JUDGMENT : MR. JUSTICE COOKE: Commercial Court. 8th November 2004

1. On 22nd October 2004 Colman J. ordered the trial of two preliminary issues as follows. (1) Whether the claimant is entitled to an order that the first defendants (that is the Charterers) and/or the second defendants (that is the Receivers) do forthwith provide bail or other security required to secure the release of the Claimant owner's vessel "THE LAEMTHONG GLORY" from arrest; (2) Whether the Charterers are entitled to an order that the Receivers do forthwith provide bail or other security required to secure the release of the Claimant's vessel "THE LAEMTHONG GLORY" from arrest.

2. In broad terms, the position is this. The parties had agreed that "THE LAEMTHONG GLORY" would discharge cargo of sugar at Aden in the Yemeni Republic not against production of bills of lading but against two letters of indemnity both dated 25th February 2004, one of which was addressed by the Receivers to the Charterers, and one of which was addressed by the Charterers to the Owners. The preliminary issues turn on the construction and effect of those two letters of indemnity.

3. The preliminary issues were ordered due to the urgency of the situation as it then appeared to be. Following discharge, the vessel had been arrested on 10th March 2004 by the Yemen and Kuwait Bank for Trade Investment of Sanaa in the Republic of the Yemen, 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 $3 million, together with interest and costs.

4. The vessel, at least on information currently available, still appears to be under arrest at Aden, but it seems that over the course of the weekend arrangements have been made which should result in the release of the vessel by the court in the Yemen today or at least in the imminent future. Whether or not that occurs may affect the exact form of the orders which this court gives.

5. The essential facts are as follows. The Owners of "THE LAEMTHONG GLORY" entered into a charter party on amended sugar charter party 1999 form dated 8th December 2003. They chartered the vessel to the Charterers for a voyage from Santos in Brazil to Hodaida, or Aden, in the Yemen, carrying 14,000 metric tonnes of bagged sugar.

6. The charter party included two clauses which are relevant for current purposes. First at clause 16 there was provision for clean mates receipts to be signed for each parcel of sugar when on board, and for the Master to sign bills of lading in accordance with those mates receipts as presented by the Charterers or shippers. The charter party therefore envisaged Owners' bills.

7. Secondly, at clause 42 there was a provision for discharge against letters of indemnity to be issued by the Charterers. That clause took the following form.

   "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."

8. The cargo was loaded in Santos and bills of lading were issued dated 21st January which were signed by the Master for and on behalf of the Owners as carrier. They were consigned "to order" but the Receivers were named as the notify party. The cargo was shipped pursuant to sale contracts, one between the shippers Cargill as sellers and the Charterers as buyers, and the second dated 30th January 2003 between the Charterers as sellers and the Receivers as buyers.

9. It is common ground that the Receivers ultimately obtained delivery of the cargo at Aden without production of bills of lading. The Receivers did so, as appears from the correspondence, on the grounds that the bills of lading "*have not been received"* and "*in order to avoid any delay in berthing the vess*el" the two letters of indemnity being proffered in order to achieve the discharge.

10. It appears from the bank's proceedings in the Yemen, pursuant to which the arrest of the vessel took place, that the bills of lading were presented to the bank in its role as issuing bank of the Receivers' letter of credit to pay for the cargo under the contract by which it purchased that cargo from the Charterers. It seems that the Charterers have been paid by the bank under the letter of credit, but the Receivers appear not to have paid the bank. So the bills of lading remain in the bank's possession. For reasons which are not plain, the Receivers seem to have withheld payment or part of the price from the bank because of a dispute with the Charterers over the sale contract. That position, it now appears, may have been resolved over the course of the weekend with the result that the vessel may be allowed to leave.

11. Miss Hopkins draws attention to a statement from Mr. Fahem saying that the letter of credit was drawn down on 5th February 2004, some time before the letters of indemnity were issued later in the month. But both the admissibility of this statement and the fact to which it refers are in dispute.

12. I refer now to the exchanges of correspondence between the parties which led up to the letters of indemnity. First at p.125 in the bundle appears a fax from the Receivers to the Charterers in which the Receivers ask the Charterers to issue their letter of indemnity to the Owners and to instruct the Master and ship's agents to allow the vessel to discharge and deliver the cargo without production of original bills of lading. That fax refers in terms to the original bills of lading not having been received by that point.

