CA on appeal from Commercial Court (Mr Justice Langley) before Ward LJ; Clarke LJ; Neuberger LJ. 28th July 2005

LORD JUSTICE CLARKE:

Introduction

1. This is an appeal from an order of Langley J made on 16th March 2005 in which he declared that the court had no jurisdiction over the claim and ordered that the issue and service of the claim form be set aside. He also ordered the claimant to pay the defendants' costs and gave permission to appeal to this court. The question in the appeal is whether the English court has jurisdiction to entertain an action by the claimant "shipowner" against cargo insurers under a general average guarantee.

The facts

2. The facts are not in dispute. The claimant was the demise charterer of the vessel "Vitoria" when on 14th February 2003 she sustained serious bottom damage as a result of grounding whilst proceeding down the River Plate. At the time of the grounding she was laden with a cargo of vegetable oil and was en route for India and Bangladesh. The cargo was being carried under various bills of lading and a voyage charterparty, which I will together call the contracts of carriage. The demise charterer was the carrier under the contracts of carriage. Expenditure of a general average nature was incurred by the demise charterer. The bills of lading incorporated the terms of the charterparty. They also provided, by clause 4, for general average to be payable according to the York/Antwerp Rules 1974 and to be settled at the place provided in the charterparty and, by clause 8, for arbitration in London.

3. Clause 20 of the charterparty provides so far as relevant:

   "20. GENERAL AVERAGE. General Average shall be adjusted, stated and settled according to York-Antwerp Rules 1950, at such port or place in the United States as may be selected by the Owner, and as to matters not provided for by these Rules, according to the laws and usages at the Port of New York. in such adjustment, disbursements in foreign currencies shall be exchanged into United States money at the rate prevailing on the dates made and allowances for damage to cargo claimed in foreign currency shall be converted at the rate prevailing on the last day of discharge at the port or place of final discharge of such damaged cargo from the ship. Average agreement or bond and such additional security, as may be required by the Owner, must be furnished before delivery of the cargo. Such cash deposit as the Owner or his agents may deem sufficient as additional security for the contribution of the cargo and for any salvage and special charges thereon, shall, if required, be made by the cargo, shippers, consignees or owners of the cargo to the Owner before delivery. Such deposit shall, at the option of the Owner, be payable in United States money, and be remitted to the adjuster. When so remitted the deposit shall be held in a special account at the place of adjustment in the time of the adjuster pending settlement of the general average and refunds or credit balances, if any, shall be paid in United States money."

4. Clause 20 is part of the printed form of Vegoilvoy 1/27/50 charterparty. Clause 20 was in part superseded by clauses 31 and 32 which were typed clauses and provide as follows:

   "31. YORK/ANTWERP RULES 1994

   York/Antwerp rules 1994 to apply to this Charter Party.

   "32. GENERAL AVERAGE/ARBITRATION

   General Average/Arbitration to be London with English law to apply."

5. It is common ground that by the combined effects of those clauses it was agreed that general average would be stated and settled in London under the York/Antwerp Rules 1994. It is also common ground that in this context "settled" means "paid" and therefore it was agreed that general average would be paid in London: see ***Union of India v EB Aaby's Rederi A/S*** [1975] AC 797 per Viscount Dilhorn at 815B. It is thus a different case from that considered by this court in ***Sameon Co SA v NV Petrofina SA,*** unreported, 30th April 1997.

6. The claimant appointed the well-known average adjusters Richards Hogg Lindley (RHL) to collect general average security and to carry out the general average adjustment.

The Average Guarantee

7. The defendants were the cargo insurers of the whole cargo. At the invitation of RHL each subscribed, for its respective proportions of the cargo it insured, to a general average guarantee covering cargo interests' liabilities in general average.

8. The claimant company is incorporated in Liberia and domiciled in Liberia and/or Norway. The first and second defendants are incorporated and domiciled in France, the third defendant in Belgium, the fourth defendant in the Midlands, and the fifth and sixth defendants in Switzerland.

9. The average guarantee is expressed to be addressed "To the Owners of the 'Vitoria' and other parties to the adventure as their interests may appear."

