Laemthong International Lines Company Ltd v Abdullah Mohammed Fahem & Co [2005] Int.Com.L.R. 05/05

CA on appeal from Commercial Court (Mr Justice Cooke) before The V.C. Clarke LJ; Neuberger LJ. 5th May 2005.

Lord Justice Clarke:

Introduction

1. This is the judgment of the court to which all members have contributed. The claimants in this action are or were the owners of the vessel LAEMTHONG GLORY ("the vessel"). We will call them *"the owners"*. The first defendants are ARTIS and were the charterers of the vessel. We will call them *"the charterers"*. The second defendants were the receivers of cargo shipped on board the vessel pursuant to the charterparty. We will call them *"the receivers"*. The third defendant is Mr Mohammed Fahem and is the person behind the receivers. There is a live issue as to his personal liability, if any, with which we are not concerned. Both the charterers and the receivers issued letters of indemnity before the cargo was discharged. We will call them *"the charterers' LOI"* and *"the receivers' LOI"* respectively. The issue in this appeal is whether the owners are entitled to proceed directly against the receivers under the receivers' LOI by reason of the terms of the Contracts (Rights of Third Parties) Act 1999 *("the 1999 Act")*.

2. On 8 November 2004 Cooke J determined certain preliminary issues which had been ordered by Colman J on 22 October 2004. He held that the owners were entitled to enforce the terms of the receivers' LOI against the receivers and made a declaration to that effect. He also declared that the owners were entitled to an order that both the charterers and the receivers provide bail or other security required to secure the release of the vessel from arrest. As we understand it, he made those orders under the charterers' LOI and the receivers' LOI respectively. As between the charterers and the receivers he made the same order for bail or security, presumably under the receivers' LOI.

3. The judge refused the receivers permission to appeal. Potter LJ subsequently granted permission to appeal on paper but did so only because of an application to adduce fresh evidence before the Court of Appeal. He said that, if the state of the evidence had been as it stood before the judge, he would not have granted permission. He nevertheless granted permission to appeal generally.

The facts

4. The facts are for the most part not in dispute and are set out by the judge. We can state them shortly. The vessel was voyage chartered under an amended form of sugar charterparty dated 8 December 2003. It provided for the carriage of a cargo of sugar from a port in Brazil to Hodeidah or Aden in Yemen at charterers' option. By clause 7 it provided for owners to appoint, employ and be solely responsible for agents at the loading and discharging ports.

5. Clause 42 provided as follows:

   "In the event of the Original Bills of lading are not being available at discharge port on vessel's arrival, if so required by Charterers, Owners/Master to release the cargo to Receivers on receipt of Faxed letter of Indemnity. Such letter of Indemnity to be issued on Charterers head paper, wording in accordance with the usual P&I Club wording, and signed by Charterers only always without a bank counter-signature."

   It is common ground that but for that clause the owners would not have been entitled or obliged to deliver the cargo otherwise than against original bills of lading.

6. The charterparty provided for the issue of bills of lading signed by the master and on 21 January 2004 the master signed bills of lading in respect of the shipment of 14,000 metric tons of white crystal sugar in bags at Santos in Brazil for carriage to Hodeidah or Aden in Yemen. The shipper was named as Cargill Agricola SA ("Cargill") and the goods were consigned "to order", which means to order of the shipper. The receivers were named as the notify party. Thus in the ordinary course the shipper would be expected to negotiate the bills of lading to others, perhaps the receivers, who would be entitled to deliver the cargo on presentation of the original bills of lading. The bills of lading were thus owners' bills evidencing a contract of carriage between, on the one hand, the shipper and any indorsee of the bills of lading and, on the other hand, the owners. As between the owners and the charterers, the contract of carriage was governed by the charterparty.

7. Although we have not seen the contract of sale between Cargill and the charterers, it appears that Cargill sold the sugar to the charterers. It looks as if they did so on fob terms (or something similar) because the vessel was chartered by the charterers and not by Cargill. At some stage the sugar was sold by the charterers to the receivers. It is not clear from the available documents when that was. We have only seen a contract between the charterers and the receivers dated 30 January 2003 providing for the sale of a very much larger quantity of sugar in seven shipments. This was one of the shipments under that contract. The contract was on a C&F free out one or two safe berths Hodeidah or Aden basis.

8. The contract provided for a pricing sale back option which, we were told, led to disputes between the parties, but we were not told what those disputes were. The contract provided for payment by letters of credit opened by HSBC or a first class bank acceptable to the charterers. It specified the documents which were to be submitted to the bank under the letter of credit. They of course included the bills of lading. They also included a signed copy of the charterparty showing the nomination of El-Mokha Shipping and Trading Co Ltd at Hodeidah ("El-Mokha") *"to attend agency of the vessel/owners"* at the discharge port. The contract expressly provided for the receivers to nominate the owners' agents at the discharge port, which proved to be Aden. It thus appears that the receivers nominated El-Mokha as the owners' agents at Aden.