13. At p.126 there appears a fax from the Charterers to the Receivers enclosing what is referred to as a "*new text*" of a letter of indemnity. This fax is dated 25th February and 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 (if I can use that term at this stage) for any letter of indemnity that the Charterers may themselves issue to the Owners.

14. At p.129 the Receivers sent to the Charterers, with a copy to the Owners' agents, what is described as "the required letter of indemnity duly signed stamped by us". The fax goes on to say "Kindly ensure to have Owners of the above vessel to instruct the Master/ships agent allowing vessel to commence discharge and deliver cargo to us without production of original bills of lading in order avoid any delay berthing vessel."

15. At p.132 then appears on 25th February a message from the Charterers to the Owners:
"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."

16. At p.137 the Owners then sent instructions to the Master of the vessel referring to the fact that the vessel had arrived at the port and was awaiting berthing, referring 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 asking the Master to release or discharge the cargo to the Receivers without production of the original bills of lading.

17. What appears from these messages, and in particular from the fax of 25th February from the Charterers to the Owners, enclosing the Charterers' letter of indemnity and the Receivers' letter of indemnity, is that the basis upon which the letters of indemnity were given was that the bills of lading had not in fact been received by the bank or Receivers. That constitutes contemporary evidence that this is what the Receivers told the Charterers, and the Charterers in turn told the Owners, and is therefore the context against which the letters of indemnity fall to be construed, notwithstanding that Mr. Fahem's evidence, if it be admissible, that payment had been made to Charterers at some earlier stage.

18. The two letters of indemnity issued by the Charterers and Receivers were in virtually the same terms, the only difference being that the Charterers' letter of indemnity was addressed to the Owners, and the Receivers' letter of indemnity was addressed to the Charterers. It is not in dispute between the parties that these letters of indemnity are enforceable according to their terms, but the meaning and effect of the Receivers' letter of indemnity is in dispute.

19. The Receivers' letter of indemnity reads as follows:
"Concern MV Laemthong Glory
Charter Party dated 8th December 2003
Goods 14,000 MT net of white crystal Brazilian sugar
Covered under bills of lading
NR.1DD 21.01.2004 covering 6,000 MT
NR. 2 21.01.2004 covering 3,5000 MT
NR 3 21.01.2004 covering 1,500 MT
NR 4 21.01.2004 covering 3,000 MT
NR 4 21.01`.2004 covering 8,400 new MT bags free of charge
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."

20. Because the Receivers' letter of indemnity is addressed to the Charterers the Owners can only take any benefit from it by relying upon the terms of the Contracts (Rights of Third Parties) Act 1999 which provides in Section 1 as follows:

"Right of third party to enforce contractual term.

Section 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."

21. The Owners maintain that the Receivers' letter of indemnity does confer a benefit upon them and that they are identified as beneficiaries of that letter of indemnity as they fall into the category of "agents" of the Charterers for delivery of the cargo to the Receivers. The Receivers contend to the contrary, but also say that the structure of the two letters of indemnity is such that on the proper construction of the Receivers' letter of indemnity, the parties did not intend that either clause 1 or clause 3 of the letter of indemnity should be enforceable against the Receivers at the suit of the Owners.

22. The Receivers essentially take three points. First, they maintain that for the purpose of Section 1(1)(b) it is going too far to say that Owners are within the class of "agents" of the Charterers, and that all that that phrase was intended to cover were people in the category of employees, stevedores, port agents and the like engaged by Charterers. It was said that the category was not intended to cover third parties which were themselves under separate contractual obligations of the kind which appear in a charter party between Owners and Charterers.

23. Moreover, the Charterers say that whatever may have been the position under the contracts of sale at an earlier stage, by 25th February, Owners were not Charterers' agents to deliver the cargo under the sale contract with the Receivers since they had been fully paid. For that purpose they rely upon the evidence of Mr. Fahem to which I have referred.

24. Secondly, Charterers say that clause 3, unlike clause 1, does not purport to confer a benefit on the Charterers' agents or servants, and therefore Section 1(1)(b) cannot apply. Thirdly, they contend that if wrong on those first two points the parties cannot have intended that the Owners should have the right to enforce the Receivers' letter of indemnity, and that the presumption of enforceability is rebutted by them in the circumstances of this case, accepting the decision of Colman J. in ***Nisshin v. Cleaves*** [2004] 1 Lloyds Reports 38, by reference to the Law Commission Paper, that the burden lies on them to show that if the contract purports to confer a benefit, it is not enforceable at the behest of the third party. Here the Receivers rely on what they refer to as the chain of contracts of indemnity between the parties.