10. It provides as follows:

    "In consideration of the delivery in due course of the goods specified below to the consignees thereof without collection of a deposit, we, the undersigned insurers, hereby undertake to pay to the shipowners or to the Average Adjusters, Richards Hogg Lindley Limited, on behalf of the various parties to the adventure as their interests may appear, any contribution to General Average and/or Salvage and/or Special Charges which may hereafter be ascertained to be legally due in respect of the said goods. We further agree:

(a) to make a payment on account of such sum as is duly certified by the average adjusters to be properly payable in respect of the goods and which is legally due in respect of the goods from the shippers or owners thereof.

(b) to furnish to the said Average Adjusters at their request all information which is available to us relative to the value and condition of the said goods.

(c) that any period of prescription whether provided by statue law, contract or otherwise, shall commence to run from the date upon which the general average adjustment is issued."

11. There then appears a list of the various cargo interests which cover the entire cargo on board the vessel. The average adjusters are stated to be RHL, whose business address in London is given. The average guarantee was signed by the insurers on various dates between 6th March and 7th April 2003.

The Adjustment

12. It is common ground that the reference to "the shipowners" in the average guarantee is a reference to the claimant. In these circumstances it is convenient to refer to the claimant as "the shipowners".

13. RHL issued a general average adjustment dated 2nd January 2004. It stated that "*those concerned in cargo*" were liable to pay general average in the sum of US$ 1,053,302.15. The total general average expenditure was stated to be US$ 1,204,118.76 of which the ship's proportion was US$ 150,816.61. The adjustment was sent to the first defendant under cover of a letter dated 10th February 2003 (an error for 2004) from RHL in these terms:

"We have now completed our general average adjustment in this case and enclose herewith a copy for your attention. You will note on page 6 the amount payable by Cargo Insurers is US$ 1,053,302.15.

We trust that you will find the adjustment to be in order and look forward to receiving your confirmation of settlement in due course. Your remittance should be sent direct to us to the following Account:

Charles Taylor Consulting PLC.

National Westminster Bank.

... London ... [The account number is given]"

14. It should be noted that although the average guarantee refers to Richards Hogg Lindley Limited, RHL is not a corporate entity but a trading division of CTC Management Limited, which is a company incorporated in England, and is ultimately owned by Charles Taylor Consulting PLC (CTC). As can be seen the letter asked for payment "to us" to a specified CTC account in London.

15. The cargo insurers refused to pay the contributions due from those "*concerned in cargo.*" As I understand it, the reason they have not paid is that they say that the cargo owners are not liable to the shipowners in general average because the vessel was unseaworthy and the grounding and subsequent general average expenditure were caused by the shipowners' breach of the contracts of carriage. The legal position is, of course, that if that is correct the cargo owners would not be liable in general average and the cargo insurers would not be liable under the average guarantee. The shipowners, for their part, deny any breach of the contract of contract and say that the cargo insurers are liable under the guarantee.

Jurisdiction

16. The shipowners have brought this action in order to recover the cargo insurers' several contributions to the sum of US$ 1,053,302.15 under the average guarantee. The insurers say that the English court has no jurisdiction to entertain the claim or claims and the judge so held. The question is whether he was right to do so.

17. The jurisdiction of the court depends upon the provisions of EC Council Regulation 44/2001 ("the Regulation") in the case of the first to fourth defendants, who are domiciled in France, Belgium and the Netherlands, and upon the provisions of the Lugano Convention ("the Convention") in the case of the fifth and sixth defendants, who are domiciled in Switzerland. Articles 2 of the Regulation and the Convention respectively require the defendants to be sued in the countries of their domicile unless some special ground of jurisdiction under the Regulation or Convention applies.

18. The only special ground of jurisdiction suggested is that to be found in Article 5.1(a) of the Regulation and Article 5.1 of the Convention which are, so far as material, identical. I should, however, note in passing that by Article 6.1 a person domiciled in a contracting state may also be sued "where he is one of a number of defendants, in the courts for the place where any one of them is domiciled." Mr Baker said, in the course of argument, that he knew of no reason why that provision should not apply here.

19. I return to Article 5.1(a) of the Regulation which provides:

"A person domiciled in a Member State may, in another Member State, be sued:

In matters relating to a contract in the courts for the place of performance of the obligation in question."

