Neutral Citation Number: [2021] EWHC 1157 (Comm)

Case No: CL-2020-000433

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 05/05/2021

Before :

Mr Justice Butcher

- -

IN THE MATTER OF AN ARBITRATION CLAIM

Between :

ALPHA MARINE CORP

Claimant/Owners

-and-

MINMETALS LOGISTICS ZHEJIANG CO. LTD

Defendant/Charterers

M/V 'Smart'

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- -

Charles Kimmins QC and Paul Toms (instructed by **Mills & Co Solicitors Ltd**) for the **Claimant**
Nichola Warrender QC (instructed by **Ince Gordon Dadds LLP**) for the **Defendant**

Hearing date: 21 April 2021

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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.

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THE HONOURABLE MR JUSTICE BUTCHER

Mr Justice Butcher:

Introduction

1. The Claimant, Alpha Marine Corp (the "Owners") were the owners of the vessel MV Smart (the "Vessel"). On 1 August 2013, the Owners chartered the Vessel to Minmetals Logistics Zhejiang Co. Ltd (the "Charterers"), for a time charter trip on an amended New York Produce Exchange form (the "Charterparty").

2. On 19 August 2013, the Vessel departed the port of Richards Bay in South Africa and, shortly thereafter, ran aground in the course of passing through a channel to depart the port and broke her back.

3. A dispute between the Owners and the Charterers arose out of the loss of the Vessel which was submitted to arbitration in accordance with the terms of the Charterparty. After a hearing over three weeks in November 2019, the arbitral tribunal, namely Mr Simon Gault, Sir David Steel and Mr Lionel Persey QC (the "Tribunal"), issued its first partial award on 12 June 2020 (the "Award").

4. The present arbitration claim is an appeal, pursuant to section 69 of the Arbitration Act 1996 (the "Act"), from the Award by the Owners, permission to appeal on a point of law having been granted by Order of Foxton J dated 13 October 2020.

5. Before turning to consider the question of law which arises from the Award, and the parties' respective submissions thereon, it is necessary to set out the factual background to the dispute and the relevant parts of the Award.

Background

The contractual structure

6. The Charterparty contained the following terms:

    a. Clause 8 was in materially unamended NYPE form and provided, in relevant part, that "... The Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards vessel's employment and agency... [and the Captain] is to sign Bills of Lading for cargo as presented…"

    b. Clause 16 provided that "should the Vessel be lost, money paid in advance and not earned (reckoning from the date of loss...) shall be returned to the Charterers at once."

    c. Clause 18 provided that "the Owners shall have a lien upon all cargoes and sub-hires and all sub-freights for any amounts due under this Charter..."

    d. Clause 41 set out the quantity of bunkers which the Vessel would be provided with on delivery and required that the Vessel should be redelivered with about the same quantities of bunkers as provided on delivery. It was further provided that any minor difference in bunker quantities between delivery and redelivery

"shall be settled with final hire" at a price of USD 600 per metric tonne for IFO and USD 920 per metric tonne for MGO.

e. Clause 101 provided that the Charterparty was to be governed by English law and that disputes would be resolved by arbitration in London.

7. The Charterers sub-chartered the Vessel to General Nice Resources (Hong Kong) Ltd ("GNR") pursuant to a voyage charter dated 1 August 2013 (the "Voyage Charter"). The Voyage Charter was not included in the materials before the Court; however, it is common ground between the parties and evident on the face of the Award that this stipulated that:

   a. the "freight [was] deemed to be earned whatever vsl/cargo lost or not"; and

   b. 100% of the freight payment was to be effected by GNR on or before 45 days of the Vessel sailing from the load port and after receipt of the freight invoice.

8. Two bills of lading ("the Bills of Lading") had been issued by the Owners on 19 August 2013. These provided that freight was payable "*as per charter party*". The charterparty was not identified, but it was common ground that this was a reference to the Voyage Charter. It was not in dispute that these were "owners' bills" and thus contained or evidenced a contract between the Owners and shippers.

Events after the loss of the Vessel

9. On 23 August 2013, the Charterers issued a freight invoice to GNR in the sum of USD 1,860,390, which represented 100% of the Voyage Charter freight on the basis of the cargo being discharged at Zhoushan. Pursuant to the payment terms contained in the Voyage Charter, GNR would have been required to make payment pursuant to the invoice on or before 3 October 2013.

10. On 12 September 2013, the Owners issued invoices to the cargo interests for freight due under the Bills of Lading and revoked the Charterers' authority to receive the freight and directed that it be paid into the bank account of the Owners' P&I Club instead (the "First Notice"). On or around this date, the Owners referred the dispute that had arisen between the Owners and the Charterers to arbitration.

