JUDGMENT : Mr Hirst QC: Commercial Court. 19th November 2008

1. This action arises out of the arrest of the M.V. "*Duden*" ("*the vessel*") at Dakar in Senegal between 9 and 21 December 2005. The Claimants, Sotrade Denizcilik Sanayi VE Ticaret AS v Amadou Lo & Ors ("*the Owners*"), the registered owners of the vessel, claim that the arrest at the suit of the First and Second Defendants (*"the Receivers*") was a breach of the express and implied terms of the London arbitration clause incorporated in the contracts of carriage. They contend that the breach was induced or procured by the cargo insurers, Axa Assurance Senegal ("*Axa Senegal*"), the Third Defendants, against whom they claim damages. They also claim that Axa Senegal interfered with their business relations with the Receivers, and that the first three Defendants conspired to do these things.

2. This Judgment should be read with the related Judgment in **the *Kallang*** [2008] EWHC 2761 (Comm), which I have delivered simultaneously with this Judgment.

The Contractual Framework.

3. The vessel is a bulk carrier with a deadweight of 26,975 Metric tonnes. She flies the Turkish flag and was managed by the Owners from offices in Istanbul. At all relevant times she was entered with the American Steamship Owners Mutual Protection and Indemnity Association ("*the American Club*") for P&I Risks.

4. On 10 March 2005, the Owners entered into a bareboat charterparty with Anchor Navigation Limited of the Marshall Islands ("*Anchor*"), whereby the vessel was chartered to Anchor for a period of 1 year, plus or minus 30 days in charterers' option. The bareboat charter was governed by English law and was on the "*Barecon 89*" form. It contained the following provisions:

   9. Maintenance and Operation

   (a) The vessel shall during the Charter period be in the full possession and at the absolute disposal for all purposes of the Charterers and under their complete control in every respect. …

   (b) The Charterers shall at their own expenses and by their own procurement man, victual, navigate, operate, supply, fuel and repair the Vessel. Whenever required during the Charter period and they shall pay all charges and expenses of every kind and nature whatsoever incidental to their use and operation of the Vessel under this Charter … . The Master, officers and crew of the Vessel shall be servants of the Charterers for all purposes whatsoever, even if for any reason appointed by the Owners.

   15. ***Non-Lien and Indemnity***

   The Charterers will not suffer, nor permit to be continued, any lien or incumbrance incurred by them or their agents which might have priority over the title and interest of the Owners of the Vessel. …

   Should the vessel be arrested by reason of claims or liens arising out of her operation hereunder by the Charterers, the Charterers shall at their own expenses take all reasonable steps to secure that within a reasonable time the Vessel is released and at their own expense to put up bail to secure the release of the Vessel.

5. Anchor is a wholly owned subsidiary of the Owners. It was managed out of the Owners' office in Istanbul by the same management team. In fact the Vessel's crew were employed by the Owners. The bareboat charterparty was concluded largely for fiscal reasons.

6. On 28 September 2008, Anchor, as disponent owners, entered into a time charterparty on the NYPE form ("*the time charterparty*") with Capezzana Shipping and Trading SA of Geneva ("*Capezzana"*) for performance of a trip from Thailand and/or Vietnam to West Africa with a cargo of bagged rice. The time charterparty included the following arbitration clause:

   "17. That should any dispute arise between Owners and Charterers, the matter in dispute shall be referred to three persons in London, one to be appointed by the parties hereto, and the third by the two so chosen; their decision or that of any two of them shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men. This charterparty shall be governed and construed in accordance with English Law."

7. The vessel was ordered to Ho Chi Minh City in Vietnam where she loaded a total of 490,000 50kg. bags of rice weighing 24,500 metric tonnes in all. Between 19 and 22 October 2005, 10 bills of lading on the "Congenbill" form were issued by the Master. The bills of lading each clearly identified the Owners on their face as "*Owner/Carrier"*. Dakar was the named Port of Discharge. The face of the Bills stated: "*Freight payable as per CHARTER-PARTY dated September 28, 2005"*

   On the reverse, clause 1 provided: "*All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated."*

8. The cargo had been sold to the Receivers by Capezzana Shipping and Trading S.A. on CFR Free Out Terms. Pursuant to these sale contracts, the bills were negotiated by the shippers to Capezzana and thence (eventually) to the Receivers. The Receivers had insured the cargo with Axa Senegal under an all risks marine insurance policy *("the Policy*") issued by Axa Senegal. It provided cover for rice cargoes, to be declared, shipped from anywhere in the world to Dakar from the moment they crossed the ship's rail. The Policy was governed by Senegalese law. It also provided as follows (in translation):

   It is agreed that shortages to be determined by the difference between the weight of the emptied bags – as increased by sweepings if any – and the weight that they should have been, had same bags arrived sound, this weight being calculated as the average weight of sound bags (full or not) at destination. The losses of quantities are thus arrived at without any other deduction than that of the eventual deductible set out by the particular provisions/conditions.

There does not seem to have been any applicable deductible. The carrying vessels were required to be entered with one of the P&I Clubs or insurance companies listed. Included in the list was the American Club.

9. The Policy contained a "*beneficiary participation clause*", whereby profits were to be shared between Axa Senegal and the Receivers. The profit and loss account was to be calculated by adding net premium and net recoveries and salvage recovered by Axa Senegal and subtracting brokerage and management costs, fixed at 50% of net premiums received, and claims paid or reserved. The Receivers were entitled to be paid 25% of any profit – Axa Senegal was entitled to retain the balance.

10. The Policy incorporated the "*Police Française D'Assurance Maritime Sur Facultés (Marchandises) Guarantie "Tous Risques*" – i.e. the standard French marine insurance policy conditions for goods (all risks). The conditions included the following (in translation):

Article 15

The insured, its representatives and all the beneficiaries of the insurance must exercise reasonable care with all that relates to the goods. Also, they must take all mitigating measures to prevent or limit damages and losses. In the event that they fail to do so, the insurer can take their place to take such measures as are necessary in the circumstances without acknowledgement that the cover is binding.

Article 16

The assured, its representatives and the beneficiaries of the insurance must equally take all steps to preserve the rights and recourses against carriers and any other third parties responsible and to permit the insurer, if necessary, to engage and pursue any action it deems necessary.

Discharge and Arrest

11. The vessel arrived at Dakar on 1 December 2005 and commenced discharging her rice cargo. TCI Africa Dakar ("TCI") acted as the vessel's agents. On 8 December, Laurence Germain of TCI notified the American Club's Piraeus office that Axa Senegal had just contacted TCI and asked for a temporary guarantee of FCFA 67 million in respect of alleged damages and eventual shortage. The claim was based on: *"their surveyor's preliminary report, who takes into consideration the discharge recorded up to 06/12/05 and who makes an extrapolation of the final figures".*

The letter went on:

"Knowing that their request is on the high side, AXA are disposed to accept a temporary guarantee from us to be replaced within 15 days by a bank guarantee, the amount of which not exceeding FCFA 67 000 000 in accordance with their surveyor's final figures. …

We know however from experience that [lack of evidence of title] cannot prevent the cargo interests to obtain a court arrest order, as local judges are unfortunately not paying sufficient attention to the files produced.

Moreover, we cannot deny the fact that they have a principle of maritime claim.