It is not in dispute that this is a matter relating to contract. It follows that the sole question is whether England is "the place of performance of the obligation in question."

20. As the judge observed in paragraph 9 of his judgment, the parties agree that the question is whether, on the true construction of the average guarantee, cargo insurers were obliged to pay contribution to general average in England. As he put it, "*If it did there is jurisdiction; if it did not, there is not.*" The judge held that the shipowners had failed to establish that there was an obligation to pay in England.

21. It is common ground that the place of performance of the payment obligation is to be determined in accordance with the law governing the contract and identified by the conflict of laws rules of the lex fori and that by those rules that law is or is to be treated as English law. It is also common ground that, if the obligation was required to be performed in more than one jurisdiction, or could be performed in more than one jurisdiction, no single jurisdiction would be established under Article 5.1 (see Case C-256/00 ***Besix v Kretzschmar*** [2002] ECR 1-1699 (ECJ) at 1724-7 and ***Hanbridge Services Ltd v Aerospace Communications Ltd*** [1993] IL Pr 778 (Irish Supreme Court) at 784-5).

22. The judge's conclusion was simple. It was that the cargo insurers each had a choice whether to pay the shipowners or RHL and that since there is nothing in the guarantee requiring them to pay the shipowners in London they were entitled to pay them wherever they could be found, notably in Liberia or Norway. The judge accepted Mr Baker's submission to that effect and Mr Baker naturally submits in this court that he was right to do so.

23. The argument which Mr Kenny presented to the judge, and presents to us, on behalf of the shipowners, is that the right to choose between the two alternative modes of payment provided for in the guarantee is vested in the parties to whom the guarantee is addressed, and that once RHL instructed the cargo insurers on behalf of those parties (here the shipowners) to pay RHL in London, the cargo insurers' obligation was to pay in London.

24. The reason why Mr Kenny put his submission in that way was that, as I indicated earlier, the guarantee was not addressed only to the shipowners but "*To the Owners of the 'Vitoria' and other parties to the adventure as their interests may appear.*" The reason that it was so addressed is that this is a standard form of guarantee and the shipowners are not the only parties to a maritime adventure who might be entitled to recover in general average. The classic example of such a case is perhaps that of the cargo owner whose cargo is jettisoned in order, say, to refloat a grounded vessel and save the adventure. The cargo owners in such a case would be likely to be a receiving and not a paying party in general average.

25. At common law shipowners have a lien on the cargo for general average. Cargo owners have no such lien because they do not have possession of cargo which is laden on board the vessel but owned by others. However, it is the duty of the shipowner to exercise a lien on the cargo, not only for his own contribution but also for that of cargo owners who may be entitled to contribution. Failure to do so exposes the shipowner to liability and damages: see Lowndes & Rudolf on The Law of General Average and The York-Antwerp Rules 1997 paragraph 30.42 and the cases cited at paragraphs 30.43 to 30.46.

Discussion

26. The issue between the parties is thus a stark one. On the true construction of the guarantee did cargo insurers have a choice whether to pay their contribution to the shipowners or the average adjusters, or did the persons entitled to contribution have a choice entitling them to require the cargo insurers to pay the shipowners or the average adjusters?

27. There has been much debate as to the context in which the guarantee falls to be construed and as to the respective interests of cargo insurers on the one hand and those entitled to contribution on the other, on the question who the parties must have intended should have the choice described above.

28. Although there has been much debate between the parties, so far as I am aware this has not been a live issue in the past even though it is common ground that the average guarantee in this case is in almost the same form as the guarantees used by other average adjusters. There are, as I understand it, essentially two types of guarantee in use, the principal difference between them being, not in the language which has formed the subject matter of the debate in this case, but in the fact that one expressly provides for English jurisdiction and the other does not.

29. As I have explained, the issue between these parties has arisen as part of a jurisdiction dispute and not because the question as to who should have the relevant choice is otherwise a live issue between the parties for commercial reasons. Thus it seems likely that, but for the fact that the cargo insurers assert that there is no liability in general average because of the unseaworthiness of the vessel, they would have complied with the average adjuster's request in the letter which I have quoted and simply paid the amount of their respective contributions into the account referred to in it. Equally, the shipowners might well have been happy with payment to themselves and not RHL.