25. It is clear and accepted by all that the cargo was, prior to discharge, in the possession of the Owners. Delivery of the cargo could in practice only be effected by the Owners. It is also accepted that in doing so they would be fulfilling first their duties to the Charterers who had produced the required letter of indemnity under Clause 42, and so were entitled to have delivery in accordance with their order, and secondly, the Charterers' duties to the Receivers under their sale contract.

26. The sale contract between the Charterers and Receivers provided for a sale and purchase on terms which were cost and freight free out, one or two safe berths Hodeidah or Aden at Buyer's option. There were provisions dealing with title, the contract providing that title should not pass until the buyer had made payment for the goods in accordance with seller's instructions, and the payment provisions included payment by irrevocable letter of credit against a number of documents including clean on board bills of lading and a signed copy of the charter which referred to the Owners' agents, El Mocca at Hodeidah or Aden.

27. It was accepted by the Receivers that their letter of indemnity was directed at the Charterers' obligation to deliver cargo under the sale contract. The Owners submit that on its true construction the Receivers' letter of

indemnity only makes sense if it is intended to benefit the Owners as owners of the vessel. It does not, so the Owners say, purport simply to protect the Charterers from the consequence of issuing its letter of indemnity to Owners, or to seek to indemnify the Charterers in respect of that letter of indemnity from the Charterers to the Owners.

28. In that regard the following points arise. First, the bills of lading are Owners' bills and were issued for and on behalf of the Owners, as was anticipated by the charter and as would accord with ordinary practice. Only the Owners could in practice deliver the cargo. The Charterers could not themselves deliver the cargo except by making use of the ship Owners to do so. In doing so, say the Owners, the Owners are constituted their agents for the purpose of delivery within the meaning of Clause 1 of the letter of indemnity.

29. In fact, 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. That analysis is plainly consistent with agency for the purpose of clause 1. Indeed, Clause 1 of the Receivers' letter of indemnity 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 to fulfil that obligation.

30. Moreover, as the Owners point out, if the Receivers' letter of indemnity had been intended to protect the Charterers from the consequences of issuing its letter of indemnity, Clause 1 would have taken an entirely different form. The only liability to which Clause 1 could therefore refer in practice was Charterers' liability to deliver through Owners and Owners are therefore, within the context of the sale contract, Charterers' agents for this purpose.

31. Secondly, any proceedings for misdelivery would inevitably be brought against the Owners, not against the Charterers. Clause 2 makes no mention of proceedings against the Charterers under their indemnity, which could only be brought by the Owners.

32. Thirdly, it was the Owners, not the Charterers, who would suffer any loss and would need to have security provided if the vessel was arrested. Clause 3 makes little sense if the letter of indemnity is intended to protect the Charterers against proceedings brought by the Owners, although it can be read to provide that in the event of a third party claim Receivers are obliged to Charterers to put up bail for the ship because the Charterers themselves have an obligation to the Owners to do so.

33. Fourthly, 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. It is, however, fair to point out the Charterers themselves would have to deliver up the bills of lading under the terms of their letter of indemnity to the Owners, if the bills came into their possession from the Receivers, and a chain of delivery up could be envisaged in this context.

34. 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.

35. The point is, in my judgment, made good by reference to the surrounding circumstances and particularly to the contract of sale between the Charterers and the Receivers. The cargo was sold by the Charterers to the Receivers on C and F free out terms, as I have indicated, and so the obligation to arrange for the carriage for the cargo rested on the Charterers. Moreover, in those circumstances the Charterers entered the contract of carriage as principal and not as agent for the Receivers.

36. In accordance with the terms of that contract the Charterers reserved the right of disposal over the cargo. I have already referred to the provisions relating to title and payment, but the effect of these provisions was to reserve a right of disposal to the charterer within the meaning of Section 19(1) Sale of Goods Act 1979 which provides "*where there is a contract for the sale of specific goods or where the goods are subsequently appropriated to the contract, the seller may by the terms of the contract or appropriation reserve the right of disposal of the goods until certain conditions are fulfilled.*" By retaining title until payment in accordance with the terms of that contract the clear reservation of the right of disposal was maintained.

37. In those circumstances, shipment of the cargo on the vessel would not amount to delivery of the cargo to the Receivers, and the Owners would be the agent of the Charterers, being the carriers carrying the cargo for the Charteres/sellers and delivering it on their behalf.