There are therefore 3 options according to us:

- *Either wait that the cargo interests arrest the ship and contest their title to act, which however suppose delay before departure.*
- *Or wait completion of discharge and provide security in accordance with real damage recorded on completion. If the discharge complete on Sunday and if cargo interests succeed to obtain a court arrest order, the vessel will then be blocked until Monday.*
- *Or issue a temporary guarantee of FCFA 67,000,000 as requested by cargo interests and replace it within 2 weeks by a bank guarantee based on the final discharge figures."*

The letter attached a copy of the wording usually required by Axa Senegal. The terms of this draft guarantee contained the following provision:

"This guarantee is valid until either amicable agreement in writing between the above-mentioned parties or contradictorily [sic], final and enforceable decision of the Senegalese Courts."

12. Marivi Banou of the American Club's Piraeus office replied indicating that the Club would prefer to use its standard Letter of Undertaking, incorporating English law, or in worst case "*court of competent jurisdiction*". This offer was passed on to Axa Senegal who replied on 9 December through Djibril Dia, a manager at Axa, that *"nous sommes au regret de ne pas pouvoir vous confirmer notre accord sur ce modèle de guarantie.*

À ce propos, nous procédons à la saisie du navire jusqu'à la mise en place de la guarantie suivant les conditions déjà indiquées dans notres dernier fax"

– i.e. We regret we cannot give you our agreement to this form of guarantee. We will therefore proceed to arrest the vessel until a guarantee is in place according to the terms already indicated in our last fax.

13. Unfortunately, neither party is able now to produce the previous fax. In their e-mail forwarding this message to the American Club, TCI interpreted this message as meaning that Axa Senegal was insisting on a temporary guarantee providing for the competence of the Senegalese jurisdiction, to be replaced by a guarantee. TCI suggested to Axa Senegal that it should accept a Club letter of undertaking providing for "*competent court*" jurisdiction. In reply Axa Senegal indicated that it was disposed to accept "*competent court*" in TCI's standard form, to be replaced by a bank guarantee after two months. TCI had given such a guarantee in the *White Mist* case in August 2005. In a departure from what had previously been discussed, Ms Banou indicated that the Club now insisted on "*competent court or tribunal*" wording and reminded M. Germain that the American Club had obtained anti-suit injunctions on two previous occasions.

14. In the meantime, however, Ba & Tandian, a firm of lawyers based in Dakar instructed by Axa Senegal, had applied on behalf of the Receivers to the President of the Tribunal Regional Hors Classe de Dakar to arrest the vessel. The application was made in the morning of Friday 9 December 2005 in the form of a written "*Requête aux Fins de Saisie Conservatoire de Navire de Mer*" which sought an order for the arrest of the Vessel "*pour avoir sûreté et paiement*" (for security and payment) of the claim provisionally valued at FCFA 53,557,511 million. The application mistakenly named the owners of the vessel as "Bulk Carrier". It was made clear that the application was being made pursuant to the Brussels Arrest Convention of 10 May 1952. The Requête included a draft order prepared by Ba & Tandian. The President made the Order accordingly authorising the Receivers:

    "*a faire procéder à la saisie conservatoire du navire "**DUDEN**" jusqu'à la mise en place d'une caution bancaire et ce, pour avoir sûreté du paiement de sa créance que nous evaluons provisoirement et sans nul prejudice aus frais et interêts à la somme de 30,000,000 FCFA (Amadou LO) et de 27,000,000 (Tiger Denrée*s Sénégal)."

    – i.e. to arrest the vessel as a security for payment of the claim, pending provision of a bank guarantee in the provisional amount of FCFA 30 million for Amadou LO and FCFA 27 million for Tiger Denrées Sénégal.

15. Having obtained the order, Ba & Tandian arranged for the *Huissier* (a self-employed professional whose role is similar to that of a bailiff in this jurisdiction) to effect the arrest. The *Huissier* attended on board the Vessel at about 1615 hours on 9 December. He delivered a *Procès-Verbal de Saisie de Navire*, which he was required to read out aloud to the Master. The terms of the document had been drafted by Ba & Tandian. As part of the *Procès-Verbal*, the *Huissier* demanded payment of FCFA 57 million, in default of which the ship would be arrested. The Master did not pay the sum demanded and the Vessel was therefore arrested by a *Denonciation de Saisie de Navire*.

16. In advising the American Club of the arrest, M Germain commented that the form of guarantee demanded was:

    "*hardly discutable before the Tribunal and the only argument we have to contest this arrest remains the lack of title to act of the receivers, as long as the original bills of lading are not endorsed in their favour"*

17. The vessel completed discharge at about 0950 hours on 13 December and she was redelivered under the time charterparty. Had she not been under arrest, she would have sailed shortly afterwards.

Events leading to the release of the Vessel on 21 December 2005

18. Nicholas Parton, a partner of Jackson Parton, London Solicitors, was instructed on behalf of the American Club and the Owners on 9 December. He obtained copies of the charterparty and the bills of lading and provided TCI with copies so that they could be shown to Axa Senegal. By now, he had considerable experience in dealing with this kind of situation with Axa Senegal. On Sunday 11 December he faxed M. Diagne and M. Dia at Axa Senegal and M. Regis Broudin of Axa Paris indicating that he had instructions to obtain an anti-suit injunction against Axa Senegal and others in order to ensure that the agreed forum for disputes, London arbitration, was honoured. He confirmed that the American Club was willing to issue a Club Letter of Undertaking to secure the decision of a "*competent Court or Tribunal*" in order to expedite the departure of the vessel and "*to spare Axa and its directors from personal liability for unlawfully detaining the vessel*". He asked Axa Senegal to accept a TCI guarantee on behalf of the Club, to be replaced as soon as practical, and in any event within 7 days, by an original Club letter of undertaking.

19. On Monday 12 December 2005, M. Dia indicated that "*we*" were disposed to accept "*competent court"* wording under the usual TCI guarantee, to be replaced by a bank guarantee within 2 months. M. Germain sent Mr Parton a copy of TCI's usual wording – it referred to "*jurisdictions compétents"* – and it provided a guarantee answerable to the decision of the competent Senegalese Courts, to be replaced by a bank guarantee in the same wording.

20. Also on 12 December 2005, unknown to Mr Parton at the time, Maître Geneviève Lenoble, an advocate in Senegal, applied on behalf of the Owners to the President of the Dakar Court to set aside the arrest on the grounds that "*Bulk Carrier"* was not the owner of the vessel and the Receivers had not established any title to sue.

21. Me. Lombrez of Schmill & Lombrez, a firm of French Advocates with offices in Paris and London, replied to Mr Parton fax on 12 December on behalf of Axa Senegal only. He noted that the vessel had been conservatorily arrested and that the Club "*[did] not want to put up an LOU in the reasonable and usual required terms"*. He also challenged the existence of any arbitration clause.

22. Mr Parton responded at about 6 pm on 12 December by sending a long fax to Mr Lombrez attaching:
    (1) The face and reverse of the bills of lading;
    (2) The time charterparty.

    He drew attention to the London arbitration clause, threatened to apply for an anti-suit injunction and offered to issue an American Club letter of undertaking in the same terms as had been sanctioned by Cooke J. in the *Kallang* case in March 2005. A draft letter of undertaking in these terms was attached. No immediate response was received to this message. On 13 December, Mr Parton sent Me. Lombrez a copy of the letter of undertaking now signed by a director of the American Club. In reply, Me. Lombrez protested that the right jurisdiction to resolve the problem was Dakar and that the Club should put up the security required by that Court. Later, Me. Lombrez indicated that his clients would accept a guarantee in the same terms as given in the ***White Mist*** case, which was in "*jurisdiction compétents*" terms. Mr Parton had not been involved in the case.