30. There was some debate as to the relevant principles to be applied to the construction of a guarantee of this kind. To my mind the principles to be applied are those which apply to the true construction of any contract. The court must, of course, have regard to the language of the guarantee, but the words used must be construed in the context of the guarantee as a whole and the guarantee as a whole must be construed in the light of the circumstances surrounding it, or put another way, its factual matrix. Thus, the guarantee must be set in its commercial context.

31. These principles have been restated in a number of well-known cases in recent years with somewhat differing emphases without, to my mind, changing the underlying approach. The courts have been inclined to emphasise the importance of adopting a commercial rather than a literal approach. This is not surprising in the case of commercial contracts between commercial parties.

32. A recent example of this approach can be seen in the speech of Lord Steyn in ***Sirius International Insurance Co (Publ) v FAI General Insurance Ltd & Ors*** [2004] 1 WLR 3251 [2004] UKHL 54. In the course of his speech Lord Steyn said at paragraphs 18 and 19:

"18. The settlement contained in the Tomlin order must be construed as a commercial instrument. The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The inquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual scene.

*"19. There has been a shift from literal methods of interpretation towards a more commercial approach. In Antaios Compania Naviera SA v Salen Rederierna AB [1985] AC 191, 201, Lord Diplock, in an opinion concurred in by his fellow Law Lords, observed: 'if detailed semantic and syntactical analysis of a word in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.' In **Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd** [1997] AC 749, 771, I explained the rationale of this approach as follows:*

'In determining the meaning of the language of a commercial contract ... the law ... generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language.'

*This tendency should therefore generally speaking be against literalism. What is literalism? It will depend on the context. But an example is given in The Works of William Paley (1838 ed), vol III, p 60. The moral philosophy of Paley influenced thinking on contract in the 19th century. The example is as follows: the tyrant Temures promised the garrison of Sebastia that no blood would be shed if they surrendered to him. They surrendered. He shed no blood. He buried them all alive. This is literalism. If possible it should be resisted in the interpretative process. This approach was affirmed by the decisions of the House in Mannai **Investment Co Ltd v Eagle Star Life Assurance Co Ltd** [1997] AC 749, 775E-G, per Lord Hoffmann and in **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 WLR 896, 913D-E, per Lord Hoffmann."*

33. As ever, much depends on the context. In the instant case the question is to whom each of the cargo insurers promised to pay cargo's respective contributions in general average. The guarantee provided that they undertook to pay "*to the shipowners or to...[RHL].*"

34. Although the contract is entitled a guarantee, it is common ground that the cargo insurers assumed a primary obligation to pay any contribution in general average which was subsequently ascertained to be legally due in respect of goods: see ***Castle Insurance Co Ltd v Hong Kong Islands Shipping Co Ltd*** [1984] AC 226. Part of the relevant context in construing the contract is, in my opinion, the fact, which was either known or would have been in the contemplation of the parties, that under the contracts of carriage general average was to be settled, that is paid, in London.

35. It should be noted that, as I have already pointed out, it is not the shipowners' case that, on the true construction of the contracts, the shipowners had an option whether to require the cargo to pay the relevant general average contribution or salvage or special charges, as the case might be, to the shipowners or to the average adjusters. When I first read the average guarantee I was attracted by the solution that, at any rate in a case like this, where the vessel had grounded and it must have been apparent to everyone that cargo interests would be the paying parties and the shipowners the receiving party, the parties must have contemplated that once the adjustment was produced the shipowners would have the choice, either of being paid directly or through the average adjusters. At first that seemed to me to be a sensible construction, especially since a promise to pay the shipowners or their agents (the average adjusters) might well be construed as giving the shipowners, as principals, the option who should be paid.

36. However, that is not quite the case advanced on behalf of the shipowners. They recognise that the guarantee is addressed both to the shipowners and to the "*other parties to the adventure as their interests may appear*" which, as explained earlier, would include any cargo interests who were receiving parties in general average under the adjustment. Mr Kenny submits that the contract should be given the same meaning whether the receiving parties were shipowners or cargo owners. I see the force of that submission given that this is a form of guarantee intended to cover the position whoever the receiving parties.

