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Case No: CL-2020-000119 / 000138

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, Fetter Lane, London EC4A 1NL

Date: 10/03/2021

Before :

MR JUSTICE ANDREW BAKER

- -

Between (in Claim 119):

NAVISION SHIPPING A/S	**Claimant**
- and -	
PRECIOUS PEARLS LTD	**Defendant**

And Between (in Claim 138):

CONTI LINES SHIPPING NV	**Claimant**
- and -	
NAVISION SHIPPING A/S	**Defendant**

m.v. *Mookda Naree*

- -

Nigel Cooper QC (instructed by **Lax & Co LLP**) for **Conti Lines Shipping NV**
Nevil Phillips (instructed by **Birketts LLP**) for **Navision Shipping A/S**
Timothy Young QC (instructed by **Stembridge Solicitors Ltd**) for **Precious Pearls Ltd**

Hearing date: 1 March 2021

- -

Approved Judgment

This is a reserved judgment to which CPR PD 40E has applied.
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Covid-19 Protocol:
This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.00 am on 10 March 2021.

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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

Introduction

1. In *The Global Santosh* [2016] UKSC 20, [2016] 1 WLR 1853, the ship was substantially delayed at Port Harcourt, Nigeria, laden with bulk cement for discharge there pursuant to a chain of charterparties. Transclear SA, the final sub-charterer in the chain, caused the ship to be arrested in connection with its claim for demurrage against IBG Investments Ltd, its buyer for that cargo. The head charter, a time charter on the Asbatime form with additional clauses, was between NYK Bulkship (Atlantic) NV as owner and Cargill International SA as charterer. Cargill sub-chartered to Sigma Shipping Ltd, and there was no finding as to whether there were further links in the chain or whether, rather, Transclear sub-chartered directly from Sigma. Additional clause 49 put the ship off hire *inter alia* upon being arrested or detained, until the time of her release, "*unless [the] arrest [etc] [was] occasioned by any personal act or omission or default of the charterers or their agents*". The Supreme Court held that Transclear's (and IBG's) acts in the course of the demurrage dispute were not any vicarious performance of an obligation of Cargill's as charterer. Therefore, they were not acts, omissions or defaults of an agent of Cargill's so as to trigger the clause 49 proviso, because Transclear was only in any sense Cargill's agent when and to the extent acting, if it did, as the agency by which Cargill sought to discharge some obligation of its under the time charter.

2. In this case, the m.v. *Mookda Naree* arrived at Conakry, Guinea, in early December 2018, to discharge c.10,700 m.t. of milling wheat carried from Novorossiysk, Russia. She was arrested at Conakry on 15 December 2018, and remained under arrest until 12 January 2019, at the instance of a Guinean company, Societe Moulin d'Or Guinea ("SMG"). The arrest was procured to secure a claim that SMG asserted against Cerealis, a French wheat trading company.

3. SMG's claim alleged short delivery of a cargo of milling wheat at Conakry in June/July 2018 as against the bill of lading quantity for which SMG said it had paid pursuant to a sale contract between Cerealis as seller and SMG as buyer. The carrying vessel on that occasion, of which Cerealis had been a sub-charterer, was the m.v. *Supertramp*, a ship unrelated to the *Mookda Naree*. The *Mookda Naree* cargo was destined for a different Cerealis buyer, Moulin Moderne du Mali Segou ("MMMS").

4. The December 2018 call at Conakry was pursuant to a head charter between Precious Pearls Ltd ("the Owner") as owner and Navision Shipping A/S ("Navision") as charterer, a sub-charter between Navision as disponent owner and Conti Lines Shipping NV ("Conti") as charterer, and a sub-sub-charter between Conti as disponent owner and Cerealis as charterer.

5. The head charter and the sub-charter were time charters on the Asbatime form with additional clauses. In both cases, additional clause 47 put the ship off hire *inter alia* upon her being detained or arrested by any legal process, until the time of her release, "*unless such … detention or arrest [was] occasioned by any act, omission or default of the Charterers and/or sub-Charterers and/or their servants or their Agents*." It is common ground that in the context of both time charters, Cerealis was a "*sub-Charterer*" within the clause 47 proviso.

6. By separate arbitration awards each dated 11 February 2020, supported by a single set of reasons, following arbitration references conducted together, Simon Croall QC, Mark Hamsher and Prof Charles Debattista held that the clause 47 proviso applied, so that *Mookda Naree* was not off hire after 12:00 hrs on 17 December 2018, because her detention under arrest thereafter was occasioned by Cerealis' failure promptly to deal with or secure SMG's claim so as to procure her release.

7. Additional clause 86 of the head charter, not included in the sub-charter, provided as follows:

> "*Trading Exclusions*
> ...
> *When trading to West African ports Charterers to provide adequate security guards during port stays in these countries to protect the vessel her crew and cargo.*
>
> *When trading to West African ports Charterers to accept responsibility for cargo claims from third parties in these countries (except those arising from unseaworthiness of vessel) including putting up security, if necessary, to prevent arrest/detention of the vessel or to release the vessel from arrest or detention and vessel to remain on hire.*
> ..."

8. The arbitrators held that the second of those paragraphs within clause 86 applied, being in their view not limited to claims concerning cargo carried under the head charter, and so for that reason also under that charter, the *Mookda Naree* was not off hire, indeed she was on hire for the entire period under arrest. For brevity below, whenever I refer to 'clause 86' I shall in fact be referring only to that paragraph held by the arbitrators to be applicable.