11. On 23 October 2013, the Owners' solicitors advised the Charterers' solicitors that the Owners and GNR agreed in principle for the freight to be held in escrow, but the Charterers did not agree.

12. On 21 January 2015, the Charterers wrote to the Owners, copying GNR, requesting that they refrain from making any further demands for freight. In response, on 2 March 2015, the Owners gave notice to GNR, copying the Charterers, suggesting that they were entitled to exercise a lien over the Voyage Charter freight pursuant to the terms of the Charterparty on the basis that the Charterers were liable to them for breach of the safe port warranty in the Charterparty (the "Second Notice").

13. No payments in respect of freight were made by GNR during this period. On 17 June 2015, GNR reported that the "main reason for the delay over the past two years" in its payments of freight derived from the fact that there was an ongoing dispute between

the Owners and the Charterers concerning which party was entitled to receive the freight.

14. On 6 May 2016, the Owners, the Charterers and GNR entered into a tri-partite escrow agreement in respect of the competing freight claims. However, on 20 December 2016, GNR was wound up by an order of the High Court of the Special Administrative Region. By this time, GNR had paid a total of USD 550,000 into escrow. No further payments were made by GNR in respect of the freight and USD 50,000 of the monies held in the escrow account was subsequently paid out to the Official Receiver in November 2017. As a result, the balance in the escrow account stood at USD 500,000 (plus any interest that may have accrued thereon).

The Arbitration and the Award

15. In the arbitration, the Owners claimed that the loss of the Vessel was caused by the failure of the Charterers to comply with the safe port warranty in the Charterparty. The Owners advanced various heads of claim and the total quantum of their claim was in excess of USD 100 million.

16. The Charterers denied that they had provided a safe port warranty in respect of Richards Bay. In the alternative, the Charterers denied that the grounding was caused by any unsafety of the port, contending, instead, that it was caused by negligent navigation by those on board the Vessel. The Charterers also pursued a number of counterclaims, seeking recovery of:

    a. A sum of USD 1,860,390 in respect of lost freight which the Charterers argued would have been paid by GNR if it were not for the Owners':

        i. Wrongful revocation of the Charterers' authority to collect freight under the Bills of Lading by way of the First Notice. In this regard, the Charterers argued that the Charterparty contained an implied term that the Owners would not revoke their authority to collect freight unless hire and/or sums were due under the Charterparty and that no such sums were due on 12 September 2013 (the "Implied Term Basis");

        ii. Wrongful exercise of the lien contained in clause 18 of the Charterparty by way of the Second Notice. In this regard, the Charterers submitted that there was no "amount due under" the Charterparty as at 2 March 2015 and, as such, the Owners were not entitled to exercise a lien when they purported to do so (the "Lien Basis"); and/or

        iii. Tortious actions, in procuring breach of contract by GNR and/or knowingly and/or unlawfully interfering with the Voyage Charter (the "Tortious Basis").

    b. A sum of USD 207,408 in respect of hire which the Charterers had paid in advance for the period after loss of the Vessel and which the Owners were required, pursuant to clause 16 of the Charterparty, to repay "at once" upon loss; and

c. Costs and expenses incurred by the Charterers in dealing with the freight claims, in an amount of GBP 227,136.40 plus USD 80,726.35 (including sums of GBP 13,924.50 and USD 21,550 which were incurred prior to the Owners' issue of the Second Notice).

17. In the Award, the Tribunal addressed each of the following six issues which had been submitted to it by the parties:

> "(1) Does the charterparty contain a safe port warranty in respect of Richards Bay?
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> (2) If so, did the Charterers breach that safe port warranty?
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> (3) Were the Master and/or the crew negligent in their handling of the Vessel?
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> (4) If so, did that break the chain of causation arising from any unsafety of the Port?
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> (5) To what relief, if any, are the Owners entitled?
>
> (6) To what relief, if any, are the Charterers entitled?"

18. In summary, on Issues 1 to 4, the Tribunal found that the Charterers had provided a safe port warranty in respect of Richards Bay and that there were some shortcomings in the running of the port. However, the Master had been negligent in his handling of the Vessel and it was this that caused the grounding of the Vessel; this negligence broke the chain of causation arising from any unsafety of the port. Those matters are not subject to this appeal.

