Neutral Citation Number: [2021] EWCA Civ 87

Case No: A4/2020/0346

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT**
**QUEEN'S BENCH DIVISION**
**COMMERCIAL COURT**
**His Honour Judge Pelling QC (sitting as a Judge of the High Court)**
**[2020] EWHC 127 (Comm)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/01/2021

**Before:**

**LORD JUSTICE BEAN**
**LORD JUSTICE MALES**
and
**LADY JUSTICE ROSE**

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**Between:**

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| **NOBLE CHARTERING INC** | **Appellant** |
| **- and -** | |
| **PRIMINDS SHIPPING HONG KONG CO LTD** | **Respondent** |

**"TAI PRIZE"**

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**James Leabeater QC** & **Rani Noakes** (instructed by **Birketts LLP**) for the **Appellant**
**Alexander Wright** (instructed by **Penningtons Manches Cooper LLP**) for the **Respondent**

Hearing date: 13th January 2021

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# Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 28th January 2021 at 10.30 a.m.

**Lord Justice Males:**

1. A bill of lading will generally state that the cargo has been shipped in apparent good order and condition. That refers to the external appearance of the cargo so far as meets the eye on a reasonable examination. One of the questions raised by this appeal is, apparent to whom? An LMAA arbitrator, Ms Sarra Kay, found that pre-existing damage in a cargo of bulk soyabeans was not apparent to the master who authorised the signature of the bill of lading, but that the shippers who prepared the draft bill of lading and presented it to the master for signature on behalf of the Charterers must be taken to have known of the damage. On that basis she held that the cargo was not in apparent good order and condition and that the Charterers were in breach of an implied warranty in the charterparty that the statement in the draft bill was accurate. As a result, she concluded that the Charterers were obliged to indemnify the Owners in respect of their liability for a cargo claim brought by the receivers under the bill of lading.

2. This decision gave rise to an appeal to the Commercial Court under section 69 of the Arbitration Act 1996 on the following three questions of law:

   (1) Did the words "CLEAN ON BOARD" and "SHIPPED in apparent good order and condition" in the draft bill of lading presented to the Master amount to a representation or warranty by the shippers and/or Charterers as to the apparent condition of the cargo observable prior to loading, or were they instead an invitation to the Master to make a representation of fact in accordance with his own assessment of the apparent condition of the Cargo on shipment?

   (2) In light of the answer to question 1, on the findings of fact made by the arbitrator, was any statement in the Bill of Lading inaccurate as a matter of law?

   (3) If so, were Charterers obliged to indemnify Owners against any consequences of that statement being inaccurate, whether pursuant to an implied indemnity arising by operation of law or an implied contractual warranty or term?

3. In the Commercial Court HHJ Pelling QC held that (1) by presenting the draft bill of lading to the master for signature, the shipper was doing no more than inviting the master to make a representation of fact in accordance with his own assessment of the apparent condition of the cargo, (2) the bill of lading was not inaccurate as a matter of law, and (3) there was no room for the implication of an obligation to indemnify the Owners. Accordingly he allowed the appeal and varied the award so that the Owners' claim was dismissed. However, he gave permission to appeal to this court. The Owners now appeal, seeking to restore the arbitrator's award.

**The facts**

4. As this is an appeal under section 69 of the 1996 Act, I take the facts exclusively from the award.

5. The Charterers (Priminds) were the voyage charterers of the motor vessel "TAI PRIZE" pursuant to a charterparty dated 29th June 2012 contained in and evidenced by a fixture recap incorporating an amended North American Grain Charterparty 1973

form. The charterparty was for the carriage of one cargo of heavy grains, soya or sorghum from Brazil to the People's Republic of China. It provided that:

> "6. Bills of Lading. The Master is to sign Bill of Lading as presented on the North America Grain Bill of Lading form without prejudice to the terms, conditions and Exceptions of this Charterparty. …"

6. It was common ground that the effect of clause 35 was to incorporate the Hague Rules into the charterparty. This provided, that:

> "35. Owners shall be bound before and at the beginning of the voyage to exercise due diligence to make the ship seaworthy and to have her properly manned, equipped and supplied and neither the vessel nor the Master or Owners shall be or shall be held liable for any loss of or damage or delay to the cargo for causes excepted by the US Carriage of Goods by Sea Act, 1936 or the Canadian Water Carriage of Goods Act, 1936. …"

7. The Owners (Noble) were the disponent owners of the vessel, which they had chartered from her head owners under a time charterparty dated 8th September 2011 on an amended New York Produce Exchange form. The head charter incorporated the terms of the Inter-Club Agreement dated 20th February 1970 and amended 1996, or any subsequent modification or replacement thereof.

8. The vessel loaded a cargo of 63,366.150 mt of Brazilian soya beans in bulk between 24th and 29th July 2012. The cargo was loaded from one or more silos via mechanical hoppers at the Cutrale Terminal in Santos, Brazil.

9. Following completion of loading, a bill of lading dated 29th July 2012 on a CONGENBILL 1994 form was issued, signed on behalf of the master by agents of the head owners. The head owners were, therefore, the party to the contract of carriage contained in or evidenced by the bill. The bill had been drafted by the local shippers and presented to the master for signature. It incorporated the Hague Rules. In a box with the heading "Shipper's description of goods" which formed part of the printed form were the typed words "CLEAN ON BOARD". As part of its printed text, the bill stated:

> "SHIPPED at the Port of Loading in apparent good order and condition on board the Vessel for carriage to the Port of Discharge or so near thereto as she may safely get the goods specified above.
>
> Weight, measure, quality, quantity, condition, contents and value unknown."

10. The vessel arrived at the discharge port, Guangzhou in China, on 9th September 2012. No damage was found on the surface of the cargo in any of the holds when the hatches were opened. Discharge commenced on 15th September and continued until 09:30 hours on 17th September, when discharge from hold 3 was suspended due to charred cargo being found. At 11:30 on the same morning discharge from hold 5 was

suspended for the same reason. Discharge from the remaining holds continued without complaint. Discharge from holds 3 and 5 resumed and was completed by 20th September, but heat and mould damage to some of the cargo in those holds led to a claim by the receivers under the bill of lading.

11. On 19th September 2012 the head owners' P&I club provided a Letter of Undertaking to the receivers as security for the cargo claim. It provided that the claim would be subject to Chinese law and the exclusive jurisdiction of the Chinese court.