23. An application for an anti-suit injunction was issued in the Commercial Court on 13 December 2005. It was heard *ex parte* (but on notice) by Morison J. on 14 December. Mr Parton properly showed the Judge a letter sent that

morning by Me. Lombrez protesting at Mr Parton's failure to refer to the ***White Mist*** case and complaining that, in that case, the Club had failed to honour its undertaking to provide a bank guarantee within 2 months. The Judge accepted that the fact that demands were given into in that case, during the Court vacation, was irrelevant to the present application. He was satisfied that on the evidence that there was a good arguable case that cargo interests were trying to apply improper commercial pressure on the Owners to concede jurisdiction to Senegal. The Judge ordered that forthwith, upon provision of the signed American Club letter of undertaking dated 13 December 2008, which he initialled, the Defendants be injuncted from commencing, continuing or instigating any proceedings before the Court in Dakar and that they procure the release of the vessel from arrest.

24. The order was granted at 1317 hours and Me. Lombrez was notified almost immediately. His response was to question whether the Court order really had been granted and to state that:

"regretfully, the situation, easy to settle, will clearly be harmful to the owners' interests now and in the future".

A sealed copy of the order with a penal notice was sent by fax later that afternoon.

25. The vessel was not released from arrest.

26. On 15 December, the Dakar Court heard the Owners' application to set aside the arrest. Me. Lenoble appeared for the Owners. Me. Tandian appeared to resist the application. Me. Schmill, Me Lombrez's partner, also appeared and, according to Me. Lenoble, spoke alongside Me. Tandian. Me. Lenoble reported them as having told the Judge:

"the current procedure in London tends to force the receivers of the world to give up under penalty of imprisonment of all those involved, including the barrister/lawyers at the dictate of the American Club despite English law being inapplicable to the present case.

My learned friends/colleagues were only too happy to explain to the Judge that the English Court holds him in contempt and wants to force him to release the vessel, while it is under Senegalese jurisdiction."

Judgment was delivered on 19 December. The Court refused to set aside the arrest of the vessel. It held that the Receivers' title was established by Capezzana's invoices addressed to them and that it was not disputed that the vessel had carried the cargo.

27. In the meantime, on 16 December Mr Parton gave notice that he intended to apply to add Me. Lombrez as a Defendant to the English action and to sequestrate the assets of the Receivers, Axa Senegal and Axa France. The case came on before Morison J. initially on 19 December but he adjourned the hearing until 20 December. According to Mr Parton's note, the Judge said:

"I can indicate that I am satisfied that there has been a contempt of my order and I propose to impose a heavy fine on the defendants and their officers and a continuing fine for every day that they are in breach which will get bigger and bigger. That is what I have in mind. There are good grounds for joining the French solicitors, who also appear to be in contempt …"

28. At the hearing on 20 December, Axa Senegal was represented by Mr Dominic Happé. It was a rather fractious hearing, in the course of which the Judge indicated that he was minded to impose "*something pretty awful*" on the defendants and that if Axa Senegal had been procuring breaches of contract, they would pay "*a very heavy price indeed*". Over the short adjournment a compromise was reached between Mr Parton and Mr Happé. This agreement was reflected in a Consent Order made by the Judge later that day whereby it was ordered that the arrest of the vessel be lifted in return for the provision of the American Club letter of undertaking previously offered and an undertaking to replace it within 3 months with a bank guarantee from a first class bank. Guarantees from Barclays Bank Plc were duly provided in March 2006.

29. After a certain amount of chasing by Mr Parton, the vessel was finally released from arrest at 1630 hours on 21 December 2005. She sailed for Salvador in Brazil where she took on gasoil bunkers before proceeding to Maceio in North-Eastern Brazil where she loaded a cargo for discharge in the Black Sea.

The settlement of insurance claims and the arbitration.

30. The Receivers' claims against Axa Senegal under the insurance policy were settled by payment of a total of CFCA 81,756,826.[1] Schmill & Lombrez started London arbitration proceedings on behalf of the Receivers in December 2006, but apart from the appointment of arbitrators, nothing else has occurred. Like the arbitration in *Kallang*, this arbitration is moribund.

The claims at trial

31. These proceedings have only been served on Axa Senegal. It is the only effective defendant in the proceedings. This is a somewhat unsatisfactory position, but Axa Senegal has not attempted to stay the proceedings.

32. The Owners contend that in acting as they did and in maintaining the arrest till 21 December 2005, the Receivers were in breach of:

(1) the express obligation to submit all disputes to arbitration in London for decision in accordance with English law and/or

(2) an implied term that no party would conduct itself in such a way as would be likely, directly or indirectly, to frustrate the English law and London arbitration clause.

[1] CFCA 44,477,331 to Amadou Lo and CFCA 37,279,495 to Tiger Denrées Senegal

They contend that Axa Senegal, through Mr Dia, caused or procured this conduct and that it wrongfully induced or procured the Receivers to breach their contract with the Owners or interfered with the Owner's business relations with the Receivers. It is additionally alleged that Axa Senegal conspired with the Receivers to do these things. As against Axa Senegal, the Owners claim damages amounting to US$115,988.72 and €5,145.00. Most of the damages are for loss of hire for 8.27 days, whilst the vessel was under arrest after completion of discharge, and for bunkers consumed and port charges incurred during this period.

The evidence at trial

33. The Owners served witness statements made by Laurence Germain, Captain Eduard Sarr, Mr Parton and Captain Dinc. The defendants indicated that they did not require M Germain and Captain Sarr to be tendered for cross-examination and so their statements were read. Mr Parton and Captain Dinc were called to give oral evidence and they were cross-examined by Mr Happé.

34. Axa Senegal served a statement by Mr Dia but, although he was required to attend for cross-examination, he did not do so. No reason was put forward as to why he was unable to give oral evidence. I read his statement.

35. The Owners put in a statement on the law and practice of Senegal by Me. Lenoble, who is an experienced advocate practising in civil and business law at the Bar in Dakar. Axa Senegal put in no expert evidence. As she had given evidence in the *Kallang* trial only a fortnight earlier and been extensively cross-examined by Mr Happé, counsel very sensibly agreed that she did not need to be re-called to give evidence at this trial and that a transcript of her evidence at the *Kallang* trial should be admitted as constituting, with her report, her evidence at this trial. I have already indicated in my Judgment in the *Kallang* case that I was quite satisfied that she was qualified to give relevant expert evidence to me and that she showed herself to be wholly independent and professional. She is well qualified to speak on the actual practice of the Courts of Dakar where she has practised for many years.

The issues on liability

36. The parties agreed that the following issues arose in the action:

(1) Were the Owners party as carriers to the bills of lading?

(2) Did the bills of lading incorporate the London arbitration clause in the time charterparty?

(3) Was it an implied term of the bills of lading that no party would conduct itself so as directly or indirectly to frustrate the arbitration agreement?

(4) Did the Dakar proceedings breach any express or implied terms of the Bills of Lading? In particular:

(i) Were the Dakar proceedings conservatory only, or did they seek payment of the claim or otherwise constitute substantive proceedings?

