Neutral Citation Number: [2014] EWHC 1643 (Comm)

Case No: 2013-979

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 22/05/2014

Before:

MR JUSTICE HAMBLEN

- -

Between:

St.Maximus Shipping Co.Ltd	**Claimant**
- and -	
A.P. Moller-Maersk A/S	**Defendant**

- -
- -

Stephen Kenny QC and Jessica Sutherland (instructed by **Holman Fenwick Willam LLP**) for the **Claimant**
Chris Smith QC and Neil Hart (instructed by **Hill Dickinson LLP**) for the **Defendant**

Hearing dates: 7 and 8 May 2014

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE HAMBLEN

Mr Justice Hamblen :

1. This is the trial of preliminary issues concerning the claim of the Claimant ("Owners") to enforce the terms of a Letter of Undertaking, dated 6 September 2007 ("the LOU"), which was provided by the Defendant ("Maersk") to the Owners on 25 September 2007 by way of security for the potential liability of cargo interests in General Average.

2. The essential issue between the parties is whether, as the Owners contend, Maersk is liable to pay the sum ascertained to be due from cargo interests in a General Average Adjustment prepared by the Average Adjusters appointed by the Owners or whether, as Maersk contends, its only liability is to pay the sum which is properly and legally due from cargo interests.

Factual background

3. The Owners were at all material times the demise charterers of the vessel "Maersk Neuchatel" ("the vessel"), but can for all relevant purposes be treated as the vessel owner.

4. Maersk was the time charterer of the vessel from the Owners pursuant to a time charter dated 16 August 2004. In relation to General Average and General Average security the time charter provided as follows:

> "14.(c) General Average: General average shall be adjusted at the place as indicated in Box 33 according to the York-Antwerp Rules 1994 or any amendment thereto by an adjuster appointed by the owners. In the event of general average or salvage, the Charterers shall provide an acceptable temporary security covering all goods and containers to avoid delay and secure their release so that transit/delivery may continue. The owners agree that the Charterers temporary guarantee may be exchanged in due course for a full set of securities from the appropriate interested parties covering all goods and containers. The Charterers agree to co-operate with the Owners and the Owners' appointed adjusters, to assist by supplying manifest and other information and, where required, to endeavour to secure the assistance of the Charterers' local agents in the collection of security, at the Owners' expense."

5. Pursuant to the time charter the vessel was operating in the liner trade, calling at various ports in South East Asia, South Africa and West Africa under the Maersk Lines banner. As is common on such services, the bills of lading for the containers and goods carried were issued by the liner operators – here Maersk and SCL – and identified those operators as the contractual carriers.

6. On 20 July 2007, whilst on a laden run from South East Asia to various ports in South and West Africa, the vessel grounded off the port of Tema, Ghana. There were 1,139 containers on board at the time, stuffed with goods owned by a variety of cargo interests and consigned to a variety of destinations. General Average was declared on 25 July 2007.

7. It is common ground that, as a result of the grounding, the vessel and her cargo were imperilled and that the grounding was, therefore, a General Average event. It is also common ground that the vessel suffered bottom damage as a result of the grounding, and that the cost of repairing this damage is not recoverable in General Average. There is a dispute as to the extent of this damage and also whether the rudder and propeller (as well as the hull) were damaged.

8. Between 20 July 2007 and 31 August 2007 eight attempts were made to refloat the vessel. On 31 August, following lightering operations, she was refloated by the salvors, Svitzer, who had been appointed on Lloyds' Open Form terms. It is common ground that during the refloating and/or the refloating attempts the vessel suffered further bottom damage, including damage to her rudder and propeller, and that the cost of repairing this sacrificial damage is recoverable in General Average. There is a dispute as to the extent of this damage.

9. Both parties were aware at the time that the vessel had suffered potentially serious bottom damage, and that there was at the very least a possibility that there would be a dispute as to the extent to which damage later found, when it was possible to survey the damage, was to be attributed to the refloating operation as distinct from damage caused by the initial grounding.

