JUDGMENT : Mr Justice David Steel : Commercial Court. 31st July 2008.

1. The court is concerned with back-to-back appeals brought with the leave of Aikens J on questions of law arising out of two arbitration awards in a headcharter reference and in a subcharter reference both dated 19 March 2008 and both made by Messrs. Michael Baker-Harber, Colin Sheppard and Patrick O'Donovan.

2. The vessel concerned was SILVER CONSTELLATION (formerly ORIENT BRILLIANCE) ("the vessel"). She is a Capesize gearless single deck self-trimming bulk carrier of 146,351 m.t. built in 1986. At the time of the arbitration references, which were heard together (as are these appeals), the owners were Seagate Shipping Ltd ("Seagate"), the charterers were Glencore International AG ("Glencore") and the sub-charterers were Swissmarine Services SA ("Swissmarine").

Chartering history

3. The chartering history as found by the tribunal, and which has some pertinence to the issues that have arisen, was as follows:
   i) On 23 June 2003, Orient Brilliance Inc. ("Orient") purchased the vessel from Swissmarine but chartered her back to Swissmarine for 24 months.
   ii) On 24 November 2003, Orient chartered the vessel ahead to Glencore for 24 months plus/minus 2 months with an option to Glencore to extend for a further year.
   iii) The terms of these two charters were in effect the same. Delivery to Glencore was to occur on redelivery by Swissmarine then expected between 15 May and 15 September 2005.
   iv) However, before delivery to Glencore, the vessel incurred substantial damage in a grounding incident. As a result she was not redelivered by Swissmarine until 4 May 2006.
   v) Thereupon, on 8 May 2006, Swissmarine took a subcharter from Glencore on essentially the same terms for a minimum of 18 months up to 24 months.
   vi) On 8 August 2006, following completion of permanent repairs, the vessel was delivered by Orient to Glencore under the November 2003 charter and by Glencore to Swissmarine under the May 2006 Charter.
   vii) On 19 August 2006 Orient sold the vessel to Seagate and, by a novation agreement, Seagate took all the rights and liabilities of Orient under the head charter.
   viii) Subject to off hire periods, Swissmarine is due to redeliver the vessel to Glencore in October / November 2008 and Glencore is due to redeliver the vessel to Seagate in August 2009.

Charterparty terms

4. These back to back charters were on the NYPE form. The relevant terms (with amendments and additional clauses in bold) were as follows:

   "Time Charter

   ….That the said Owners agree to let and the said Charterers agree to hire the said vessel, from the time of delivery for about ***See Clause 34*** *within below mentioned trading limits. Charterers to have liberty to sublet the vessel for all or any part of the time covered by this charter but Charterers remaining responsible for the fulfilment of this charter Party.*

   Vessel to be placed at the disposal of the charterers at ***See Clause 33****…*

   Vessel on her delivery to be ready as per Clause 36 and tight, staunch, strong and in every way fitted for the service… to be employed in carrying lawful merchandise… ***See Clause 35*** *in such lawful trades between safe port and/or ports* ***See Clause 35a*** *as the Charterers or their Agents shall direct on the following conditions:*

   1. That whilst on hire the Owners shall …and maintain her class ***and seaworthiness*** *and keep the vessel in a thoroughly efficient state in hull,* ***holds and hatch covers machinery and equipment with all certificates necessary to comply with current requirements of all ports of call and canals for the service and at all times during the currency of this Charter, also see Rider Clauses*** *[Line 38]*

   6. That the cargo or cargoes be laden and/or discharged in any dock or at any wharf or anchorage or place that Charterers or their Agents may direct….

   8. That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by the Owners) shall be under the orders and directions of the Charterers as regards employment….

   11. That the Charterers shall furnish the Captain from time to time with all requisite instructions and sailing directions, in writing ***and/or telecommunications*** *and….****The Captain to properly fill in and return all forms furnished by Charterers.***

   ADDITIONAL CLAUSES TO M.V. "ORIENT BRILLIANCE CHARTER PARTY DATED 24TH NOVEMBER 2003

   29. ***Detailed description of vessel***

   MV Orient Brilliance
   Panama flag – Built 1986
   - *Vessel is to be a gearless/singledeck/self-trimming bulk carrier.*
   - *Vessel has clear and unobstructed holds for the loading and discharging of all bulk cargoes allowed under this charterparty*
   - *Vessel is fitted ITF/WWF/AHL in order*
   - *Owners warrant that the vessel is suitable for alternative hold loading for heavy cargoes at time of delivery, in accordance with IMO regulations and its latest amendment applicable.*
   - *Owners warrant that the vessel has a valid certificate of financial responsibility (water pollution) issued by USCG during this Charter period which should apply OPA 90….*

30. P. and I. Club Clause and Classification

It is a condition of this Charter that the vessel is and will remain during the currency of charter classed highest class with a full member of the International Association of Classification Societies insured with a P and I Club which is a full member of the International Group of P and I Clubs.

31. Certificates, Laws and Regulations

a) It is a condition of this Charter that the vessel is and will remain in all respects eligible for trading to the ports, places or countries specified or not excluded in this Charter and that at all necessary times vessel and/or Owners shall have all valid certificates records and other documents required for such trade. Furthermore, it is a condition of this Charter that the vessel complies and will continue to comply with all applicable laws and regulations of the ports, places and countries specified or not excluded in this Charter.

b) It is a condition of this Charter that the vessel is and will remain during the currency of this Charter in possession of the necessary valid equipment and all certificates, records and documents necessary to comply with safety and health regulations, international regulations and all current requirements at all ports of call, Suez Canals included.

c) BIMCO ISM Clause

From the date of coming into force of the International Safety Management (ISM) Code in relation to the vessel and thereafter during the currency if this Charter Party the Owners shall procure both the vessel and "the Company" (as defined by the ISM Code) shall comply with the requirements of the ISM Code. Upon request the Owners shall provide a copy of the relevant Document of Compliance (DOC) and Safety Management Certificate (SMC) to the Charterers. Except as otherwise provided in this Charter, loss damage or expense, or delay caused by failure on the part of the Owners or "the Company" to comply with the ISM Code shall be for Owners' account.

e) It is a condition of this Charter that the vessel carries and will carry on board at all times during the currency of this Charter a Certificate of Financial Responsibility acceptable to the United States Coast Guard and all individual States which exercise jurisdiction over the load and discharge port(s) in the ranges and areas specified in this Charter. The Master, upon Charterers request shall make such certificate available for inspection to the charterers or its representative.

35. Lawful trades, non-lawful merchandize (breaking) IWL

a….Trading to be world wide between safe port(s), safe anchorage(s), safe berth(s) always safely afloat, always within IWL.