(ii) Were the Dakar proceedings commenced for the sole purpose of obtaining security, alternatively reasonable security, in relation to claims to be made in London arbitration in accordance with the Arbitration Agreement?

(5) What (if any) involvement did Axa Senegal have in the commencement or prosecution of the Dakar proceedings?

(6) Did Axa Senegal knowingly and intentionally procure and/or induce the Receivers to breach the Arbitration Agreement and/or the implied term?

(7) Did Axa Senegal unlawfully interfere with the Arbitration Agreement and/or the implied term?

(8) Did Axa Senegal and the Receivers conspire to injure the Claimant by causing it economic loss?

(9) What (if any) loss, recoverable from Axa Senegal, have the Owners suffered?

(10) Should a final injunction be granted restraining the continuance, instigation or commencement of proceedings for any claims arising out of or under or relating to the bills of lading other than before a duly constituted London arbitration tribunal?

Evidence.

37. I must now revert to what happened after the arrest of the vessel on 9 December 2005

38. M Germain is the legal director at TCI. He has obviously had many dealings over the years with Axa Senegal and he said that most of the time Axa Senegal conduct procedures themselves, and the receivers follow them. His evidence largely explained the correspondence I have already summarised. Additionally, he stated that it usually takes at least a week to obtain a bank guarantee in Dakar. A Senegalese bank will never accept to issue a guarantee providing for the competence of a foreign jurisdiction and will always insist that the guarantee is subject to Senegalese law. He said that, in order to speed things up, Axa Senegal offers to accept a Club letter of undertaking in the first instance, to be replaced by a bank guarantee within a given period. However, the effect of this wording is to accept Senegalese jurisdiction. The alternative is a long delay whilst the parties argue about the wording. He believed that the arrests of ships in Dakar by receivers and underwriters were intended to put pressure on owners to accept Senegalese jurisdiction, which is regarded as more favourable to local cargo interests.

39. In his statement Captain Sarr stated it would take a lengthy period, which he put at 7-15 days from receipt of instructions from the foreign correspondent bank, to establish a local bank guarantee.

40. Mr Parton's evidence was along the same lines that he gave in the *Kallang* case. He emphasised that putting up a temporary Club letter to be replaced by a Senegalese bank guarantee was a "*Trojan gift",* by which I think he meant that the Club would be committing itself to much more than it intended; in particular it would have encountered great practical difficulty (which had nothing to do with the credit status of the American Club) in putting up a bank guarantee in Dakar. Further if the security given was in support of "*jurisdiction compétents*" (as

opposed to "*jurisdiction ou tribunaux compétents*"), it was security for a Court Judgment not an arbitration award and, in practice, the Owners would be giving up their right to have disputes resolved in London arbitration.

41. As in *Kallang*, Mr Parton's evidence also attested to a series of other cases where Axa Senegal had been involved in what he called a scam to force shipowners either to pay up or submit to Senegalese jurisdiction despite the existence of an English law and London arbitration clause. They were relied upon as similar fact evidence. The cases he mentioned were

(1) *The Pace* (2003) where Axa Senegal demanded a guarantee answerable to Senegalese law and jurisdiction. It was made absolutely clear that, unless this security was provided, Axa Senegal and Mr Diagne's standard practice would to be proceed to arrest the vessel on the basis that the Judge would insist on Senegalese jurisdiction. In particular in an e-mail dated 12 August, M Diagne stated:

"*En ce qui concerne la letter de guarantie, nous vous précisons que nous n'accepterons pas de compétence de jurisdictions autre que celles Sénégalaises à defaut nous serions constaints de saisier le navire.*"

– i.e. with regard to the letter of guarantee we make it clear that we will not accept any jurisdiction other than Senegal, failing which we will have to arrest the vessel.

The owners gave in and provided a Club letter of guarantee answerable to Senegalese jurisdiction. The case has since been settled for less than 10% of the security demanded, but the American Club is still being charged bank fees and charges.

(2) *The Spring Breeze* (2003) which did not involve Dakar or Axa Senegal and seems to me to be of little direct relevance.

(3) *The Cirus* (February 2005 – very shortly before *Kallang*) involved a cargo of rice discharged at Conakry in Guinea. Axa Senegal was the cargo insurer and it demanded a bank guarantee with a submission to Senegalese jurisdiction. It was indicated that a Club letter of undertaking would be acceptable, but only if French law and arbitration was agreed. The vessel was arrested, but released against an American Club letter of undertaking with Senegalese jurisdiction, to be replaced by a bank guarantee. The Club encountered enormous difficulties in securing a bank guarantee. The Senegalese banks would only issue a guarantee against counter-security from a French bank, but French banks were unwilling to issue a guarantee answerable to the decision of a Senegalese Court. After 4 months of considerable effort by the Club and much bureaucratic obstruction, a guarantee was put up by Credit Lyonnais Senegal, with counter security from Deutsche Bank, but the guarantee was rejected by Axa Senegal, on instructions from head office in France, because Credit Lyonnais Senegal had limited the validity of the guarantee to 1 year, renewable on demand. When threatened with an application for an anti-suit injunction, Me. Schmill for Axa Senegal threatened proceedings against the Club in Senegal and refused to accept London arbitration, insisting on Senegal or Guinea, unless French arbitration was agreed. An application was made to the Commercial Court in London for an anti-suit injunction which was granted by Langley J on 3 February. On 4 February, a direction was given by M Broudin of Axa Corporate Solutions in France to Mr Dia (using his first name) and Me. Schmill to discontinue immediately any proceedings in Dakar. The claim is now in arbitration.

(4) *The Kallang* (March 2005) which is the subject of the separate Judgment delivered by me simultaneously with this Judgment. I will not repeat my findings of fact here. It is enough to say that the conduct of Axa Senegal in *The Kallang* case was very similar to what is alleged in this case.

(5) *The Argola* (March 2005 almost immediately after *Kallang*) where security was accepted for "competent court or tribunal". Proceedings were started in Dakar for about 25% of the security that had been demanded and were settled for 10% of the security.

(6) *The Rizcun Trader* (May 2005) where Axa Senegal had demanded a guarantee answerable to Senegalese Jurisdiction and then had the vessel arrested. What appears to be a standard form guarantee was produced by Cabinet Pruvot, providing for Senegalese jurisdiction. The case was settled for about a quarter of the security demanded.

(7) *The Primavera* (June 2005) which involved a discharge in Tema and again seems to me to be not really to the point.

(8) *The White Mist* (July 2005) where Axa Senegal demanded a guarantee answerable to Senegalese jurisdiction. The Club offered security answering to competent jurisdiction. Agreement was reached on the basis of a temporary Club letter of undertaking to be replaced by a bank guarantee. It is seems to have been accepted that this guarantee had to be Senegalese. The case was settled before the guarantee was provided.

(9) *The Pathfinder* (August 2005) where part of the cargo was insured by Axa Senegal. The vessel was arrested in Rotterdam by receivers insured by other underwriters and released in return for standard Rotterdam security which is neutral on the substantive jurisdiction. This case is of little assistance to me.

(10) *The Evangelos L* (January 2006, shortly after *The Duden*), involving a cargo discharged at Abidjan insured by Axa Senegal, where initially a guarantee was demanded answerable to the Abidjan Court or to the Chambre Arbitrale Maritime de Paris, but, before arrest, a Club letter of undertaking answerable to competent court or jurisdiction was accepted.