38. As appears therefore from the fax of 25th February and the other material to which I have made reference, as at the date of the Receivers' letter of indemnity the cargo was thought to be on board the vessel, to be still in transit, and no payment was then thought to have been made by any party to the Charterers. In those circumstances, the background against which this letter of indemnity arose was one in which all contemplated that the Owners were the Charterers' agents for the purpose of delivering the cargo under the contract of sale.

39. In addition, it is right to note that in order to obtain the discharge of the cargo the Charterers did provide their letter of indemnity not merely to the Charterers but also to the Owners' local agents in order to obtain delivery of the cargo. The Charterers themselves then provided the Receivers' letter of indemnity to the Owners, together with

their own letter under cover of their fax of 25th February. In that fax the Owners were requested to discharge the cargo against both the letters of indemnity, the phraseology being this: *"Please find herewith our letter of indemnity issued as per P&I wording as well as the LOI signed by the Receivers in order to start discharging upon vessel's arrival."*

40. Clause 1 of the letter of indemnity expressly purports to confer a benefit on Owners as the agents of the Charterers. Miss Hopkins' argument that there is a chain of letter of indemnity contracts does not avail her. As I have said, the Receivers' letter of indemnity was not framed as a letter of indemnity in respect of Charterers' liability under its letter of indemnity to the Owners. It was framed as a letter of indemnity in respect of delivery by the Charterers or their agents, and for the reasons given Owners come within that definition.

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.

45. When regard is had to Section 1(b) of the Act, Miss Hopkins again draws attention to what she described as the chain of letters of indemnity and also to Clause 42 of the charter. The charter, as she points out, contemplated a Charterers' letter of indemnity and not the Receivers' letter of indemnity. Indeed, Owners never appear to have asked for an additional letter of indemnity from Receivers. Nonetheless, one was provided in respect of Charterers' liability and Owners' liability, as their agents, to deliver, and there is no additional factor which militates in favour of Miss Hopkins' arguments under Section 1(b), beyond those advanced in relation to Section 1(a). The Law Commission report, to which she referred and which in turn refers to the lack of impact of the Act on well-known contractual chains of the kind found in the construction industry with employers, head contractors and subcontractors or in the supply of goods with manufacturers, wholesale suppliers and retail suppliers, does not assist her here any more than in relation to Section 1(a). 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 on their terms. Each has to be construed according to its own terms.

46. I therefore find that the Receivers' letter of indemnity is enforceable against the Receivers at the suit of the Owners. Equally, the Charterers' letter of indemnity is enforceable against it by the Owners, no argument being advanced against that proposition by the Charterers.

47. I turn then to the question of specific performance, if it is necessary for security to be put up in order to secure the release of the vessel. It was contended, both by the Charterers and the Receivers, that damages are an adequate remedy for the Owners here. There is evidence before me that enforcement of judgments in the Yemen is a matter of some difficulty, a matter upon which I would not have required evidence in any event. That in itself means that damages against the Receivers would not be an adequate remedy.

48. So far as the Charterers are concerned, they are a French company against whom any judgment is enforceable under the European Convention. But Clause 3 has a particular purpose behind it, namely to ensure the release of the vessel so that issues of damages for detention do not arise. Whilst damages for detention are capable of evaluation by expert evidence and the like, this is never an entirely straightforward matter, and particularly so in the context of a rising market. The point at which contracts might be made is one of some debate.

49. I consider that the Owners are right here in saying that a failure to arrange the provision of security by either Receivers or Charterers in accordance with their letter of indemnity obligations so negates the object of the letters of indemnity that the court ought to grant specific performance. The very purpose of the letters of indemnity was to avoid the detention which has actually occurred. This clause is of a different nature therefore from those which constitute the ordinary, primary obligations to be found in most contracts.

50. Whilst Mr. Lewis is right in saying that contracts provide for primary obligations, and this is a primary obligation and therefore it is not right simply to look at the clause and say that it made provision for a certain result and therefore damages are not an adequate remedy (as performance of a secondary liability) this particular clause does fall into a different category from most.

51. Where damages may constitute an adequate remedy for failure to perform many primary obligations, the whole point of the letters of indemnity was to replace secondary liability under any suit for damages for detention by the primary performance of the obligation to ensure release of the vessel, so that such a suit was unnecessary. It would, in such circumstances, be inequitable not to grant specific performance to require fulfilment of that obligation and then to leave the Owners to a remedy in damages for detention, or even damages for the loss of the ship, which was the very thing that the letters of indemnity were intended to avoid. Furthermore, I can see no reason for distinguishing between the position of the Charterers and the Receivers in this regard.