9. The banking arrangements in fact set up are far from clear, but it appears that the receivers opened a letter of credit with the Yemen Kuwait Bank for Trade Investment YSC ("the Yemen Bank") as the issuing bank. There was no confirming bank. Credit Agricole Indosuez Suisse SA ("CAI") was the advising bank. One of the two documents which the receivers wish to adduce by way of fresh evidence suggests that CAI sent the original documents, including presumably the bills of lading, to the Yemen Bank. It is not however clear when the Yemen Bank received them.

10. There is a dispute between the parties as to whether and when the charterers received payment for the sugar. The two documents upon which the receivers wish to rely as fresh evidence are said to be relevant to that question. For reasons which will appear below it is not necessary for us to resolve those questions or, indeed, to decide whether the fresh evidence should be admitted. We will not therefore lengthen this judgment by rehearsing the arguments, either on the question whether the evidence should be admitted, or on the questions whether and when the charterers were paid.

11. On 22 February the receivers sent a fax to the charterers saying that the latest information from the master of the vessel was that her ETA was 26 February and that

"in view of the original Bs/L … have not been received, kindly issue your LOI to owners and have them urgently instruct Master/Ship's agents allowing vessel to commence discharge and deliver cargo for us without production original bills of lading. …"

The next document available to the court is an email from the charterers to the receivers dated 25 February attaching "a new text". As the judge held in paragraph 13 of his judgment, it appears that there had been some communication between the charterers and the receivers requiring the receivers to produce a letter of indemnity in respect of the cargo and presumably as some backup (as he put it) for any letter of indemnity that the charterers might themselves issue to the owners.

12. The receivers replied to that email by fax to which they attached the receivers' LOI duly signed. It was in the form which had been attached to the email and was in the same form as the charterers' LOI. The fax was in these terms:

"In compliance with your request, we herewith return back to you the required LOI duly signed/stamped by us.

Kindly ensure to have Owners of the above vessel to instruct Master/ship's agent allowing vessel to commence discharge and deliver cargo to us without production original Bills of Lading in order avoid any delay berthing vessel.

Kindly confirm the attached LOI in a good readable order."

13. It is thus clear that the receivers' purpose in providing their LOI was to obtain delivery of the cargo. It seems a reasonable inference, as the judge held, that the charterers asked them for an LOI, not being willing to provide their own LOI without the receivers doing the same. It is clear from the receivers' faxes to which we have referred that, having provided their LOI, they expected the charterers to instruct the owners to deliver the cargo to them. Not only was their contract of sale with the charterers, but so was their LOI. It is common ground that the parties to the receivers' LOI were the charterers and the receivers, just as they were to the contract of sale.

14. It is also common ground that the charterers owed no duty to deliver the goods to the receivers under the contract of sale. As sellers under a C&F contract on the terms of that in the instant case, the charterers' obligation was to procure a contract of carriage, obtain original bills of lading and present them to the issuing bank under the letter of credit. In the ordinary course the bills of lading would be delivered to the receivers, who would present them to the owners and obtain delivery of the cargo. In the instant case, for whatever reason, the receivers did not have possession of the bills of lading but, since they wanted delivery of the goods, they were willing to provide their LOI.

15. In order to obtain delivery they required the charterers to procure the owners to deliver the cargo to them. It was known to all parties that the owners had physical possession of the cargo and that the charterers did not. Nor indeed did anyone else. Thus if the charterers were to deliver the cargo to the receivers, the only way they could do so was, in ordinary language, through the agency of the owners. That is what the receivers were seeking to achieve by providing their LOI to the charterers.

16. After receiving the receivers' LOI, the charterers sent a fax to the owners, headed "top urgent", in these terms:

"Please note that we have been informed by the Receiver in Yemen that original bills of lading has not yet been received by his bank.

We check on our side with our bank who sent the documents. We do think that original documents will be next week with them.

In order not to waist [sic] any time as vessel is scheduled to arrive by tomorrow please find herewith our L.O.I. issued as per P&I wording as well as the L.O.I. signed by Receivers in order to start discharging upon vessel's arrival as Saturday and Sunday are working days in Yemen. So please instruct Master accordingly."

It will be noted that the charterers attached both their own LOI and the receivers' LOI to the fax.