Subject to Owners approval, case by case, Charters may be allowed to break IWL, …

b. Cargo exclusion…

Cargo to be coal or iron ore, all cargo to be stored and carried in accordance with latest IMO regulations:

The following cargo exclusions are mutually agreed upon:

Asphalt, livestock, hides, acids, and other dangerous, inflammable and injurious cargo, ammonium nitrate, tar in bulk, logs, scrap, motorblocks, turnings, pitch in bulk, arms, ammunitions, explosives, nuclear and radioactive materials, petroleum or its products, sulphur, fishmeal, calcium carbide, reduced iron ore pellets, fines, cement in bulk, sodium sulphate, ammonium, sulphate, calcium hydrochloride, bonemeal, creosoted goods, charcoal, mobile homes, grain expellers, resin in bulk, turpentine, granit, ferrosilicon, soda ash, borax, seedcakes, oil cakes, car and motor vehicles, motor spirits, chilian nitrate, copra and copra products, quicklime, pond coal, pyrites, cement clinker, grain and any other grain products.

36. Crew assistance

Timecharter hire to include rendering all customary assistance by the crew

46. Eligibility

a) It is a condition of this Charter that the vessel is not and will not be during the currency of this Charter in any way directly or indirectly owned, controlled by or related to any Cuban, North Korean or Iraqi interest. If the goods are to be loaded in or destined to the United States, the (1) Iran, Libya or Sudan, Yugoslavia including Montenegro shall be added to this list.

66. Australian-Port Call Clause

If the vessel proceeds to Australian ports, Owners guarantee that the vessel and her equipment shall comply with current Australian Navigation Regulations and without prejudice to Charters other rights Owners to indemnify Charterers for any consequences arising from partial or full non-compliance with this stipulation.

Owners guarantee that the vessel is fitted with valid Australian Hold and Pilot Ladders in accordance with WWF requirements or any amendments thereto, and will remain so throughout the currency of this Charter.

The Owners hereby confirm that the Owners duly acknowledge the voluntary guidelines for controls of the discharging of ballast water ad sediments for entering Australia from overseas stipulated by Australian quarantine and inspection service.

69. Arbitration

a) This contract is governed by and constructed in accordance with English Law."

The issues

5. The central issues which the tribunal was asked to determine were as follows:

i) Whether pursuant to line 38 and/or clause 31 of the charter parties, owners are obliged to provide a vessel with RightShip approval and to maintain such approval for the currency of the charterparties; and/or

ii) Whether owners are obliged to permit a RightShip inspection of the vessel and other RightShip vetting procedures, as and when required by Charterers, pursuant to clause 8 of the charterparties and/or pursuant to implied duties of co-operation.

6. The tribunal found in favour of Glencore and Swissmarine and answered both question in the affirmative. The same two issues form the focus of this appeal. It is accordingly desirable to start by deriving from the reasons the tribunal's findings as to the nature of the RightShip approval system and the extent of the vessel's experience of it. In so doing, it is fair to say that the findings are somewhat disparately spread throughout the reasons and rolled up with citation from the witness evidence which it would appear that the tribunal accepted. There are also some inconsistencies as to dates.

The RightShip Approval System

7. RightShip was set up in 2001. It is a ship approval system maintained by the three major players in the coal and iron ore markets, B.H.P. Billiton, Rio Tinto Shipping and Cargill Ocean Transportation. It is designed as a ship vetting information system. The aim is to identify those vessels that are suitable and safe for the carriage of iron ore or coal cargoes. The clients of the system are said to include owners, charterers, terminal operators, port state control authorities and insurers.

8. The system rates vessels in three principal categories:

***-*-* A three, four or five star rating means the ship is an acceptable risk

** Two stars means the user must contact RightShip for further review of the ship's risk profile

* A one star rating indicates that RightShip would need to do more detailed investigation, including a physical inspection of the ship and/or an audit of the vessel and its management systems.

9. The rating is based on an analysis using "*algorithm software*" called SVIS. This involved a "*complex analysis"* taking account of no less than 50 factors. The ten of these that were revealed were yard, owner operator/manager, vessel age, casualty history , port state control history, condition of class and class changes, trading patterns and cargo history, terminal inspections and ISP certificate data.

10. The significance of an acceptable rating is that "*RightShip would accept the vessel if a notional nomination of the vessel was made to RightShip in respect of a notional RightShip cargo*." Any vessel with a 1* or 2* risk rating will not obtain approval without the submission of an approval form by the "*subscriber*" to the system and subsequent processing by a RightShip vetting officer, including, where appropriate, inspection of the vessel. In this regard, any vessel in excess of 18 years of age is automatically downgraded to a 2* risk rating and will thus not be eligible for approval until a satisfactory physical inspection report is available.

11. The system had been operated by shippers and terminal operators in Australian ports more or less since inception. With the Capesize market increasing to unprecedented levels in mid to late 2003, the RightShip vetting system gradually became more widely recognised. Thus the tribunal found that *"by late 2003 the system must clearly have been well in the minds of those involved in the transportation of coal/iron ore*". During 2004 some 7,200 vessels were vetted. By 2006 the figure had increased to 12,050 vessels. By that stage Rightship vetted 90% of all the iron shipped globally and 52% of the coal.

12. In short, the significance of the approval system in coal and iron ore trade has grown and has become such that the tribunal accepted the evidence of Mr Weernink, the sub-charters' broker, to the effect that it is now "a *sine qua non* for a Cape vessel to trade to Brazil, Australia, Puerto Bolivar, Seven Island, Tanjury Bora and North Pulai Lant plus all cargoes where CVRD, BHP Billiton, RTS are involved in the chain." Or as another broker put it in a passage accepted by the tribunal:

"…major shippers/players in the dry cargo market like CVRD-Vale, BHP Billiton and Rio Tinto require vessels to be RightShip approved in order to be able to accept them for their ports and cargoes. The industry views RightShip as a necessary bureaucracy to standardizing the process of quality control of vessels and ship management."

13. Thus, without it, trading is now limited. It would all be at reduced rates, exemplified by the losses claimed at the present reference of US$900,000 per month. As one broker put it in evidence accepted by the tribunal:

"*From a Capesize viewpoint, I would consider that the implications of not having a RightShip vetted Capesize would be quite catastrophic as most shippers now have RightShip approval as an absolute requirement. I would find it difficult to identify regular trades where the vessel would be full time employed without suffering huge discounts*."