9. Conti and Navision appeal against the resulting awards in favour of Navision and the Owner respectively, with leave granted by Foxton J by order dated 23 June 2020. The awards were for US$266,946.38 and damages to be assessed, plus interest and costs, in the head charter reference, and US$419,198.55, plus interest and most of the costs, in the sub-charter reference.

10. It is both necessary for Conti, and sufficient for its appeal to succeed in full, that the arbitrators should have erred in law in relation to clause 47, as Conti contends they have. For Navision's appeal to succeed, there must have been an error of law in relation to clause 86, the impact of which, if there is such an error, will depend on whether the arbitrators also erred in relation to clause 47. If the arbitrators misconstrued clause 86 but not clause 47, a proportionately small adjustment is needed to the hire awarded in the head charter reference and the award of damages to be assessed cannot stand, as it was founded solely upon clause 86. For Navision's appeal to succeed in full, the arbitrators must have erred as regards both clauses.

The Questions of Law

11. The questions of law on which Foxton J granted leave to appeal are these:

    (1) In the sub-charter appeal:

> *Where an off-hire clause in a time charter provides that the vessel is to be off hire during any period of capture, detention, seizure or arrest unless such capture, seizure or arrest is occasioned by any act or omission or default of the charterers and/or sub-charterers and/or their servants or agents, what is the test for whether or not there has been an omission by a sub-charterer such that the vessel remains on hire during a period of arrest?*

No such generic question arises or is capable of an answer except the glib answer that it is a matter of construing the particular clause. The question is whether the arbitrators misconstrued clause 47 in saying that the proviso applied on the facts of this case.

(2) In the head charter appeal:

> *On a proper construction of the [sub-charter] (i) was the Vessel on hire during the period of an arrest in respect of a claim by a buyer against a seller under a sale contract for short delivery of goods carried on board a vessel other than the chartered vessel and (ii) did [Navision] have an obligation to put up security to prevent the arrest or to release the Vessel from arrest.*

With respect, I do not find that helpful either. The real questions are (a) as above, whether the arbitrators misconstrued clause 47, and (b) whether SMG's claim against Cerealis for short delivery of the *Supertramp* cargo was a "*cargo claim*" within clause 86.

12. The argument by Conti and Navision (as appellant) on clause 47 is that upon its proper construction there is only an "*omission*" by a sub-charterer when it fails to do something its sub-charter obliged it to do. There is no finding that Cerealis was under any obligation under its sub-charter to deal with or secure SMG's claim, or otherwise to procure the prompt release of *Mookda Naree* from arrest.

13. The argument in response by the Owner and Navision (as respondent) is that the arbitrators were not wrong to construe clause 47 as they did, namely as follows:

> "68. Not all inaction will qualify as an omission or default in this context. For there to be an omission within the meaning of clause 47, there must be a failure to act. … [N]either an act nor an omission necessarily connotes any degree of culpability. However an omission does connote a failure to act. Such a failure requires that there is either an obligation to act or that the circumstances are such that it could reasonably be expected that a party in that position would or should appreciate that action is appropriate and/or that failing to act might give rise to adverse consequences."

14. The argument by Navision on clause 86 is that "*cargo claims*" in that clause are limited to claims connected with cargo carried under the head charter or other contract of carriage entered into pursuant to the head charter.

15. The argument in response by the Owner is that the arbitrators were not wrong to construe "*cargo claims*" in clause 86 as meaning any claims made in respect of cargo. It might be unusual that SMG's claim, for short delivery of the *Supertramp* cargo, should have founded an arrest of *Mookda Naree*, given that the party allegedly liable *in*

personam was Cerealis and the ships were unconnected except that Cerealis was a sub-charterer of both; but it was without doubt, by nature, a cargo claim.

16. I am grateful to Mr Cooper QC for Conti, Mr Phillips for Navision and Mr Young QC for the Owner, for their written and oral submissions developing those arguments.

The Arbitrators' Findings

17. The arbitrators found that the following were material express terms of the head charter:

> *Clause 8:*
> *…The Captain (although appointed by the Owners) shall be under the orders and directions of the Charterers as regards employment and agency; and Charterers are to perform all cargo handling including load, stow, trim, dunnage, secure, lash/unlash draft survey/tally at their expense under the supervision of the Captain, who is to sign the bills of lading for cargo as presented in conformity with mate's receipts…*
>
> *Clause 43:*
> *P & I Club*
> *…Cargo claims as between Owners and the Charterers shall be governed by, secured, appointed and settled fully in accordance with the provisions of the Inter-Club New York Produce Exchange Agreement 1996 (as amended 2011), or any subsequent modification or replacement thereof…*
>
> *Clause 47:*
> *Capture, Seizure, Arrest*
> *Should the vessel be captured, seized or detained or arrested by any authority or by any legal process during the currency of this Charter Party, the payment of hire shall be suspended until the time of her release, unless such capture, seizure, detention or arrest is occasioned by any act or omission or default of the Charterers and/or sub-Charterers and/or their servants or their Agents. Any substantiated extra expenses incurred by and/or during the above capture or seizure or detention or arrest shall be for Owners' account.*
>
> *Clause 86 [so far as material]:*
> *Trading Exclusions*
>
> *……*
> *When trading to West African ports Charterers to provide adequate security guards during port stays in these countries to protect the vessel her crew and her cargo.*
>
> *When trading to West African ports Charterers to accept responsibility for cargo claims from third parties in these countries (except those arising from unseaworthiness of vessel) including putting up security, if necessary, to prevent arrest/detention of the vessel or to release the vessel from arrest or detention and vessel to remain on hire.*
> *……*
> *Clause 102:*
> *When trading to West African posts (sic) Charterers to provide gangway watchman during port stays in these countries to protect the vessel, her crew and her cargo.*