12. The receivers subsequently commenced proceedings against the head owners in China. The head owners defended the claim, both at first instance and on appeal, but were unsuccessful. Eventually, on 18th February 2016, they paid to the receivers the amount for which they were held liable, which was the equivalent of US $1,004,385.61. The head owners then commenced London arbitration proceedings against the Owners for a contribution under the Inter-Club Agreement of 50% of this amount. Pursuant to a settlement agreement dated 24th July 2017 the Owners agreed to pay US $500,000 (inclusive of interest and costs). The Owners then sought to recover this from the Charterers, together with their costs of defending the claim by the head owners.

13. The Charterers contended that the damage found in holds 3 and 5 was caused during the voyage by heat transfer from the adjacent fuel oil tanks on board the vessel. However, the arbitrator rejected this contention. She found that the damaged cargo was loaded with an excessive moisture content and with pre-existing heat damage.

14. Importantly, the arbitrator found that the damage was not reasonably visible to the master or crew at and during loading. She also found, however, that the shippers would have been able to discover by reasonable means the condition of the beans before they were loaded and "must be taken to have knowledge of the actual (apparent) condition of the beans". I do not understand this to be a finding of actual knowledge and ultimately Mr James Leabeater QC for the Owners accepted that it is not. It is, however, a finding of fact that the shippers had the means of discovering the damaged condition of the beans in one of the silos at the load port. The arbitrator found also that the shippers were acting as agents of the Charterers for the purposes of supplying the cargo and presenting a draft bill of lading to the master for signature, so that the shippers' imputed knowledge of the damage was also to be imputed to the Charterers.

15. I would note that if, as the arbitrator found, the damage found at the discharge port was pre-shipment damage, the head owners ought not to have been held liable to the receivers on a bill of lading which was subject to the Hague Rules. They would have been entitled to rely on the defence of inherent vice under Article IV, Rule 2(m). The arbitrator made no findings as to the reasoning of the Chinese courts, and accordingly we do not know on what basis the head owners were held liable to the receivers. It may have been because the Chinese courts took a different view of the cause of the damage, because they concluded (wrongly, on the arbitrators' findings) that the damage was reasonably apparent to the master at the load port, because Chinese law (unlike the Hague Rules) does not recognise a defence of inherent vice, or perhaps for some other reason. Whichever it was, however, the arbitrator found that the head owners acted reasonably in providing a Letter of Undertaking subject to Chinese law and jurisdiction, that doing so did not amount to a new cause of the loss so as to break

the chain of causation, and that it was reasonably foreseeable that if the Charterers presented an inaccurate bill of lading for signature when the cargo was in fact damaged, the receivers would bring a cargo claim before the Chinese courts which would apply Chinese law. There is no challenge to these conclusions.

**The Hague Rules**

16. Article III, Rules 3 to 5 of the Hague Rules (and the Hague-Visby Rules) provide as follows:

> "3. After receiving the goods into his charge the carrier or the master or the agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:
>
> (a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.
>
> (b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper.
>
> (c) The apparent order and condition of the goods.
>
> Provided that no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.
>
> 4. Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b) and (c).
>
> 5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper."

17. It is notable that "the apparent order and condition of the goods" is not something which is said to be "furnished in writing by the shipper", even though it has long been

the practice for shippers to prepare draft bills of lading for the master to sign, and that the guarantee and indemnity given by the shipper pursuant to Rule 5 does not extend to the apparent order and condition of the goods.

**The Owners' case in the arbitration**

18. The Owners' case in the arbitration was that they incurred liability towards the head owners due to instructions given by the Charterers to load what turned out to be a damaged cargo. They put their claim to recover from the Charterers in three ways:

    (1) first, that there was an express right of indemnity pursuant to clause 35 of the charterparty and/or an implied term to the same effect;

    (2) second, that they were entitled to be indemnified against the consequences of the bill of lading being inaccurate as to the apparent condition of the cargo; and

    (3) third, pursuant to an implied term of the charterparty that the Charterers would not load a dangerous cargo.

19. The arbitrator rejected the Owners' first and third ways of putting the case. The Owners have not sought to revive these issues by way of respondent's notice or cross-appeal and accordingly neither we nor the judge have heard any argument about them. The appeal proceeds on the basis that the arbitrator's decision on these issues is correct, that is to say that the charterparty contains no express term entitling the Owners to be indemnified against their liability to the receivers as a result of the Charterers providing a damaged cargo and that the Charterers were not in breach of their obligation not to load a dangerous cargo. That forms the framework within which this appeal arises.

**The award**

20. The arbitrator accepted the Owners' second way of putting the case and it was on this basis that their claim succeeded. She identified two issues for determination: (1) was there actually an inaccuracy on the face of the bill of lading? (2) in the absence of express terms of the charterparty allocating risk of liability on this subject, on what basis could the Charterers be liable to the Owners for the consequences of any inaccuracy?

21. As to the first of these issues, the arbitrator acknowledged that there was no representation by anyone in the bill of lading as to the actual condition of the cargo, which was stated on the face of the bill to be "unknown" to the master. She acknowledged also that the words "in apparent good order and condition" refer to the condition of the cargo "so far as meets the eye, and externally" or "upon reasonable examination", citing *The Peter der Grosse* (1875) 1 PD 414. Applying this test, she held that the cargo was not loaded "in apparent good order and condition". Her reasoning on this issue is at paragraph 84 of the award:

> "Defects in cargo attributable to inherent vice can be visible – it depends on the nature of the inherent vice. In this case, some beans loaded towards the bottom parts of holds 3 and 5 were discoloured. It would have been visible upon reasonable

> examination to the shippers before loading, upon reasonable inspection. Furthermore, hypothetically, if loading had been halted from time to time so as to allow the dust to settle, at some point it seems likely to me that the discoloured beans would have been visible to the master and crew too. If, at that point, the bill of lading had been cut and presented to the master for signature, he would have claused the bill (assuming he did his job properly). It was obviously not the *modus operandi* of loading soya beans for that to happen, but it proves the point that simply by an accident as to timing and speed of loading it did not render the cargo in good order and condition, nor in apparent good order and condition. To illustrate this another way – if there was fog that disabled the crew (on the deck) from seeing the defective condition of the cargo, but others standing by (on the quay or at the loading terminal), such as the shippers could see better, the cargo is still not, as a matter of fact, in apparent good order and condition. That is my view and I therefore find that the cargo was not in good order and condition, nor in apparent good order and condition."