10. The Claimant appointed Messrs Stichling Hahn Hilbrich (Average Adjusters) Ltd. ("SHH") as Average Adjusters on or about 26 July 2007. SHH provided Maersk with a draft LOU on 27 July 2007. The initial draft was intended only to be temporary security, whilst security from the actual cargo interests was obtained, as envisaged by the terms of the time charter. However, in the event Maersk decided to provide permanent security in respect of cargo. A revised draft was therefore produced by SHH on 20 August 2007. Both drafts included the wording which is now in issue, but there was some correspondence between the parties as to other parts of the draft. By 18 September 2007 all of the wording had been agreed and on 25 September 2007 Maersk, through its solicitors (Messrs. Hill Dickinson ("HD") – Mr. Wallis acting), provided a scanned copy of the LOU (dated 6 September 2007) to SHH, acting on behalf of the Owners. The Owners' solicitors (Messrs. Holman Fenwick Willan ("HFW") – Mr. Chamberlain acting) were copied in on the relevant correspondence and had been asked by the Owners to consider and comment on the wording of the LOU before it was signed.

11. The LOU read as follows:-

> "We, the undersigned, A.P. Moller-Maersk A/S are the Time Charterers of the m.v. MAERSK NEUCHATEL under a BIMCO, BOXTIME Charterparty dated 16th August 2004. Various Cargo and Containers were shipped on the above vessel by various parties for delivery at Walvis Bay, Tema, Lome, Cotonou and Apapa and Bills of Lading have been issued by us and Safmarine Container Lines (SCL).
>
> In consideration of the delivery to Cargo Interests or to their order on payment of the freight due of the cargo carried onboard the m.v. MAERSK NEUCHATEL at the time of the above mentioned casualty, we hereby undertake and agree as follows:-
>
> 1. To pay the proper proportion of any General Average and / or Special Charges which may hereafter be ascertained to be due from the Cargo or the Shippers or Owners thereof under an Adjustment prepared by the appointed Average Adjusters in accordance with the Charterparty, dated 16th August 2004, and / or the Bills of Lading issued by us or SCL.
>
> That in the event of the vessel's cargo or part thereof being forwarded to original destination by other vessel, vessels or conveyances,
>
> (a) rights and liabilities in General Average shall not be affected by such forwarding, it being the intention to place the parties concerned as nearly as possible in the same position in this respect as they would have been in the absence of such forwarding and the adventure continuing by original vessel for as long as is justifiable under the law applicable or under the Contract of Affreightment. The basis of contributions to General Average of the property involved shall be the values on delivery at original destination unless sold or otherwise disposed of short of the destination; but where none of the cargo is carried forward in the vessel, she shall contribute on the basis of her actual value on the date she completes discharge of her cargo.
>
> […]
>
> 2. To furnish particulars of the value of the said Cargo as may have been provided by cargo or the shippers or owners thereof, supported by copy of detailed Cargo Manifest(s) covering the Cargo, Bills of Lading and by commercial invoices rendered or, where there is no such invoice, to accept the valuation of the Cargo as estimated by an independent Cargo Valuer as instructed by the Average Adjusters on the basis of the Cargo Manifest(s), and if insufficient information is available, a value of USD25,000 per TEU to apply.
>
> 3. To make one or more payment(s) on-account of such sum or sums as will be certified by the Average Adjusters to be due from Cargo and payable in respect thereof by the Shippers/Consignees/Cargo Owners."

12. The LOU was provided under cover of an e-mail dated 25 September 2007 which was addressed to SHH, copied to HFW, and read as follows:-

> "I enclose herewith a scanned copy of the GA Letter of Guarantee provided by AP Moller-Maersk A/S dated 6/09/07 on behalf of all cargo interests.
>
> This guarantee is provided on the basis that any liability on the part of cargo to contribute in GA arising out of this incident is agreed between owners and Charterers or determined by the English High Court of Justice in the event GA liability is disputed"
>
> I will forward the original L/G to you when received."

Following the provision of the LOU the remaining containers were discharged from the vessel at Tema, and she sailed to Gdansk for repairs. The repairs were undertaken between 26 November 2007 and 21 February 2008. The vessel was surveyed by Mr Bowman on behalf of the Owners and by Mr Gordon on behalf of Maersk. She was also inspected by Mr Sandomeer, a German surveyor instructed by SHH.