When trading to West African ports with bagged cargoes Charterers to accept full responsibility for cargo claims from third parties in these countries (except those arising from unseaworthiness of vessel) including putting up security, if necessary, to prevent arrest/detention of the vessel or to release the vessel from arrest or detention.

18. The arbitrators found that the sub-charter did not include clause 86 or clause 102. It included clauses 8, 43 and 47 in the same terms as the head charter.

19. Aside from the terms of the charters, the arbitrators' findings of primary fact, so far as material, were as follows:

"3. The stated basis for the arrest of the Vessel [i.e. *Mookda Naree*] was, according to the writ subsequently issued by SMG, that she was "*either owned by the company Cerealis or are chartered by them"* and that *"…In any event both vessels [i.e. Mookda Naree and Supertramp] have a contractual relationship with CEREALIS".* The same document quantified SMG's claim at US$150,726.24. It is common ground before us that Cerealis was neither the owner of the Vessel nor the owner of the MV Supertramp.

…

8. The Head Charterparty was dated 23 October 2018. It was based substantially on the ASBATIME 1961 form with amendments and rider clauses and was a period time charter for "*about 4 months up to about 6 months in Charterers' option*". The hire rate was US$8,500 per day or pro rata.

…

10. The Sub-Charterparty is contained within a fixture recapitulation dated 2 November 2018. We have been provided with a working copy of the draft charterparty which we were told was drafted by brokers but it was common ground this draft was not a contractual document.

11. The Sub-Charterparty was for a time charter trip "*via novorossyisk to Conakry + Douala + DAKAR + ABIDJAN ONLY*", "*with … grains in bulk only from Novo to Conakry and Douala*" for a duration of about 50 days without guarantee. The hire was US$15,150 per day.

12. The recapitulation records that, apart from the specifically agreed main terms set out in the recapitulation, the Sub-Charterparty was to be "*owise as per Mookda Naree cp dated 23 Oct 2018 which to be logically amended as per main terms agreed and with following amendments only*".

[The arbitrators found that the amendments thus referred to in the recap meant that clause 86 of the head charter was not part of the sub-charter.]

22. In early August 2018, SMG alleged that there was short delivery under the sale contract of 563.100 tons and sought damages from Cerealis, given that the total Bill of Lading quantity had been paid for pursuant to a credit arrangement.

23. On or about 29 October 2018, SMG applied to arrest the MV Agia Sofia, in support of its claim against Cerealis under the sale contract. Cerealis was also a charterer of the MV Agia Sofia.

24. In that application, SMG acknowledged that Cerealis were the only party that they held liable for the alleged short delivery. That application for arrest of the MV Agia Sofia was granted by the local court on or about 11 November 2018. However the Court of Appeal of Conakry ordered the release of that vessel on 26 November 2018 effectively setting aside the original order for arrest. The reasoning of the court appears to have been that the only basis for the arrest was the status of Cerealis as charterers of the MV Supertramp and this did not provide an adequate link to found a maritime claim.

…

26. On 6 December 2018, SMG applied to the Court of First Instance of Kaloum for the arrest of the Vessel. We have explained the basis for this application above. The application was granted on 10 December 2018.

27. The Court Bailiff issued a document on 11 December in relation to this arrest which in translation is entitled "Official Statement of Conservatory Arrest of Vessel". This appears to be an official document which at least has the appearance of being in a standard official form. However it includes the following passage …:

> "*The Company Cerealis having refused to reimburse the said quantity of wheat.*
> *I proceeded this 7th day of December 2018 to the Port of Conakry to arrest the following vessel ….:*
> *MOOKDA NAREE…*"

…

30. In the morning on 15 December 2018 the Vessel was served with an arrest order. The materials we have seen suggest that at least as of this date Cerealis became aware of the arrest and, at least in general terms, the basis for the arrest.

31. On 18 December 2018, a Writ was filed on behalf of SMG against Cerealis, Head Owners and the owner of the M.V. Supertramp. The Writ sought the payment of US$150,726.24 from all defendants plus 300,000,000,000 Guinean francs as damages.

32. On and after 15 December communications took place between PPL [i.e. the Owner], Navision, Conti and Cerealis. Transmar, Cerealis' agents, were informed of the arrest but no specific request was made, whether through them or otherwise, for them to put up security or accept responsibility for the claim. There is a message sent on 16 December 2018 by Navision's agents which sets out a message from "sub-charterers". That message, to which our attention was drawn, makes clear that sub-charterers regarded the case as "Owners matter". However it seems that in that context the sub-charterers were Conti rather than Cerealis.

33. The result of these exchanges is that PPL and their club, Skuld, concluded on the same day that they could not *"expect any assistance from charters/sub-charterers"* and that the focus should be on seeking to set aside the arrest as wrongful.

