, but it is difficult to see how it can be accommodated within the basic principle which Gross LJ adopted.

32. It is right to add that clause 49 does not readily lend itself to the dichotomy suggested by Gross LJ. While the other off-hire clauses in Cargill's time charter (clauses 15 and 48) relate broadly to matters relating to the owner's management of the vessel which prevent him from making the contractual services available to the time charterer, this is not true of clause 49. Capture, seizure or arrest will not necessarily lie within the spheres of responsibility of either party. In *The Doric Pride*, *supra*, from which Gross LJ derived his dichotomy, Rix LJ was concerned with a proviso for cases where the capture, seizure or detention arose from the charterer's choice of loading or discharging port, and it was in that context that he made the observations cited by Gross LJ.

Conclusion

33. I would allow the appeal, set aside the orders of both courts below and dismiss NYK's appeal under section 69 of the Arbitration Act 1996.

LORD CLARKE: (dissenting)

34. I have reached a different conclusion from that reached by Lord Sumption. I would dismiss the appeal. I gratefully adopt the account of the facts given by Lord Sumption in paras 1 to 11 of his judgment. The question for decision is whether the vessel was off hire during the period when she was under arrest and unable to discharge as a result (as Lord Sumption puts it) of a dispute between the receiver of the cargo and a party who appears to have been a sub-sub-charterer which had nothing to do with the owners of the ship. That depends upon whether the owners can show that the arrest was "occasioned by any personal act or omission or default of the Charterers or their agents" within the meaning of clause 49 of the charter.

35. It is common ground that Transclear and IBG were for some purposes the "agents" of the Cargill within clause 49. As Lord Sumption puts it at para 22, the right under the time charter whose exercise by Transclear and IBG is said to have occasioned the arrest of the vessel is the right to call for the discharge of the cargo. The relevant obligation under the time charter was the obligation to carry out such discharging obligations as should be required. As Lord Sumption says, it is not disputed that Transclear and IBG exercised that right and performed that obligation as "agent" for Cargill. The real question, he says, concerns the scope of that "agency". To what acts or omissions did it extend?

36. Approaching the matter in that way, I am of the opinion that the answer is that it extends to the operation of the vessel from the time that notice of readiness was given (or perhaps earlier) until the completion of discharge. Throughout that time the vessel was complying with the orders of the charterers (ie Cargill) as to proceeding to a berth, waiting to discharge and subsequently discharging. If she had been arrested by Transclear or IBG in the course of the discharging operations themselves there could surely be no doubt that they would be treated as the "agents" of Cargill. To my mind the same is true of an arrest during the period during which she was waiting to discharge.

37. The true construction of the charter, like the construction of any contract, depends on the language used by the parties construed in its context and having regard to the commercial purpose of the clause. In the case of arrest, one would surely expect the vessel to be off hire if she is arrested by reason of some act or default of her owners or, as a result of some event associated with the vessel or her owners. Here, the arrest had nothing to do with NYK. It was a detention or arrest at the instance of Transclear by reason of an alleged failure by IBG to pay demurrage under the agreement between Transclear and IBG. Why then should the vessel be off hire in circumstances where it is common ground (a) that she was not off hire by reason of an earlier failure of IBG to provide a working offloader and (b) the arrest was not caused either by any act or omission on the part of NYK or by any event associated with the owners or the ship?

38. It is convenient to repeat here clauses 8 and 49 of the charter:

> "8. Prosecution of Voyages
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> The Captain shall prosecute his voyages with due despatch, and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by the Owners) shall be under the orders and directions of the Charterers as regards employment and agency; and Charterers are to perform all cargo handling at their expense under the supervision of the Captain, who is to sign the bills of lading for cargo as presented in conformity with mate's or tally clerk's receipts. However, at Charterers' option, the Charterers or their agents may sign bills of lading on behalf of the Captain always in conformity with mate's or tally clerk's receipts. All bills of lading shall be without prejudice to this Charter and the Charterers shall indemnify the Owners against all consequences or liabilities which may arise from any inconsistency between this Charter and any bills of lading or waybills signed by the Charterers or their agents or by the Captain at their request.
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> 49. Capture, Seizure, Arrest
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> Should the vessel be captured or seizured or detained or arrested by any authority or by any legal process during the currency of this Charter Party, the payment of hire shall be suspended until the time of her release, unless such capture or seizure or detention or arrest is occasioned by any personal act or omission or default of the Charterers or their agents.
>
> Any extra expenses incurred by and/or during the above capture or seizure or detention or arrest shall be for Owners' account."