(11) *The Androusa* (March 2006), involving a cargo discharged at various West African ports including Dakar, where a guarantee for €32,600 answerable to the Dakar Court with Senegalese law or to the *Chambre Arbitrale Maritime de Paris* with French law was demanded. The amount of security required was later increased to €55,000. It is unclear how the demand for security was resolved. The claim was ultimately settled at €6,000.

42. Mr Parton also gave evidence of the great concern that international P&I Clubs, apart from the American Club, had as to what he called the "*claims industry*" in Senegal being used "*to blackmail*" owners into giving up London arbitration clauses or simply settling inflated claims to obtain the release of their vessel. I am satisfied that those concerns are genuinely held, although I would not use such inflammatory terms.

43. In his written statement, Mr Dia denied that Axa Senegal was always insisting on security which provided for Senegalese law to determine the claims against shipowners. At no stage did Axa Senegal make any suggestion that security would only be acceptable if it provided for Senegalese law and jurisdiction. He believed that the *Duden* Receivers would have preferred a guarantee from a local Senegalese bank or a French bank, but they would have been happy with any respected first class bank and, indeed, accepted a guarantee from a London bank when this was offered for the first time on 20 December.

44. I have set out this evidence at length. In my judgment it demonstrates that:

(1) Axa Senegal did not accept, unless forced, that the receivers in West Africa were bound by London arbitration and English law clauses as a result of express incorporation of the charterparty arbitration clause. This conclusion is supported by an undated letter sent by Marine Consultants of France, representing Fortis and Axa Senegal, to Mr Desbrousses of the American Club in late April 2006:

*As per Common Law, you consider that from the moment a vessel is chartered the arbitration clause of the C/P is opposable "**erga omnes**".*

We think that because of the principle of autonomy of the contracts, the C/P is "res inter alios acta" as regards the bearers of Bs/L and the subrogated underwriters.

You do not appreciate that proceedings be instituted in Conakry, Bissau, Dakar ... for instance.

The letter proposed that for the future the parties agree that the American Club would issue a letter of undertaking accepting arbitration by the *Chambre Arbitrale Maritime de Paris*. The language of the letter is not grammatical but its sense is clear enough. Axa Senegal does not accept that charterparty arbitration clauses can be incorporated in bill of lading contracts, and bind receivers and their cargo underwriters.

(2) It was Axa Senegal's standard practice to try and secure a Senegalese guarantee answerable to Senegalese jurisdiction, whatever the terms of the Bill of Lading as to jurisdiction. This was well understood by the law firms representing owners and their P&I Clubs.

(3) It is, in practice, extremely difficult to procure the issue of Senegalese bank guarantees. It may be practically impossible to do so on terms acceptable to Axa Senegal.

(4) Axa Senegal was acting on its own initiative in setting out demands for security. Mr Happé argued that the variety of outcomes suggested that Axa Senegal was acting in accordance with the instructions of the particular receivers. That is not how it appeared to me on the evidence. It is striking that Axa Senegal appeared invariably to be making the decisions without involvement of the receivers.

Expert Evidence

45. Me. Lenoble's evidence was that the terms of the arrest order made by President Kandji were normal and complied with the law and judicial practice of Senegal. The arrest was a conservatory arrest based on the Brussels Convention of 1952. In fixing the amount of security required, the Judge is dependent on expert reports provided by the applicant for an arrest. In practice, when claims are tested at a trial, it is apparent that the amount required was "*very excessive*".

46. Me. Lenoble was critical of the *Huissier's* demand for payment. He ought not to have made this demand, which was not part of the Court's Order, and had it been complied with, the payment would have been definitive and irrecoverable.

47. Me. Lenoble stated that in practice Senegalese Banks will not agree to put in place a guarantee providing for the jurisdiction of a foreign tribunal. They will only guarantee claims in the Senegalese Courts. She strongly doubted that they would ever agree to put in even "*competent court*". Although she could not say from her experience exactly the time needed, the process of putting up a local guarantee is not straightforward and involved delays, especially if French parent banks have to be involved. If an owner wishes to challenge an arrest, the application is made to the Juge Référré. Theoretically, an application to the lift an arrest takes 48 hours. In practice, it takes a week.

48. So the financial constraints placed on an owner whose vessel is immobilised in Senegal are very considerable, and often out of all proportion to the scale of the cargo claim. Me. Lenoble's evidence was that the Juge Référré would never agree to refer a case for decision in a foreign jurisdiction and he would insist on a Senegalese Bank guarantee, unless the parties were agreed otherwise.

49. In cross-examination, she said that, if there was any dispute, the Judge would rule in favour of a Senegalese bank guarantee. Mr Happé referred her to one case, *The Samsun Galaxy*, where in August 2002, Credit Lyonnais Senegal had issued a guarantee of a Judgment by "*compétents jurisdictions*" although it went on to refer to Senegalese Courts. She thought this was an isolated instance but, when pressed, she accepted that if the parties agreed, "*anything is possible*" and it was possible that, with both parties' agreement, a Senegalese bank would be willing to put up security for a foreign tribunal.

Conclusions on the evidence

50. Mr Happé argued that I should prefer the documentary evidence and the evidence of Mr Dia to that of M. Germain, Captain Sarr and Mr Parton. The normal practice in cases of disputed fact is to pay particular attention to the contemporary documents, following the approach of Robert Goff LJ in ***Armagas Ltd. v. Mundogas S.A. ("The***

Ocean Frost") [1985] 1 Lloyd's Rep 1 at 57, as approved by the Privy Council in ***Grace Shipping v Sharp & Co.*** [1987] 1 Lloyd's Rep 207 at 215:

"Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth."

Of course, this is not a fraud case, but Robert Goff LJ's approach is of much wider application.

51. But in this case, Axa Senegal has not asked to cross-examine M. Germain or Captain Sarr. It has offered no witness for cross-examination. All I have is a statement from Mr Dia who has not attended for cross-examination for unspecified reasons. I cannot in justice refuse to accept M Germain's and Captain Sarr's evidence when they have been offered for cross-examination and that offer has been declined by Axa Senegal, unless it is contradicted by other evidence called by the Owners. If Axa Senegal wished to challenge their evidence it should have asked for them to be called. It should also have called Mr Dia unless there was some compelling reason why that was not possible. No reason has been put forward. His evidence is entitled to minimal weight. No other evidence has been called by Axa Senegal, although there were certainly other witnesses who could have been called to give relevant evidence.

CONSIDERATION OF AND CONCLUSIONS ON THE ISSUES

52. I can now turn to consider the main issues in the action.

(1) **Were the Owners party as carrier to the bills of lading?**

53. The bills of lading clearly and expressly identified the Owners as the carrier. That is unusual where a vessel has been bareboat chartered but it is well known that many letters of credit require the presentation of owners' bills. Mr Happé argued that the Master must have issued the bills of lading without actual or apparent authority, since he was not an employee of the Owners. That submission might have had some merit if the Owners and the bare boat charterers were different organisations dealing at arms length. However, that was not the case here. Anchor is a subsidiary of the Owners. As Captain Dinc explained in evidence, both were operated out of the same office by the same management, and the Master and crew were actually employees of the Owners, not Anchor. The inference I draw is that the Master had actual authority from the Owners to issue the bills of lading in their name. As an employee he certainly had apparent authority to do so. Either way, the Owners were bound by the bills of lading and they were the contractual carriers.