52. Whilst the provision of security by one of them to procure the release of the vessel would fulfil the obligations of the other, both are obliged in my judgment to do what they have contracted to do, and an order will if necessary be made against each that they fulfil their Clause 3 obligations forthwith, whether by co-operation or otherwise, it being a matter for them to decide how to do this and how to act appropriately so as not to be in contempt of any order of this court.

I will listen to submissions as to the appropriate orders to be made.

MR. MALES: My Lord, I would ask you first answer the reformulated preliminary issue affirmatively. That is to say, to make a declaration that we are entitled to the terms of the Receivers letter of indemnity. As to the extent to which an order for specific performance is necessary, I am afraid we have no further information on what the exact position is.

MR. JUSTICE COOKE: It is still light out there!

MR. MALES: I think it is four hours. I suggested earlier that one way to deal with it would be to make the orders that they not be enforced for a limited period. Your Lordship suggested making a declaration that we are entitled to an order for specific performance forthwith, which presumably would enable us to come back to your Lordship.

MR. JUSTICE COOKE: At a moment's notice!

MR. MALES: Once the situation out there has resolved itself within 24 or 48 hours.

MR. JUSTICE COOKE: I am rather inclined to do that on the basis that if, as one suspects, the matter is actually going to resolve itself, then I have made the declaration, the points are decided and there is no need for any further order. But if something goes wrong, then it will be res judicata, so far as everybody is concerned, and it is literally just a matter of you notifying the court and producing a draft order.

MR. MALES: I am entirely content with that course.

MR. JUSTICE COOKE: Unless anybody has any further and better thoughts on the subject from the Charterers' or Receivers' angle?

MR. LEWIS: My Lord, nothing on that small point. The second issue is actually whether my clients are entitled to an order.

MR. JUSTICE COOKE: You are quite right, and I have not dealt with that specifically at all.

MR. LEWIS: It may be important when we come to the question of costs, whether my client has succeeded on that.

MR. JUSTICE COOKE: Yes, indeed. I do not believe any argument was advanced to the contrary. In failing to deal with it in my judgment, it was simply a question of overlooking that further factor. But there is no doubt in my mind you are entitled to enforce your letter of indemnity as against the Receivers likewise.

MR. MALES: My Lord, we come then to the question of costs, and I would ask for an order for my costs of this hearing against each of the first and second defendants.

MR. LEWIS: I would say that the appropriate order should be that the second defendants should pay the costs of the claimant and the first defendant. What we have had this morning has been an application in essence by Mr. Males which was focused largely on the second defendants. Very little time has been taken up at all in dealing with his application as against the first defendants for specific performance against us. The substance was the 1999. You then had the application by my clients against Miss Hopkins' clients.

MR. JUSTICE COOKE: Does that not go to taxation rather than anything else?

MR. LEWIS: It may go to taxation.

MR. JUSTICE COOKE: He has succeeded against you, he has succeeded against Miss Hopkins, you have succeeded against Miss Hopkins.

MR. LEWIS: In essence, without the court going into the complexity of making some sort of sum as an order, the simplest option is for Miss Hopkins' clients to have to pay the costs of both the claimant and the first defendant.

MR. JUSTICE COOKE: They are ganging up on you!

MISS HOPKINS: They are, my Lord. I think it is a question of whether I can get

Mr. Lewis on my side in relation to one of those orders.

MR. JUSTICE COOKE: He ought to pay a bit, you think?

MISS HOPKINS: I think he should, my Lord, yes. For this reason: he could have admitted liability to Mr. Males' clients. He has not. He has come along and argued his corner. Clearly they should get their costs, and I accept that. My submission is that it should be joint and several liability.

On the form of the order, my Lord, I have nothing to add. What your Lordship says certainly seems to work. I think I know what the answer is going to be, but may I formally ask for permission to appeal on the grounds that this is only the second case on the 1999 Act. It is a point of some interest. Indeed, I think it is of sufficient interest to have somebody from the … here today and my clients may wish to take it further.

MR. JUSTICE COOKE: It is very interesting, but that does not justify going to the Court of Appeal in my judgment. I think it is pretty straightforward at the end of the day on these facts and I see no prospects of success. As you have anticipated, I refuse your application.