39. Notice of readiness was tendered at 0635 hours local time on 15 October 2008. It seems to me to be a reasonable inference that the notice of readiness was communicated to all of Cargill, Sigma, Transclear and IBG. The next step was for the discharge of the cargo. I would accept that it was not the duty of Cargill as charterers to discharge the cargo at any particular time but, in accordance with lines 31-33 of the charter, they remained responsible for the fulfilment of the charter notwithstanding that the vessel was sub-chartered. Moreover, by clause 8, it was agreed that the master would be "under the orders and directions of the Charterers as regards employment and agency; and the charterers [were] to "perform all cargo handling at their expense".

40. It is common ground that the vessel remained on hire during the period between her arrival on 15 October and 18 December 2008 when she was instructed to proceed to a berth for discharging. In the meantime she was simply waiting at Bonny Town Anchorage. The delay was caused by congestion which was caused at least in part by the breakdown of IBG's offloader and thus by the failure of those responsible for the discharge to arrange for the discharging. Under the charter that was of course Cargill, even though the delay was in fact caused in part by IBG. It seems to me that in these circumstances it is appropriate to regard IBG as the "agents" of Cargill during this period for the purposes of the charter, even though they were not agents in the classic Bowstead sense of being appointed by Cargill to perform a particular act or class of act. As I see it that is why it is correctly accepted that Cargill continued to pay hire for the period of delay and was obliged to do so. In these circumstances it was or would have been appropriate to regard IBG as the "agents" of Cargill in respect of the delay caused by congestion which was in turn caused by the breakdown of their unloader.

41. I appreciate that there is no clause similar to clause 49 expressly putting the vessel off hire in that period. But why is that so? The answer must be that the parties appreciated that there was no sensible basis for including the breakdown of sub-charterers' discharging equipment as an off hire event. That was surely because it was accepted on all sides that (as stated above) the scheme of the time charter was that the vessel would be on hire throughout the time charter period unless there was some reason associated with the vessel or her owners why they should not receive hire during a particular period.

42. I agree that it is necessary for the owners to show that the particular acts which caused the vessel to be arrested were done in the capacity of Cargill's agents, ie by way of vicarious enjoyment of Cargill's contractual rights or vicarious performance of its obligations, pursuant to its express rights under clause 8 to give orders and directions as to employment and agency. Further (by reason of lines 31-33) it had a right to sub-charter the vessel under the charter and did so by sub-chartering to Sigma, which in turn sub-contracted in some way with Transclear and/or IBG.

43. I would accept the way the owners put their case as follows. Cargill were enabled to generate the string of contracts referred to above and thus engage the involvement of both Transclear and IBG to discharge the vessel by virtue of the express liberty to sublet the vessel granted by the charter with NYK. Under that liberty, Cargill were expressly to remain "… responsible for the fulfilment of the charter". Cargill could delegate the performance of the charter to sub-contractors but could not delegate responsibility. The precise form and terms of the sub-contracts which could be concluded pursuant to the liberty to sub-let were a matter entirely for Cargill and their sub-contractors, so long as they did not amount to a breach of the charter. Thus Cargill were entitled to conclude the voyage charter with Sigma (imposing discharge functions and obligations on Sigma) and Sigma (or their intermediate sub-contractors) were entitled to conclude a voyage charter or a sale contract with Transclear (equally imposing discharge functions and obligations on Transclear)

and in turn Transclear were entitled to conclude a sale contract with IBG (imposing discharge functions and obligations on IBG). The arrest was intimately linked to the discharge functions thus delegated in turn to both Transclear and IBG. IBG's failure to discharge the vessel properly (ie within the laytime stipulated in the sale contract) led to it incurring a demurrage liability to Transclear, but, because IBG then failed to discharge the lien on the cargo for that claim, Transclear sought security for it by the arrest of the cargo and (as it transpired) also the arrest of the vessel. The arrest prevented discharge of the cargo. Quite apart from the novelty of a ship being arrested for a claim for demurrage, it is noteworthy that there was no claim against the vessel or NYK as her owners.