Again as stated by a manager in a chartering department:

"*RightShip approval today is necessary in order to be able to effectively trade in the iron ore and coal industries."*

Vessel's RightShip History

14. As early as December 2001, the vessel was rated 2*. Through 2002 and 2003 the vessel had been rated 3* but shortly afterwards was downgraded again to 2* in 2004 when she became 18 years old. Nonetheless she performed a number of voyages at that rating until February 2007 by which time she was 21 years old. On 8 February 2007, Swissmarine once again requested Seagate to complete the RightShip vetting questionnaire for an intended iron ore voyage. The master duly filled in the questionnaire and furnished the necessary documents. The response from RightShip was a request for an inspection. On 13 February 2007, Seagate contacted

RightShip to arrange for this inspection whilst the vessel was bunkering in South Africa. RightShip were content however to postpone the inspection until the next discharging port.

15. On 15 March 2007 Seagate asserted to Glencore that, although RightShip "was *not a requirement under the charter"*, Seagate was considering "*reinstating"* the vessel's RightShip status. In return, Seagate asked Glencore (and Swissmarine) to increase the hire. The response from Swissmarine was*:*

"RightShip approval does not provide an additional trading benefit but merely keeps vessel fit and suitable for normal trading as required under the cp. On the other hand failure by owners to maintain RightShip approval reduces her trading capacity and seems contradictory to owner's obligation to keep her fitted for the trade including Australia… "

16. Thereafter, no RightShip inspection took place despite requests in June, September and October. By now the vessel was graded 1*. There was one voyage approval based on a state control inspection in August but in January 2008 RightShip approval was *"denied"*. As I understand it, matters have remained in this state of limbo ever since.

Pre-contract discussions

17. At the arbitration, it was the case of Glencore in the head charter reference and of Swissmarine in the sub-charter reference that the two charters were fully back to back and, as a matter of construction, the owners/disponent owners were required to provide a vessel with RightShip approval and, in any event, to permit a RightShip inspection and any other RightShip vetting procedure. Seagate submitted otherwise.

18. Significantly, apart from the terms of the two charterparties, construed against the background of the RightShip system and the vessel's experience of it, heavy reliance was placed by Seagate on certain parts of the precontractual discussions between Orient and Glencore in November 2003. As summarised by the tribunal, they were as follows

i) On 20 November, Glencore proposed an additional clause requiring owners "to continue to endeavour to maintain RightShip approval through the charter period" failing which the charterers would have the right to cancel failing remedial action within 30 days.

ii) Orient declined the additional clause: it was said to be unacceptable particularly as it would lead to cancellation "based on vetting criteria from RightShip".

iii) In response Glencore pointed out on 20 November that "RightShip approval is becoming essential for normal trading of an older cape" and suggested omission of the right to cancel.

iv) Orient responded by saying that the vetting standards were often arbitrary and inconsistent and, although the vessel was currently rated 2* by RightShip "*owners would prefer to continue with traditional vetting standards already covered"* in charterparties. The message concluded by asking Charterers' confirmation of the charter *"without RightShip*".

v) The reply from Orient was that Charterers *"agree to leave charterparty unchanged therefore you are fully fixed"*.

vi) On 24 November, Orient acknowledged the message "*charterers'* acceptance to leave the [charterparty] unchanged and the subject of fixture is now fully fixed".

19. It was contended by Seagate that these exchanges were undertaken after the conclusion of the charter and established an estoppel by convention. In the alternative, it was Seagate's submission that, if they formed part of the negotiations, they were admissible in evidence in that they established the parties' knowledge of a circumstance which was material to the construction of the charterparties, viz the refusal on the part of Seagate to agree any term which required RightShip approval or, alternatively, established a common assumption to the same effect.

The tribunal's conclusions

20. From the tribunal's reasons, it can be discerned that the tribunal concluded as follows:

i) As regards the first issue:

a) The exchanges in November took place prior to the conclusion of the head charter. The exchanges did not establish the parties' knowledge of the fact or the common assumption as alleged but merely reflected a jockeying for position on the question of a RightShip approval clause. They were accordingly inadmissible as an aid to construction.

b) Having regard to the need to construe the intentions of the parties objectively and to construe the charterparties in a commercially sensible fashion, clause 31 "*would have conveyed to reasonable people with all the background knowledge reasonably available"* that it obliged Seagate to obtain and maintain RightShip approval. Those involved in the iron ore/coal trade *"could not but have been aware of the RightShip approval initiative from soon after its inception"*. Indeed the vessel was duly rated from December 2001 onwards. "*Accordingly, from this angle we would expect a charter signed in late November 2003 to include an obligation, whether express or implicit, for an owner to obtain and maintain RightShip approval*."

c) The RightShip approval system was and is not conducted in an onerous or arbitrary manner but in a fashion consistent only with the remedying of deficiencies "*which any conscientious owner operating effective risk management would wish to see remedied"*. Likewise, in considering the balance of interests between the owners and charterers, on the one hand, from the charterers' point of view, the exploitation of the earning capacity of the vessel is greatly dependent on approval whilst, from the owners' point of view, the

availability of approval was again only dependent on "*what any conscientious Owner would be seeking to achieve in any event by way of the proper maintenance of the vessel*".

d) Clause 31 was not solely concerned with official or governmental requirements for vessels (although in many cases they may coincide). The emphasis of the clause was on eligibility for trading in the broadest sense.

e) If and to the extent that the clause was a condition strictly so called, there were no good grounds for regarding a right of termination for a failure to comply with the rules of private terminals as in any sense commercially extraordinary. It was no more harsh an outcome than that flowing from a failure to comply with public authority rules.

f) The requirement for documents in the second part of clause 31 was not confined to hard copy certificates and was apt to include RightShip approval as certified on line.

ii) As regards the second issue:

a) It follows from the conclusions on the first issue that the owners are obliged to permit a RightShip inspection and other vetting procedures under line 18 and/or clause 8 and/or pursuant to the implied duties of co-operation.

b) In any event, there had been prolonged co-operation between Orient and Glencore and later between Seagate and Glencore in obtaining RightShip approval through to 2007. This must have involved inspections whilst the 2* rating applied. The master duly completed a vetting questionnaire in February 2007. This reflected the usual cooperation in the field as portrayed by the evidence of one broker as accepted by the tribunal;

"*I cannot recall encountering a situation where the Owner of a vessel refuses to attempt to obtain RightShip approval or assist a charterer to obtain the same.*"

c) In any event, whilst "*customary assistance*" within clause 8 was probably directed at such matters as hold cleaning rather than RightShip approval, the words "*orders and direction of the charterers as regards employment*" are apt to oblige the owners to permit a RightShip inspection.