17. On 26 February the owners sent an email to both the master and El-Mokha, which referred to the fact that the vessel had arrived at the port and was awaiting berthing, to the absence of the bills of lading in the receivers' hands, but to the provision of a letter of indemnity by the charterers and which asked the master to release or discharge the cargo to the receivers without production of the original bills of lading. The master complied with

those instructions and the cargo was delivered by the owners to the receivers. Thus the owners complied with the charterers' instructions to deliver the cargo to the receivers.

18. After discharge was complete, the vessel was arrested on 10 March 2004 by the Yemen Bank, which alleged that it held all the original bills of lading in respect of the cargo and asserted a claim for the value of the cargo in a sum of something in excess of US $3 million, together with interest and costs.

19. In this action the owners sought a declaration under both LOIs, first, that they were entitled to be indemnified in respect of any such liability and, secondly, that both the charterers and the receivers were obliged to provide bail or other security to secure the release of the vessel.

20. The receivers sent their LOI to the charterers and not to the owners, and the owners do not say that they were parties to the contract contained in or evidenced by it. The owners' case, which was accepted by the judge, is that they are entitled to enforce the terms of the receivers' LOI in their own right by reason of the terms of the 1999 Act.

The 1999 Act

21. The 1999 Act provides, so far as relevant, as follows:

*"**Right of third party to enforce contractual term.***

1(1) Subject to the provisions of this Act, a person who is not a party to a contract (a 'third party') may in his own right enforce a term of a contract if

(a) the contract expressly provides that he may; or

(b) subject to subsection (2), the term purports to confer a benefit on him.

(2) Subsection 1(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.

(3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into."

22. It is common ground that two issues potentially arise under section 1. In order to satisfy the section, the claimant must show that the term of the contract relied upon purports to confer a benefit upon him. If the claimant succeeds in showing that the term purports to confer a benefit upon him, he is entitled to enforce the term directly against the defendant unless the defendant persuades the court that the parties did not intend the term to be enforceable by him: see ***Nisshin Shipping Co Ltd v Cleaves & Co Ltd*** [2003] EWHC 2602 (Comm), [2004] 1 Lloyd's Rep 38, per Colman J.

The receivers' LOI

23. The receivers' LOI identified the vessel, the charterparty, the 14,000 metric tons of sugar and the particular bills of lading and continued as follows:

"Load Port/disport Santos Brazil to Hodaida or Aden Port Republic of Yemen.

The above cargo was shipped on the above vessel by Cargill Agricola SA and USINA CAETA SA and consigned to Abdullah Mohammed Fahem & Co, PO Box 3637 Hodaida Republic of Yemen for delivery at the port of Hodaida or Aden Port Republic of Yemen. But the bills of lading have not yet arrived. We hereby request you to deliver the said cargo to Abdullah Fahem PO Box 3637 Hodaida Republic of Yemen at Aden without production of the original bills of lading.

In consideration of your complying with our above request we hereby agree as follows:

1) To indemnify you, your servants and agents and to hold all of you harmless in respect of any liability, loss, damage or expense of whatsoever nature which you may sustain by reason of delivering the cargo in accordance with our request.

2) In the event of any proceedings being commenced against you, or any of your servants or agents, in connection with delivery of the cargo as aforesaid to provide you or them on demand with sufficient funds to defend.

3) If in connection with delivery of the cargo as aforesaid the ship or any other ship or property in the same or associated Ownership management or control should be arrested or detained or should the arrest or detention thereof be threatened or should there be any interference in the use or trading of the vessel (whether by virtue of … being altered on the ship's registry or otherwise howsoever) to provide on demand such bail or other security as may be required to prevent such arrest or detention or to secure the release of the ship or property, or to remove such interference and to indemnify you in respect of any liability, loss, damage or expense caused by such arrest or detention or threatened arrest or detention or such interference whether or not such arrest or detention or threatened arrest or detention or interference may be justified.

4) If the place at which we have asked you to make delivery is a bulk liquid or gas terminal, facility or another ship, lighter or barge then delivery to such terminal, facility, ship, lighter or barge shall be deemed to be delivery to the party to whom we have requested you to make such delivery.

5) As soon as all original bills of lading for the above cargo shall have come into our possession to deliver same to you or otherwise to cause all original bills of lading to be delivered to you whereupon all liabilities hereunder shall cease.

6) The liability of each and every person under this indemnity shall be joint and several and shall not be conditional upon your proceeding first against any person whether or not such person is party to or liable under this indemnity.

7) This indemnity shall be governed by and construed in accordance with English law and each and every person liable under this indemnity shall at your request submit to the jurisdiction of the High Court of Justice in England."