13. It was subsequently agreed that SHH would provide a draft copy of their adjustment to Maersk for consideration before it was finalised. The draft was provided to HD on 9 December 2010. It concluded that 79.55% of the bottom damage and 100% of the propeller damage was sacrificial damage, and that the amount due from cargo interests was US$ 6,304,663.92 (US$ 6,039,827.26, plus US$ 264,836.66 under the non-separation agreement). The final adjustment ("the Adjustment") was published on 10 January 2012. It concluded that 82.17% of the bottom damage, and all of the damage to the propeller, was sacrificial damage and that the amount still due from cargo interests (after the payment on account referred to below) was US$4,254,985.53 (i.e. a total of US$ 3,990,092.50 and US$ 264,893.48, those figures appearing in the Adjustment). The correctness of these conclusions is disputed by Maersk. Both the draft and final adjustments were based, to a large extent, on the opinions formed by Mr Stanley of JSL Marine Associates Ltd, who had been appointed by SHH.

14. Maersk's case was originally that the proper amount legally due from and payable by cargo interests was US$2,803,080.31, and in July 2011 it made a without prejudice payment on account of US$2,500,000. Maersk no longer pursues the suggestion that US$714,500 should be credited to it, to reflect the costs saved as a result of it putting up security on behalf of all cargo interests. On Maersk's case the proper amount legally due from cargo interests is US$3,517,580.31 and on 14 March 2014 a further payment on account of US$1,017,580.31 was made to reflect this.

15. The Owners contend that Maersk is obliged to pay the full amount stated in the Adjustment provided only that the Adjustment was prepared in accordance with the York-Antwerp Rules, and that Maersk is bound by the findings of fact made by SHH in the Adjustment and by SHH's assessment of their own costs.

The preliminary issues

16. The preliminary issues to be decided are as follows:

(1) Whether the defendant is bound, on a proper construction of the terms of the Letter of Undertaking, to pay the proportion of any general average and/or Special Charges that is properly and legally ascertained to be due, in accordance with the York Antwerp Rules 1994, from the Cargo (or the Shippers or Owners thereof) under the Adjustment, the Defendant being bound by such factual determinations as the Average Adjusters have made in the Adjustment.

(2) If the answer to Issue 1 is yes, whether the Claimant is nonetheless estopped by representation from asserting that the Defendant is bound to pay the proportion of any general average and/or Special Charges that is properly and legally ascertained to be due, in accordance with the York Antwerp Rules 1994, from the Cargo (or the Shippers or Owners thereof) under the Adjustment, the Defendant being bound by such factual determinations as the Average Adjusters have made in the Adjustment.

(3) Alternatively, if the answer to issue 1 is yes, whether the LOU should be rectified as follows:

> "1. To pay the proper proportion of any General Average and/or Special Charges which may hereafter be ascertained to be due from the Cargo or the Shippers or Owners thereof under an Adjustment prepared by the appointed Average Adjusters in accordance with the Charterparty, dated 16th August 2004, and/or the Bills of Lading issued by us or SCL, and which is legally due from and payable by the Cargo or the Shippers or Owners thereof."

(4) If the answer to issue 1 is yes and to issues 2 and 3 is no, whether or to what extent the Defendant is bound:

a. by the Adjusters' determinations referred to in paragraph 9.a. of the Defence;
b. by the Adjusters' determination of their proper fees,

as referred to in paragraph 9.b.i. of the Defence; and

c. by the Adjusters' determination of the sum due from cargo interests under the Non-Separation Agreement.

17. At the trial there was oral evidence from Mr Chamberlain of HFW and Mr Wallis of HD.

Issue (1) – construction of the LOU

Factual matrix

18. Maersk submits that the following background matters are of particular relevance in construing the LOU:

(1) The fact that, as a matter of English law, it is well established that the parties are not bound by a General Average Adjuster's conclusions. The question is therefore whether Maersk has contracted out of its right to challenge the adjustment. If there is any doubt about this it should be resolved *contra proferentem* in favour of Maersk.

(2) The fact that Average Adjusters do not act as arbitrators or quasi legal tribunals.

(3) The fact that, before the LOU was tendered, both parties were aware of the fact that the vessel had suffered extensive bottom damage both as a result of the grounding and as a result of the refloating operation. Both parties were aware that a substantial dispute as to what percentage of the relevant repair costs was recoverable in General Average and what percentage would have to be borne by the Claimant without recourse to others was a real possibility.

(4) The fact that, because a General Average Adjustment is not a quasi legal or arbitral process, it is not an appropriate forum for deciding complicated contested issues. Any party claiming to recover in General Average will have to provide details of the cost which it claims is recoverable. Any party liable to contribute in General Average will have to provide evidence as to value. It is then for the adjuster to form a view as to which claims to allow in General Average and how much each party must contribute towards them. None of the parties has any right to put in factual, still less expert, evidence on disputed points and none of the parties has any right to make submissions (still less require a hearing of any kind). Although the Adjuster must act impartially, his role is not to determine disputes between the parties.