19. The Tribunal's decisions on Issues 5 and 6 are material to this appeal and need to be set out in rather more detail. On the question of to what, if any, relief the Owners were entitled, the Tribunal found as follows:

> "[151] The bulk of Issue 5 does not arise in circumstances where we have found that the Owners' unsafe port claim has failed. The Owners are not, therefore, entitled to recover the agreed value of the Vessel, the agreed value of the loss of use claim or the agreed sums incurred in respect of the wreck removal claim.
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> [152] Owners have one head of claim, in relation to bunkers, which does not depend upon their succeeding on the unsafe port claim. Owners contend that in that event they are nevertheless still entitled to recover the value of the bunkers consumed in the performance of the charterparty. This is because the Charterers were obliged under clause 41 to pay for any shortfall in the fuel on redelivery. Owners claim that they have a claim either in debt, alternatively for liquidated damages, in respect of such shortfall. They have assessed this to be US$444,558.40: i.e. 682.585MT of IFO at US$600/MT and 38.945MT of MDO at US$929/MT.
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> [153] We do not understand the Charterers to dispute this head of claim. They have made no submissions upon it in either their opening skeleton argument or their written or oral closing submissions. We find that the Charterers are liable

> to the Owners in the sum of US$444,558.40, together with interest from 1 September 2013 at a rate of US Dollar LIBOR plus 1 percent with three monthly rests."

20. As to what, if any, relief the Charterers were entitled to, the Tribunal found, in pertinent part that:

> "[157] …After the Owners' message of 12th September 2013 GNR's position was that their priority was to pay any freight due to the correct party and the fact that they entered into an escrow agreement and paid instalments into escrow confirms this. The reason why GNR did not pay the Voyage Charter freight in accordance with their usual practice is because Owners directed GNR not to do so and thereafter continued to request that GNR pay freight to them instead of to Charterers. The Owners then purported to exercise a lien over the Voyage Charter Freight. In short, Owners sought to treat the freight as de facto security for their unsafe port claims."

21. The Tribunal then turned to consider whether the Owners were entitled to intervene in relations between GNR and the Charterers in the manner in which they had, namely by issuing the First Notice and/or the Second Notice. Addressing these in reverse order, the Tribunal found:

> "[158] We are satisfied that the Owners are not and were not entitled to exercise any lien over the Voyage Charter freight, save possibly in respect of their claim in respect of bunkers. This is because Clause 18 only gives a contractual lien for "any amounts due under this Charter". The Owners' grounding claims have failed and, apart from their claim for bunkers, there is no sum due to them under the charterparty. We are further satisfied that on the true and proper construction of the Charterparty, Owners were not entitled to revoke Charterers' right to obtain the bill of lading freight or to direct it be paid to the Owners. This is because the Charterparty contained an implied obligation that Owners would not revoke unless hire and/or sums were due to them under the Charterparty and no such sums were due for the reasons given above: see Wilford on Time Charters (7th Ed) at para 30.68 which states that
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> > *"*… ordinarily under the terms of the New York Produce and similar forms of charter, there is an implied obligation on the owners to allow the charterers to collect the freight. That obligation is an implicit corollary of the obligation in clause 8 to allow the charterers to direct the ship's employment"."

22. The Tribunal, therefore, concluded that the Charterers were entitled to recover, as damages from the Owners, the value of freight which was not paid by GNR, amounting to USD 1,860,390, less the amount held in escrow. In reaching this decision, the Tribunal made no finding on the alternative Tortious Basis on which this counterclaim had been advanced.

23. The Tribunal also found that the Charterers were entitled to recover the amount of overpaid hire, which was undisputed, plus interest which had accrued on this from 1 September 2013 onwards. Finally, the Tribunal found that all costs and expenses that were properly incurred by the Charterers in dealing with the freight claims would be

recoverable, but reserved jurisdiction to assess the quantum of these costs in a later partial award given the late particularisation of these costs.

Permission to Appeal

24. On 10 July 2020, the Owners applied to Court for leave to appeal, pursuant to section 69 of the Act, on the following question of law arising out of the Award:

> "Did the Charterparty contain an implied obligation that the Claimant would not revoke the Defendant's authority to collect from GNR the freight payable under the Bills of Lading unless hire and/or sums were due to the Claimant under the Charterparty?"

25. On 13 October 2020, Foxton J granted permission to appeal on that point of law, on the basis that it was a point of general public importance and that the conclusion of the Tribunal was at least open to serious doubt.

26. Foxton J was also satisfied that the determination of this question would substantially affect the rights of the parties, the Tribunal having relied on the correctness of the Implied Term Basis in granting the Charterers' counterclaim for unpaid freight, by reference to its finding, at paragraph 157 of the Award, that it was the purported, and on the Tribunal's view wrongful, revocation of the Charterers' authority to collect freight by the First Notice which had caused GNR to fail to pay freight.