The first issue

24. The owners' case is that each of the terms of the receivers' LOI was for their benefit. They say that they were agents of the charterers for the limited purpose of delivering the cargo to the receivers. They also say that, if that is wrong, they were the agents of the charterers because, although the general presumption is that the carrier is the buyer's agent to take delivery, the presumption may be rebutted, as where the seller agrees to deliver goods at their destination or reserves the right of disposal under section 19(1) or, as the case may be, section 19(2), of the Sale of Goods Act 1979: see *Halsbury's Laws of England* (4th edition reissue) volume 41 at paragraph 188 note 7. The editors say that in either of those cases the carrier is the agent of the seller or, as the case may be, of the person indicated by the bill of lading and not of the buyer. The owners' contention is that this is a case in which they reserved a right of disposal and were thus the agents of the charterers under that principle.

25. The receivers' contention, on the other hand, is that, if the owners were the agents of the charterers as sellers because of the reservation of the right of disposal, that agency came to an end when the charterers were paid by the receivers. In response, the owners say that there is no or no sufficient evidence that the charterers had been paid and that the court should not admit the fresh evidence, which is relevant only to the issue of payment and thus to the owners' case of agency on this alternative basis. If the owners succeed on the first way in which their case was put, which was accepted by the judge, their alternative case becomes academic and it will not be necessary to address it. We therefore consider first the question whether, on the true construction of the receivers' LOI, the owners were the charterers' agents in delivering the cargo to the receivers without insisting upon receiving the original bills of lading.

26. The owners' case, which was in effect accepted by the judge, may be summarised in this way. In the preamble to the numbered clauses in the receivers' LOI the receivers expressly requested the charterers to deliver the cargo to them without production of the original bills of lading. Further, in consideration of the charterers' complying with that request, the receivers expressly agreed to discharge each of the obligations in the numbered clauses in the LOI. Thus they became bound by those terms if and when the charterers delivered the cargo to them without production of the original bills of lading. Since the cargo was physically on board the vessel and thus in the possession of the shipowners, the charterers could not physically deliver the cargo themselves. They could only comply with the receivers' request by requesting the owners to deliver the cargo to the receivers.

27. Under the charterparty the charterers had a contractual right to have the cargo delivered to them or their order without production of original bills of lading upon provision of a charterers' LOI which complied with clause 42 of the charterparty. However, that is irrelevant for present purposes. The charterers needed the assistance of the owners because the only way they could procure the delivery of the cargo to the receivers was through the owners or, to put it another way and in ordinary language, through the agency of the owners. The owners were accordingly the agents of the charterers for the purpose of complying with the receivers' request in the receivers' LOI, namely to deliver the cargo to them under the receivers' LOI, and were thus properly to be regarded as falling within the category of "agents" whom the receivers promised to indemnify in clause 1 of the LOI.

28. The owners' case is as straightforward as that and, as we read his judgment, the judge accepted it as both simple and correct. In paragraphs 29 to 34 of his judgment the judge accepted a number of further points urged on behalf of the owners. They included the following. The only way in which the charterers could sustain liability for misdelivery of the cargo would be on the basis that they had misdelivered the cargo through the agency of the owners, so that clause 1 of the LOI would be meaningless in seeking to protect the charterers against a liability to deliver unless it operated when the charterers delivered in the only way they could in practice, namely by using the services of the owners. If the receivers' letter of indemnity had been intended to protect the charterers from the consequences of issuing their LOI, clause 1 would have taken an entirely different form. The only liability of the charterers to which clause 1 could therefore refer in practice was thatof delivery through the owners and, as the judge put it, the owners were therefore, within the context of the sale contract, the charterers' agents for this purpose.

29. Any proceedings for misdelivery brought by the holders of the original bills of lading would inevitably be brought against the owners, not against the charterers. Clause 2 makes no mention of proceedings against the charterers under their indemnity. The proceedings contemplated by clause 2 can only be proceedings brought by the owners against the receivers to enforce the terms of the receivers' LOI. Moreover, it was the owners and not the charterers who would suffer loss if the vessel was arrested, and it was the owners and not the charterers who would need to have security for the release of the vessel. Clause 3 makes little sense if the letter of indemnity is intended to protect the charterers against proceedings brought by the owners. Similarly, it was the owners and not the charterers who would need to have the bills of lading delivered to them once they came into the receivers' possession, just as the receivers were the party that should have presented them directly to the vessel rather than the charterers.