37. Mr Kenny submits that on the true construction of the guarantee it was for the receiving party or parties to notify each cargo insurer whether it or they wanted it to pay the relevant contribution to the shipowners or the average adjusters, and that it was then the cargo insurers' obligation to carry that instruction out. Presumably, if the option was not exercised it would be open to the cargo insurers to choose who to pay. But whether that is so or not, on the facts of this case, the shipowners, as the relevant receiving party, exercised the option by the average adjuster's letter asking for payment to them at a designated account in London.

38. Mr Kenny submits that there was no commercial reason for the cargo owners to be given the choice, whereas there was good reason for the receiving parties to be given the choice. Thus, a receiving cargo owner or cargo owners might well not want the cargo insurers to pay the shipowners who might well be insolvent or a one-ship company, but might well prefer the much greater security of payment through the average adjusters.

39. I see that in such circumstances receiving cargo owners might well have an interest in being given such a choice. However, the question is whether they were given such a choice in this average guarantee. Mr Kenny submits that they were and, moreover, that there is no need to imply a term to that effect, but that the contract should be

construed so as to achieve that result. He submits that the contract makes it clear that the shipowners or the average adjusters, as the case might be, are to receive the cargo owners' payment "*on behalf of the various parties to the adventure as their interests may appear*", by which is meant the persons entitled as receiving parties, and that construed as a whole the contract gives the relevant choice to those parties. I accept that any payment is indeed to be received by the shipowners or the average adjusters on behalf of those entitled to receive it, but I do not think that the contract has the meaning which Mr Kenny seeks to ascribe to it, whether it is construed literally or in its context.

40. Mr Baker submits that where a contract provides for the promisor to do A or B, it is for the promisor to choose whether to do A or B. He goes so far as to say that there is a rule of law to that effect. He relies, for example, on the principles stated in paragraph 21-006 of the 29th edition of Chitty on Contracts as follows:

*"**Promises in the alternative**. Where a contractual promise is in the alternative, in that the promisor agrees to do one of two or more things, the legal effect of the promise depends on the kind of alternative involved: there may be a promise to perform in one of two or more alternative ways, where the form of the promise requires an election to be made; or there may be a primary or basic obligation to perform in one way unless the party who holds the 'option' chooses to substitute another way. Under the first kind of alternative promise, there is no primary or basic obligation and there must be an election of an alternative by one of the parties. The contract may provide which party may choose the alternative to be performed; in the absence of such a provision, the right to elect the alternative is impliedly vested in the promisor, the rule being that the party who is obliged to perform the first act may choose which alternative he wishes to perform. If the promisee is entitled to elect between the alternatives, he must give notice of his election, and until such notice has been given the liability of the other party does not arise. Once the party entitled to elect chooses the alternative to be performed, he is absolutely bound by his choice, even though the chosen mode of performance afterwards becomes impossible to carry out."*

41. Mr Baker relies in particular upon the statement that in the absence of a provision as to which party may choose the alternative, the right to elect is impliedly invested in the promisor. Moreover, he says that is a rule of law. The cases cited for that proposition by Chitty are ***Layton v Pearce*** (1778) 1 Dougl 15; ***Re Brookman's Trusts*** (1869) LR 5 Ch App 182 and ***Christie v Wilson*** 1915 SC 645. Mr Baker referred us to each of those cases and also to ***Price v Nixon*** (1813) 5 Taunt 338. Those cases do contain statements of principle to that effect. For example, in ***Layton v Pearce*** Lord Mansfield said at page 15: *"But, though the practice may be, that the insured shall have the option, in point of law, the person who is to perform one of two things in the alternative has the right to elect."*

42. Mr Kenny submits that it is to overstate the case to say that there is any such rule of law and that the question which party has a relevant choice is a matter of construction of the particular contract to be resolved by applying the modern principles of construction which are less rigid than they were in the eighteenth and nineteenth centuries. He relies upon the principles of construction in the modern cases to which I referred earlier, and also in this regard in ***Honck v Muller*** (1881) 7 QBD 92 and ***Thorn v City Rice Mills*** (1889) 40 Ch D 357.