19. Against this background Maersk submits that it is inherently improbable that it would give up its right (at least in the first instance) to dispute the Average Adjuster's determination of the amount which should be allowed in General Average.

20. In response the Owners stress that it is important to distinguish between the position of cargo interests and Maersk. The liability to contribute in General Average is owed by cargo interests. It is accepted that the Adjustment will not be determinative of that liability. However, Maersk were not the cargo owners. This is a case of independent contractual arrangements being made with a party which, whilst it might be interested in the adventure, has no interest in the cargo. The Owners submit that Maersk's position is analogous to that of an on demand guarantor. A third party is making a promise to pay which is independent of the underlying legal rights and liabilities.

21. The parties in this case concluded a mutually beneficial bargain.

22. The Owners had the right to exercise a possessory lien over the containers and their cargoes until General Average security had been provided by all interested parties. Given the number and variety of cargo interests that could have taken a very considerable period of time. It was in Maersk's interests to minimise the delay involved both from the point of view of its commercial reputation and of its liability as time charterer. This was no doubt an important reason for the provision in the time charter whereby Maersk was to provide temporary security and also for the expedient decision taken by Maersk to offer permanent security rather than seeking itself to substitute temporary security with a full set of securities from cargo interests.

23. The main advantage to Owners of the LOU was that they now had a single security instrument from a substantial concern with agreed terms (including jurisdiction) rather than a series of separate securities from various individual cargo interests on such terms as might be negotiated.

24. The Owners accept that if the Adjustment required what turned out to be an overpayment under the LOU of cargo interests' actual legal liability then (without making any formal concession) the overpayment could be recouped from them. That could be done by Maersk, if it had an assignment. Even if it did not, as the Owners recognised, it might well have rights of or analogous to subrogation against Owners. Conversely, if the LOU required an underpayment to be made then the Owners would be left with unsecured claims against cargo interests.

25. The Owners did not know if Maersk would be obtaining assignments of cargo interests' rights in return for the provision of General Average security, although they anticipated that it might do so. There was evidence that Maersk did request such assignments, although it was Mr Wallis's evidence that they were rarely obtained.

26. The Owners and Maersk had good commercial relations, and they both knew SHH well and had confidence in them. Mr Wallis accepted that SHH had a duty to be careful and fair.

27. Against that background, whilst the Owners recognised that Maersk could be prejudiced if it was required to "pay first, argue later", they submit that there is nothing inherently improbable or uncommercial about such a bargain being struck.

The language of the LOU

28. The critical provision is clause 1 whereby Maersk undertook "to pay the proper proportion of any General Average and / or Special Charges which may hereafter be ascertained to be due from the Cargo or the Shippers or Owners thereof under an Adjustment…"

29. The Owners submit that this is clearly and unequivocally an undertaking to "pay" such amount as may be "ascertained to be due" under the Adjustment. The undertaking is unconditional and absolute.

30. Maersk submits that the undertaking is only to pay a "proper proportion" of the sum ascertained to be due, and that means a sum which is properly and legally due. Further or alternatively, Maersk is only obliged to pay sums where the contributing values have been determined as a "proper proportion".

31. As a matter of language I prefer the Owners' construction. In particular:

(1) There is a clear undertaking to pay.
(2) That is to be contrasted with the obligation in clause 3 to make payment "on account".
(3) The payment is to be of a sum "ascertained to be due". To "ascertain" means to make certain. "Due" connotes due and payable.

> (4) The sum so ascertained is to be as set out "under" the Adjustment.
> (5) There is no suggestion that the sum ascertained to be due under the Adjustment is only conditionally or provisionally due, nor is there any procedure or mechanism laid down as to when and how it becomes unconditionally due.
> (6) The clause says nothing about the sum being legally due.
> (7) The clause does not even say that it has to be properly due.
> (8) The only reference to "proper" is in relation to "proper proportion".
> (9) In the context of General Average that it is to be understood as a reference to Cargo's pro-rated General Average liability – i.e. its appropriate proportion of the overall liability.

32. I consider that Maersk's argument has to and does place undue weight on the words "proper proportion". If the words had been "proper amount" or "proper sum" then there would be more force in the argument. However, the adjective "proper" is used in relation to "proportion". That provides a particular context, and a context which relates to one aspect of General Average (pro-rating) rather than the amount or sum due by way of General Average.