30. In these circumstances the owners submitted and the judge accepted that it is natural to read the receivers' LOI as conferring a direct benefit on the owners. That is so, even though it of course also operated as between the receivers and the charterers and is by no means lacking in meaning as a contract between them. Indeed, as the judge observed, it is fair to point out that the charterers themselves would have to deliver up the bills of lading to the owners under the terms of their LOI if the bills came into their possession from the receivers, and a chain of

delivery up could be envisaged in this context. Those considerations do not provide a good reason for construing the receivers' LOI as not conferring a direct benefit upon those most interested in it, namely the owners. The judge put the position thus in paragraph 34 of his judgment:

"Nonetheless, for the purpose of delivering the cargo it is plainly right to say that the owners acted as the charterers' agents, and the owners must be the primary party who is intended to be covered by the expression ***"your agents".*** *Others might also be involved, perhaps stevedores or port agents or something of that kind, should they be the agents of the charterers in fact, but as matters arise, and subject to what I am about to say, it is clear that the primary party to whom this clause was intended to refer as agents must be the owners."*

We agree. There is moreover nothing in the remainder of the judgment to lead to any different conclusion.

31. Ultimately, Mr. Berry's case for the receivers on the construction of the receivers' LOI resolves itself into two contentions. The first contention focuses on the word "*agents*" in clause 1 and, contrary to the owners' case, is that the term does not extend to the owners. The second contention focuses on the word "you" in clauses 1 and 3 and is that the "you" referred to is, and is only, the addressee, namely the charterers. Both contentions are deployed to the same end, namely to establish that the receivers' LOI does not directly extend to any liability incurred by the owners, and because one is construing the same document, in the same commercial context, the analysis of the first contention overlaps to a significant degree with the analysis of the second contention.

32. So far as the first contention is concerned, there is no doubt that, as is the case with almost every word and expression in a contract (as elsewhere), the word *"agents"* can have different meanings in different contexts. Mr. Berry initially contended that, in order to be within the word "*agents"* in the receivers' LOI, a person would have to have been contractually appointed as an agent, and he suggested that this construction was assisted by the immediately preceding words, *"servants and*". However, he later accepted that an agent by estoppel would be included, but persisted in his contention that it could not or did not extend to the owners.

33. In this connection, he drew our attention, at the prompting of the Vice-Chancellor, to the definition in paragraph 1-001 of Bowstead & Reynolds on Agency (17th Edition), which is in the following terms:

"Agency is the fiduciary relationship which exists between two persons, one of who expressly or impliedly consents that the other should act on their behalf ***so as to affect his relations with third parties****, and the other of whom similarly consents so to act or so acts"* (emphasis added).

34. We do not see how that definition, and in particular the words Mr. Berry emphasised, can assist his construction of the word *"agents"* in the present case. When the charterers requested the owners to deliver the cargo in order to comply with the receivers' request in the receivers' LOI, then, as we see it, by effecting such delivery, the owners thereby *"affect[ed] [the charterers'] relations with [the receivers]"*. The factual and the legal relationships between the charterers and the receivers changed as a result of the delivery of the goods: the charterers complied with the receivers' request, the receivers received the cargo without production of the original bills of lading and the receivers' obligations under the receivers' LOI crystallized, whereas before delivery the legal position as between them was different. Moreover, as we see it, that is so even though the charterers had a contractual right under the charterparty to have the cargo delivered to them or to their order without production of the original bills of lading in return for the charterers LOI.

35. In our judgment, the notion that "agents" in clause 1 of the receivers' LOI extends to the owners in the present case is supported by the opening words of the LOI, where the receivers "request you to deliver the said cargo". That "you" must be, or at the very least include the addressee, namely the charterers, and it seems clear that (as already mentioned) it was envisaged at the time that delivery would be physically effected by the owners. If the very act for which the indemnity was being given was described in the receivers' LOI as one to be carried out by the charterers, in circumstances where it was known to all parties that it was physically to be carried out by the owners, it seems to us that the only way in which it could be sensibly said that the charterers "deliver[ed]" the cargo was on the basis that the owners were their agents. Otherwise, it would not have been the charterers who were "deliver[ing]", albeit through the agency of the owners, but the owners who were delivering under a contractual arrangement with the charterers.

36. This point is reinforced by two of the practical points made by the judge, to which we have already referred. As he said in paragraph 28 of his judgment:

"The charterers could not themselves deliver the cargo except by making use of the shipowners to do so".

Accordingly, as he went on to say in paragraph 29:

"The only way in which the charterers could sustain liability for a misdelivery of the cargo would be on the basis that they had misdelivered the cargo through the agency of the owners".

As we see it, that has two consequences (to which we have already referred in paragraph 28 above) for the purposes of this first contention. First, it reinforces the point that the parties envisaged the charterers delivering through the agency of the owners. Secondly, it indicates that the only way in which the charterers could become liable would be on the basis that they were treated as responsible for the acts of the owners in effecting the delivery, which reinforces the contention that the parties to the receivers' LOI envisaged that the owners would be treated as the agents of the charterers.