Questions of law on Issue 1

21. The questions of law on which leave to appeal was granted as regards the first principal issue are as follows:

a) Properly construed, did line 38 of the charterparty require the Claimant to provide a vessel with RightShip approval and to maintain such approval for the currency of the charterparty?

b) Properly construed, did clause 31 of the charterparty require the Claimant to provide a vessel with RightShip approval and maintain such approval for the currency of the charterparty?

c) What is the correct approach to construction of a contractual document - in particular, is it correct to approach the construction of the contract from the premise of a pre-conceived presumption/assumption that the contract should/would be expected to include an obligation of the sort contended for by one party?

d) In what circumstances are statements made during pre-contractual negotiations admissible as an aid to construction and, in particular, when might such statements be admissible to show knowledge of the circumstances or objective facts against the background of which the parties subsequently used words in the contract and/or to show a common assumption as to the effect/scope of the words used in the contract?

e) Did the pre-contractual written exchanges contain a statement of objective fact, to the effect that the vessel's owner was not prepared to have the vessel submitted to the RightShip vetting regime, which was admissible and a relevant part of the factual matrix for the purposes of construing the contract?

f) Did the pre-contractual written exchanges evidence a common assumption, which was relevant to the proper construction of the contract, to the effect that line 38 and/or clause 31, as subsequently embodied in the contract, did not require the vessel's owner to provide a vessel with RightShip approval and to maintain such approval for the currency of the charterparty?

Questions of law on Issue 2

22. The questions of law on which leave to appeal was granted as regards the second principal issue are as follows

a) Properly construed, did clause 8 of the charterparty require the claimant to permit a RightShip inspection of the vessel and other RightShip vetting procedures?

b) When considering whether a contract, properly construed, imposed an obligation to permit X or co-operate as regards the doing of X, is it correct to take account of the fact that other parties operating under different contracts do generally permit X or co-operate as regards the doing of X?

Issue 1: Line 38 / Clause 31

23. Three overlapping obligations under line 18 and/or clause 31 are relied upon by Glencore and Swissmarine as establishing the requirement on the part of the owners to provide a vessel with RightShip approval:

i) keeping the vessel in a *"thoroughly efficient state in terms of her hull machinery and equipment, with all certificates necessary to comply with current requirements at all ports of call"* during the currency of the charter: line 38;

ii) ensuring that the vessel remained "*in all respects eligible for trading to ports*" not excluded in the charter and ensuring that the vessel has "*all valid certificates records and other documents required for such trade*": clause 31 a);

iii) ensuring that the vessel had all certificates and documents "*necessary to comply with …all current requirements at all ports of call*": clause 31 b).

The rival contentions

24. Seagate's position can be briefly summarised as follows:

i) there was no express reference to RightShip approval;

ii) it was not necessary to imply an obligation in that respect;

iii) line 38 was only concerned with questions of seaworthiness and with official certificates such as arise from classification or flag state requirements in that respect;

iv) Clause 31, given its heading, was solely concerned with compliance with official or legal requirements and documents demonstrating compliance with such;

v) an obligation as regards RightShip could easily have been expressly included and the numerous express provisions with regard to such matters as the Australian Port Call are inconsistent with any construction requiring RightShip approval in addition.

vi) the references to certificates is not to the point as RightShip does not issue certificates;

vii) since clause 31 is a condition, the outcome of any temporary and/or minor basis on which RightShip approval might be withheld or withdrawn would have a wholly disproportionate effect;

viii) The word "*eligible*" meant either "*legally qualified*" in which case RightShip approval would not be relevant; alternatively it meant "fit to be chosen" in which case it was well established that being *"in every way fitted for service"* was solely directed to the physical state of the vessel and thus not concerned with compliance with the whole range of factors on which the RightShip approval was based.

25. Glencore and Swissmarine's position can equally briefly be summarised as follows:

i) As a matter of construction, the requirements of eligibility and certification include RightShip approval;

ii) Questions of implication do not arise: if they do, it is necessary to imply an obligation with regard to RightShip approval so as to give the charterparties business efficacy;

iii) Line 38 encompasses the current requirements of all ports regardless of whether they concern such matters as class, seaworthiness and flag state requirements or not: in any event RightShip certification does relate to seaworthiness;

iv) Clause 31is not confined to official or legally required documents: the heading does not lead to such a restriction;

v) The express reference to other certificates or compliance with other requirements does not establish that RightShip approval is excluded;

vi) The absence of hard copy certificates or documentation is not determinative: certification and/or approval is satisfactorily evidenced by entries on the RightShip web site or otherwise on-line;

vii) Categorisation of Clause 31 as a condition does not give rise to any disproportionate impact;

viii) In its ordinary and natural meaning, the word "eligible" simply means that the vessel is fit for selection by reason of meeting the pre-conditions for selection.

Discussion

26. A convenient starting point is to consider whether, as the charterers contend, RightShip approval is a pre-requisite to the vessel being "*eligible*" to trade to the ports specified (or rather not excluded) in the charter within the meaning of Clause 31a. First, what is meant by eligible? In this regard Seagate relied on various legal dictionary definitions and in particular a cross-reference to ***Baker v Lee (1860) 8 HL. Cas. 495***.

27. The issue in the case was by any standards markedly different from the issue in the present case - namely whether dissenters were or were not excluded from appointment as trustees of a school founded by Edward VI in 1549 for the teaching of "*Literature and Godly learning*". Sitting with a panel of four, the House of Lords were, unfortunately, evenly divided on the topic and thereby the decision of the Court of Appeal, declaring that dissenters were excluded, was affirmed.

28. The word "*eligible*" did not appear anywhere in the relevant indenture. The trustees were simply required to appoint to their number "*other honest persons*" of the parish as should be thought "*most convenient to the uses, intents and purposes*" set out in the Indenture. However, in the judgment of the Master of the Rolls, he had summarised his conclusion in terms that "persons dissenting from the doctrines of the Church of England are eligible to be appointed". In the speech of Lord Chelmsford (who was minded to affirm that view) there is this passage:

"The word 'eligible' as here used by the Master of the Rolls is ambiguous. It may mean either "legally qualified" or "fit to be chosen"."

29. Albeit in a markedly different context, I do not find this analysis unhelpful. In my judgment '*eligible*' is a straight forward word. It means that the relevant person or object is fit for selection as satisfying the relevant conditions for selection. Thus, any proprietary interest in the vessel by a Cuban, North Korean or Iraqi entity would mean that the vessel was not eligible for service: see clause 46.

30. By the same token, taken in isolation, the concept of eligibility is potentially apt to encompass conditions imposed by shippers and/or ports in Australia and elsewhere in respect of the acceptance of only those vessels with RightShip approval. But Seagate went on to submit that '*fitness*' in this respect was closely analogous to the requirement in line 22 that the vessel be "in every way fitted for service". It followed so the argument ran that, in the light of the decision in ***The Derby [1985] 2 Lloyd's Rep. 325*** there was no obligation to comply with the requirements of "a self appointed and extra-legal organisation".