22. It is not entirely clear to me whether the arbitrator's reasoning in this paragraph was that the cargo was not in apparent good order and condition because its condition would have been visible *to the shippers* upon reasonable examination; or because, if the facts had been otherwise, the discoloured beans would have been visible *to the master and crew* (i.e. the arbitrator's hypothetical example of loading being halted from time to time, albeit this was not something likely to happen with a cargo of this nature).

23. Turning to the second issue, the arbitrator undertook an extensive review of authority, drawing a distinction between cases concerned with the liability of a carrier under a bill of lading and cases concerned with a charterparty relationship. So far as the latter were concerned, she derived from a trilogy of cases, *Kruger & Co v Moel Tryvan Ship Co Ltd* [1907] AC 272, *Elder Dempster v Dunn & Co* (1909) 15 Com Cas 49 and *Dawson Line Ltd v AG Adler fur Chemische Industrie of Berlin* [1932] 1 KB 433, "a general principle that where the contract required the master to sign a bill of lading as presented, and the charterer or a person for whom the charterer is responsible presents an inaccurate bill of lading, the charterer must be responsible for the consequences that follow". Applying that principle (for which she also cited *Cooke, Voyage Charters*, 4th Ed (2014) at paragraph 18.231), she held that the master was obliged by clause 6 of the charterparty to sign the bill of lading as presented, and accordingly that there was an implied warranty by the Charterers that the statement contained in the bill of lading as to the apparent good order and condition of the cargo was accurate. She treated *The Nogar Marin* [1988] 1 Lloyd's Rep 412 as confirming that there is an implied term in a charterparty that representations on the face of the bill of lading are true when the facts are uniquely within the knowledge of the charterers and not within the scope of a reasonable investigation on the part of the master. She regarded this as such a case in view of her findings that the master had no reasonable means of knowing the damaged condition of the cargo and that the shippers, for whom the Charterers were responsible, must be "taken to know the actual apparent condition of their own cargo".

## The judgment

24. The judge answered the first question of law by saying that:

> "23. … by presenting the draft B/L for signature by or on behalf of the Master, in relation to the statement concerning apparent good order and condition, the Shipper was doing no more than inviting the Master to make a representation of fact in accordance with his own assessment of the apparent condition of the Cargo."

25. His reasons for so holding, in summary, were that the bill of lading once signed contains a representation of fact by the master as to the apparent condition of the cargo which, as "Everyone in the shipping trade knows" (see *The Nogar Marin* at p.422 col 2), is based on the master's own reasonable assessment of the cargo. This has consistently been held to be the effect of such a statement in the bill of lading. Moreover, Article III, Rules 3 and 5 of the Hague Rules draw a clear distinction between (1) information about the cargo which the shipper is deemed to have guaranteed to the carrier and (2) the apparent order and condition of the cargo where no such guarantee is given precisely because that is for the master himself to assess. Accordingly the presentation of a draft bill containing a statement that the cargo was in apparent good order and condition cannot be understood as an invitation to sign without any independent investigation by the master. Further, there was no finding in the award that the master failed to carry out his own investigation or that he acted either wholly or in part in reliance on any implied representation arising from the shippers' tender of the draft bill of lading.

26. I would note that there appear to be two strands to this reasoning. The first strand, reflected in the judge's formal answer to question 1 which I have set out at [24] above, is that the tender of the draft bill did not give rise to any warranty or representation by the shippers. The second strand is that in any event the master did not rely on any implied representation, so that a claim would fail as a matter of causation.

27. Turning to the second question, the judge held that in the light of the finding of fact that the damage was not reasonably visible to the master or crew or any agent of the Owners at or during loading, the bill of lading was not inaccurate. It contained nothing more than a representation by the master that the cargo was in *apparent* good order and condition, which representation was true.

28. Finally, the charterparty was subject to the Hague Rules which make specific provision for what guarantees are given concerning information furnished by the shippers. Those guarantees do not extend to statements concerning the apparent order and condition of the cargo, the omission of which is deliberate and leaves no room for the implication of an implied guarantee or warranty. The cases on which the arbitrator relied were not concerned with the Hague Rules or with the apparent condition of the cargo which it is for the master to assess.

## The submissions on appeal

29. Both counsel made their submissions, written and oral, with considerable skill.

30. For the Owners, Mr James Leabeater QC identified the issue arising in the following terms:

> "Where an owner incurs liability as a result of a misdescription of the apparent condition of the cargo in a draft bill of lading presented to the master for signature by or on behalf of the charterer, and the charterer knows or should know of the misdescription, is the owner entitled to an indemnity from the charterer if the master did not have reasonable means of discovering that the description was inaccurate?"

31. He submitted that this was an issue of wide general importance on which the arbitrator's decision was in accordance with the authorities and the leading textbooks. The judge's principal error was in holding that the tender of a draft bill of lading describing the cargo as shipped in apparent good order and condition was *only* an invitation to the master to make his own assessment, when in fact it was *also* a representation that the cargo was in apparent good order to the shippers' and Charterers' knowledge.

32. Mr Leabeater cited a number of cases which, he said, establish the proposition that "where charterers require the Master to sign a bill of lading which misdescribes the cargo, including the *condition* of the cargo; and that misdescription cannot reasonably be discovered by the Master, charterers are liable to indemnify owners against the consequences". These included the trilogy of cases identified by the arbitrator and also *The Nogar Marin*. He submitted that this proposition is also supported by leading textbooks.

33. I would note at this stage that whereas Mr Leabeater's identification of the issue arising on this appeal is limited to a situation where "the charterer knows or should know of the misdescription", the proposition which he derives from the authorities and textbooks is not so limited. In either case, however, his formulation is that the right of indemnity only arises when (1) there is a misdescription in the draft bill of lading tendered to the master for signature and (2) that misdescription cannot reasonably be discovered by the master. I note also that although Mr Leabeater submitted that the tender of a draft bill of lading amounts to a representation by the shipper, his case (and the case which the arbitrator accepted) is that this gives rise to an implied contractual warranty that the draft is accurate. The distinction is or may be important because, as the judge pointed out, there are no findings in the award of any reliance by the master on any implied representation.