37. So far as the second contention, which focuses on the word "you", is concerned ("the you point"), Mr. Berry's argument has two stages. The first stage involves saying that the word "you" in the receivers' LOI means the

charterers, and only the charterers; the second stage is to say that, even if the owners are within the expression "agents", any loss suffered by the owners is not loss to which the LOI extends (i) in the case of clause 3, at all, and (ii) in the case of clause 1, save to the extent that the loss is also suffered by the charterers.

38. This argument proceeds on the basis that, as a matter of ordinary language, the word "you" means the addressee of the receivers' LOI, namely the charterers, and that that reading is reinforced by the following: first, the fact that in clause 1 the indemnity extends not merely to "you" but also to "*your servants and agents*" and, indeed, "all of you"; and secondly, that in clause 3 the proceedings referred to are not merely "against you" but also against "any of your servants or agents", and the obligation on the receivers is to provide sufficient funds not merely to "you" but also to "them".

39. Accordingly, runs the argument, when one looks at clause 1 closely, the indemnity only extends to any liability "which you may sustain", i.e. which the charterers may sustain, and not to any loss which their servants or agents may sustain. Although at first sight this may seem something of a nonsense given that the indemnity extends to the servants and agents, Mr. Berry explains this on the basis that the servants and agents are indemnified, but only in respect of loss which the charterers also suffer. So far as clause 3 is concerned, Mr. Berry's argument is simpler, because the indemnity is only expressed to extend to "you".

40. On the face of it, the you point has obvious force, at least if one confines oneself to the linguistic exercise of comparing the use of words and expressions in clauses 1, 2 and 3 of the receivers' LOI. However, once one looks more widely, both in the direction of other parts of the LOI and in the direction of commercial common sense, this argument can be seen to be wrong. In this connection, although it may at first sight appear a somewhat cheap point, it seems to us that Mr. Males was justified in relying on the fact that, until the hearing of the appeal, it had not been suggested by either party or by the judge that the receivers' LOI be read in this way. The reason that this is not a cheap point, but has substance, is that we are here concerned with the construction of a commercial document and, while it is not impossible for its correct interpretation first to occur to anyone during argument in an appellate court, the fact that such an interpretation has not occurred to anyone until that time must cast doubt on the contention that it is the natural, or even the correct, meaning of the document concerned. However, that is by no means the only problem with Mr Berry's you point.

41. First, the opening words of the receivers' LOI request "*you to deliver the said cargo*", in circumstances where it was clearly envisaged that the cargo would be physically delivered by the owners. Accordingly, the word "you", on the first and very important occasion in which it is used in the LOI, applies to an act which the charterers are to carry out through the owners, who are, in light of the rejection of Mr. Berry's first contention, agents of the charterers. It would therefore be a little surprising, although, we accept, not impossible, if the ensuing indemnity applied only to losses which the charterers suffered, and did not apply to losses which the owners, as their agents who were to deliver the cargo, suffered, as a result of the delivery of the cargo.

42. Secondly, the contention that clause 1 should be read as required by the you point appears to us to produce a result which is commercially somewhat surprising. A clause which appears to be an indemnity applying equally to "you" and "your servants and agents" is, on this argument, to be limited to damages suffered by "you" only or "you" and "your servants and agents" but not *"your servants and agents*" only. That is a particularly odd construction given that, as the judge said, it was the common expectation and intention that physical delivery would be effected by "agents", namely the owners, and not by the charterers, i.e. not by "you". The point is reinforced by the words "*in accordance with our request*" at the end of clause 1 which refers back to the words "we hereby request you to deliver" in the opening part of the LOI, the effect of which we have already discussed.

43. Thirdly, while it might assist Mr. Berry's you point as a matter of semantic analysis, the wording of clause 2 of the LOI, when viewed by reference to commercial common sense, appears to call the point into question. It is clear from clause 2 that the obligation to provide funds for litigation in respect of claims against "your servants or agents" extends to any claims brought against them "in connection with delivery of the cargo", and not merely to claims against them for damages which would also be the liability of the charterers. In this connection, we do not consider that the words "*as aforesaid*" in clause 2 call that conclusion into question: they refer back to the closing words at the end of clause 1 "*in accordance with our request*". While it would not be conceptually impossible, it would seem very odd if clause 1 only operated as an indemnity in favour of servants and agents in respect of liability which was also that of the charterers, if clause 2 applied to claims against servants or agents which were not also the liabilities of the charterers.