44. In these circumstances, while I agree with Lord Sumption in his para 27 that Cargill had no contractual obligation to the owners NYK to procure that the vessel be discharged at any particular time, I do not think that it is right to say that they had no contractual interest in the timing of the operation. As Lord Sumption observes, they had a contractual obligation to pay hire, so that the longer the delay before discharge the more hire would have to be paid.

45. It seems to me to be a reasonable inference that Cargill were either aware of the arrangements between Sigma and Transclear or were aware that it was open to Sigma to make arrangements with Transclear (and Transclear with IBG). In such circumstances they were certainly aware of the demurrage provisions in their sub-charter with Sigma (and must know whether they had a claim for demurrage). Equally they must have known that there was a real possibility of similar provisions down the line of sub-charters. As I see it, it is reasonable to hold that they must have appreciated that there might well be liabilities for demurrage down the line. I do not think that it is fair to say (as Lord Sumption does) that the chain might have included a quite different sort of contract to which Cargill were not a party and of which they would not necessarily have had any knowledge. It seems to me that it must have been clear to Cargill that there was every possibility that there would be sub-sub-charters on voyage terms and that some party other than them (or indeed Sigma) would ultimately be responsible.

46. Further, Lord Sumption draws a distinction between defective performance of the cargo handling operations on the one hand and the absence of cargo handling operations on the other. He says this, in the context of what he calls the first problem facing NYK arising out of the arrangements:

> "28. The first is that the effect of these arrangements, as between NYK and Cargill, was that such cargo handling operations as occurred, although carried out by IBG, were carried out on Cargill's behalf, at their orders and expense under clause 8 of the time charter. It was the vicarious exercise of a right of Cargill under the time charter, which Cargill indirectly made available to IBG. But the defective performance of cargo handling operations is one thing. An absence of cargo handling operations is another. Whatever its cause, IBG's failure to discharge the cargo between the giving of notice of readiness on 15 October 2008 and the commencement of discharge on 15 January 2009 cannot meaningfully be regarded as the vicarious exercise by IBG of some right of Cargill under the time charter. IBG were doing nothing in this period, as far as the vessel was concerned, and were therefore doing nothing on behalf of Cargill. Their inactivity could be relevant to the question of responsibility posed by clause 49 only if it amounted to the vicarious breach of some obligation of Cargill under the time charter, which it did not. It follows that any responsibility of Cargill

under the time charter for IBG's acts or omissions in the conduct of cargo handling operations at the port of discharge, extended only to acts or omissions in the actual performance of those operations while they were in progress."

47. As stated above, and as Lord Sumption accepts in para 8, the vessel was not off hire during the period between 15 October and 18 December because of delay caused by defects in IBG's unloader. That must be because at that time IBG was acting as "the agent" of Cargill because there was a sufficient causal nexus between the delay caused by congestion and the failure of IBG to provide an unloader for the purpose of discharging the cargo, which was of course the obligation of Cargill under the charter which had been delegated to others. It is an example of the point made by Lord Sumption in the first sentence of his para 28. The delay arose out of the vicarious exercise of the discharging operations by IBG carried out on Cargill's behalf. It was the vicarious exercise of a right of Cargill under the time charter, which Cargill indirectly made available to IBG.