(2) Did the bills of lading incorporate the London arbitration clause in the time charterparty?

54. The bills of lading expressly provided that all terms and conditions, liberties and exceptions of the Charter Party dated 28 September 2005 "*including the Law and Arbitration Clause*" were incorporated. The charterparty was a time charter rather than a voyage charter, so hire rather than freight would be payable. There can be no doubt that the parties intended the terms of the time charterparty (to which the sellers Capezzana were party) to be incorporated in the bill of lading contracts. The express reference to the arbitration clause would be sufficient to incorporate a charterparty arbitration clause, even if it required a degree of manipulation: *The Rena K* [1978] 1 Lloyd's Rep 545. So, the bills of lading were subject to a London arbitration and English law clause.

(3) **Was it an implied term of the bills of lading that no party would conduct itself so as directly or indirectly to frustrate the arbitration agreement?**

55. For the reasons I have set out in the *Kallang*, in my judgment there is no need to imply such a term. The bills of lading contain an express agreement, binding on all holders including the Receivers, that all disputes are be referred to arbitration in London to be decided in accordance with English law and practice. In my judgment, if one party seeks to use a foreign arrest for ulterior purposes – i.e. beyond obtaining reasonable security for the arbitration claim – he is in breach of the express agreement whereby he agreed that all disputes would be decided by London arbitration. This is not a case like those in *Stirling*, *Mackay* or *Bournemouth* where the parties needed to co-operate to achieve a particular result or to allow one party to perform the bargain. If one party tried to obtain security for proceedings in another jurisdiction or to force the other party to give up his right to arbitrate disputes, that would be a direct and straightforward breach of the arbitration clause.

(4) **Did the Dakar proceedings breach any express or implied terms of the Bills of Lading? In particular:**

(i) **Were the Dakar proceedings conservatory only, or did they seek payment of the claim or otherwise constitute substantive proceedings?**

(ii) **Were the Dakar proceedings commenced for the sole purpose of obtaining security, alternatively reasonable security, in relation to claims to be made in London arbitration in accordance with the arbitration agreement?**

56. Mr Happé submitted that I should be very careful before finding that the Receivers were in breach of contract. They were not before the Court and were unable to defend themselves. The Court should be reluctant in the extreme to find that they were in breach of contract. I have already observed that it is somewhat unsatisfactory that only Axa Senegal is before the Court, but we are where we are and it is fair to observe that the conduct alleged is really that of Axa Senegal. My duty is to decide the case on the evidence before me and, if it is established on the balance of probability that the Receivers committed breaches of contract through Axa Senegal's conduct, I must say so. The arbitrators considering any claim brought against the Receivers will not be bound by my decision.

57. It is clear that the arrest itself was a conservatory arrest for security. The application by Ba & Tandian was for security and payment, but the order obtained was a normal order for security of payment. There was nothing sinister in the terms of application – had there been, this would have been repeated in the draft order prepared for the Court by Ba & Tandian. In my view, the request for security and payment was a word processing error and nothing more.

58. I am equally satisfied that the *Husssier's* demand for payment was intended to reflect the requirements of the OHADA Code. Ba & Tandian, who probably drafted the *Procès-Verbal*, were mistaken in including this sentence because the Owners were not going to be present. I do not think there was any intention to trick the Master. The reality was that it was exceedingly unlikely that he would make payment and, of course, he did not. I rather expect that the *Husssier's* demand for payment completely passed him by.

59. Mr Happé submitted that, if I accepted that the arrest was conservatory only, that was the end of the case against Axa Senegal. I disagree. The case against Axa Senegal goes much further than just the nature and terms of the arrest itself.

60. In my judgment, it is clearly established on the evidence that Axa Senegal was using the arrest as a means of trying to secure Senegalese jurisdiction and to avoid London arbitration. This was made quite clear on the correspondence:

(1) Although the fax referred to in Mr Dia's e-mail of 9 December 2008 is not before the Court, it is fairly apparent that it was demanding security on Axa Senegal's usual terms, which, as TCI advised in the letter of 8 December, required Senegalese jurisdiction. That is a clearly stated contemporary understanding, and I am sure that M Germain, who had considerable experience in the situations, would not have misstated the true position as he understood it.

(2) The request for "*competent court*" or "*jurisdiction compétents*", if accepted, would have meant that the Owners would have been giving up their right to have disputes decided in London arbitration. Mr Happé submitted that "*jurisdiction*" would include a London arbitral tribunal and that to hold otherwise was to use "too fine grained a distinction" between the French words "*jurisdiction*" and "*tribunal*". In my judgment, however, it is clear that, at least in Dakar at that time, the English word "Court" and the French word "*jurisdiction*" were being used interchangeably and they were not understood to include an arbitral tribunal. In practice, if "*jurisdiction compétents*" had been accepted, this would have meant Senegalese jurisdiction as Axa Senegal plainly intended. Although Ms Banou at the Piraeus office of the American Club had at one point been willing to accept competent court jurisdiction, this was something of a trap for the unwary, and she did not appreciate the implications, which were clearly explained by M Germain in his evidence, as summarised above.

(3) Mr Parton offered "*competent court or tribunal*" wording on 11 December. It was not taken up by Axa Senegal. Instead on 12 December, Mr Dia indicated that Axa Senegal would accept "*competent court*" wording.

(4) Me Lombrez challenged the arbitration clause on 12 December and, even after he had been provided with a copy of the charterparty and had his attention drawn to the terms of the arbitration clause, he still refused to accept the position and continued to try and obtain "*jurisdiction compétents*" security. Me Schmill's submission to the Dakar Court demonstrated a clear refusal to accept the terms of the contract.

It was not until its hand was forced by Morison J. at the hearing on 20 December, that Axa Senegal finally was prepared to recognise that the cargo claims must be arbitrated and that the security would have to reflect this position.

61. Axa Senegal's insistence was not some accidental result. It had been the consistent practice of Axa Senegal over the previous months and years. It is clear from Axa Senegal's behaviour in other cases that it was its intention to use the arrest of the vessel as a means of forcing Senegalese jurisdiction, if at all possible. It was only the intervention of the English Court which prevented this result from being achieved.

62. I am therefore satisfied that the conduct of the Receivers, through Axa Senegal, went well beyond seeking security for its claims in London arbitration. By seeking to use the arrest as a means of achieving Senegalese jurisdiction, the Receivers were in breach of the express terms of the arbitration clause.

(5) **What (if any) involvement did Axa Senegal have in the commencement or prosecution of the Dakar proceedings?**

63. I am satisfied on the evidence that Axa Senegal was the driving force in arresting the vessel and using the arrest as a means of forcing Senegalese jurisdiction. It was not taking instructions from the Receivers or even consulting with them – nothing has been disclosed by Axa Senegal that any such communication took place. It was exercising its rights under the cargo insurance policy to take control of claims handling even prior to settlement of the insurance claim. Its motives were twofold. First it did not like having cargo claims decided in London arbitration. Second, its chances of effecting a substantial recovery would be much greater if the Hamburg Rules were applied, as they would be by a Dakar Court, rather than the terms of the bills of lading and the Hague-Visby Rules which would be applied by London arbitrators applying English law.