The Parties' Submissions on Appeal

27. The Owners' contention was that the Tribunal was wrong to find that there was any implied obligation on them not to revoke the Charterers' authority to collect freight. The Owners submitted that they had an unfettered right to collect freight under the Bills of Lading. Further, the Owners argued, the term which the Tribunal had found was implied into the Charterparty was neither necessary for business efficacy, nor so obvious that it went without saying.

28. In the alternative, the Owners contended that, if any term was to be implied, the formulation of that term had to be considered with care. They submitted that, if there was any implied term, it would provide that, if the Charterers were in default of their obligations under the Charterparty, then the Owners would be entitled to collect the entirety of the freight, even if it exceeded the amount of the Owners' claim against the Charterers arising out of their default. This was referred to in argument as the "All Freight Implied Term". The significance of this, the Owners said, was that if it was the All Freight Implied Term which fell to be implied, then the appeal would still succeed, as the Owners would not have been in breach of that term. This was because the Charterers had been in default, in the sense that a sum had been outstanding from the Charterers under the Charterparty, at the time of the First Notice; namely, the amount due in respect of bunkers, as found by the Tribunal in paragraph 153 of the Award.

29. Therefore, the Owners submitted that the Tribunal must have proceeded on the basis that the term to be implied was not the All Freight Implied Term, but rather a term whereby the Owners were only entitled, in the event of a default by the Charterers, to revoke the Charterers' authority to collect freight in respect to an amount up to, but no more than, the amount due from the Charterers under the Charterparty. This was

referred to in argument as the "Dollar for Dollar Implied Term". What the Tribunal must have found, without articulating the precise term involved, was, the Owners contended, that there had been a breach of the Dollar for Dollar Implied Term, as the Owners had revoked the Charterers' authority to collect freight of a greater value than the amount which was due to them under the Charterparty in respect of bunkers. The Owners submitted that there was no basis on which such a Dollar for Dollar Implied Term could be implied. In particular, the Owners argued, the implication of such a term would render the established obligation on owners to account to charterers for the surplus of any freight due, after deducting amounts owed to them, redundant and would therefore be inconsistent with the authorities.

30. For the Charterers it was submitted that a term preventing the Owners from revoking the Charterers' authority to collect freight should indeed be implied, as the Tribunal had found. There were a number of possible ways in which that term could be formulated. The Charterers identified three: (1) the All Freight Implied Term; (2) a term by which the Owners were not entitled to revoke the Charterers' authority to collect any freight unless a sum was due to the Owners under the Charterparty and the relevant sum was identified at the time of any revocation of the Charterers' authority (termed in argument the "All Freight (Sum Identified) Implied Term"); and (3) the Dollar for Dollar Implied Term.

31. The Charterers contended that the question of which of these formulations was correct would not substantially affect the rights of the parties, and therefore did not need to be decided, as the Owners' appeal would fail in any event. In particular, the Charterers submitted:

    a. As to the All Freight Implied Term, the Tribunal had found, in paragraph 158 of its Award, that no sum was due under the Charterparty at the time of the First Notice. This was a finding of fact that could not be disputed in the present proceedings. As such, even if the correct formulation for any implied term were the All Freight Implied Term, the Owners were nevertheless in breach of it.

    b. As to the All Freight (Sum Identified) Implied Term, the Owners were in breach of this as the Tribunal had found that no sum had been owing at the time of the First Notice (as discussed above) and there was no suggestion that the Owners had identified that any sum in respect of bunkers was due from Charterers at the time of the First Notice. On the contrary, on a fair reading of the Award, it was apparent that the First Notice had been served to secure the Owners' unsafe port claims.

    c. As to the Dollar for Dollar Implied Term, the Charterers pointed out that it appeared to be common ground that, if that was the term that fell to be implied, then the Owners were in breach and the appeal would fail.

32. The Charterers further submitted that the alternative Tortious Basis for their freight counterclaim had not been decided by the Tribunal, because the Tribunal had found in favour of the Charterers on the Implied Term Basis for this claim. The Charterers, therefore, contended that if the Award on the freight counterclaim was not upheld, its counterclaim should be remitted to the Tribunal for further consideration of the Tortious Basis.

Discussion

Established entitlements: an owner's right to collect freight and obligation to account

33. Before considering directly the issue of whether any and if any what term is to be implied into the Charterparty, it is necessary to recall certain features of contractual arrangements such as these, which are established by authority.