33. I also consider that Maersk's argument also affords insufficient weight to the fact that the sum payable is that which is "ascertained" to be due. That connotes a determination of the amount to be paid.

34. Some support for the Owners' construction of the LOU is to be derived from the authority most in point, namely *The Jute Express* [1991] 2 Lloyd's Rep. 55. There the average bond was in materially the same terms as clause 1 of the LOU save for additional words at the end of the clause which were repeated in the payment on account clause. The bond was on the following terms:

> "In consideration of the delivery to us or to our order on payment of the freight due, of the goods noted above we agree to pay **the proper proportion of any salvage and/or general average and/or special charges which may hereafter be ascertained to be due from the goods or the shippers or owners thereof under an adjustment** prepared in accordance with the provisions of the contract of affreightment governing the carriage of the goods or, failing any such provision, in accordance with the law and practice of the place where the common maritime adventure ended ***and which is payable in respect of the goods by the shippers or owners thereof***.
> We also agree to: (i) . . . (ii) make a payment on account of such sum as is duly certified by the average adjusters to be due from the

> goods ***and which is payable in respect of the goods by the shippers or owners thereof****. "* (emphasis added)

35. In that case the bond issuer was the cargo receiver rather than an intermediary party such as Maersk. It was argued that the bond obliged its issuer to pay the sum ascertained due by the average adjusters. That argument was rejected. Having noted that the words italicised above appeared twice, Sheen J said (p. 61 rhc):

> "Unless the words ‘‘and which is payable in respect of the goods by the owners thereof’’ add a qualification to the agreement to pay the proper proportion of the general average which has been ascertained, those words would be surplusage. They have been inserted for a purpose.
>
> If the meaning of a document is clear then effect must be given to it regardless of the consequences. But if there is an ambiguity I prefer to resolve that ambiguity with a construction that makes good commercial sense. Counsel for the cargo-owners submitted that the words of the average bond mean that when the adjustment has been made and stated in accordance with the York-Antwerp Rules 1974 it is not open to the cargo-owners to set up actionable fault as an answer to a claim on the bond. If that is the correct construction of the bond the consequence is that the cargo-owners are obliged to pay the amount stated by the average adjuster and thereafter recover from the shipowner, if they can, such amount as might be due to them in respect of a fault of the shipowner. Such a claim by the cargo-owners would probably have to be made without security.
>
> I do not see an ambiguity in the average bond. I have been left in no doubt that the words “and which is payable” mean “and which is legally due”. They preserve the right of the cargo-owners to challenge the amount said to be due to the shipowners".

36. The basis of Sheen J’s decision that the obligation under the average bond was to pay that which was actually, factually and legally, due was therefore the appearance in the bond, twice, of the words "and which is payable in respect of the goods by the shippers or owners thereof".

37. Whilst it is fair to observe that Sheen J does not actually state what his decision would have been if those words had not been present, if the bond would have the same meaning regardless then there would have been no need to stress the significance of those words or that they had been “inserted for a purpose”.

38. I therefore accept that the decision does provide some support for the Owners' construction. On any view it provides a clear and well established precedent as to how to achieve the effect contended for by Maersk, namely by the addition of the words found to be critical in that case. No such wording has been used in this LOU.

39. In *The Jute Express* Sheen J held (at p. 61 lhc-rhc) that:

> "Despite argument to the contrary, I have no doubt that the words "proper proportion" mean pro rata according to the values of the ship and cargo."

40. Maersk relied on this statement in support of its further or alternative case that the binding ascertainment in the Adjustment of the amount of General Average due from cargo does not extend to the ascertainment of the "proper proportions" i.e. to the valuations of the various interests involved in the maritime adventure. In this case that it is of critical importance on the facts as the assessment of the vessel's contributory value includes added value based on the Adjuster's determination of the sacrificial damage, the very matter in issue.

41. I agree, however, with the Owners that this serves to illustrate the implausibility of Maersk's construction. It makes little sense for the parties to agree that the sum ascertained to be due in the Adjustment is payable whilst at the same time agreeing that constituent elements of the sum ascertained to be payable may be challenged. Valuation is an intrinsic part of the ascertainment which the parties have agreed to be binding. In my judgment the words "proper proportion" mean the pro-rated proportion, as Sheen J stated. They are descriptive rather than prescriptive words.