64. It was Axa Senegal that finally decided on 20 December that it would have to modify its position and agree to a consent order as the price of having the injunction discharged. There is no evidence that there was any consultation with the Receivers before the consent order was made.

(6) **Did Axa Senegal knowingly and intentionally procure and/or induce the Receivers to breach the arbitration agreement and/or the implied term?**

65. The House of Lords judgment in ***OBG Ltd v. Allan*** [2007] UKHL 21 [2008] 1 AC 1 establishes that, in order for a tortious claim for wrongful inducement or procurement of breach of contract to succeed, it must be established that the defendant:

(1) Knew that he was inducing a breach of contract; and

(2) Intended to do so.

I should stress that both parties agreed that this issue was to be decided in accordance with English law. No case on Senegalese law was pleaded.

66. From the outset, Axa Senegal knew that the terms of the Bills of Lading purported to incorporate a charterparty arbitration clause. It was possible, but unlikely, that the charterparty would turn out not to contain an arbitration clause. It was unknown what the terms of the arbitration clause were, especially as to the seat. As Mr Parton fairly observed, however, it was inconceivable that the charterparty would contain a Senegalese arbitration or jurisdiction clause. I think it is likely that M Germain showed Mr Dia a copy of the charterparty on 9 December but, even if that is not so, on 12 December Mr Parton sent Me Lombrez, Axa Senegal's lawyer, a copy of the charterparty. It had been entered into by the sellers of the rice cargo. Axa Senegal was experienced in these matters. In my judgment, once it had a copy of the charterparty, it knew that there was indeed a London arbitration clause which was incorporated into the bills of lading contracts.

67. As to intention, it is clear that Axa Senegal was determined, if it could, to use the arrest as a means of forcing the Owners to give up the right to have any dispute arbitrated in London and to accept Senegalese jurisdiction. To use Lord Hoffman's words (at §43), the breach of the London arbitration clause was an end in itself. That counts as an intention to procure a breach of contract.

68. In my judgment, therefore, Axa Senegal's conduct, knowledge and intent was such as to make it liable for the accessory tort of procuring the Receivers' breach of the contract to arbitrate all disputes in London as from 12 December – it may have been earlier, but it is unnecessary for me to decide that.

(7) **Did Axa Senegal unlawfully interfere with the arbitration agreement and/or the implied term?**

67. Mr Collett recognised that this added nothing to his case.

(8) **Did Axa Senegal and the Receivers conspire to injure the Claimant by causing it economic loss?**

69. This claim also really adds nothing to the inducement claim and I will deal with it shortly. Mr Collett contended that he could establish a conspiracy between the Receivers and Axa Senegal to injure the Owners – i.e. a conspiracy involving no acts or means which were unlawful – with the object of causing deliberate damage to the Owners without any just cause.

70. I am not satisfied that there was any such conspiracy involving the Receivers. The reality is that Axa Senegal simply took over the running of the claim. There is no evidence that it consulted with the Receivers. Given the Owners' case about Axa Senegal's conduct, which I have largely accepted, it is somewhat inconsistent to contend that the Receivers were party to any conspiracy.

(9) **What (if any) loss, recoverable from Axa Senegal, have the Owners suffered?**

71. The following issues arose:

(1) What loss was caused as a result of Axa Senegal's wrongful procurement of the breach of the arbitration clause in the bills of lading?

(2) Who sustained that loss?

(3) If the loss was sustained by Anchor, is it recoverable by the Owners? Should Anchor be joined as additional claimants at this stage?

Quantum of losses

72. The following claims are advanced by Owners:

(1) Loss of hire at $11,000 per day for 8.27 days from 1000 hours on 13 December to 1630 hours on 21 December 2005:	$90,970.00	
(2) Bunkers consumed for 8.27 days x 1.5 m.t. x $605:	$7,505.02	
(3) Deviation to Salvador, Brazil to replenish bunkers:	$5,320.17	
(4) Extra expenses at anchorage	$8,483.53	
(5) Legal fees (FCFA 1,700,790)	$3,710.00	
(6) Survey fees		€5,145.00
Totals:	US$115,988.72	€5,145.00

73. These claims were supported by Captain Dinc, the operations manager employed by the Owners, who also acted as such for Anchor. The loss of hire claim was based on the time charter rate. Captain Dinc's evidence was that the market rate was around $11,000-12,000 per day and that, had the vessel not been arrested, she would have sailed, immediately after she had completed discharge, to South America, the main source of business for bulk

carriers at that time of year. The voyage takes 10-15 days and that would have given ample time to obtain a fixture. The effect of the delay was that that she was commensurately delayed in being able to obtain new employment. I broadly accept that evidence.

74. However, it by no means automatically follows that Axa Senegal would be liable for damages for the entire period of the arrest. The Receivers were entitled to seek security for the claim in London arbitration. What was improper was the attempt to use the arrest as a means of defeating the arbitration clause. I have to ask what the position would have been if Axa Senegal on the Receivers' behalf had recognised that there was a binding arbitration clause and had acted in good faith in seeking reasonable security for the arbitration, and nothing more. On this basis, it is very likely that the vessel would still have been arrested on Friday 9 December because security would not have been made available by then and she was nearing completion of discharge. However, by the morning of Monday 12 December, had Axa Senegal wanted just to secure the English arbitration claim, it would have taken up Mr Parton's offer of a Club letter of undertaking made on Sunday 11 December and a letter of undertaking would have been available. If Axa Senegal had been focussed, as it should have been, on security for a London arbitration, it would not have been demanding a Senegalese bank guarantee which in practice would offer a much lower level of security than an American Club guarantee. I was not at all persuaded that Me Lombrez's point about the *White Mist* was genuinely being put forward as a reason for refusing an American Club letter of undertaking. The sums involved were modest and an American Club letter of undertaking would have satisfied Axa Senegal, had it been seeking in good faith proper security for the London arbitration alone. It is striking that the cargo insurance policy includes the American Club as an acceptable P&I Club. That can only be because its security was regarded as adequate. Even if that is wrong, a London bank guarantee would certainly have been acceptable and that could have been obtained on 12 December. In my view, on any basis the vessel could and should have been released from arrest by 0950 hours on 13 December, when she completed discharge, with adequate security in place. The losses sustained were $90,970 in respect of hire and $7,505.02 for gasoil consumed during this period.

75. As regards the claim for extra expenses at anchorage (consisting of port fees, agency fees and night-watchman's expenses) I am satisfied that expenses totalling $8,483.53 were incurred and are attributable to the period under arrest. I am not satisfied that the other expenses claims can fairly be attributed to Axa Senegal's tortious conduct. The survey fees relate to the costs of tallying the cargo on discharge and have nothing to do with the arrest. Much of the legal expenses and bank charges would have been incurred anyway, and it is not established that any part was incurred as a result of this conduct.

76. Axa Senegal became an accessory to the Receivers' breach of contract (at the latest) on 11 December when it knew that there was a binding London arbitration clause but decided to maintain the arrest with a view to forcing Senegalese jurisdiction. It is therefore liable in principle for the loss sustained during the 8.27 days during which the vessel was under arrest after completion of discharge.