34. Cerealis' position emerges for the first time on 17 December in response to a message from Conti. In that message Cerealis' Monsieur Naudet makes clear that so far as Cerealis is concerned the arrest is wrongful and that Cerealis *"cannot bear any liability in respect of such claim"* and *"rejects any liability for loss of time arising from*

this unlawful arrests". Cerealis go on to say that only PPL can take action to obtain the release of the Vessel. A similar message was sent more widely by Cerealis two days later on 19 December.

35. Subsequent attempts by Head Owners to set aside the order for arrest were unsuccessful. On 7th January there was a hearing before the Court of Appeal of Conakry. By an order dated 8 January 2019 the arrest was upheld although the Court ordered the arrest would be lifted upon payment by PPL of US$80,000 "*as a guarantee*".

36. Such a guarantee was subsequently provided by PPL on or about 11 January 2019. That guarantee was funded by Cerealis. On 12 January 2019, an order was given to the ship department of the Merchant Marine to release the Vessel. The Vessel obtained port clearance and departed Conakry at 1900 hours local time on 12 January 2019.

37. Under both charterparties Navision and Conti (the respective charters) treated the Vessel as being off hire from 1200hrs on 15 December until 1900hours on 12 January 2019.

38. Cerealis compromised SMG's claim relating to the shipment of cargo on the M.V. Supertramp by a settlement agreement dated 15 January 2019 providing for the payment of US$150,726.24."

20. The arbitrators reached the following further conclusions of fact against which there can be no appeal:

(1) that Cerealis was not on notice that SMG would seek to arrest *Mookda Naree* to obtain security for its claim against Cerealis;

(2) it was not reasonably to be expected by Cerealis, therefore, that its failure to provide SMG with security for that claim might result in *Mookda Naree* being arrested;

(3) however:

> "76. … On 15 December 2018 Cerealis became aware of the arrest by SMG and that it related to short discharge from the MV Supertramp. Cerealis when informed that day would immediately have appreciated that the arrest was made in support of the claim against them. The correspondence demonstrates that by 17 December 2018 Cerealis were denying any liability, refusing to act and indicating that PPL were the party who should act. In this context the circumstances are such that once informed on 15 December Cerealis would or should have appreciated that if they failed to deal with or secure SMG's claim there was a significant risk that the Vessel of which they were the sub-charterers would remain under arrest at least until the arrest was set aside or some other party put up security.
>
> …

> 78. … had Cerealis acted promptly to put up security or settle the claim (as they did subsequently) the Vessel would not have remained under arrest until 12 January 2019. …
>
> 79. … PPL settled upon a strategy of seeking to set aside the arrest in the same way as the owners of the MV Agia Sofia had successfully set aside a similar order. However … this … was because … the conclusion had been reached that no assistance could be expected from charterers or sub-charterers. If Cerealis had promptly decided to settle or secure the claim … the arrest would have been lifted soon afterwards.
>
> 80. … it might in practice have taken 24 hours or more for the security to be provided and for the arrest to be lifted even assuming there was no omission to act promptly. We have concluded, doing the best we can based on our experience and the inherent probabilities, that the omission can fairly be said to have caused the period of arrest/detention from 12:00hrs on 17 December 2018 by which point the prompt action of Cerealis ought to have led to the release of the Vessel."

21. The language of the arbitrators' paragraph 80, as just quoted, blends (a) their conclusions of fact that (i) upon becoming aware of the arrest of *Mookda Naree*, Cerealis should have appreciated that it would be expected to deal with SMG's claim, and (ii) if Cerealis had acted promptly to settle or secure SMG's claim, she would have been released by 12:00 hrs on 17 December 2018, and (b) their view that Cerealis' inaction in those circumstances was an "*act or omission or default of … sub-Charterers …*" (to wit, an 'omission') within the meaning of clause 47.

22. That is important because some of Mr Cooper QC's arguments for Conti strayed beyond criticism of the arbitrators' construction of clause 47 into criticism of the first of those factual conclusions (paragraph 21(a)(i) above). Thus, for example, in the absence of a finding that Cerealis owed a contractual obligation under the sub-charter to secure the release of the ship from arrest, it was said that "*There is no basis for this conclusion*", *viz.* "*that it was Cerealis who should have appreciated that it was for them to put up security*", given various circumstances Conti highlighted, for example that Cerealis said it had a good defence to SMG's claim and the fact that the previous similar arrest, of *Agia Sofia*, had been overturned on appeal. Those circumstances no doubt were highlighted before the arbitrators too. At any rate, that was the proper place to highlight them, and to run that argument. But the arbitrators were against Conti on it, and there can be no appeal against that.

Clause 47

23. The arbitrators approached the construction of clause 47 on the basis that it was for the Owner (under the head charter, Navision under the sub-charter) to persuade them that the case fell squarely within the proviso, because the main purpose of the clause overall was to protect the interests of the time charterer by a *prima facie* rule that the ship would be off hire if she was *inter alia* arrested or detained by legal process. They were correct to do so, and to note that doing so accorded with the approach taken by the Supreme Court in *The Global Santosh*, *supra*, at [12].

24. They approached the construction of the proviso itself on the basis that its evident purpose was to negative that *prima facie* rule, i.e. to keep the ship on hire, where it could be said to be the time charterer's, or a sub-charterer's, responsibility that the ship has been arrested or detained. I see no error in that approach.