48. The distinction between "the defective performance of cargo handling operations" and "the absence of cargo handling operations" altogether seems to me to be too narrow. It would surely logically lead to the conclusion that NYK should not be paid hire while waiting to discharge because of breakdown of IBG's offloader. The reason why it is not so suggested is surely that the charter is drawn up on the basis that the vessel will be on hire while carrying out the owners' obligations under the charter. Those obligations include waiting to discharge cargo in accordance with the "orders and directions of [Cargill] as regards employment and agency" in clause 8. The whole period of waiting during the period of congestion, including that caused by the breakdown of the IBG's offloader falls within clause 8. That makes commercial sense for the reason already given, namely that the delay arose out of the vicarious exercise of the discharging operations by IBG carried out on Cargill's behalf. As I see it, the discharging operations include the period of waiting after the notice of readiness and the period of actual discharge because the vessel is throughout complying with the charterers' orders under clause 8. Moreover, the vessel was also complying with Cargill's instructions in their letter to the master of 18 December (para 9) when she did not commence cargo discharge because of the court order obtained by Transclear.

49. For these reasons, I do not think that it is right to distinguish between the time when the vessel is waiting for discharge and the time when she is in fact discharging. In both cases the vessel is engaged in the actual performance of the owners' obligations and/or in the performance of the owners' rights. The vessel is waiting as instructed by the charterers or their "agents", who include for this purpose sub-charterers and those who become responsible for discharge, as for example here Transclear and IBG. This analysis seems to me to lead to the conclusion that, when the vessel was instructed not to commence discharging in Cargill's letter to the master quoted above as a result of the order of the court in Nigeria, she was complying with charterers' orders under clause 8. Moreover when Transclear took action to delay cargo discharge which resulted in the detention of the vessel (albeit as a mistake) its claim arose out of arrangements made (or not made) for the discharge of the vessel as between itself and IBG.

50. I respectfully disagree with Lord Sumption when he says that the responsibility of the charterers after the service of the notice of readiness was limited to acts or omissions in the actual performance of cargo handling operations. It extended throughout the period when the vessel, as stated above, was acting under the "orders and directions of [Cargill] as regards employment and agency". That was throughout the period when she was at anchor waiting for instructions to discharge the cargo, when she remained at anchor after the order of the Court, and thereafter when

she proceeded to a berth and discharged the cargo. It seems to me to be of some significance that (as quoted above) the proviso in clause 49, which reads

> "unless such capture or seizure or detention or arrest is occasioned by any personal act or omission or default of the Charterers or their agents",

expressly covers personal omissions and defaults of the charterers' agents. Nothing in clause 49 requires a positive act that is a specific breach of the charter, whether vicarious or otherwise. As I see it, the failure to discharge within the laydays in the sub-charter or sub-sub-charters (or the like) entered into by or with the authority of Cargill are omissions or defaults of the charterers' "agents" within clause 49. An absence of cargo handling operations is just as much defective performance of them.

51. Further, in his para 30 Lord Sumption says that the second difficulty in NYK's way is that we are not in this case concerned with responsibility for delay generally, but with responsibility for loss of time caused by the arrest of the vessel. An arrest occasioned by incurring or enforcing a liability for demurrage under a sub-charter could not possibly be regarded as the vicarious exercise of any facility made available to Cargill under the time charter. I respectfully disagree. As stated above, it seems to me that the cause of the arrest of the vessel was action taken by Transclear as a result of a failure of IBG to discharge the vessel within the lay days. It makes no difference that this was a failure as between IBG and Transclear. That failure was a failure on the part of an "agent" of the charterers, whether IBG or Transclear, or indeed Sigma, to discharge the vessel timeously, with the result that the vessel was arrested and delayed.

52. On this basis I would hold that the failure to discharge the cargo was caused by the acts or omissions of the charterers' "agents" and that when the vessel was arrested by Transclear she was arrested by the charterers' agents within the meaning of clause 49. This makes commercial sense because (as stated earlier) there is no reason why the vessel should be off hire for a reason outside the control of the vessel or her owners. On the contrary, she should be on hire and clause 49 construed accordingly. After all, the charter expressly provided at lines 31-33 that the charterers had liberty to sublet the vessel but that "Charterers shall remain responsible for the fulfilment" of the charter. It may well be that the charterers have rights over against Sigma on the basis that IBG and Transclear were delegates of Sigma's discharge functions under the sub-charter between Cargill and Sigma. We are not however concerned with those, although it would to my mind be bizarre if Cargill were entitled to demurrage at a time when the vessel was off hire, so that Cargill were not paying hire to the owners.