44. As to clause 3, although the receivers only purport to indemnify "*you in respect of any liability… caused by such arrest or detention*", it is noteworthy that, in addition to the points we have already mentioned, the clause opens with the words "*if in connection with delivery of the cargo as aforesaid",* which must be, as we have mentioned, a reference back to the opening provision whereby the receivers "*hereby request you to deliver the said cargo*". Further, if the indemnity in clause 1 extends to the liability of agents (even where the charterers have no liability themselves) it would seem very odd if clause 3 had a different ambit.

45. The judge expressed his conclusions with regard to clause 3 in these terms:

> *"41. It was suggested that Clause 3 might fall into a different category. Clause 3 makes provision for two different types of obligation. First the provision of bail, or surety, or security, in order to release the ship; and secondly, for an indemnity to the addressee. The context of the clause is, however,* ***"the ship and any other ship in the same or associated ownership"****, so that attention is immediately directed to the Owners of the ship who, as already*

mentioned, are the party with the primary liability to deliver and against whom proceedings would normally be taken under Clause 2.

*42. Although there is no reference to **"servants or agents"** in Clause 3, the clause plainly purports to confer a benefit, namely the release of the vessel, which is primarily a benefit to the Owners and only secondarily a benefit to the Charterers in respect of any liability which they may have to the Owners. The wording of the indemnity in Clause 3 must, in my judgment, be taken to be commensurate with that in Clause 1. And although there is no express reference to **"servants or agents"**, it is plain that the indemnity must operate in the same way, and so the difference in wording adds nothing to the arguments advanced by Charterers.*

43. Because the letter of indemnity is not framed in terms of indemnifying the Charterers against their liability to the Owners under the Charterers' letter of indemnity (although it would benefit Charterers if the Receivers secured the release of the vessel in as much as it would relieve them of their responsibility to do so under their letter of indemnity) what the clause requires is bail or other security which would satisfy the third party claims against the vessel (here, the bank's claims) so that the Owners' vessel would be free to go.

44. Clause 3 not only has to be read in the context of the letter of indemnity as a whole, which is to benefit the Owners or their agents, but also on its own terms it purports to confer benefit both on Charterers and Owners."

We entirely agree with the conclusions and reasoning of the judge in those paragraphs.

46. Clause 4 tends to reinforce the point that "you" extends to agents, or at any rate to the owners, because the words *"we have asked you to make delivery"* is a reference back to the request at the beginning of the LOI, the effect of which we have referred to above.

47. We have dealt with Mr. Berry's two points separately. However, in a sense, the reason for rejecting his case that it is not open to the owners to rely upon the receivers' LOI directly can be dealt with by conflating the points, or at least the answers to the points. Read as a whole, the receivers' LOI is all of a piece on the question of whether or not the owners were entitled to enforce the provisions of clauses 1 and 3 against the receivers directly for any loss the owners suffer "*by reason of delivering the cargo*". The parties undoubtedly envisaged it would be the owners, and not the charterers, who effected the delivery. In those circumstances, the fact that the charterers "*request you to deliver the said cargo*" must be a request which extends to physical delivery by the owners. (We stress that in so holding we do not intend to say that the owners became a party to the receivers' LOI but simply that the parties agreed that they should have the benefit of it as the agents of the charterers in delivering the cargo to the receivers). Further, the contention that the indemnities in clauses 1 and 3 of the LOI apply only to losses suffered by the charterers appears commercially insensible, and inconsistent with clause 2.

48. In all these circumstances, we have reached the clear conclusion:

i) that the judge was right in holding that the terms of the receivers' LOI relied upon by the owners purport to confer a benefit upon the owners within the meaning of section 1(1)(b) of the 1999 Act, essentially for the reasons he gave;

ii) that Mr Berry's you point, while it has some linguistic attraction, cannot be accepted if the words used are construed in the context of the LOI as a whole and if the LOI is in turn viewed against its surrounding circumstances or factual matrix;

iii) that it follows that the owners are and were entitled to enforce clauses 1 and 3 of the LOI in their own name unless, on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by them, which is the second issue in this appeal; and

iv) that it also follows that it is not necessary to examine whether the owners' alternative case on agency is correct, which in turn means that it is not necessary to consider whether or not the charterers were paid for the sugar or whether the fresh evidence should be admitted. We will not therefore do so but turn to the second issue.

The second issue

49. The second issue is whether the judge was right to hold that the receivers had failed to discharge the burden of showing that the parties did not intend the terms of the receivers' LOI to be enforceable by the third party. It is plain that there is a considerable overlap between the considerations relevant to this question and those relevant to the first issue.