MR. MALES: My Lord, on costs, in my submission there should be an order that each of the defendants pay our costs with joint and several liability. If Mr. Lewis' clients had performed the obligations which your Lordship has held that they had we would not have needed to be here at all against either defendant. The justice of the case is that we should have an order against each of them. The second defendants are in the Yemen where they say they have lots of assets. The first defendant is in a more readily enforceable jurisdiction but claims, in correspondence your Lordship has not had to be taken to, to be in great financial difficulties. So in my submission it is important that we have a remedy against each of them to proceed as we see fit.

MR. JUSTICE COOKE: But if I make an order simply that you have your costs, what you are going to get is the costs of your application against Mr. Lewis and your application against Miss Hopkins, which will be subject to detailed assessment, will it not?

MR. MALES: Yes.

MR. JUSTICE COOKE: So how that is going to work out in practice I have not the remotest idea, because Mr. Lewis has a point which seems to me to be relevant on detailed assessment. Namely as to the extent to which today's hearing has been taken up on arguments against him as opposed to Miss Hopkins.

MR. MALES: It is clearly correct that the majority of the time before your Lordship has been dealing with the issue between Miss Hopkins and myself. But my submission is that in practice I would be very surprised if there is any breakdown in the costs as between the two defendants. My side will give the costs of this hearing, and the whole costs of this hearing have been necessary because Mr. Lewis' clients did not perform the obligation which your Lordship has held they had. Namely to put up security to get the vessel released. Therefore, in those circumstances, suppose for example that the second defendant is insolvent or it is not practicable to enforce against them, in my submission the right order would still be that we would be entitled to get the whole of today's costs against the first defendants. Therefore, I do invite your Lordship to make an order which ensures that that will happen. Namely that the two defendants be jointly and severally liable for the whole of the costs, so that the costs judge does not have to go into the rather artificial exercise of how many minutes on this and how many minutes on that.

MR. JUSTICE COOKE: Nobody is going to ask me to make a summary assessment?

MR. MALES: I am not. I have not seen any schedules of costs from the other side either.

MR. JUSTICE COOKE: In my judgment, the correct order is clearly that Mr. Males should have his costs, but the right order is that he should have the costs of his application against Mr. Lewis on the one hand, and his costs of his application against Miss Hopkins on the other. What that means in practice is a question for detailed assessment by the costs judge. It actually does seem to me that in practice there would be some apportionment in all probability in relation to the overall time taken in respect of the different arguments employed here.

The material leading up to that forms an entirely different category. I suppose broadly speaking it will be pretty much the same as against one as against the other. But I am not going to make an order that in any way ties the costs judge in determining what is an appropriate amount for Mr. Males' clients to recover as against each of the two defendants. Then Mr. Lewis can have his costs as against Miss Hopkins for the odd minute and a half that was spent on that subject.

We can make Mr. Byan-Cook draw up an order and thus justify further his existence! Can he do that and get an order to me for initialling, please.

MR. MALES: Certainly, my Lord. That then leaves only the question of what happens in the action now. I do not know to what extent your Lordship would be able to deal with that.

MR. JUSTICE COOKE: Do you want some directions?

MR. MALES: Yes. We discussed this, but only very briefly, outside court just before 2 o'clock. There will be a number of stages which will need to be gone through now. We will need to serve a reply, or may do, to the second and third defendants' defence. There will need to be disclosure on the remaining issues. There will need to be provision for witness statements and for expert evidence. The expert evidence in question will be as to quantum and as to Yemeni law. That latter point goes only to the status of the third defendant. What we envisaged in those brief discussions was that it would be for us, on the one hand and for the second defendants on the other, to serve experts' reports, and that the first defendants would simply adopt whichever -----

MR. JUSTICE COOKE: Whichever one seems to fit their tactical position best!

MR. MALES: Probably on this occasion adopting the second defendants'. But there is no need for separate experts by each of the defendants because their position would be covered one way or the other in the reports which I and Miss Hopkins will put in. We thought that those remaining issues would probably take something of the order of three days. I have not looked to see what dates the court has.

MR. JUSTICE COOKE: Do you have a draft timetable effectively mapped out there that you have had a chance to put across the bows of the defendants?

MR. MALES: We had not really got as far as talking about dates for that, but I would anticipate that it ought not to be difficult within whatever the period would be that the court would normally order as a three day trial.