53. As I see it, the purpose of clause 49 is achieved by carving out of the clause the case of "… arrest … occasioned by any personal act or omission or default of the Charterers or their agents". For the reasons I have given, I would hold that Transclear and/or IBG were for this purpose the "agents" of Cargill when the vessel was arrested because the arrest was closely related to the discharge of the cargo and there is no suggestion that the vessel or her owners were in any way responsible. The owners had no control over the process of delegation or sub-delegation. The delegation included delegation of the obligation to discharge, which was ultimately passed to IBG. But IBG did not perform it at all. Looking at the matter from the perspective of the commercial risks involved, it was Transclear who subcontracted with IBG. The demurrage dispute was entirely a matter between those two parties. Why should the owners be responsible for non-performance of the obligation, in circumstances where it had no way of assessing the commercial risks attaching to the

delegation? As it turned out, those commercial risks crystallised into IBG's failure to secure Transclear's claim. This had nothing to do with NYK. In all these circumstances there is no good commercial reason why the vessel should not remain on hire.

54. I agree with Lord Sumption in para 21 that nobody suggests that the mere fact that Transclear and IBG were for some purposes "agents" of Cargill means that Cargill is responsible for anything they might do which results in the detention of the ship. I further agree that that is because not everything a subcontractor does can be regarded as the exercise of a right or the performance of an obligation under the time charter. I agree that, if Transclear or IBG had caused the vessel to be arrested in support of a claim to a proprietary interest in it or in support of a cargo claim in connection with a sister ship, the vessel would have gone off hire. It appears to me that in those cases the proviso in clause 49 would not have applied because the arrest would not have been occasioned by Cargill or their "agents" because neither Transclear nor IBG would have caused the arrest in their capacity as Cargill's "agents". The vessel would therefore have gone off hire under clause 49. By contrast, on the facts here, Transclear did occasion the arrest in their capacity as Cargill's "agent" for the reasons explained above.

55. I recognise that my construction of clause 8 (and clause 49) is wider than that proposed by Lord Sumption. However, I do not think that it is as wide as that of the Court of Appeal. The essence of my view is that stated in para 43 above. Cargill were in charge of the discharging operations, which they arranged though Sigma, Transclear and IBG. The vessel was throughout under the orders of the charterers. A decision to this effect makes sense and will not open the floodgates.

56. Finally, I do not regard my view as inconsistent with any of the decided cases. In *The Mediolanum* a refinery was engaged by charterers as an independent contractor but was held by Kerr LJ (in the passage quoted by Lord Sumption in para 16) to be the agent of the charterers because it was used by the charterer to perform one of the charterers' obligations under the contract. The claim failed for an unconnected reason, namely that the refinery was not responsible for designating the particular bunkering place. The decision in *The Arctic Trader* (referred to by Lord Sumption in para 17) carries the issue no further.

57. In *The Goodpal* in the passages from the judgment of Colman J quoted at para 18 he referred to the position of the shippers and receivers as agents of charterers in connection with the process of loading and discharging respectively. As Lord Sumption observes, Colman J held that the time charterers were not responsible contractually for the order given by the charterers at the first port of discharge because their "agency" could not extend to cargo which was not consigned to them but for other consignees at the second port. He quotes this passage:

> "The only relevant instructions were received from the receivers at the first discharge port who could not reasonably have been thought by anybody to be standing in the position of the charterers in relation to the balance of the cargo to be loaded at the second discharge port."

I would entirely accept those statements as applied in that case.

58. There is in my opinion no conflict between any of those principles and those which I would apply in this case. For the reasons given above I would hold that the vessel was on hire throughout

and would dismiss the appeal.