31. The charterers had contended in ***The Derby*** that, as a matter of construction of line 22, the owners were in breach by having a Filipino crew employed on terms which did not meet with the approval of the ITF. But the arbitrators had found that:

    a) the trading limits had been curtailed to avoid ITF "*hotbeds*"

    b) the off hire clause had been tailored to allow for loss of time through ITF activity

    c) the ITF was *"a notorious organisation for arbitrary interference*" and its methods of pursuing its ends and enforcing its "*erratic will"* were "*reprehensible*".

    Against that background the arbitrators found against the owners.

32. On appeal, Hobhouse J set aside the award on the basis that line 22 of the NYPE form relates only to matters of seaworthiness or the ability of the owners to comply with the orders given to them by the charterers: see ***[1984] 1 Lloyd's Rep. 635 at p. 642.*** The subsequent appeal to the court of Appeal was dismissed: ***[1985] 2 Lloyd's Rep 325.*** In discussing the specific issue of the scope of line 22, Kerr L.J. agreed with Hobhouse J that there was no analogy between an ITF blue card and, for instance, a deratization certificate (the absence of which would affect the fitness of a vessel): cf. ***The Madeleine*** ***[1967] 2 Lloyd's Rep. 224***. The context demonstrated that line 22 related "*primarily to the physical state of the vessel."*

33. In discussing the scope of the words to the extent that they might go beyond the mere physical state of the vessel, Kerr L.J. said this:

    "…have been held to cover the requirement that the vessel must carry certain kinds of documents which bear upon her seaworthiness or fitness to perform the service for which the charter provides. Navigational charts which are necessary for the voyages upon which the vessel may be ordered from time to time are an obvious illustration. For present purposes, however, we are not concerned with certificates bearing upon the seaworthiness of the vessel. The nature of such certificates may vary according to the requirements of the law of the vessel's flag or the laws or regulations in force in the countries to which the vessel may be ordered, or ***which may lawfully be required by the authorities exercising administrative or other functions in the vessel's ports of call pursuant to the laws there in force.*** *Documents falling within this category, which have been considered in the authorities, are certificates concerning the satisfactory state of the vessel which is in some respect related to her physical condition, and accordingly to her seaworthiness. Their purpose is to provide documentary evidence for the authorities at the vessel's ports of call on matters which would otherwise require some physical inspection of the vessel, and possibly remedial measures - such as fumigation - before the vessel will be accepted as seaworthy in the relevant respect. The nature of description of such certificates, which may accordingly be required to be carried on board to render the vessel seaworthy, must depend on the circumstances and would no doubt raise issues of fact in individual cases. But I do not see any basis for holding that such certificates can properly be held to include documents other than those which may be required by the law of the vessel's flag or by the laws, regulations or lawful administrative practices of governmental or local authorities at the vessel's ports of call…"* (emphasis added)."

34. In one sense, this passage is of some assistance to the charterers since RightShip approval is, at least in part, concerned with the physical condition of the ship for the purpose of undertaking coal or iron ore cargoes. As the tribunal has found, the factors on which the assessment is made include such matters as conditions of class, terminal inspections and so on all with a view to assessing whether the relevant vessel is in a suitable condition to complete the voyage safely. Thus the approval, as the tribunal put it, would confirm what a conscientious owner would seek to achieve "*by way of maintenance of the vessel*."

35. However, as the quoted passage makes clear, the focus is upon requirements legally imposed either by the law of the flag, the law of the country to which the vessel has been ordered or by the laws of the port of call. This is further emphasised by the heading to Clause 31 "*Certificates, Laws and Regulations*". It is not suggested however that RightShip approval is "*lawfully"* required by the ports at which coal or iron ore may be loaded (albeit there may be some unidentified exceptions). It is simply a commercial requirement which had become progressively more widespread since 2001.

36. This elides with a further submission by Seagate. Read as a whole, it was contended, Line 38 and Clause 31 focus on certification and documentation which in turn establish fitness and eligibility. Yet the RightShip scheme does not give rise to the provision of any documentary form of certification. This point is well made. It is not an answer, in my judgment, that approval (or lack of it) is recorded in the computer hard drive of the RightShip vetting organisation.

37. This feature is a further reflection of the extra-legal and private nature of the system. Even accepting for present purposes the tribunal's finding that the system was not operated in an arbitrary fashion, the fact remains that the basis of any approval remains obscure:

    i) no less than 50 factors are considered by the relevant software but only a small proportion are revealed on the website;

    ii) the relative weight accorded to the factors is not disclosed and thus the owner cannot himself undertake the "*complex analysis of comprehensive data*";

    iii) the algorithm software is not publicly available;

    iv) whilst it is said that the requirements are no more than those which a conscientious owner would wish to achieve, it is clear that matters extend well beyond the physical state of the vessel (in respect of which there was already an obligation as regards the maintenance of seaworthiness);

v) indeed it is not clear how, for instance, such matters as "*yard", "operator/manager*" or "*trading patterns*" can be gauged by an owner for the purposes of assessing whether the vessel was suitable for nomination to RightShip;

vi) in short this secrecy renders the scope and standard of the requirement difficult to comply with and exposes the owners to the unpublished requirements of a third party without any period of grace.

38. It is also of considerable note that specific provision is made in the charterparty for a whole range of certificates. For instance:

i) Fitted with ITF/WWF/AHL;

ii) Suitable for alternative hold loading in accord with IMO Regulations;

iii) Maintenance of class with IACS member;

iv) Insured with International Group of P & I Clubs;

v) Compliance with ISM Code;

vi) Compliance with Australian Navigation Rules;

vii) Compliance with Australian quarantine and inspection guidance.

I agree with Seagate that this gives rise to a strong inference that, given the absence of RightShip approval (something the tribunal would expect to be included) no such approval is required under the charterparty. This is all the more so where the charterparty focuses almost exclusively on iron ore and coal cargoes and thus involves trading to the "hotbeds" of the RightShip system such as Australia.

39. Considerable concern was expressed by Seagate as regards the passage in the reasons quoted above of an expectation on the part of the tribunal that a charter signed in late November 2003 would include an express or implicit obligation to maintain RightShip approval. This it was submitted demonstrated a preconception on the part of the tribunal as to the meaning of the words used: see ***Pagnan SpA v. Tradax Ocean Transportation[1987] 1 All ER 81***..

40. In one sense this is an unfair characterisation of the tribunal's approach. The tribunal has made it clear in paragraph 55 of the reasons that, in construing clause 31, it was seeking to determine the parties' objective intentions having regard to the background material with an emphasis on achieving a commercially sound conclusion. In this regard, the tribunal found that there was an obligation to provide RightShip approval "with these principles in mind". However, there is some force in the submission that the tribunal gave undue weight to this expectation. In fact, I accept that, if relevant at all, it is more consistent with a construction which does not accord any implicit obligation to obtain approval.