34. In the case of an owners' bill of lading, in the ordinary way, the owner has the right to demand the bill of lading freight from the holder of the bill as the consideration for the agreed carriage, because the contract is the owner's contract: Wehner v Dene Steamship Co [1905] 2 KB 92, 99; Molthes Rederi Aktieselskabet v Ellerman's Wilson Line Ltd [1927] 1 KB 710, 715; Tradigrain S.A. v King Diamond Shipping S.A. (The 'Spiros C') [2000] 2 Lloyd's Rep 319, 331 ([55]); Dry Bulk Handy Holding Inc v Fayette International Holdings Ltd (The 'Bulk Chile') [2013] 2 Lloyd's Rep 38, 46 ([24]); *Carver on Bills of Lading* (4th ed), 4-052.

35. Unless the bill otherwise provides, the shipper or holder of the bill will not obtain a good discharge by paying the charterer. However, bills of lading very often contain a provision that freight is payable as per a charterparty. That may direct payment to a charterer. In such a case, ordinarily, the nominated recipient is, as between the owner and the shipper, the agent of the owner, and the authority of such agent can be countermanded by the owner provided that this is done before the shipper makes payment as initially directed: The 'Bulk Chile', 47 ([25]). This right to countermand, as between the owner and the shipper, is not conditional on default by an intermediate charterer: *ibid*.

36. If the shipowner "intervenes" in this way, and requires payment of the freight to himself he will generally have to account to a time charterer for any amount which he receives over and above that which is due in respect of the hire of the ship under the time charter. This was expressed by Channell J in Wehner v Dene as follows (at 98-99):

> "I have next to consider the effect of the clause in the charterparty which provides that the captain, though appointed by the owner, shall be under the orders and direction of the charterer as regards employment and agency, and shall sign bills of lading at any rate of freight that he may be directed by the charterer … the owner has also, of course, contracted by the charterparty that for the use of his ship he will be satisfied with a different sum, which will also in the great majority of cases be less than the total amount of the bill of lading freights; and, therefore, if the owner were himself to demand and receive the bills of lading freight, as he might do if he chose, he would still have to account to the charterer or the sub-charterer, as the case may be, for the surplus remaining in his hands after deducting the amount for hire of the ship under the charterparty…"

37. In The 'Bulk Chile' at 47 ([26]) Tomlinson LJ stated that "The obligation in principle to account for the surplus is clear." He agreed with a submission which had been made to the effect that there had been little working out, in the authorities, as to whom and in what circumstances the owner had to account, but said that "the inference I would derive from that is that in practice this has not proved to be a real problem".

The suggestion of a restriction on an owner's right to intervene

38. The issue which arises in the present case is whether the terms of a time charter such as the NYPE charter in the present case, qualify or restrict, as between the owner and the time charterer, the circumstances in which the owner is entitled to revoke a time charterer's authority to collect and to direct that freight under the bill of lading should, instead, be paid to him. The origin of the suggestion that it may lies in what was said in The 'Bulk Chile' by Tomlinson LJ, at 47-48 ([27]-[28]), and it should be quoted in full:

> "[27] Mr Happé's main objection to the analysis espoused by Rix LJ [in The Spiros C] was that it would permit a shipowner to intervene to require payment of freight to himself without being obliged to wait for a default by his charterer, and he contrasted this with the position which obtains under the contractual lien clause, here clause 18. Mr Happé suggested that in such circumstances shipowners would be likely to perceive it as in their interests always to require payment of freight themselves. The right to intervene to claim freight should, he suggested, be regarded as a right of security exercisable only after a default by the time charterer. Adopting the expression used by Rix LJ in The Spiros C, Mr Happé suggested that as the time charter represents the shipowner's real interest in the venture, so too his entitlement should be tied to the fate of the charter.
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> [28] The principal answer to this point was I think supplied by Toulson LJ in the course of the argument, who observed that it was not to be expected that shipowners would routinely act in a manner which would damage their commercial reputation. I have already explained how the direct contractual relationship brought about between the owners and the shippers is inconsistent with the owner's entitlement to require payment of the contractual remuneration being contingent upon default by a third party. As I then noted, the position as between the owners and the time charterers may be different. At para. 39 of his judgment in The Spiros C Rix LJ said this:
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> > "In my judgment, when a shipowner contracts that his freight should be payable as per a charterparty, he intends, and it is common ground with his shipper that he does so, that, at any rate until he steps in to claim his freight upon the failure of his time charterer, the whole manner or mode of the collection of the freight should be delegated to the time charterer."
>
> This passage is contained in a discussion of a quite different problem, the extent to which payment of freight may be effected by offsets of other payments in a manner agreed between the time charterer and others beneath him in the contractual chain. It was because of the efficacy of arrangements of this sort to accomplish the payment of freight by the shippers by those to whom they were directed to pay it that the broader issue of principle, whether owners could require payment to themselves, did not arise for decision in The Spiros C. So Rix LJ was not discussing the question whether charterers may prevent shipowners from making such a demand. However it is to my mind arguable that a time charterer who is not in default of his obligation to pay hire, and other amounts, under the head charter could restrain a shipowner from demanding