25. Taking those two points together, as the arbitrators put it:

> "71. … the commercial purpose of clause 47 is for the vessel to be off hire when arrested or detained unless charterers or sub-charterers are responsible for the period whilst the vessel is out of service."

26. In *The Global Santosh*, the proviso in clause 49 did not extend to the acts, omissions or defaults of sub-charterers, and the act of the charterer, Cargill, in sub-chartering to Sigma (such that, directly or indirectly, Transclear became a sub-charterer too) could not sensibly be said to have occasioned the arrest. Therefore, the shipowner had to show that what Transclear (or IBG) did was to be regarded as an act, omission or default of an agent of Cargill's. Hence the decisive consideration in that case was whether what was done to occasion the arrest of the ship was part of the vicarious performance by Transclear (or IBG) of Cargill's clause 8 responsibility for cargo discharge operations. The majority in the Supreme Court concluded that it was not.

27. Therefore, *The Global Santosh* did not decide that the proviso in clause 49 was confined to acts, omissions or defaults in the course of performance of Cargill's obligations as time charterer. If Cargill had by its own act occasioned the arrest, the proviso would have been straightforwardly applicable. No further question whether the act in question had been an act of Cargill's *qua* time charterer would have arisen. That disposes of the subsidiary argument by Mr Cooper QC for Conti, to the effect that as regards the acts etc. of sub-charterers, the proviso in clause 47 was confined to acts etc. in the course of performance or purported performance of their obligations as such. He rightly accepted that on that argument, an arrest of *Global Santosh* by Cargill would not have been within the proviso in that case, which to my mind would be an absurd result. It was only because it could not be said that Cargill, which was the charterer referred to in the proviso, had itself occasioned the arrest, that the debate turned to whether it could be said that in occasioning the arrest Transclear (or IBG) had been acting as Cargill's agent.

28. That brings me to the principal argument on clause 47, namely that as a matter of language, and bearing in mind who bears the burden of persuasion, "*act or omission or default of … sub-Charterers*" connotes, and is confined to, conduct in breach of a contractual obligation under the sub-charter in question. In my judgment it does not, and is not so confined, and I agree with the arbitrators that inaction in circumstances where a sub-charterer should reasonably appreciate that it would be expected to act is naturally and fairly characterised as a failure to act, i.e. an omission. It is a conclusion of fact with which I could not interfere even if I took a different view, but as it happens I regard it as unsurprising that the arbitrators held that Cerealis should have realised that it ought to deal with SMG's claim, which was a claim against Cerealis alone but which had resulted in the arrest of *Mookda Naree* because Cerealis was her sub-charterer and was therefore liable to detain *Mookda Naree* unless Cerealis did something promptly about it. Mr Cooper QC expressed Conti's position as a requirement that "*(i) … [there be] a failure on the part of the Sub-Charterer to do something which it was legally obliged to do and (ii) … that failure … be in respect of*

an obligation on the Sub-Charterer as sub-charterer". That rather cumbersome formulation seemed to me meaningful only as regards obligations of the sub-charterer under the sub-charter, but it may be Mr Cooper QC intended it to refer also to conduct on the part of the sub-charterer that was actionable (by whom not specified) otherwise than as a breach of contract. If so, that would only serve to make Conti's position the more convoluted and uncommercial.

29. Mr Cooper QC argued that the arbitrators' approach introduced a level of uncertainty that the parties cannot have intended, cutting across the default rule that the ship is off hire if arrested. The latter element of that submission says nothing: the proviso on any view 'cuts across', i.e. qualifies, the default rule. The former element has no real force: the proviso operates by reference to acts, omissions or defaults of various entities occasioning the arrest or detention. The arbitrators' construction of 'omission' in that context does no more than unpack or spell out what it connotes, and introduces no additional uncertainty for parties than is inherent in the need to explore what occasioned the arrest or detention and who had what involvement in that, and to take a view on whether the proviso is engaged. There may in any given case be room to differ over whether in the prevailing circumstances the sub-charterer ought reasonably to have appreciated it was expected to take action; but that type of question routinely arises in the performance of time charters, and is left to arbitrators (or judges if there is no arbitration clause) to resolve if it gives rise to dispute.

30. The contrary contention is that the owner's protection, via the proviso, from what would otherwise be an uncommercially absolute rule that the ship is always off hire when arrested during the course of the time charter, is defined by reference to the terms of a sub-charter of which the owner typically will have neither knowledge nor any right to know (the terms of individual charters being typically private and confidential to the immediate parties), and/or an investigation of the actionability of some conduct of the sub-charterer's otherwise than in contract. That in my view is a far less likely bargain to strike than one that aims simply to say that if the time charterer or a sub-charterer brings about the arrest or detention, the ship ought to remain on hire. It will be a matter for negotiation in any given case whether to strike that bargain by reference to the time charterer only or by reference also to sub-charterers, as the difference between clause 47 in this case and clause 49 in *The Global Santosh* shows. Ultimately, the owner's difficulty in *The Global Santosh* was that Cargill in that respect secured a better bargain than did Navision (under the head charter) or Conti in the present case.