41. I must deal with one final submission by Seagate. The argument ran thus:

i) Clause 31 is expressly a condition

ii) This is to be contrasted with other provisions which are expressly warranties.

iii) It followed that any breach would entitle Glencore to terminate.

iv) Such would be commercial nonsense.

42. The tribunal rejected that submission and so do I. There is no want of commercial realism in treating the provision of RightShip approval if applicable as a condition strictly so called. In any event, it is by no means clear that the clause is a condition. Line 35 describes all the terms of the charter as conditions yet it is clear that some are mere warranties or at most innominate terms. I have put this point to one side.

43. Nonetheless for all the reasons set out above I conclude that the tribunal erred in concluding that on its proper construction the charterparty required the owners to obtain and retain RightShip approval. However I go on to consider whether any part of the negotiations leading up to the conclusion of the charterparty are admissible for the purpose of construction and, if so, whether they assist in clearing up any doubt or ambiguity.

Pre-contractual negotiations

44. It was at the forefront of Seagate's submissions that the arbitrators wrongly excluded as inadmissible certain e-mail exchanges between the parties made on the eve of the conclusion of the contract. The exchanges demonstrate, it is contended, either:

i) a statement of objective fact to the effect that the owners were not prepared to have the vessel submitted to the RightShip vetting regime; or

ii) a common assumption to the effect that line 38 and/or clause 31 did not require the owner to provide a vessel with RightShip approval.

45. As already noted, it was the tribunal's conclusion that the exchanges established neither but were simply made up of messages demonstrating that a specific RightShip approval clause could not be agreed for inclusion and that the parties were content to rely on the existing wording. The tribunal accepted the analysis of Mr Weernink:

"Both parties agreed to leave the charterparty as it was. Some things are left vague in negotiations. We often leave matters vague. That is why we say ***'as per last charterparty'***"

Seagate challenges this conclusion as representing, it was submitted, the subjective, inadmissible and inaccurate view of Mr Weernink.

46. The first potential difficulty canvassed by Glencore is that Seagate was not as such a party to the negotiations. The established fact or the common assumption, if any, was reached during the course of negotiations between

Orient and Glencore. Seagate only became a party to the headcharter by reason of a novation dated 19 August 2006. However, I understand that Orient and Seagate were ultimately owned and controlled by the same individual. Accordingly, from Seagate's perspective the point is not claimed to be of any material consequence.

47. But it may still be important to recognise the lack of participation of the subcharterers in the negotiations in 2003 (although they were parties to the previous charter on which the head charter was based). This could, if Seagate's submission on their admissibility is correct, give rise to a potential disparity in what was otherwise a back to back transaction.

48. Glencore placed strong emphasis on this issue in its submissions. A good reason for the non-admission of pre-contractual exchanges, it was contended, was the risk of unfairness to third parties unaware of their content. By way of example, reliance was placed on the decision of Briggs J in ***Chartbrook Homes Ltd v Persimmon Homes Ltd [2007[1 All E.R. (Comm) 1083***. In ruling that the evidence of negotiations was inadmissible, Briggs J said:

> *"[35] In my judgment the second of those reasons [the effect on third parties] is compelling. Most modern commercial contracts are to a greater or lesser extent assignable, such that the benefit or burden of the obligations therein contained can be, and often is, transmitted to third parties who took no part in the negotiation of the contract, and who may therefore be assumed to be wholly ignorant of what took place. Some types of commercial contracts, such as long leases of land, commonly give rise to transmission or rights and obligations long after the contract negotiators have died. Others, such as the agreement in this case, are of a more limited duration, but it is common ground that the agreement was understood and intended to be capable of assignment by way of security to a bank, and indeed was so assigned. Furthermore, even in the absence of assignment, the rights and obligations created by a commercial contract may form an important part of the assets and liabilities of one or more of its parties, such that the reporting and auditing of its financial health may be dependent upon a proper understanding of its terms, again by persons with no participation in, or knowledge of, its negotiation.*
>
> *[36] If the parties' negotiations were, to the extent 'helpful', to be routinely admissible as an aid to contractual construction, then no such third parties reading, dealing with or having transferred to them rights or obligations under the contract could make any safe assumptions about its meaning without themselves carrying out an inquiry as to those negotiations, so as to put themselves in the same state of knowledge as the parties to the contract. Furthermore, since ambiguity is no longer (after the Investors Compensation Scheme case) a prerequisite for recourse to the admissible background, a third party's appreciation of the apparently unambiguous meaning of a word, phrase or term could be subverted by reference to the original parties' negotiations, without which no secondary meaning was even capable of being guessed at."*

49. By a majority, the Court of Appeal upheld the judge's construction of the relevant agreement ([***2008] EWCA Civ. 183***) and in doing so rejected the argument that it was a case in which it was legitimate to have regard to the pre-contractual negotiations. In his dissenting judgment, Lawrence Collins LJ devoted a long passage to this issue. In particular he addressed the issue of the impact on third parties. He observed as follows:

> ***"[111]*** *Lord Nicholls suggested ((2005) 121 LQR at 587-588) that the policy reasons put forward for the proposition that pre-contract negotiations were inadmissible were as follows:*
>
> *(1) increased uncertainty and unpredictability in dispute resolution;*
>
> *(2) adverse effect on third party rights;*
>
> *(3) the use of the evidence would be unhelpful (Lord Wilberforce's reason);*
>
> *(4) subversion of the objective approach.*
>
> *Lord Nicholls accepted that these were important practical considerations, but that they were not conclusive. To that I would add a further one, which is that without such a rule sophisticated and knowledgeable negotiators would be tempted to lay a paper trail of self-serving documents.*
>
> ***[112]*** *The judge in this case was particularly impressed by the second of Lord Nicholls' reasons, the effect on third parties. But, as Lord Nicholls recognised (at 588), the same objection would apply (although perhaps with less force) to the admissibility of other background material, which might be equally unavailable to third parties. The Law Commission, Law of Contract: The Parol Evidence Rule (Law Com No 154, 1986), when concluding that the parol evidence rule did not have the effect of excluding evidence which ought to be admitted if justice was to be done between the parties, did not consider that assignees would be prejudiced: para 2.43. It is also significant that the effect on assignees does not prevent (as I have indicated) the admissibility of pre-contract negotiations for the purposes of interpretation in the practice of the world's greatest capitalist nation, the United States."*

50. This limitation of the significance of any impact on third parties is respectfully convincing. Perhaps the more so when the relevant contract is not assignable. The negotiations leading to the sub-charter could have fully adopted, at Glencore's insistence, any agreed fact or understanding that emerged from the earlier negotiation. Accordingly I largely put this point aside.