43. So, for example, in ***Honck v Muller*** a contract provided:

"Sold to John Honck Esq.

...

2,000 (two thousand) tons, No 3, GMB Middlesbro' pig iron, at 42s (forty-two shillings) per ton fob maker's wharf here.

Delivery November, 1879, or equally over November, December, and January next at 6d per ton (sixpence) extra.

Payment, nett cash here against bills of lading."

The plaintiff was the buyer and the defendant the seller. A majority of this court were of the opinion that the plaintiff had the choice to have the 2000 tons in November or in equal proportions in November, December and January. The court simply treated the question as one of construction of the contract. The same was true in ***Thorn v City Rice Mills*** which was a decision of North J, although I am not sure that I would have reached the same conclusion as North J on the facts of that case.

44. On this issue I prefer the submission of Mr Kenny that all depends upon the construction of the contract construed in accordance with the developed principles. This approach has received some support in the textbooks. For example, in volume 9(1) of Halsbury's Laws of England, paragraph 939, under the heading *"Alternative Places Specified"* the editors say: *"Where a contract specifies two or more alternative places for payment or performance, the question whether the promisor or the promisee has the right of selection depends on the intention of parties, which is to be ascertained from the nature and terms of the contract and the surrounding circumstances."*

That said, it does seem to me that the natural meaning of a clause which imposes an obligation on a party to do A or B is likely to be that it is for the promisor to choose whether to do A or B. Here, by the express terms of the contract, the cargo insurers "*undertake to pay to the shipowners or to the Average Adjusters... any contribution to General Average...*" To my mind, the natural meaning of that language is that the cargo insurers must pay their contribution to the shipowners or to the average adjusters but they can decide which. Moreover, there is nothing in the language of the average guarantee, viewed as a whole, to lead to any other conclusion. In particular there is nothing in the language to suggest that it is for the persons entitled to the contribution to choose.

45. Thus Mr Kenny has to point to the context and the underlying probabilities. He submits that the construction favoured by the judge is too literal and that, if proper regard is had to the commercial approach to which Lord Steyn referred in the Sirius International case, the correct view of the contract is that it was for the receiving

parties to choose whether the cargo insurers should pay the shipowners or the average adjusters. An important part of the shipowners' case is Mr Kenny's submission that the cargo insurers have no commercial interest in having the choice whom to pay.

46. Mr Baker submits, by contrast, that that is wrong and that cargo insurers do have a real interest in deciding whether to pay the shipowners or the average adjusters. He first submits that on the true construction of the contract the insurers have an obligation to make one payment which is to be made either to the shipowners or to the average adjusters. Although it is not, to my mind, necessary to express a final conclusion on that question in order to decide this appeal, I would not accept it. It seems to depend on the fact that the obligation expressed in the contract is to pay "any contribution" in the singular. I do not think that the language naturally means that the obligation is to make one payment which must be either to the shipowners or to the average adjusters. I cannot see why the cargo insurers should not, for example, pay a contribution owed to the shipowners to the shipowners and a contribution, say, to cargo insurers to the average adjusters.

47. Mr Baker's second submission is that depending on the circumstances there may be very good reasons why cargo insurers may wish to have the choice of paying the average adjusters instead of the shipowners. Thus, in a case where there were cargo interests who were entitled to receive payments in general average, the cargo insurers might properly take the view that the simplest and safest thing to do would be for them to pay the average adjusters and not the shipowners. The cargo insurers might know that the shipowners were insolvent, or potentially insolvent, and that monies owed to cargo interests, but paid to shipowners, might not reach the relevant cargo interests whereas payments made to the average adjusters would.

48. Mr Kenny submits that that is not a real fear, or at least not a real commercial interest because payment to the shipowners would be a good discharge of the cargo insurers' liability under the guarantee. While there is force in that submission, I would accept Mr Baker's submission that cargo insurers might well have a legitimate commercial interest in paying the average adjusters in order to ensure that monies owed to cargo interests were in fact paid to those interests.

49. There are other sensible reasons for giving the choice to cargo insurers in a case where there are a number of cargo interests entitled to receive contributions. The construction suggested on behalf of the shipowners involves each such interest communicating with each cargo insurer and giving instructions, whereas there is nothing in the contract to suggest that that was intended.