31. I do not agree, as Mr Cooper QC argued, that the arbitrators introduced "*a two-tiered definition of 'act or omission'*", because (as he put it) where the act or omission is that of a sub-charterer it does not have to be an act or omission in performance of the charterer's rights and obligations, but "*[w]here the act or omission is an act or omission of a servant or agent of the charterer or sub-charterer, then [under] The Global Santosh, the relevant act or omission does have to be in performance of the charterers' rights and obligations under the charterparty*". Mr Cooper QC's second proposition, supposedly clashing with his first so as to be unlikely to have been intended, is wrongly formulated. The *Global Santosh* question falls to be asked, where it does, in order to decide whether some causative act or omission is to be regarded as that of an agent of the charterer (or sub-charterer). The meaning of 'act or omission' is constant; the *Global Santosh* complexity (if that is what it is) arises because there is a notion in this context of independent parties who are not in any normal sense a charterer's agent being the

agency by which a charterer will discharge its contractual obligations, and that notion sensibly needs to be taken into account in construing what is meant by an act (etc.) of a charterer's (or sub-charterer's) agent, where that is the allegation upon which reliance on the proviso is founded.

32. I do not agree that the arbitrators' interpretation of 'omission' in this context offends the dictionary definition relied on by Mr Cooper QC, *viz.* "*The non-performance or neglect of action or duty*", since their definition is, in essence, that of failing to take action that it was reasonably to be expected would be taken. Mr Cooper QC also reminded me that 'act or omission' appears in Article IV, rule 2(i) of the Hague-Visby Rules, and said there is no authority holding it there to mean something wider than breach of contract (or other actionable wrong). While it is not necessary for me to make a decision on Article IV, rule 2(i), for my part I envisage that if Mr Cooper QC is right about the lack of authority, that is because it has never been supposed arguable that Article IV, rule 2(i) might be confined to breaches of contract (or other actionable wrongs). Article IV, rule 2(i) excepts the shipowner from liability for loss or damage arising or resulting from "*Act or omission of the shipper or owner of the goods, his agent or representative*", and I am not aware that it has ever been suggested that in order to bring himself within that exception the shipowner must locate and prove breach of some contract to which the shipper or owner of the goods was privy (or actionable wrong other than a breach of contract).

33. In my judgment, there is no error of law in the arbitrators' conclusion that the detention of *Mookda Naree* under arrest after 12:00 hrs on 17 December 2018 was occasioned by Cerealis' failure to act as it ought reasonably to have acted to deal promptly with the claim being made against it by SMG, that being an "*act or omission or default of … sub-Charterers*" within the meaning of the proviso to clause 47 of both charters.

34. Conti's appeal against the award in the sub-charter reference is therefore dismissed, and Navision's appeal against the award in the head charter reference is confined to the impact of the arbitrators' conclusion on clause 86, i.e. the award of hire from the time at which *Mookda Naree* was arrested until 12:00 hrs on 17 December 2018 and the award of damages to be assessed for breach of clause 86. Save to that extent, Navision's appeal also fails.

Clause 86

35. The arbitrators dealt with clause 86 as follows:

> "45. We note a number of features of this specific provision:
>
> (i) It is applicable only when trading in West Africa (i.e. it is not generally applicable);
> (ii) Insofar as it relates to responsibility for cargo claims it creates and is specifically intended to create a different regime to the default regime under clause 43;
> (iii) Insofar as it relates to the payment of hire whilst the Vessel [is under arrest etc.] it creates and is specifically intended to create a different regime to the default regime under clause 47;

(iv) It shows that the parties regarded trading to West Africa as giving rise to risks or perceived risks which required the application of a different regime to that which was generally applicable.

46. On behalf of PPL it was submitted that the provision applied whenever three requirements were met: (a) there was a claim made by a third party (b) the nominal basis of the claim was that it related to cargo and (c) the claim was not premised on the unseaworthiness of the Vessel. PPL contended that the claim made by SMG satisfied these criteria and that as a result Navision became obliged to take responsibility for the claim as between them and PPL and that the Vessel remained on hire.

47. Navision … disputed that the clause was engaged. They contended that cargo claims within the meaning of that provision was limited to claims made in respect of or relating to the goods carried under the charterparty and/or any other contract of carriage entered into pursuant to the charterparty in respect of the goods carried on the chartered vessel.

48. Navision … in support of this argument drew our attention to the following:

(i) Elsewhere … at clause 43 the party use the expression "cargo claims". In that clause its meaning is obviously limited in the restrictive way suggested by Navision because it provides for the application of the Inter-Club New York Produce Exchange Agreement 1996 ("the ICA") which is applicable only to claims under contracts of carriage authorised under the relevant charterparty. This is said to reflect an agreed definition of this expression which is applicable when used in clause 86.

(ii) The exclusion in the relevant language in clause 86 to claims arising from the unseaworthiness of the vessel indicated a specific reference to this Vessel and hence to claims relating to cargo carried on this Vessel;

(iii) The prospect of this Vessel being arrested in respect of a "cargo" claim other than one brought under the current chartering arrangements should be regarded as intrinsically remote and therefore unlikely. We were urged to conclude that it would, as a matter of simple construction, be unlikely that the parties intended in a charterparty clause to specifically allocate to the charterers risks associated with claims having little if anything to do with the charterparty.