Conclusion on construction

42. For the reasons set out above, I consider that the Owners' construction accords both with the natural and ordinary meaning of the words used in the LOU and relevant authority of many years standing.

43. I do not consider that the "factual matrix" matters relied upon by Maersk require or even point to a different intended meaning. For the reasons given by Owners, as addressed above, the Owners' construction is not unreasonable, uncommercial or inherently improbable.

44. The parties' agreement reflects a bargain made between two parties in good commercial relations, with benefits and drawbacks for both sides. Further, there are reported examples of like agreements being made in the General Average context – see, for instance, the General Average Guarantee in *Tharsis Sulphur & Copper Co. Ltd. v Loftus* (1872-73) LR8 CP1 and the insurance policy guarantee in *Attaleia Marine Co Ltd v Bimeh Iran (Iran Insurance Co), The "Zeus"* [1993] 2 Lloyd's Law Rep. 497. It is similar to an on-demand guarantee dependent on certification, a far from unusual contractual arrangement.

45. For these reasons, and those given by the Owners, in my judgment the proper construction of the LOU is that it does oblige Maersk to pay the sum ascertained to be due in the Adjustment. That sum may in fact be an overpayment or an underpayment. If it is an overpayment then Maersk may have means of recourse against Owners. If it is an underpayment then Maersk is free of any further liability and the Owners are left with unsecured claims against various cargo interests for the balance.

46. The answer to preliminary issue (1) is therefore "Yes".

Issue (2) – estoppel by representation

47. For there to be an estoppel by representation it is necessary to establish:

(1) a clear and unequivocal representation of fact by the representor;
(2) reliance on that representation by the representee; and
(3) that it would be inequitable to allow the representor to resile from the representation made.

48. The alleged representation made in this case is that:

> "by accepting the LOU on the basis set out in Hill Dickinson's [email], the Claimant unequivocally represented that it agreed that the LOU was provided on that basis"; and that "[Maersk] relied on the said representations in that it permitted the Claimant to retain the LOU and did not enter into any further negotiations as to the wording of the LOU. In the premises it would be unconscionable for the Claimant to advance the assertions made [in the Reply]":

49. Even if one assumes that this involves a representation of fact, it is apparent that the alleged representation is founded on silence/inaction and is therefore premised on the Owners being under some duty to speak.

50. A duty to speak may arise where "a reasonable man would expect the person against whom the estoppel is raised, acting honestly and responsibly, to bring the true facts to the attention of the other party known by him to be under a mistake as to their respective rights and obligations" – see *The Lutetian* (1982) 2 Lloyd's Rep. 140 per Bingham J at 157. As Bingham J observed in that case at p.158: there is "a duty not to conduct oneself in such a way as to mislead".

51. In the present case Maersk stresses that the email was sent to a solicitor, Mr Chamberlain, and that under the Solicitors' Code of Conduct there are circumstances in which a solicitor should act so as to not take unfair advantage. This was not disputed by Mr Chamberlain. However, his evidence was that he was unaware that any mistake had been made.

52. As Mr Chamberlain explained, the context was one in which the negotiation of the terms of the LOU had been carried out between SHH and HD. He had been copied in on some of the exchanges and had provided some advice to SHH but he had not been directly involved in the negotiation. This is reflected in the fact that the critical email was sent to SHH rather than HFW and was merely copied to Mr Chamberlain.

53. Mr Chamberlain's evidence was that he did not take any particular note of the covering email at the time. The important matter was the provision of the signed LOU. It was "job done". Now that the LOU had been signed matters could move on. The covering email was not addressed to him and did not call for any response to be made. Nor was one sought thereafter. I accept that evidence. Mr Chamberlain, for understandable reasons, did not address his mind to whether any mistake had been made. In such circumstances he can have been under no duty to speak or act.

54. Even if Mr Chamberlain had addressed his mind to the meaning of the covering email it would still not have been clear to him that any mistake had been made. As he explained, had he done so he would have understood that Mr Wallis was simply proposing that "any liability on the part of **cargo** to contribute in GA" should be determined by the High Court: in other words that the email was concerned with matters of jurisdiction as between Owners and cargo interests; not with the nature of the undertaking given by Maersk under the (now signed) LOU.

55. Whilst Maersk and Mr Wallis sought to criticise this hypothetical understanding of Mr Chamberlain, it is a plausible interpretation of what is on any view an unclear email. As Mr Wallis frankly acknowledged in evidence, when it was put to him that the email was not clear – "I regret that that may be the case".