MR. JUSTICE COOKE: I suspect that is right. I will just get a list back and give you an idea of when it is you would be likely to come on. Miss Hopkins, do you want to say something about the proposed timetable?

MISS HOPKINS: Only that the stages sound right, my Lord, but we have not got as far as talking about dates. That also means I have not got instructions from the Yemen in relation to dates. So there might difficulty about doing things, as it were, tomorrow, but a three day trial is not going to come on tomorrow. I am told by my learned friend that we could reasonably work out the period.

MR. JUSTICE COOKE: As soon as you get over two days you are looking at April. So it is a timetable leading up to April with a date to be fixed convenient to counsel through the usual channels.

MR. MALES: Without checking we guessed it may be May so that is slightly better news than we thought.

MR. JUSTICE COOKE: This was as at 4th November, last Friday.

MR. MALES: What I was going to suggest was that we would do our reply within 14 days. We will have disclosure by whatever is a suitable date at the end of December, witness statements either at the end of January or mid-February, expert evidence at the end of March and then looking at a trial in May.

MR. JUSTICE COOKE: I think it all needs to come back a little bit on that. Indeed,

I think there is a lot to be said for having witness statements and expert evidence in with a bit of time to spare before a trial because those are the things that always slip.

MR. MALES: I respectfully agree.

MR. JUSTICE COOKE: Reply 14 days. Can the parties manage disclosure by 31st December? Inspection seven days. Witness statements end of January, is that pushing it? It does not seem to me there is going to be an awful lot of witness evidence really.

MR. MALES: No. It is simply going to be the quantum evidence, I suppose, as to what it is that we say we would have done if we had had her. I do not know how complicated that would be. It does not sound all that complicated.

MR. JUSTICE COOKE: No, it is likely to come down to the expert evidence at the end of the day, is it not, on rates and all the rest of it?

MR. MALES: Probably. There may be one complication in that we anticipate that the results of the vessel having sat in Yemen for six months ----

MR. JUSTICE COOKE: She will be fouled.

MR. MALES: The fouling will have to be got rid of, which will be to a much greater extent than whatever the position would have been if she had not been there.

MR. JUSTICE COOKE: Yes. You may have a marine engineer having to give some evidence, do you think, or bottom fouling expert of some kind?

MR. MALES: Maybe. I had not anticipated that, but I see the possibility.

MR. JUSTICE COOKE: I am not suggesting it.

MR. MALES: Perhaps we could simply come back if we find that is the case.

MR. JUSTICE COOKE: If we say witness statement end of January and can we say experts end of February? That is 31st January and 28th February respectively.

I would quite like to tie down the question of experts, because I do not like leaving experts open like this. I should never have mentioned the idea of a bottom fouling expert, because that will set people off on a trail now. Obviously you are looking at brokers' evidence in relation to the market.

MR. MALES: We are looking at brokers and we are looking at Yemeni law. Perhaps your Lordship could say that in the event of any application for a further category of expert, that application to be made by a certain date, perhaps shortly after the witness statements are served.

MR. JUSTICE COOKE: Yes. Application for any further category of experts to be made by 7th February. I think we will have a progress monitoring date. Will you need a pre-trial review?

MR. MALES: I would not have thought so.

MR. JUSTICE COOKE: Let us have a progress monitoring date then on 7th March. Then if, at that stage, it appears that something further needs to be done before a trial it can be sorted out at that point.

MR. MALES: Yes. I am reminded your Lordship has ordered expert evidence by 28th February. Presumably there will follow on from there the usual provisions about meetings and order and all the rest of it.

MR. JUSTICE COOKE: Yes, in the standard form as per appendix 13 or whatever it is.

MR. MALES: We will incorporate all those standard directions, if we may, in the draft order which Mr. Byan-Cook will settle.

MR. JUSTICE COOKE: Would Mr. Byan-Cook draw it up and then agree it with Mr. Lewis and Miss Hopkins following appendix 13 or whatever it is. That would do the trick, and then get it to me for initialling. Very good. That is it. Thank you all very much.

MR. S. MALES Q.C. and MR. H. BYAN-COOK (instructed by Messrs. Jackson Parton) appeared on behalf of the Claimant.
MR. D. LEWIS (instructed by Messrs. Holman, Fenwick & Willan) appeared on behalf of the First Defendant.
MISS P. HOPKINS (instructed by Messrs. Shaw & Croft) appeared on behalf of the Second and Third Defendants.