> payment of bill of lading freight to be made directly to himself, on the simple ground that until such time as the charterer is in default the shipowner has, by reason of clause 8 of the NYPE form, or a similar employment clause, agreed to delegate collection of freight to the charterer. Whether such an argument would succeed must await decision on another occasion when it arises. It suffices to say that I am far from convinced that a charterer would be without a remedy in the event that a shipowner took the unusual course of intervening in an attempt to collect freight in circumstances where the charterer was duly performing his obligations under the head charterparty. Such an attempt by a shipowner to interfere with the charterer's exploitation of the vessel for purposes of his trade might even be regarded as repudiatory, as was the direction to the master to refuse to sign bills of lading marked freight prepaid in The Nanfri, above."

39. As is apparent, the issue as to whether a charterer can prevent an owner from directing that freight should be paid to him under an owners' bill did not arise for decision. As Tomlinson LJ very clearly said, whether they could was a point which would have to be decided in a case in which it arose. Moreover, Tomlinson LJ did not go further than saying that he considered that it would be arguable that a charterer might have a remedy if an owner did intervene in circumstances where the charterer was performing under the head charterparty. This suggestion was taken up, and the suggested jurisprudential basis developed as relying on "an implied obligation on the owners to allow the charterers to collect the freight", in Wilford: Time Charters (7th ed.), paras. 30.69-30.70. It was on this passage that the Tribunal relied in the Award in finding that there was an implied term in the Charterparty.

Implication of a term

40. As is apparent from what I have already said, it was common ground between the parties, and was the basis of the leave granted by Foxton J, that the issue is indeed whether there is an implied term. It was not suggested that the result arrived at by the Tribunal can be reached on the basis simply of the construction of the express terms. This has significance in that, as Lord Neuberger said in Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd [2016] AC 742, at 756 ([26]), "construing the words used and implying additional words are different processes governed by different rules."

41. The bases on which a term may be implied in a contract such as this were restated by the Supreme Court in the Marks and Spencer case. As Lord Neuberger said, by reference to the opinion of the Privy Council in BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266, a term may be implied on the basis of business necessity or obviousness. These are alternatives, in that only one needs to be established, although he said that he suspected "that in practice it would be a rare case where only one of those two requirements would be satisfied" (at [21]). In relation to business necessity, he said that this "involves a value judgment"; it is not a test of absolute necessity; it is rather a question of whether "without the term, the contract would lack commercial or practical coherence" (ibid). In relation to obviousness, one way of testing this is by reference to Mackinnon LJ's officious bystander (Shirlaw v Southern Foundries (1926) Ltd [1939] 2 KB 206, 227), but if this is done, it is necessary to formulate the question to be posed by him with great care (*ibid*.).

42. It is necessary, for a term to be implied, that it should be clear what that term is, and that it is capable of clear expression. As Bingham MR said in Philips Electronique Grand Public SA v British Sky Broadcasting Ltd [1995] EMLRT 472, at 482 (quoted in Marks and Spencer para. [19]):

> "… it is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred…"

In this regard, the fact that an implied term may take several different formulations "is a classic sign that it is neither necessary nor obvious" (see per Rix LJ in Port of Tilbury (London) Ltd v Stora Enso Transport & Distribution Ltd [2009] 1 Lloyd's Law Rep 391, at 396 ([25]).

Analysis and conclusions

43. The issue has been fully debated in a way which it was not in The 'Bulk Chile'. Having considered the arguments, I have concluded that no term of the sort found by the Tribunal or contended for by the Charterers is to be implied. My reasons follow.

44. While it is not easy to separate the considerations relevant to business necessity and obviousness, I will start with the former. In light of the obligation of the owner to account to the charterer for any excess in the amount of freight collected over the amount due under the charterparty, I do not consider that the present charterparty, or other time charters in similar form, lack commercial or practical coherence without an implied term restricting the owners' right to intervene. Such charterparties work satisfactorily without such a term.

45. It is true that the precise basis for the obligation to account has not been the subject of any detailed consideration in the authorities and, as referred to in para. [26] of The 'Bulk Chile', the bounds of the obligation have not been fully worked out. However, the existence of an obligation to account is not in doubt, and, as Tomlinson LJ pointed out in that paragraph of The 'Bulk Chile', it appears not to have given rise to real problems in practice.