51. Returning to the question of admissibility, it is common ground that the exclusionary rule does not apply where the negotiations are being considered *"to establish the parties' knowledge of the circumstances with reference to which they used the words in the contract"*: see ***Bank of Scotland v Dunedin Property Inr. Co. Ltd [1998] SC 657:***

> ***"****As these authorities demonstrate, the rule which excludes evidence of prior communings as an aid to interpretation of a concluded contract is well-established and salutary. The rationale of the rule shows, however, that it has no application when the evidence of the parties' discussions is being considered, not in order to provide a gloss on the*

terms of the contract, but rather to establish the parties' knowledge of the circumstances with reference to which they used the words in the contract:" per Lord Rodger at p. 7.

Such was and is accepted as a principle of English law by both parties.

52. The question of admissibility was discussed in paragraph 46 to 51 of the award. It is common ground that the tribunal correctly directed themselves as to the appropriate law: see also the reference to ***The Rio Assu [1999] 1 Lloyd's Rep 115***. The tribunal concluded that the exchanges summarized above were inadmissible as being no more than a reflection of a process whereby each party was jockeying for position.

53. This was a conclusion which Glencore submitted fell squarely within the range of decisions which the tribunal was entitled to reach on the written and oral material before them: ***Atisa v Aztec [1983] 2 Lloyd's Rep. 579, The Matthew [1990] 2Lloyd's Rep. 323, Kershaw Mechanical Services Ltd v Kendrick [2006] EWHC 727 (TCC)***.

54. It was submitted that it had to be born in mind that these exchanges were taking place against the background of a completed fixture subject to confirmation. The words used in Clause 31 for instance had been adopted from an earlier charterparty between Orient and Swissmarine. The exchanges, so the argument ran, may throw some light on what the parties subjectively thought the words used meant or may reveal a degree of uncertainty on the part of either or both parties. But they are not directed to any understanding of the attitude of Seagate as at the time the relevant clauses were negotiated.

55. Similar considerations apply, it was said, to the proposition that the exchange gave rise to a common assumption. This principle has been summarised as follows:

"I think that in such cases the principle can be stated as follows. If a contract contains words which, in their context, are fairly capable of bearing more than one meaning, and if it is alleged that the parties have in effect negotiated on an agreed basis that the words bore only one of the two possible meanings, then it is permissible for the Court to examine the extrinsic evidence relied upon to see whether the parties have in fact used the words in question in one sense only, so that they have in effect given their own dictionary meaning to the words as the result of their common intention. Such cases would not support a claim for rectification of the contract, because the choice of words in the contract would not result from any mistake. The words used in the contract would ex hypothesi reflect the meaning which both parties intended:" see ***The Karen Oltmann [1976] 2Lloyd's Rep 708 per Kerr J at p.712.***

56. Once again the tribunal has made a finding that the exchanges did not display any common assumption. As the tribunal put it, *"the only common understanding in our view was that there was no common understanding on the effect of clause 31."* That conclusion is, Glencore submitted, within the range of permissible conclusions arising from the exchanges.

57. That all said, the court was urged to review the exchanges so as to form its own view of the existence or otherwise of an agreed fact or common understanding. There are three reasons for being somewhat reluctant to accept this invitation:

i) As already recorded the tribunal properly directed itself on the law;
ii) It was a panel made up of experienced commercial arbitrators
iii) The written exchanges were supplemented (without challenge to their admissibility) by oral evidence from Mr Chan who acted on behalf of Orient and Mr. Weernink who acted on behalf of Glencore: this material is not before the court.

58. However, despite my concerns, I go on to record the detail of the emails summarised earlier and then express my own conclusions on them:

a) 7.27 p.m. 14 November Glencore to Orient

"As per telcon believe we have agreed as follows, sub reconf from both sides within 1 working day."
MV Orient Brilliance for account Glencore
- period 24 months +/- 2 months in charters. Opt……
- delivery to be immediately after redelivery from current C/P to Swiss Marine ……
- otherwise as per current nype Orient Brilliance/Swissmarine with logical amendment……"

b) 04.30 15 November Orient to Glencore

"…As vessel is now clean fixed/confirmed we look forward to receiving charterers' reconfirmation which is to be declared latest by next Monday 17th November 2003 Swiss time."

c) 03.03 a.m. 20 November Glencore to Orient

"Charterers can accept cp as per SwissMarine/Orient steamship with logical alterations as per mainterms and following additional clause:

Owners will continue to endeavour to maintain RightShip approval through the charter period failing which the charterers to immediately advise such an owners to have 30 days after last call of discharge to rectify the position.

Notwithstanding foregoing if owners fail to maintain RightShip approval through the charter period and fail to rectify position in time given above then the chtrs shall have the right to cancel the c/p without any further liability to either party."

d) 10.20 p.m. 20 November Orient to Glencore

"Thanks for your message below with Charterers' acceptance of cp as per SwissMarine/Orient Brilliance with logical alterations as per mainterms with "additional clause". After proper review/consultation, regret to inform that owners are unable to accept Charterers' "additional clause" for the following reasons:

1. RIGHTSHIP is a private ship vetting established jointly by Rio Tinto and the risk of c/p cancellation based solely on their subjective vetting approval is not an acceptable charter party condition/clause for both Owners and Owners' financier.

2. It not Owners' intention to commit its vessel for a 2 to 3 years period, if there is a chance that such commitment can be cancelled based on vetting criteria from RIGHTSHIP. There are other traditional terms to ensure vessel's conditions which is already covered in c/p as per SwissMarine/Orient Brilliance."

Awaiting Charterer's confirmation of the above.

e) 1.45 a.m. 21 November Glencore to Orient

"Have discussed with charterers and they have the following comments:

- RightShip is indeed a private organisation, however their approval is currently required to load ex west australia, queensland and port kembla. Shippers in Brazil (Sepetiba), puerto bolivar and Newcastle are now also switching to the use of rightship. So righship approval is becoming essential for normal trading of an older cape.

- Having private organisation doing the vetting is exactly the same as what is happening in the oil market where oil major approvals have the same effect and clauses are the same.

Could amend clause as follows:

Owners will continue to endeavour to maintain rightship approval through the charter period failing which charterers to immediately advise such and owners to have 30 days after last call of discharge to rectify the position."

f) 6.28 p.m. 23 November Orient to Glencore

"Thanks for your comments below. After further internal review and proper consultation with our management company (Wallem), we were being inform that RightShip's vetting standards are often arbitrary and inconsistence as there were many instances where ships were rejected for one cargo but accepted for another account and eventually loaded at the same terminal. Accordingly, regret to inform that Owners are not prepared to accept such uncertainties.

Also, while M/V "Champel" (the Vessel's name under RightShip current rating) is currently rated "2" by RightShip, which is below the "3" minimum approval rating level, "M/V Orient Brilliance" had been able to trade in the Australian area without any difficulties, therefore, Owners would prefer to continue with traditional vetting standards already covered in SwissMarine/Orient Brilliance's C/P. As previous Owners and Operator of the Vessel, we are sure you will agree with us that the Vessel can fulfil its trading requirements without RightShip.