34. Mr Leabeater accepted that the phrase "apparent good order and condition" has the meaning explained in *Scrutton on Charterparties*, 24th Ed (2020) at paragraph 8-027. That is to say, it refers only to the external condition of the cargo "so far as met the eye". He submitted that there was a misdescription in the bill of lading in the present case: the cargo was not in apparent good order and condition because, as found by the arbitrator, the damage "would have been visible upon reasonable examination to the shippers before loading, upon reasonable inspection".

35. For the Charterers, Mr Alexander Wright supported the reasoning of the judge. He submitted that it is long established that statements in a bill of lading as to the apparent good order and condition of the cargo are representations made by the

master based on his own assessment of the cargo, from which it follows that a shipper presenting such a draft bill makes no representation and gives no warranty about the apparent order and condition of the cargo, particularly in a case governed by Article III, Rules 3 and 5 of the Hague Rules. It follows also from the arbitrator's findings of fact that the bill of lading in this case was not inaccurate, that is to say that the cargo *was* loaded in apparent good order and condition because the damage was not apparent to the master.

**The meaning of "apparent good order and condition" in a bill of lading**

36. I begin by considering the meaning of the statement in a bill of lading that a cargo is shipped in apparent good order and condition.

37. In *The Peter der Grosse* a cargo of bagged feathers was shipped under a bill of lading which described the cargo as "shipped in apparent good order and condition" but was found to be damaged on discharge. The issue was whether the damage occurred during the voyage or existed on shipment. It was held that the bill of lading was evidence of the apparent condition of the cargo on shipment. Sir Robert Phillimore said:

> "… it becomes important to consider what evidence is furnished by the bill of lading as to their condition when they were put on board; and I agree with the observation which has been made by Mr Clarkson [counsel for the bill of lading holder], that, fairly construed, and giving all due weight to the legal effect of the marginal note, the result must be that apparently, and so far as met the eye, and externally, they were placed in good order on board this ship."

38. There was, however, no distinction drawn in this case between damage which was apparent on shipment and damage which was not. The damage in question consisted of an offensive smell caused by liquid leaking onto the bags which, if it had existed, would have been apparent and was not inherent in the cargo. Nevertheless this decision as to the meaning of "apparent good order and condition" has been adopted in later cases.

39. In *Silver v Ocean Steamship Co Ltd* [1930] 1 KB 416 the cargo consisted of cans of frozen eggs which were stated to be shipped in apparent good order and condition under a bill of lading incorporating the Hague Rules. It was loaded at night under floodlights. On discharge some of the cans were found to be punctured while others were perforated, with some of the perforations being "gashes" while others were merely pinholes. The Court of Appeal held, in accordance with previous authority, that the carrier was estopped from denying that the cargo was shipped in apparent good order and condition, but that this estoppel applied only to what was reasonably apparent to the shipowner's servants. Scrutton LJ said at pp.425-7:

> "Apparent good order and condition was defined by Sir R. Phillimore in *The Peter der Grosse* as meaning that 'apparently, and so far as met the eye, and externally, they were placed in good order on board this ship'. If so, on the *Churchill & Sim* decision [1906] 1 KB 237 the shipowner is not allowed

> to reduce his liability by proving or suggesting contrary to his statement in the bill that the goods in respect of matters externally reasonably visible were not in good condition when shipped.
>
> Now what was reasonably apparent to the shipowner's servants loading at Shanghai at night but under clusters of electric lights? The ultimate damage was classed by the surveyors as (1) serious damage where the tins were gashed or punctured, damage easily discernible in handling each tin; (2) minor damage, pinhole perforations, which on tins covered with rime were not easily discernible but which were found when the tins were closely examined. I have considered the evidence and I find that the first class of damage was apparent to reasonable examination; the second, having regard to business conditions, was not apparent. The result of this is that the shipowner is estopped against certain persons from proving or suggesting that there were gashes or serious damage when the goods were shipped. He may raise the question whether there was not minor or pin-prick damage at that time, but having regard to the small quantity of goods rejected for visible damage I should not estimate the amount of such minor damage at shipment as very high. …
>
> I am therefore of opinion that against the proper person the shipowners are estopped by their statement that the cans were shipped in apparent good order and condition from proving that they were insufficiently packed, or in fact seriously gashed, but that they may prove or suggest pinholes on shipment as not being reasonably apparent."

40. Greer LJ said at pp.433-6:

> "It appears to me that when the goods were received for shipment the shipper and the shipowner were considering that there might be a claim for damage caused during the carriage by sea. In these circumstances the shipowner is willing to say to the shipper: 'I admit that up to the present the goods have not been damaged, so far as can be discovered by such examination as can reasonably be expected'. He does not seem to me to be admitting anything as to the fitness of the goods of the kind presented for carriage at sea but only as to their undamaged condition. …
>
> As regards the question whether the defendants are estopped from denying that the tins accepted by them on the bills of lading were free from gashes and pin-holes, I think there would be such an estoppel as regards gashes and pin-holes which could have been ascertained by such reasonable examination as can be expected when goods of this kind are delivered for

> shipment under the conditions necessarily prevailing, that is to say, delivery by night. …
>
> The damage for which I hold that the plaintiff is entitled to be compensated is comprised under two heads: (1) damage which in fact occurred before the goods were received for shipment under the bill of lading and was of such a character as to be apparent on a reasonable examination. … (2) damage occasioned by negligence in the discharge of the cans."

41. Thus Greer LJ described the statement in the bill as to the apparent condition of the cargo as a statement made by the master to the shipper, not the other way round.

42. Slesser LJ said at p.439:

> "In this case, however, a complication has arisen by reason of the fact that whereas the gashes may reasonably be said to be apparent, the perforations were not so apparent. In *Churchill & Sim's* case Channell J says: 'In my opinion, not only was there damage in fact, but it was damage of such a character that it must have been apparent to anyone'. In my judgment, the estoppel in this case goes no further which, I think, includes the gashed tins but reasonably excludes the less apparent perforations and punctures."