77. The claim for deviation costs is based on Captain Dinc's evidence that, had the vessel not been arrested, she would have had sufficient gasoil on board to make the ballast trip across the Atlantic to South America and have been able to bunker at the load port. As it was, the 12.405 m.t. consumed left her with an inadequate reserve: 32.927 m.t. as opposed to the 45.332 m.t. on board when she was arrested. Captain Dinc's estimate was the vessel required 31 m.t.[2] plus a sea safety margin. 45 m.t. would have been adequate. 33 m.t. was not. There were no bunkering facilities at Dakar and the vessel had to deviate to Salvador in Brazil where she loaded 100.585 m.t. MGO before proceeding to Maceio.

78. Captain Dinc confirmed that there were facilities at Maceio whereby the vessel could have taken on gasoil bunkers. In those circumstances, I find the deviation claim difficult to accept. Maceio is rather nearer Dakar than Salvador. I could have understood the claim if the vessel had bunkered in West Africa but, as it is, I conclude that the decision to bunker in Salvador, after the vessel had crossed the Atlantic, was driven by operational convenience whilst the new fixture was concluded, rather than the tortious acts of Axa Senegal. I reject the claim for deviation expenses.

79. So the losses caused by the delay to the vessel after completion of discharge were US$106,958.55

Who sustained that loss?

80. The vessel was on bareboat charter and the Owners were entitled to be paid hire throughout, without any deduction for the fact that she was under arrest. The fact that, as Captain Dinc stated, no hire was actually ever paid under the bareboat charter is irrelevant. I do not see how I can ignore the legal structure that the Owners created, with a view to saving tax. The loss of hire was sustained by Anchor and it was its bunkers that were consumed. It is possible that the Owners may have incurred some of the port expenses in the first instance, but they would have been entitled to recover these from Anchor under the terms of the bareboat charter.

81. Mr Collett's primary argument (and only argument until closing) was that, because the Owners issued the bills of lading as carriers, it was they who had led to the arrest of the vessel at the suit of the Receivers. It was the Owners' obligation under clause 9(a) of the bareboat charter to ensure that the vessel was "*in the full possession and at the absolute disposal for all purposes of the Charterers and under their complete control in every respect*". The Owners were therefore under an obligation to procure the release of the vessel from arrest and their failure to do so until 21 December was a breach of the bareboat charter, for which Anchor was entitled to claim its losses

[2] 2 m.t. p.d. x 13 plus 5 m.t. for river transit.

as damages. It was not a bar to recovery that the Owners had not, as a matter of fact, indemnified Anchor. At times, Mr Collett seemed to be submitting that the Owners had in some way intermeddled by allowing the Master to issue bills of lading in their name, contrary to the scheme of the bareboat charter.

82. Mr Happé submitted that this argument was contrived. I agree. It bears no relationship to the reality of how the Owners and Anchor conducted their businesses. The proposition that the Owners in some way interfered in the affairs of the bareboat charterers by causing bills of lading to be issued in their name is little short of ridiculous. The Owners and Anchor were being managed by the same team in Istanbul. The inference that I draw is exactly opposite to Mr Collett's submissions. The bills of lading were issued as owners' bills because the shippers wanted owners' bills, and Anchor and the Owners considered it was in their joint interests that this should be done in the interests of their business. I can see no basis on which the Owners would be liable to indemnify Anchor. This would be contrary to the provisions and the whole scheme of the bareboat charter.

83. The loss was therefore sustained by Anchor, not the Owners.

If the loss was sustained by Anchor, is it recoverable by the Owners and should Anchor be joined as additional claimants at this stage?

84. Detecting a good deal of judicial resistance to his submissions, Mr Collett adopted an alternative tack in his final submissions. He submitted that:

(1) If the bills were issued in the Owners' name by agreement with Anchor, as I have found, the Owners were acting as agents for an undisclosed principal, Anchor.

(2) As agents, the Owners were entitled to recover the loss for their principals;

(3) Alternatively, Anchor should be joined as Second Claimant to enable it to maintain the claim for damages.

I allowed both parties to put in additional written submissions after the end of the trial.

85. In support of the agency argument, Mr Collett submitted that agency could be inferred from the facts and that such an inference should be drawn where:

(a) Anchor was the disponent owner under the time charterparty which required the Master to sign bills of lading as presented.

(b) Anchor did not employ the Master.

(c) It had no right to require the Owners to issue bills of lading naming the Owners as carriers.

(d) Nevertheless the bills of lading were issued as owners' bills and signed by the Master employed by the Owners.

(e) There was a close relationship between the Owners and bareboat charterer.

He applied to amend his pleadings accordingly.

86. Mr Happé responded that this was a tortuous and wholly artificial route. It had arisen at the last moment in order to allow the Owners to recover substantial damages. It is made very late and caused prejudice to Axa Senegal because it had not been able to investigate the question of agency on disclosure or to test it properly in cross-examination.

87. With some reluctance, I have concluded that it is too late to allow the Owners' to recast their case. In answer to my question during his opening, Mr Collett made it very clear that the claim was being made by the Owners as principals, not agents. No disclosure has been given about the circumstances in which the bills were issued as Owners' bills. Captain Dinc's statements completely fail to face up to the fact that the losses were sustained by Anchor and not by the Owners. The cross-examination of Captain Dinc did not go into the circumstances in which the Bills were issued and there was no need to do so as the pleadings stood. The issue was raised after Mr Collett had closed his case. I think there might be some prejudice to Axa Senegal if I allowed a late amendment. There might have been additional relevant disclosure. Mr Happé could properly have explored a number of matters with Captain Dinc and I cannot speculate as to what the answers might have been. I therefore refuse the application for permission to amend.

88. It means that the claim for damages is defeated by something of a technicality and it may well be that, had the point been taken earlier, the Owners could have recovered damages as agents on behalf of Anchor, or alternatively Anchor could have been joined. However, the Court must be cautious before allowing a very late amendment.

(10) Should a final injunction be granted restraining the continuance, instigation or commencement of proceedings for any claims arising out of or under or relating to the Bills of Lading other than before a duly constituted London arbitration tribunal?

89. Mr Happé submitted that the English Court should not be concerned with a conservatory arrest of a vessel in Senegal. It should not intervene in security proceedings which are brought in the place where the claim arose, before a foreign court which has jurisdiction by reason of an international Convention, and where, by that Convention, the form of security is a matter for that foreign court. Leaving aside issues of comity, the Court simply has no interest in interfering or making a judgment on such security proceedings. Mr Happé also originally submitted that there had been material non-disclosure to the Morison J. at the time of the original application and that the injunction should be discharged for that reason. This latter submission was rightly not maintained in final submissions.

90. I have already indicated that I am in no doubt that, but for the injunction, Axa Senegal would have continued to use the Dakar arrest as a means of forcing the Owners to accept Senegalese jurisdiction and to give up on the London arbitration clause. Mr Happé's submission fails to recognise that the Receivers through Axa Senegal were, as I have found, using the arrest proceedings as an illegitimate means of trying to force the Owners to give up the right to arbitrate disputes in London. The Owners were entitled to seek the intervention of the English Court to protect their English law right to arbitration. In my judgment, a final injunction should be granted restraining the continuance, instigation or commencement of proceedings for any claims arising out of or under or relating to the Bills of Lading other than before a duly constituted London arbitration tribunal, unless an undertaking is given to the Court instead.

Conclusion

91. A final injunction will be granted, unless an undertaking is offered in its stead. The Owners' claim for damages is dismissed.

Michael Collett (instructed by Jackson Parton) for the Claimants
Dominic Happé (instructed by Marine Law LLP) for the Defendants