49. On the other hand, in support of their construction PPL submitted:

(i) That as a matter of language the expression "cargo claims" was wide and referred to any claims made in respect of cargo and did not limit the expression to claims relating to cargo currently carried on the Mookda Naree as suggested by Navision/Conti;

(ii) That clause 43 was a generally applicable provision designed to achieve a different purpose and cast no useful light on the construction of the disputed words in clause 86;

(iii) That the parties had deliberately created a specific regime for West Africa to reflect a perceived unusual risk and accordingly it could not be concluded that the parties did not intend the provisions to extend beyond the type of claims which could be subject to the ICA;

(iv) That the purpose of the clause was to create a carve-out from the otherwise applicable regime (set out in clause 47) when trading to West Africa. This purpose would be substantially undermined if the carve-out was limited artificially in the way suggested by Navision … which interpretation would not cover for example sister ship arrests, arrests in support of claims under contracts of sale or arrests of the kind which occurred in this case.

50. On this point we prefer the submissions of PPL. In this regard we give weight to the natural language of the provision. The expression "cargo claims" is wide and is not restricted by the rest of the language of this part of clause 86 (unlike for example clause 43). In the light of this there would need to be compelling reasons to read in such a restriction.

51. We are not persuaded that such reasons exist. We do not believe the language of the generally applicable clause 43 assists in construing clause 86. Nor are we persuaded that the exclusion of a narrow category of claims (those arising out of the unseaworthiness of the vessel) shines a light on the scope of the broader application of clause 86.

52. Moreover it is clear to us that clause 86 was intended to create a different regime to that which is generally applicable by reason of clause 47. It seems to us that if Navision's construction were right this purpose would be significantly undermined. If the only cargo claims which are caught by clause 86 are those relating to cargo carried on the Vessel under existing chartering arrangements then in the event of an arrest by a third party it would in many cases be open to PPL to say that the arrest had been occasioned by an act, omission or default of the either the charterers or sub-charterers or their agents. The result would be that the regime under clause 86 would appear to add little to the existing regime under clause 47.

53. In the light of the above we conclude that the arrest by SMG fell within the scope of clause 86. The result is that the Vessel remained on hire …"

36. The arbitrators rightly concluded that if clause 86 applied to SMG's claim, as they thought it did, then the Owner's damages claim in respect of expenses incurred by it in relation to the SMG arrest also succeeded in principle. Hence they awarded damages to be assessed as well as unpaid hire. The arbitrators were told that the parties were seeking to agree *quantum* in relation to the damages claim. I was told by Mr Phillips for Navision, but this is not in evidence, that agreement was subsequently reached. That has no bearing upon whether the appeal on clause 86 succeeds, although if there has been some agreement it conceivably might affect the relief to be granted upon a successful appeal, depending on the terms of the agreement.

37. Mr Phillips' argument for Navision was that by clause 86, special provision was made supplanting clause 43 for West African trading, so that cargo claims arising out of West African trading ordered under the charter would not be apportioned between them in accordance with the Inter-Club Agreement but would be Navision's sole responsibility

unless arising from unseaworthiness of *Mookda Naree*. The provision for Navision to put up security, if required, to prevent the ship from being arrested or procure her release from arrest, and for the ship to remain on hire (whether or not the proviso in clause 47 applied), were consequential matters, not the primary focus of the provision.

38. He submitted that in the context of a time charter and provisions concerning responsibility for third party claims, a reference to 'cargo claims' naturally connotes claims concerning cargoes carried or ordered to be carried pursuant to the time charter. It goes without saying, on that view, that what is meant is cargo claims arising out of the chartered employment. Applied to clause 86, the sense of "*When trading to West African ports Charterers to accept responsibility for cargo claims from third parties in these countries*" is that Navision accepted responsibility for cargo claims arising out of the carrying of cargo from or to West African ports pursuant to the charter.

39. Mr Phillips bolstered the argument by submitting, by way of sense-check, that the consequences of the arbitrators' construction are so startling as to be very unlikely to have been intended. Thus, on that construction, Navision was it seems accepting full responsibility for:

    (1) claims against the Owner in respect of short-delivery or cargo damage at a West African port under prior employment, if the relevant claimant happened to pursue its claim, and arrest the ship, while she was again calling at a West African port pursuant to Navision's orders, but not if the claimant found and arrested the ship during the Navision charter but not in West Africa, or found and arrested the ship before she was on hire to Navision or after the Navision charter had been fully performed;

    (2) claims against the Owner in respect of short-delivery or cargo damage arising during the charter elsewhere than at a West African port, if the relevant claimant found the ship so as to arrest her at a West African port during the period of the Navision charter, but not in respect of those same claims if the claimant found the ship and arrested her elsewhere or found her and arrested her at a West African port under subsequent employment, after the Navision charter had run its course;

    (3) claims against the Owner in respect of short-delivery or cargo damage by a sister ship, wherever in the world arising, so long as the relevant claimant pursued them, and found *Mookda Naree* to arrest her, while she was calling at a West African port pursuant to the Navision charter.

40. Those examples made for an incoherent, arbitrary allocation of responsibility to Navision, Mr Phillips argued, whereas on the construction for which he contended, there was no more than a coherent and obviously purposeful adjustment of the Inter-Club Agreement allocation of responsibility, for West African trading.