43. In more modern times the duties of a master concerning the issue of a bill of lading were considered by Colman J in *The David Agmashenebeli* [2002] EWHC 104 (Admlty), [2003] 1 Lloyd's Rep 92. That was a charterparty case involving a cargo of urea where the master proposed to clause the bill of lading on the ground that the cargo was discoloured and contaminated. The issue was whether he was justified in doing so. Colman J began at pp.103 col 2 to 104 col 1 by identifying the function of the statement of the order and condition of the goods in a bill of lading:

> "The starting point in this analysis is to identify the function of the statement of the order and condition of the goods in a bill of lading. For this purpose it is necessary to go back to the issue of the bill. It is the shipper or the shipper's agent who, in the ordinary way tenders the bill to the carrier or the carrier's agent, usually the master, for signature. In so doing, the shipper invites the carrier to acknowledge the truth of the statement in the tendered bill as to the order and condition of the goods which the shipper has delivered into the possession of the carrier pursuant to the contract of affreightment. In determining whether the carrier by the master's or other agent's signature accepts contractual responsibility for the accuracy of the statement as to the condition of the goods it is relevant to take account of the fact that it is the shipper or his agent who is delivering the goods and that accordingly any such statement would be as to facts of which he must already have actual or imputed knowledge. Further, because the shipper already has that knowledge he cannot be said to rely on the accuracy of the

> statement. His requirement goes no further than the need to obtain from the carrier a receipt for the goods in appropriate form. The tender for signature of a bill which states the order and condition of the goods is thus an invitation to the carrier to express his acknowledgement of the truth of the statements in the bill. As such it is an invitation to make a representation of fact as distinct from a binding promise as to the accuracy of the represented facts. The purpose of making that representation is to record the carrier's evidence as to his receipt of the goods and as to their apparent condition when he did receive them for carriage. Given that bills of lading are negotiable instruments, the specific function of recording that evidence is to inform subsequent holders of the facts represented, by the carriers themselves.
>
> Against this background, it is not difficult to see why it has been said in many of the authorities on the Harter Act, the Hague Rules and the Hague-Visby Rules that those codes stop short of imposing on the carrier any contractual obligation as to the accuracy of that which is stated in the bill as to the order and condition of the goods."

44. Referring to the carrier's obligation under Article III, Rule 3 of the Hague Rules to issue a bill of lading showing the apparent order and condition of the cargo, Colman J said this at p.105:

> "If there is a contractual obligation to the shipper that the bill of lading should state the apparent order and condition of the goods, how is that duty to be performed? In my judgment, the general effect of the authorities is that the duty requires that the master should make up his mind whether in all the circumstances the cargo, in so far as he can see it in the course and circumstances of loading, appears to satisfy the description of its apparent order and condition in the bills of lading tendered for signature. If in doubt, a master may well consider it appropriate to ask his owners to provide him with expert advice, but that is a matter for his judgment. In the normal case, however, he will be entitled to form his own opinion from his own observations and the failure to ask for expert advice is unlikely to be a matter of criticism. For this purpose the law does not cast upon the master the role of an expert surveyor. He need not possess any greater knowledge or experience of the cargo in question than any other reasonably careful master. What he is required to do is to exercise his own judgment on the appearance of the cargo being loaded. If he honestly takes the view that it is not or not all in apparent good order and condition and that is a view that could properly be held by a reasonably observant master, then, even if not all or even most such masters would necessarily agree with him, he is entitled to qualify to that effect the statement in the bill of lading. This

> imposes on the master a duty of a relatively low order but capable of objective evaluation. …
>
> Against this background, the shipowners' duty is to issue a bill of lading which records the apparent order and condition of the goods according to the reasonable assessment of the master. …"

45. The judgment of Aikens J in *The Sea Success* [2005] EWHC 1542 (Comm), [2005] 2 Lloyd's Rep 692 at [27] and [28] is to similar effect. So too is that of Simon J in *The Saga Explorer* [2012] EWHC 3124 (Comm), [2013] 1 Lloyd's Rep 401 at [32].

46. The textbooks confirm this position (*Scrutton on Charterparties*, 24th Ed (2020) at para 8-027; *Carver on Bills of Lading*, 4th Ed (2017) at para 9-160; *Aikens, Bills of Lading*, 3rd Ed (2021) at para 4.11).

47. Several points are clear from these cases.

48. First, a statement in a bill of lading as to the apparent order and condition of the cargo refers to its external condition, as would be apparent on a reasonable examination.

49. Second, what amounts to a reasonable examination depends on the actual circumstances prevailing at the load port. The master's responsibility is to take reasonable steps to examine the cargo, but he is not required to disrupt normal loading procedures. If cargo is loaded at night, as in *Silver v Ocean Steamship Co Ltd*, the master must do the best he can in the prevailing conditions. For example, he is not required to wait until daylight, when visibility would be better. In the same way, he is not required, if a grain cargo is loaded continuously from silos, to pause the loading from time to time in order to let the dust settle and examine the cargo in the vessel's holds. I read the arbitrator's comment that this "was obviously not the *modus operandi* of loading soya beans" as meaning that it would not have been reasonable for the master to insist on this being done. With other kinds of cargo, however, it may be much easier for the master to observe the condition of the cargo without needing to disrupt the loading process. Steel cargoes, as in *The Nogar Marin*, *The Sea Success* and *The Saga Explorer*, are an example. In such cases the master will have an opportunity to observe the condition of the cargo as it is brought alongside and before it is loaded. In the case of bulk grain cargoes, however, he may only be able to observe the surface condition of the cargo after it has been loaded in each hold.

50. Third, what matters is what is reasonably apparent to the master or other servants of the carrier. The bill of lading contains a representation by the master and says nothing about what may be apparent to anyone else, such as the shipper, who may have other means of examining the cargo.

51. Fourth, the statement relates to the apparent order and condition of the cargo at the time of shipment, that is to say of receipt by the carrier, and not at any earlier time.

52. Fifth, the statement is based upon the reasonable examination of the cargo which the master has (or should have) undertaken. As Mustill LJ put it in *The Nogar Marin* at p.422 col 2:

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

53. This understanding of what is (and is not) happening when a bill of lading is issued containing a statement that the cargo is in apparent good order and condition is confirmed by the Hague Rules. The Rules distinguish between information in the bill of lading which is provided by the shipper, as to which the shipper is deemed to have given a guarantee of its accuracy and has an obligation to indemnify the carrier in the event that the information is inaccurate, and the apparent order and condition of the cargo, which is not provided by the shipper and as to which the shipper gives no guarantee and undertakes no obligation to indemnify the carrier. That is because the statement of the apparent order and condition of the cargo is based exclusively on the examination carried out by or on behalf of the master acting on behalf of the carrier and does not depend on information provided by the shipper.