In view of the above, obtain Charterers confirmation of SwissMarine/ Orient Brilliance's C/P without incorporating the RightShip Clause."

g) 2.43 a.m. 25 November Glencore to Orient

"Mr Weernink has asked me to confirm to you that charterers agree to leave charter party unchanged, therefore you are fully fixed"

h) 4.55 p.m. 24 November Orient to Glencore

"Thanks for your message below confirming Charterers acceptance to leave the SwissMarine/Orient Brilliance C/P unchanged and that subject fixture is now fully fixed. We look forward to receiving execution copy of the C/P unchanged and that subject fixture is now fully fixed. We look forward to receiving execution copy of the C/P for our Principals' review and signature."

59. I confess that I find those exchanges as conclusively establishing that Orient was making it quite clear that no obligation to obtain RightShip approval was acceptable and Glencore accepted as much:

i) There was no express requirement in the agreed terms of the fixture.

ii) Whether it was implicitly included in the required "*certification*" was open to debate.

iii) The vessel had been classed 2* or 3* in the short period that RightShip had been operational.

iv) Glencore put forward at a late stage a clause imposing an obligation "*to endeavour to maintain RightShip approval*" with a 30 day period after discharge to correct any default (with a right of cancellation thereafter).

v) Orient expressed concerns about being subject to a form of private vetting potentially leading to cancellation (albeit accepting "traditional" terms such as maintenance of class and seaworthiness).

vi) Glencore pointed out that RightShip approval was "becoming" essential and that in the oil market similar clauses were employed: their counter proposal was to remove the right of cancellation.

vii) In response Orient expressed concern about lack of consistency in the system and pressed for continuance of "*traditional vetting standards*". The point was made that the trading could be fulfilled "*without RightShip*".

viii) This position was accepted by Glencore.

60. It strikes me that both parties were proceeding in the knowledge, or at least on the assumption, that there was no provision in the fixture as agreed (subject to confirmation) which requires RightShip approval. Indeed, Glencore's proposal for, and Orient's rejection of a term allowing for rectification within 30 days, was only consistent with there being no existing fulltime commitment. One thing in my judgment is clear namely that the owners were not prepared to agree to RightShip vetting standards being applied to the vessel and the charters were prepared to leave the charterparty unchanged. Whether this be admissible as an agreed fact or as a common assumption is a barren debate.

61. I have not forgotten one final point. Seagate's complains that the tribunal took account of somewhat incomplete internal exchanges between Orient and their managers in which Orient commented: "Since we are not able to avoid charterers insisting on such a clause." This was recorded as demonstrating a possible weakness in Orient's negotiating status.

62. I am not persuaded that the tribunal were much influenced by this material although it obviously would somewhat undermine any suggestion that Orient would in fact not agree a RightShip clause under any circumstances. The primary concern must be what objectively viewed was the agreed fact relating to, or the common understanding as to the scope of, the existing terms. The internal exchanges are not germane to that issue but only to the question whether Seagate might have agreed to an express clause if pressed.

63. It follows that the answers to the questions of law arising under the first issue are as follows:
a) No
b) No
c) No
d) See paragraphs 51ff
e) Yes
f) Yes

The second issue

64. I turn now to the second main issue - namely whether there is any contractual obligation on the part of Seagate to permit RightShip inspectors on board even absent an obligation to maintain RightShip approval. Seagate contends that RightShip approval is a stand alone obligation akin to class. Merely because the charterer might be concerned about the state of the vessel's class, this is not accompanied by any entitlement to insist on an inspection by a classification surveyor.

65. So be it. But the analogy is not, in my judgment, apposite. RightShip approval is to be obtained voyage by voyage. It is dependent on the requirements of the relevant shipper/loading terminal. Classification in contrast is a continuous survey system by the society selected and paid for by the owners and conducted in accord with the rules of the selected society. A much closer analogy is the need to allow shore inspectors on board to inspect the cleanliness of holds.

66. Indeed it is clear that Seagate permitted RightShip vetting and inspection in the course of 2003 to 2006. As the arbitrators have found, a difficulty only occurred in early 2007. The master filled in and returned a RightShip vetting questionnaire to Swissmarine. It was arranged by Seagate that the inspection would take place while bunkering in South Africa en route to load iron ore in Brazil. However, co-operation was suddenly withdrawn absent a response to Seagate's request for an increase in hire.

67. This leads to a discussion of the implications of Clause 8. The tribunal concluded that the words "*under orders and directions of the Charterers as regards employment"* were apt to oblige the owners to permit a RightShip inspection for the purpose of RightShip approval. In this regard the parties' submissions revolved around ***The Hill Harmony [2001] 1 Lloyd's Rep. 147*** which related to a direction to a master to proceed on a GreatCircle route as opposed to a rhumb line route.

68. As regards clause 8, the tribunal (and the respondents to the appeal) relied on two passages in the judgments:

"Clause 8 of the present charter-party, providing that the master (although appointed by the owners) shall be under the orders and directions of the charterers, gives the charterer his key right under the contract: to decide where the vessel shall go and what she shall carry, how (in short) she shall be used, always subject to the terms of the charterparty. The language used is general, and the power correspondingly wide:" per Lord Bingham at p. 150

"The owner still has to bear the expense of maintaining the ship and the crew. He still carries the risk of marine accidents and has to insure his interest in the vessel appropriately. But, in return for the payment of hire, he transfers the right to exploit the earning capacity of the vessel to the time charterer:" per Lord Hobhouse at p. 156.

69. In reliance on those passages, the tribunal concluded that an order requiring a vetting questionnaire to be completed or to permit RightShip inspection were orders "*as regards employment*." Indeed the owners had accepted as much until February 2007. It can be assumed that the owners have complied with their obligation to maintain seaworthiness of the vessel. But if RightShip vetting is excluded, the charterers would be stymied as to nominating any loading port and/or any cargo: in short although hire would remain payable, the vessel would be unemployable. In my judgment the arbitrators were correct.

70. This renders it unnecessary to decide the second question which focuses on the finding that other shipowners make a practice of allowing a RightShip inspection. For what it is worth I am unpersuaded that such justifies any finding of an obligation to co-operate.

71. It follows that my answers to the questions of law arising under the second issue are:
a) Yes
b) Unnecessary to decide.

Bernard Eder Q.C. & Michael Ashcroft (instructed by Hill Dickinson) for the Claimant (Seagate)
Timothy Hill (instructed by Elborne Mitchell) for the Defendant/Claimant (Glencore)
Timothy Young Q.C. (instructed by Holman Fenwick & Willan) for the Defendant (Swissmarine)