46. The Charterers further contended that the obligation to account was not sufficient to protect time charterers, and that there should be the possibility of an action for damages if an owner intervened to require payment of freights to them in circumstances where no sum was due under the charterparty. They submitted that the need for such an action was demonstrated by the facts of this case, in that it was the assertion of the right on the part of the Owners to be paid the freight, and the resulting dispute, which led to GNR paying only USD 550,000 rather than the full amount of the outstanding freight. I agree with the Owners, however, that the clearer it is to all in the market that a shipowner is ordinarily entitled to collect bill of lading freight under an owners' bill without restriction, the less likely it is that there will be disputes between owners and charterers on this, and the less likely shippers are to be faced with competing claims in this regard.

47. The Charterers also submitted that questions of insolvency are likely to create particular difficulties with an obligation to account. I accept that it is possible that cases of insolvency may give rise to issues. The potential difficulties do not appear to me to be

as substantial as those involved in formulating an implied term, a point which I consider further below. Furthermore, in various commonly-encountered situations of actual or potential insolvency, the two-fold regime of a right for owners to claim the freight under the bills of lading and an obligation to account works in a commercially satisfactory way for the parties to the arrangements. This is the case if an intermediate charterer below the head time charterer becomes or is likely to become insolvent. In such a case, the owners can collect the freight under the bills of lading and account for hire to the head charterers who would not otherwise have received it up the charterparty chain. Similarly, if it was clear that a head time charterer was likely to become insolvent, perhaps at a time when there was no sum outstanding under the time charter, the owners' right to collect freights direct from shippers makes commercial and practical sense.

48. Turning to consider the question of obviousness, I do not consider that it is clear that the parties would have given the same answer to the officious bystander's question. In particular, I think that the Owners would probably have said that, if they were to be committed to owners' bills, with attendant obligations under the contract of carriage, there should be no restrictions on their entitlement to intervene to collect freight.

49. Tomlinson LJ in The 'Bulk Chile' raised the issue of whether an obligation not to intervene in the collection of freight might be implicit in clause 8 of the NYPE form or other employment clauses in different charterparties. Ms Warrender QC, for the Charterers, emphasised that clause 8 and other employment clauses give effect to the purpose of a time charter which is to allow the charterers to have the benefit of the full earnings of the vessel in return for the payment of hire to the owners. The employment of the vessel therefore embraced that essential economic aspect of the arrangement whereby the charterer is to be able to exploit the vessel's earning potential. She referred, in this connexion, to Federal Commerce & Navigation Co Ltd v Molena Alpha Inc. (The 'Nanfri') [1979] AC 757 especially at 777G per Lord Wilberforce and Whistler International Ltd v Kawasaki Kisen Kaisha Ltd (The 'Hill Harmony') [2001] 1 Lloyd's Rep 147 at 156 and 159 per Lord Hobhouse.

50. In my judgment, however, a right on the part of an owner to intervene to collect freights under an owners' bill of lading, if the employment of the vessel should involve the issue of such a bill, when coupled with an obligation on the owner to account to the charterer for any amount over and above that due by way of hire or otherwise under the charter, does not interfere with the charterer's employment of the vessel or deprive it of the benefit of the vessel's earning capacity. The position is significantly different from that in The 'Nanfri', where the owners' refusal to sign or authorise "freight prepaid" bills was such as significantly to interfere with the uses to which the vessels could be put and effectively to debar them from the grain and steel trades (775B-F). There is no basis here for any contention that the actual or prospective exercise of the Owners' rights to collect freight would or did interfere with the uses to which the Vessel was or could be put. Moreover, it is particularly difficult to see that there could be any interference with the Charterers' right to employ the Vessel in circumstances, where, as in the present case, the Vessel had, by the time of the Owners' intervention, already suffered a casualty which had brought the charter to an end.

51. The objections to the implication of a term are, to my mind, considerably increased when attention is given to what any such term might be. The Charterers' case was that

it did not make any significant difference which of three possible implied terms was the right one. That ambivalence was itself suggestive of there not being a term which met the tests for implication. Furthermore, there are significant difficulties with the formulation and practicability of each of the implied terms which were suggested.