**Was the bill of lading accurate?**

54. Once it is understood that a statement as to the apparent order and condition of the cargo refers only to its external condition as that appears on reasonable examination by or on behalf of the master in the circumstances prevailing at the load port, it is clear that the bill of lading as issued and signed on behalf of the master in the present case was accurate. The arbitrator's finding that the damage was not reasonably visible to the master or crew at and during loading means that the cargo *was* in apparent good order and condition despite the fact that some of it was damaged. The additional finding that the shippers would have been able to discover by reasonable means the condition of the beans before they were loaded is nothing to the point. The issue is whether the cargo was in good order and condition "so far as met the eye" and, for this purpose, it is the master's eye which counts.

55. As I have indicated, it is not entirely clear to me whether the arbitrator's conclusion that the bill was inaccurate because the cargo was not in apparent good order and condition was because its condition would have been visible to the shippers upon reasonable examination or because, if loading had been paused from time to time, there would have been an opportunity for the master and crew to observe the damage. Either way, the conclusion is wrong in law. If it was based upon the shippers' knowledge (or, more accurately, their deemed knowledge) it is not their knowledge which matters. If it was based upon what the master might have learned if loading had been paused, those were not the conditions under which this cargo was in fact loaded or would reasonably be expected to be loaded and a reasonable examination by the master did not require him to insist that this be done.

**The tender of a draft bill of lading**

56. I have so far been explaining the meaning of a statement as to the apparent order and condition of the cargo in a bill of lading issued by the master and signed by him or on his behalf. However, despite the way in which the arbitrator expressed herself and despite the way in which the question of law is formulated for the purpose of the appeal under section 69, that is not on analysis the statement on which the Owners actually rely. Their case is that the tender of a *draft* bill of lading containing such a

statement itself constitutes a representation, such as to give rise to a warranty, as to the apparent order and condition of the cargo. But a statement in a draft bill cannot be made by the master or refer to the condition of the cargo as it appears to the master. Rather, the Owners' case is that the tender of such a draft bill involves a representation by the shippers, on behalf of the Charterers, that what is said in the draft bill is accurate to their knowledge, based upon their reasonable examination of the cargo. On this analysis, therefore, although the two documents appear to be in identical terms ("shipped in apparent good order and condition"), the statement in the draft bill is materially different from the statement in the bill of lading as issued. Whereas the bill as issued refers to what is apparent to the master based on his examination of the cargo at the time of shipment and is a representation made by the master, the statement in the draft bill refers to what is apparent to the shippers based on an examination which they are deemed to have undertaken at some unspecified time prior to shipment, and is a representation made by them.

57. It is, perhaps, not impossible that the particular circumstances in which a draft bill of lading is tendered may amount to a representation of some kind by the shippers as to the condition of the cargo. In particular, I would wish to leave open the possibility that, by tendering a draft bill containing a statement that the cargo is in apparent good order and condition, the shippers make an implied representation that they are not actually aware of any hidden defects or damage which, if known to the master, would mean that he could not properly sign the bill as tendered. However, that is not how the Owners put their case, either in the arbitration or on appeal and, on the arbitrator's findings of fact, with no finding that the shippers had actual knowledge of the damage to the cargo, it would not have assisted them to do so. But even if such a representation is made by the tender of a draft bill, and even if it is treated as made on behalf of the Charterers, I would not accept that any implied representation is made (or contractual obligation is undertaken) as to matters of which the shippers do not have actual knowledge.

58. First, in circumstances where it is well established that a statement in a bill of lading as to the apparent order and condition of the cargo is a statement made by the master and based on his own examination of the cargo at the time of shipment, it would be confusing to regard the tender of a draft bill of lading as a representation by the shippers (or as giving rise to a contractual obligation on the Charterers) about the apparent condition of the cargo at some other time. It is inherently unlikely that a draft bill should be understood as saying something quite different from what the bill is well understood to say once it is signed by the master.

59. Second, the tender of such a draft bill is well understood to be a request by the shipper that the master should satisfy himself as to the apparent order and condition of the cargo and should sign the bill of lading (or authorise its signature) accordingly. Obviously the shipper hopes that the master will sign the bill in the form in which it is tendered to him. It is likely to be important to the shipper that the master should do so if, as will usually be the case, the shipper needs such a bill of lading in order to get paid under his sale contract. If the master demurs, he may come under commercial pressure to sign. But, as "everyone knows", it is ultimately the master's responsibility to decide whether to do so, exercising his own judgment in accordance with the principles stated by Colman J in *The David Agmashenebeli*.

60. Third, in circumstances where the tender of a draft bill is perfectly explicable as amounting to such a request by the shippers, to say that it also gives rise to the implication of a warranty that the cargo is in fact in apparent good order and condition is neither necessary in order to give the charterparty business efficacy nor so obvious as to go without saying (cf. *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742). Indeed, it is not obvious what precisely the implied warranty would be. Would it be (as briefly discussed above, but which would not help the Owners in the present case) that there are no defects in the cargo of which the charterer or shipper is aware? Or none of which the charterer or shipper would be aware on reasonable examination? Or none which the master will not have an opportunity of discovering for himself?

61. Fourth, to imply a warranty by the Charterers or shippers as to the apparent condition of the cargo would run counter to the scheme of the Hague Rules.

62. Finally, I have so far considered the position as a matter of principle, but it seems to me, not only that there is no trace in any of the authorities or textbooks cited to us of any such representation by the shippers or warranty by the Charterers, but also that the Owners' case is contrary to the decision of this court in *The Nogar Marin*. In that case the charterers tendered a bill of lading, which the master signed, stating that a cargo of wire rods in coils was shipped in apparent good order and condition. In fact the cargo was rusty and the master was found by the arbitrators to have been negligent in failing to record this on the mate's receipts. The owners settled a claim by the receivers and sought to recover from the charterers. Their case, at any rate in this court, was that the tender of a draft bill of lading stating the cargo to be in apparent good order and condition was a breach of the charterparty and that they were entitled to the benefit of an implied indemnity against liability under a bill of lading signed at the charterers' request.

63. After examining the cases on implied indemnity on which the Owners rely in the present case, Mustill LJ, giving the judgment of the court, held first that the claim for breach of charter failed as a matter of causation. Even if the tender of a bill of lading which, if signed, would misstate the condition of the cargo was a breach of contract, the master's negligence in failing to observe the damage broke the chain of causation. However, he also made clear at p.421 col 1 that even though the charterers had hitherto conceded that they were in breach by tendering "inaccurate" bills of lading, the court did not accept that the concession had been rightly made:

> "It has been assumed throughout, and indeed conceded by the charterers, that they were in breach by tendering 'inaccurate' bills of lading: by which we take it to be meant that the documents, if signed, would acknowledge the receipt in apparent good condition of a cargo which was not in such a condition. We would not be inclined to hold the charterers to this concession, given the very different turn which the argument has taken in this Court; and we are far from convinced that the concession was sound. Essentially, the issue is whether the term of which the charterers are said to have been in breach must necessarily be implied into the charter so that it shall work properly in practice."