50. Mr Berry submitted that the judge was wrong to reach the conclusion he did. He relied in particular upon the fact that there was here a chain of LOIs (albeit a short chain) in the sense that the charterers provided an LOI to the owners and the receivers in turn provided an LOI to the charterers. The owners could have but did not ask for an LOI directly from the receivers. The result was that the parties all proceeded on the express basis that the owners' contractual rights against and obligations to the charterers were contained in the charterparty and in the charterers' LOI, which was provided under clause 42 of the charterparty. The owners had contractual obligations to the indorsees of the bills of lading, namely the Yemen Bank, to whom they had been indorsed by the shippers. They would no doubt have owed such obligations to the receivers if and when they became indorsees or holders of the bills of lading but that had not happened by the time of the relevant events. By contrast the rights and obligation of the charterers and the receivers as between themselves were contained in the contract for the sale of the sugar and in the receivers' LOI.

51. Mr Berry submitted that the chain of contracts in this case is similar to the chain of contracts common in the construction industry to which the Law Commission referred in paragraph 7.18 of its Report No 242 where it

considered the proposed 1999 Act. In that paragraph, having observed that the parties can of course include an express clause, the Commission said:

"But to allay the fears of the construction industry we should clarify that, even if there is no express contracting out of our proposed reform, we do not see our second limb [ie what became section 1(2)] as cutting across the chain of sub-contracts that have traditionally been a feature of that industry. For example, we do not think that in normal circumstances an owner would be able to sue a sub-contractor for breach of the latter's contract with the head-contractor. This is because, even if the sub-contractor has promised to confer a benefit on the expressly designated owner, the parties have deliberately set up a chain of contracts which are well understood in the construction industry as ensuring that a party's remedies lie against the other contracting party only. In other words, for breach of the promisor's obligation, the owners' remedies lie against the head-contractor who in turn has the right to sue the sub-contractor. On the assumption that that deliberately created chain of liability continues to thrive subsequent to our reform, our reform would not cut across it because on a proper construction of the contract - construed in the light of the surrounding circumstances (that is, the existence of the connected head-contract and the background practice and understanding of the construction industry) - the contracting parties (for example, the sub-contractor and the head-contractor) did not intend the third party to have the right of enforceability. Rather the third party's rights of enforcement in relation to the promised benefit were intended to lie against the head-contractor only and not against the promisor. For similar reasons we consider that the second limb of our test would not normally give a purchaser of goods from a retailer a right to sue the manufacturer (rather than the retailer) for breach of contract as regards the quality of the goods."

52. Mr Berry submitted that similar considerations apply to the chain of LOIs here. He recognised that this was not a chain of quite the kind which commonly exists in the construction industry but he drew attention to the fact that the report referred to chains of sale contracts and submitted that chains of charterparties are common in the maritime industry, as for example a time charter, a sub-time charter, a voyage charter and a sub-voyage charter, and that similar considerations should apply both to them and to these two LOIs. His essential point was that, as in the case of other chain contracts, the parties had expressly set up the contractual arrangements as described above, namely between the owners and the charterers and between the charterers and the receivers.

53. The judge did not accept those submissions when they were made to him. In paragraph 45 of his judgment he referred to the two examples of chains in the Law Commission Report, said that the contents of the Report did not assist the receivers any more under this head than they had done under section 1(1)(a) of the 1999 Act, and added:

"Those situations are well-known and provide a commercial background of practice to contracts which are unlikely to cut across the legal framework customarily employed. Here there is no such background. Letters of indemnity take a number of different forms and have given rise to a wealth of arguments between parties as to their terms. Each has to be construed according to its own terms."

54. We agree with the judge. We say nothing about the position on the case of a chain of charterparties but we agree that there is no tradition of chain LOIs similar to the examples given in the report. All depends upon the construction of the receivers' LOI. The reasons we have given in reaching our conclusion under the first issue also point to the correct resolution of this issue. If we are right in agreeing with the judge that both clause 1 and 3 of the LOI were intended to be for the benefit of the owners, it makes no sense to hold that it was nevertheless intended that the receivers' liability should not be directly to the owners. For example, as pointed out earlier, it was the owners who needed the benefit of clause 3 in order to secure the release of the vessel from arrest. They needed the bail or other security, not the charterers. We see nothing in the LOI to lead to the conclusion that the parties did not intend clauses 1 and 3 to be enforceable by the owners. The whole purpose of the receivers' LOI was on the one hand to ensure that the receivers received the cargo from the ship without production of the original bills of lading and on the other hand to ensure that the owners were fully protected from the consequences of arrest or other action which might be taken by the holders of the original bills of lading. In short, in our judgment, the judge was correct on this second issue as well as the first.

CONCLUSION

55. For these reasons the appeal must be dismissed.

Mr S Males QC and Mr Henry Byam-Cook (instructed by Jackson Parton) for the Respondent
Mr S Berry QC and Miss P Hopkins (instructed by Shaw & Croft) for the Appellant