41. Mr Young QC for the Owner supported the arbitrators' approach. He emphasised the *prima facie* width of the term 'cargo claims'. Whatever else may have been true, SMG was claiming in respect of an alleged short delivery against a bill of lading quantity in respect of cargo carried to Conakry, and that could properly be described as a cargo claim. In his submission, therefore, the question was whether there was clear language or compelling reason to cut down the apparent width, and therefore negative the

apparent applicability in this case, of clause 86. The immediate context was that of (a long list of) trading limits and thus, the relevant acceptance of responsibility by Navision was an express *quid pro quo* for the Owner's willingness to allow it to order the ship to trade to West African ports. There was no reason to circumscribe in a way not achieved expressly by the contractual language the types of harmful incidents the Owner might have wished to be Navision's sole responsibility if it was to be allowed to take the ship to West Africa.

42. I prefer Mr Phillips' argument. The Inter-Club Agreement defines 'Cargo Claims' to mean "*claims for loss, damage, shortage (including slackage, ullage or pilferage), overcarriage of or delay to cargo including customs dues or fines in respect of such loss [etc.] …*". It does not expressly limit that definition to relate it to cargo carried or ordered to be carried under the time charters to which the Inter-Club Agreement applies. That goes without saying.

43. Clause 43 provides that as between the Owner and Navision, "*Cargo claims*" are to be dealt with under the Inter-Club Agreement. Clause 43 is not explicitly limited to claims concerning cargo carried or ordered to be carried under the charter. That goes without saying.

44. In clause 102, a strikingly similar provision to clause 86 but referring only to bagged cargoes, it is obvious that 'cargo claims' refers only to claims relating to the bagged cargoes traded to West Africa that are the subject matter of the clause. Reading the charter as a whole, the language of clause 86 to like effect but not limited only to bagged cargoes would not to my mind strike any reasonable reader as having a radically different meaning. In fact, clause 86 subsumes clause 102 entirely, so the Owner would never need to rely on clause 102, but that does not detract from the present point which concerns what the parties' use of language in clause 86 conveys.

45. Mr Phillips also referred me to various other clauses of the head charter not mentioned by the arbitrators. I agree with him that they reinforce the argument of consistency and coherence, and therefore his argument as a whole; but if I were not persuaded by his argument upon the provisions referred to by the arbitrators, I would have wanted to take more time, and it may be receive further submissions, as to whether it is proper to allow an appeal on the basis of matters not put to the arbitrators, no matter that it is common practice to put before the court, on an arbitration appeal, the underlying contract document(s) referred to in the award and not just the award itself.

46. The arbitrators were correct, I think, to identify certain basic features of clause 86 that might influence its proper construction (their paragraph 45, quoted in paragraph 35 above). But in my judgment, with respect, they were wrong to see any of those features as pointing in the Owner's favour, let alone decisively. On Navision's argument as much as on the Owner's, clause 86 was a particular provision concerning West African trading, providing a different allocation of responsibility for 'cargo claims' than the default under clause 43, on the basis (it can be inferred) of a mutual acceptance that trading to West Africa gave rise to particular risks, and (as regards hire) providing wider protection for the Owner than under the proviso to clause 47. Furthermore, with respect, the arbitrators' correct appreciation that clause 86 (like clause 102) was linked to, and a carve-out from, clause 43, is telling. It is no more than the logical consequence of that linkage to say, as Mr Phillips did, that clause 86, like clause 102, is concerned with the same universe of claims as is clause 43, *viz.* claims concerning cargoes carried or

ordered to be carried pursuant to the charter, a 'limitation' (if that is how it is to be labelled) that is so obvious as not to need spelling out.

47. I respectfully disagree with the arbitrators that saving the Owner any need to show that an arrest or detention was occasioned by an act, omission or default of Navision, a sub-charterer, or servants or agents thereof, can be said to be an insufficient additional benefit or purpose to explain the part of clause 86 that deals with hire. As Mr Phillips put it, although not quite in these terms, there is a danger of the tail wagging the dog if one allows a possible view that the specific *consequential provisions as to arrests and hire* of the clause 86 allocation of responsibility did not achieve much more for the Owner than it had anyway from the proviso to clause 47 to drive the meaning of that primary allocation of responsibility.

48. Finally, I also agree with Mr Phillips that his examples of the consequences of the arbitrators' construction are stark and surprising, sufficiently so that one ought to hesitate before concluding that the contractual language really has the meaning and effect they gave it. The arbitrators did not hesitate in that regard, indeed they do not appear to have recognised the startling consequences of the construction they adopted.

49. The respect that is always due to the views of an experienced arbitral tribunal as the parties' chosen primary tribunal notwithstanding, I have come to the view that the arbitrators erred in their construction of clause 86. They should have said that SMG's claim, though it related to a cargo that had been carried to a West African port, was not a cargo claim within clause 86 of the charter between the Owner and Navision because it did not concern *Mookda Naree*'s West African trading pursuant to that charter but a different ship altogether. It was therefore not a claim allocated to be Navision's full responsibility by clause 86, any more than it would have been a claim to be dealt with under the Inter-Club Agreement pursuant to clause 43 in the absence of clause 86.

50. Navision's appeal against the award in the head charter reference therefore succeeds to this extent only, namely that because the arbitrators misconstrued clause 86 they wrongly held that the ship never went off hire, whereas they should have held that when arrested she went off hire under clause 47 until the proviso bit from 12:00 hrs on 17 December 2018, and they wrongly held that Navision had a liability for damages to be assessed for breach of clause 86. It is agreed that in those circumstances, the award in the head charter reference should be remitted to the arbitrators and, subject to detailed terms for the remission that have been agreed between counsel, that will be the order on Navision's appeal.