64. He went on to explain why it was not necessary to imply such a term in order to make the contract work:

> "The cases previously cited show that where the master is expressly required to sign the bills as presented, and where the contract stipulates that the act is to be without prejudice to the charter, the charterer's right to issue bills to suit his own convenience must be constrained by the need not to make the terms of the new contract which he thus imposes on the shipowner more burdensome than those which the owner originally contracted to assume in exchange for the freight. But this is in our judgment some way removed from the case where the complaint about the bill concerns, not its contractual terms, but about a representation of fact on its face backed by the signature of those acting for the owners; where the shipowner's servants have the opportunity to check the accuracy of the representation to which they are committing the shipowner; and where the making of which is a tortious act towards those who become transferees for value in reliance on the fact that the document is a clean bill of lading.
>
> Again, although it is evident from *Elder Dempster v Dunn* that a term requiring representations on the face of the bill to correspond with the true facts may be implied as against a charterer, when those facts are uniquely within the knowledge of the charterer and are not within the scope of a reasonable investigation on the part of the shipowner's servants, it seems to us that a case such as the present stands on a different footing. Granted, the arguments before this Court have assumed that the charterers were well aware of the defective state of the goods. Nevertheless, the arbitrators' findings show that the master should at least have recognised enough of the true facts to require the bill to be qualified. The making of a proper inspection is not just a matter between the master and his owners; it affects the transferees as well. We see no reason to imply a term which takes the ultimate financial responsibility for this task, away from the master's employers and places it on the shoulders of the charterer.
>
> Moreover, from a strictly practical point of view, we cannot see the point of the suggested term. Two situations may be envisaged. First, the defects in the goods are not such as to be apparent on a reasonable examination at the point of shipment. It is a common place that in such a situation the signature of the bill of lading without qualification does not preclude the owners from establishing the true condition of the goods. There is thus no enhanced exposure, beyond that which existed under the charter, and no need for an implied term to protect the owners against it. In the second case, the defective condition of the cargo is to be apparent on reasonable examination. If this is

> so, the master should not issue clean bills. Why imply a term to protect the owners against the consequences of the master failing to do his job, when this failure will present the charterers in almost every case with an unanswerable argument on causation? We can see no reason."

65. The facts of *The Nogar Marin* corresponded to the second of these two situations. That is to say, the defective condition of the cargo was apparent on reasonable examination and the master ought not to have issued clean bills. Nevertheless, the first situation described by Mustill LJ represents (or at least is very similar to) the situation in the present case, namely that the defects in the cargo were not such as to be apparent to the master on a reasonable examination at the point of shipment. In that situation, the view of the court was that the signature of the bill of lading did not preclude the owners from establishing the true condition of the cargo (because the representation made by the bill of lading as signed was true) and there was no need for an implied term. It is true that the arbitrator has found in the present case that the signature of the bill of lading in the terms presented did as a matter of fact expose the head owners to liability in China, but even if that is a ground of distinction, it cannot be said that *The Nogar Marin* provides any support to the Owners' case.

66. Moreover, the court's approach to the claim based on an implied obligation to indemnify the owners is in my judgment fatal to the Owners' claim for an indemnity in the present case. Mustill LJ dealt with this at p.422:

> "It seems to us plain and the authorities leave us in no doubt that the implication of an obligation to indemnify is not automatic. It must always depend on the facts of the individual case, and on the terms of any underlying contractual relationship. The first step is always to indemnify [sc. identify] the express or implied request by the person called upon to indemnify. Here, if the request is to be understood as meaning: 'Kindly sign this bill, just as it stands, with its acknowledgement of receipt in apparent good order and condition', the claim for an indemnity must be sound, for the agents did precisely what they were asked; and the defence based on an intervening act must fail, since no act intervened, or ever could intervene, in such a situation. In the present case, we do not regard this as the correct reading of what happened. Everyone in the shipping trade knows that the master need not sign a clean bill just because one is tendered; everyone knows that it is the master's task to verify the condition of the goods before he signs. This being so, we cannot understand the request implicit in the tender as being more than this: 'The charter requires you to bind your owners to the contract contained in the bill of lading and please do so. The bill of lading also constitutes a receipt, and please sign it as such, with whatever appropriate qualification you may think fit'. If this is a right account of the transaction, as we believe it to be, the claim for an indemnity must fail."

67. This is a clear decision, by a master of maritime law, that the tender of a draft bill of lading stating the cargo to be in apparent good order and condition is no more than a request to the master to satisfy himself that the bill in these terms can properly be signed and does not give rise to any right of indemnity. It is apparent, as Mr Wright submitted, that Mustill LJ's reasoning was based on the nature of the request made by a shipper when tendering a draft bill.

**The indemnity cases**

68. What I have said so far means that this appeal must be dismissed, but I should explain why the indemnity cases on which the arbitrator and Mr Leabeater rely do not support the arbitrator's conclusion.

69. The arbitrator's reasoning was that the cases of *Kruger & Co v Moel Tryvan Ship Co Ltd*, *Elder Dempster v Dunn & Co* and *Dawson Line Ltd v AG Adler fur Chemische Industrie of Berlin* stand for "a general principle that where the contract required the master to sign a bill of lading as presented, and the charterer or a person for whom the charterer is responsible presents an inaccurate bill of lading, the charterer must be responsible for the consequences that follow". I do not doubt the general principle, but it has no application in this case for three related reasons which can be stated shortly. First, the master was not required by the charterparty to sign a bill of lading stating that the cargo was in apparent good order and condition if, based upon his examination of it and applying the principles stated in *The David Agmashenebeli*, he could not properly do so. Second, for the reasons I have explained, the draft bill of lading was not inaccurate and did not contain any implied representation as to the apparent order and condition of the cargo; its tender was merely a request to the master to satisfy himself whether the bill could be signed in this form, as to which on the facts he rightly concluded that it could be. Third, none of the cases were concerned with statements about the apparent order and condition of the cargo. In *Kruger v Moel Tryvan* the issue was whether the owners were entitled to an indemnity when the tendered bill of lading was in a form which the master was not obliged to sign and which exposed them to more extensive liability than they were required to accept under the charterparty. *Elder Dempster v Dunn* was concerned with the way in which the cargo was marked, which was the charterers' responsibility under the charterparty. *Dawson v Adler* was about the weight of the cargo stated in the bill of lading, which determined the owners' entitlement to freight.