52. I take first the so-called All Freight Implied Term. The gist of the alleged term is that the Owners are not entitled to intervene to collect freight unless a sum is outstanding under the Charterparty. There is, however, a difficulty in defining what sums or types of claim would count for the purposes of there being a sum due under the Charterparty. A possible answer would be that what was to be implied was that it should be the same sums as are referred to in the lien clause, clause 18, which refers to "any amounts due under this Charter". But this is not a satisfactory answer. That phrase in the lien clause is itself capable of causing, and has given rise to, argument, see Wilford paras. 30.3-30.4. It is far from clear that the parties would have regarded as obvious that the relevant sums outstanding for the purposes of the hypothesised implied term should be the same as those referred to in that phrase whose own boundaries are not clearly defined. Furthermore, in addition to the issue of what sums would qualify, there are issues as to the date on which the sum would be required to be outstanding; and as to whether the sum outstanding had to be of any minimum amount or whether any sum however small sufficed. If any sum would suffice, then the term would be unlikely greatly to assist charterers: shipowners might very well be able to point to some, perhaps trivial, sum as due; if it is not any sum, then what would be the threshold? Moreover, as far as owners are concerned, the suggested term would produce an unsatisfactory result, in a foreseeable situation. Thus, if an owner could see that a charterer would be unlikely to pay the next instalment of hire, but no sum was yet outstanding under their charter, on the basis of the All Freight Implied Term, the owner would be unable to intervene to collect the freight.

53. The All Freight (Sum Identified) Implied Term, suffers from the same difficulties as the All Freight Implied Term discussed above, and also from other uncertainties. In particular, there are questions as to what notice would have to be given, in what form, when and to whom for it to be effective to trigger an owner's right to intervene.

54. The Dollar for Dollar Implied Term is difficult to reconcile with the existence of the duty to account, which has been recognised since at least Wehner v Dene. If there were a Dollar for Dollar Implied Term, then an owner would be in breach of contract in collecting any amount over the amount outstanding under the charterparty, and would be liable in damages for doing so. Yet there is no suggestion in any case or text book to which I was referred that the duty to account is effectively an obligation to pay damages in the amount of the surplus, or that the owner must be in breach of contract in finding itself in a position in which it has to make an account. Furthermore, there are in relation to this implied term also considerable uncertainties as to how it would be framed or operate. Would the owner be in breach if it intervened to collect a sum more than the amount outstanding under the charterparty, no matter how small the excess, and even if the owner was acting in good faith? Would there have to be notice by the shipowner to the charterer as to its intention to intervene and the grounds of doing so, specifying the amount which is said to be outstanding under the charterparty? If so, it would give rise to further questions as to the nature of the notice to be given; if not, it would not afford the charterer with any sort of opportunity to prevent the owner from intervening.

55. For the reasons I have given, I find that the Tribunal was wrong to consider that there was an implied term of the Charterparty which prevented the Owners from intervening and withdrawing the Charterers' authority to collect the freight. While express provision could be made in a charterparty which had that effect, no such provision was made here. I reject each of the three suggested implied terms as neither necessary nor obvious.

Would the All Freight Implied Term have been broken in any event?

56. For the sake of completeness, and because it was fully argued, I should deal with the point which was raised by the Owners to the effect that if there was an implied term, and if that term was the All Freight Implied Term, then the appeal would have to be allowed in any event, because a sum was due to the Owners under the Charterparty, by way of debt or liquidated damages, in respect of bunkers.

57. I consider that the Owners are correct about this. The Tribunal clearly found that a sum was due in respect of bunkers, and that this was due as at 1 September 2013, hence the award of interest from that date (paragraph 153). While this is lost sight of in the fifth (though not the third) sentence of paragraph 158 of the Award, it is nevertheless in my view apparent from the Award, fairly read.

Clause 18

58. Ms Warrender QC confirmed at the hearing that no argument was pursued to the effect that the Award could be upheld on the basis that the Owners had been in breach of clause 18 by the giving of the Second Notice.

The Tortious Basis for the Charterers' freight counterclaim

59. The Tribunal made no findings as to the counterclaim on the Tortious Basis. While Mr Kimmins QC for the Owners submitted that these claims could not succeed if the Owners were correct in relation to there being no implied term, as I have found that they are, it appears to me that it is the Tribunal which should consider and adjudicate on these claims.

Disposal

60. The appeal is allowed. The question of law on which permission to appeal was given is answered: No, the Charterparty did not contain an implied obligation that the Owners would not revoke the Charterers' authority to collect from GNR the freight payable under the Bills of Lading unless hire and/or sums were due to the Owners under the Charterparty.

61. The Award is set aside insofar as it awarded damages for breach of the implied term found by the Tribunal; and the matter is remitted to the Tribunal for reconsideration of the Charterers' freight counterclaim on the alternative Tortious Basis, having regard to this judgment.