50. For these reasons I would not accept Mr Kenny's submission that cargo insurers have no legitimate commercial interest in having the choice. I accept that the receiving parties also have an interest in having the choice, but I do not think that that interest is sufficient to lead to the conclusion that the parties to the contract must have intended to give the receiving parties the right to choose to whom the receivers should pay.

51. As Lord Steyn said in Sirius International, the aim of the enquiry upon which the court is engaged is to ascertain the contextual meaning of the relevant contractual language. I have reached the conclusion that applying that test the judge was right to construe the contract as he did, essentially for the reasons he gave. That construction is consistent with the simple operation of the agreement in every case. The average adjusters produce an adjustment. The adjustment indicates the average adjuster's view of the liability of the cargo interests to the receiving interests. By the express terms of the contract, time starts to run from the date of the adjustment and each of the cargo owners' obligation to pay arises at that time. It is then for them to choose whether to pay the shipowners or the average adjusters. That is a simple scheme with none of the potential complexities involved in this shipowners case.

52. I recognise that it will be the rare case in which there will be cargo interests entitled to contribution and an even rarer case when there will be many such interests, but it can happen. The whole basis of Mr Kenny's construction was that the average guarantee should be construed to cater for such a case.

53. There was a certain amount of what the judge described as "contextual evidence" before him. The judge concluded that, while relevant, it was of no real assistance. It was not, and is not, suggested that there was any uniform custom upon which the shipowners could rely. The evidence related to the usual practice and in the main focused on the usual case where the average adjusters ask the cargo insurers, on behalf of the shipowners, to pay the average adjusters or sometimes the shipowners.

54. The judge said that he did not find the evidence of any real assistance in resolving the issue between the parties on the true construction of the average guarantee. I agree. The judge expressed his conclusions thus in paragraph 17 of his judgment: *"I do not find the contextual evidence of any real assistance in construing the Average Guarantee. In law an adjustment is not conclusive nor binding:* ***Sameon Co SA v NV Petrofina*** *CA (unreported), 30 April 1997. Whilst the guarantee plainly contemplates in the wording commencing: 'We further agree', that there will be an adjustment the obligation of insurers is to pay general average which is 'legally due'. That obligation is to pay the shipowners 'or' RHL. Those words are unqualified and, I think, unequivocal. I see no need to read into them any qualifications about election between one or other payee. It is for the claimant to establish, if there is to be jurisdiction in this court, that the obligation of insurers is to make payment to RHL in this jurisdiction. It is not, as expressed, and in my judgment that is conclusive against the claimants submission."*

I agree. I should add that I do not read this judge as ignoring the commercial context and applying an over-literal approach.

55. Finally, the judge said this in paragraph 20 of his judgment: *"No construction is, in my judgment, free from potentially unfortunate consequences. But, the place of performance is itself only an exceptional basis for jurisdiction. Insurers may be sued as co-defendants in one state of domicile under Article 6.1 of the Regulation and Convention. This country has no connection with the factual issues in this case of damage and unseaworthiness. On the claimant's construction each 'creditor' could choose to whom payment was to be made. I agree with Mr Baker that the commercial way to provide for jurisdiction is to adopt a jurisdiction clause. Otherwise, in context, jurisdiction in the place of domicile is, and has now for many years, been the established rule regardless of whether or not that place has any connection with the material events."*

Again I agree.

56. The moral of the story is that if shipowners wish to have the choice who is to be paid they should ensure that the average guarantee expressly says so, and, more importantly perhaps, if they want issues of liability and general average to be determined in England they should include an English exclusive jurisdiction clause.

57. For all these reasons I would dismiss the appeal.

58. **LORD JUSTICE NEUBERGER**: For the reasons given by my Lord, Lord Justice Clarke, to which I cannot usefully add, I too would dismiss this appeal.

59. **LORD JUSTICE WARD**: I agree.

ORDER: appeal dismissed; respondents' costs of appeal summarily assessed in the sum of £9,000; permission to appeal refused.

MR S KENNY (instructed by Holman Fenwick & Willan) appeared on behalf of the Appellant
MR A BAKER (instructed by Ince & Co) appeared on behalf of the Respondents