70. *Groves & Sons v Webb & Kenward* (1916) 13 Asp M.C. 386 was also cited. That was a case in which, at the request of the defendants, warehousemen issued clean warrants for a consignment of wheat before it was in their possession and before they had any opportunity to examine it. In fact the wheat was damaged. The warehousemen were held liable to the buyers of the wheat, who had paid the full price in reliance on the warrants, and were entitled to be indemnified for the liability incurred as a result of the issue of clean warrants at the defendants' request. The case says nothing, in my judgment, about the nature of the request made by a shipper to a master when a draft bill of lading stating the cargo to be in apparent good order and condition is tendered for signature. In contrast with the position in *Groves v Webb*, the parties know that the master will have an opportunity to examine the cargo before signing and that the representation which he makes by signing the bill of lading refers only to what is reasonably apparent to him from that examination. In *Groves v Webb* the warrants were not qualified in that way and the parties would have understood that the

warehousemen were taking the condition of the wheat on trust from the defendants and would incur a liability to a transferee of the warrants if it turned out that it was damaged.

71. I do not regard the passage from *Cooke, Voyage Charters* on which the arbitrator relied as supporting her conclusion. That passage, at para 18.231, states:

> "Where the owner has incurred liability to a bill of lading holder as a result of an inaccurate statement in the bill of lading presented to the master by the charterer or shipper, he may recover an indemnity from the charterer, as long as the master did not have reasonable means of discovering that the statement was inaccurate. This liability may be founded upon an obligation to indemnify implied by law from the request to sign the bill of lading, or upon an implied warranty that the statements contained in the bill of lading are accurate."

72. This passage is concerned with inaccurate statements in the bill of lading when the master does not have reasonable means of discovering the inaccuracy. It has no application in the present case, where the alleged inaccuracy is as to the apparent order and condition of the cargo which the master does have an opportunity to check.

73. Similarly, Mr Leabeater's proposition that "where charterers require the Master to sign a bill of lading which misdescribes the cargo, including the condition of the cargo; and that misdescription cannot reasonably be discovered by the Master, charterers are liable to indemnify owners against the consequences" also misses its mark. It fails to distinguish between the condition of the cargo, which was not described in the bill of lading (on the contrary, it was expressly stated to be unknown) and its *apparent* condition. As I have explained, the apparent condition refers to the external condition of the cargo as it appears to the master. Based upon his examination, the bill which was signed on his behalf did not misdescribe the cargo. Moreover, as the apparent condition of the cargo refers to the condition as it appears to the master on reasonable examination, it is essentially meaningless to say that a misdescription of the apparent condition cannot reasonably be discovered by the master.

74. Some reliance was placed upon the passage of Mustill LJ's judgment in *The Nogar Marin* referring to facts "uniquely within the knowledge of the charterer". It is important, however, to see that passage, which I have already set out, in its proper context. By definition, a statement as to the apparent order and condition of the cargo cannot be uniquely within the knowledge of the charterer (or the shipper). The apparent order and condition of the cargo is precisely what a reasonable investigation on the part of the shipowner's servants is intended to ascertain.

**An encouragement to misdescribe?**

75. Finally, I should respond to the arbitrator's *cri de coeur* that it is unfair for the Owners to be liable without recourse to the Charterers when their liability arose from the shipment of damaged cargo and the shippers (on the Charterers' "side of the line") could by a reasonable examination have ascertained its damaged condition when the master could not. Mr Leabeater developed that point further by submitting that the

judge's decision is an encouragement to charterers and shippers to misdescribe the condition of cargo in draft bills of lading because the consequences of that misdescription will not fall on them but on the owners. The judge referred to this submission at [14] of his judgment:

> "14. … Mr Leabeater QC submits that if the [Charterers are] correct then a charterer or shipper who '… knows of either (a) a latent defect in cargo or (b) a patent defect which a Master would not be able to identify could properly draft a bill describing the cargo as clean on board and in apparent good order because … that representation in the mouth of the Master would be correct. That cannot possibly be the right answer: if the shipper or charterer knows of a defect in the cargo he is bound to declare it to the Master and if he chooses not to do so he is liable for the consequences."

76. I have some sympathy with this submission and can see that it may seem unfair for charterers who actually know about pre-existing damage to escape liability. However, this is not a case where there was any finding of actual knowledge on the part of either the shippers or the Charterers and I say nothing (see [57] above) about what the position would be if there had been. In a case where there is no such finding, and where the arbitrator has decided that there is no express right of indemnity and that the cargo is not dangerous, I see no good reason to distort the established meaning of a phrase such as "shipped in apparent good order and condition", or the established understanding of what is happening when a draft bill containing those words is tendered to a master for signature, in order to address any perceived unfairness. It is necessary also to bear in mind the limited role of the court on an appeal under section 69, which is to determine the question of law which is the subject of the appeal.

## Disposal

77. Accordingly I would answer the first two questions of law as follows:

(1) The words "CLEAN ON BOARD" and "SHIPPED in apparent good order and condition" in the draft bill of lading presented to the master did not amount to a representation or warranty by the shippers and/or Charterers as to the apparent condition of the cargo observable prior to loading; they were merely an invitation to the master to make a representation of fact in accordance with his own assessment of the apparent condition of the cargo on shipment.

(2) On the findings of fact made by the arbitrator, the statement in the bill of lading that the cargo was shipped in apparent good order and condition was accurate.

78. In these circumstances the third question, which assumes the existence of an inaccuracy in the bill of lading, does not arise. However, I agree with the judge that the Charterers were not obliged to indemnify the Owners against liability for the cargo claim and that to impose liability on the Charterers based on the tender of a draft bill of lading containing a statement that the cargo was shipped in apparent good order and condition would be contrary to the scheme of the Hague Rules.

79. For these reasons, which are essentially the same as those given by the judge, I would therefore dismiss the appeal.

**Lady Justice Rose:**

80. I agree.

**Lord Justice Bean:**

81. I also agree.