56. It follows that Maersk do not come close to establishing that any representation was made as alleged. On my findings, there was no failure to act honestly or responsibly or any impropriety or indeed any inequity in this case.

57. The answer to preliminary issue (2) is "No".

Issue (3) - rectification

58. Rectification is claimed on the basis of common mistake.

59. For there to be rectification for common mistake it is necessary to establish the following:

(1) The parties had a continuing common intention, whether or not amounting to an agreement in respect of a particular matter in the instrument to be rectified;
(2) There was an outward expression of accord;
(3) The intention continued at the time of the execution sought to be rectified; and
(4) By mistake, the instrument did not reflect that common intention.

See *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 A.C. 1101 at [48] per Lord Hoffman citing with approval the requirements "succinctly summarised" by Peter Gibson LJ in *Swainland Builders Ltd v Freehold Properties Ltd* [2002] 2 E.G.L.R. 71 at 74 para. [33]*; Chitty on Contracts* (31st Edition) at para. 5-115ff.

60. In the *Chartbrook* case Lord Hoffman stated, *obiter,* that an objective approach should be taken when considering whether there is a continuing common intention. However, this creates a "conundrum" since the objective manifestation of the parties' common intention at the time the contract is made is the contract itself – see the judgment of Toulson LJ in *Daventry District Council v. Daventry & District Housing Ltd* [2012] 1 WLR 1333 at [159]. Further rectification "exists for the correction of mistakes. In order to be able to decide whether there has

been a relevant mistake, evidence of the parties' actual understanding and intention is admissible" – *ibid* at [158].

61. In *Daventry* the Court of Appeal considered that the court should follow *Chartbrook* even though it was *obiter*. However, there were particular reasons for doing so in *Daventry* and it may be said that the majority (Lord Neuberger and Toulson LJ) were not stating or deciding that *Chartbrook* should be followed in other cases. This view has been expressed extra-judicially by Lord Toulson in a lecture: "Does Rectification require rectifying". In that lecture Lord Toulson draws attention to the Court of Appeal decision in *Britoil plc v Hunt Overseas Oil Inc.* [1994] CLC 561 and suggests that aspects of *Chartbrook* are inconsistent with the majority Court of Appeal decision in *Britoil.* As he observes, "in principle a court should follow a binding decision of the Court of Appeal rather than a later opinion expressed obiter by the House of Lords".

62. It is not necessary to determine these important questions in this case since whatever approach is adopted, the claim for rectification must fail on the facts.

63. First, for there to be an "outward expression of accord" the Owners would have had to agree to the terms of the email. They never responded to the email nor, for reasons already given, were they under any duty to do so. There was no acceptance and therefore no accord, as alleged or at all. Nor did Mr Chamberlain or the Owners ever share Mr Wallis and Maersk's understanding of the email. The requirements of outward expression of accord and continuing common intention were not met, either objectively or subjectively.

64. Secondly, the "accord" has to be made and expressed before the instrument is drawn up and the contract made. In this case there was no such prior "accord". The contract was made at the latest when the signed LOU was provided. In fact all the terms of the LOU had been agreed on 18 September 2007.

65. For (at least) these reasons the claim for rectification must be rejected.

66. The answer to preliminary issue (3) is "No".

Issue (4) - Whether or to what extent the Defendant is bound:

a. by the Adjusters' determinations referred to in paragraph 9.a. of the Defence;

b. by the Adjusters' determination of their proper fees, as referred to in paragraph 9.b.i. of the Defence; and
c. by the Adjusters' determination of the sum due from cargo interests under the Non-Separation Agreement.

67. In light of my conclusions on Issues (1), (2) and (3) the answer to Issue (4)a. is "Yes". The same answer must be given to Issue (4)b. since the Adjusters had ascertained their proper fees, as General Average expenses, under the Adjustment. The Answer to Issue (4)b. is therefore "Yes". As for Issue (4)c., by the time of trial it was common ground that the determination of sums due from cargo interests under the Non-Separation Agreement had been carried out in accordance with the York Antwerp Rules 1994. The only remaining issue there was whether Maersk was bound by the Adjusters' determination of their proper fees for the separate adjustment required in accordance with that Agreement. That issue was an aspect of Issue (4)b. and must be resolved accordingly. The Answer to Issue (4)c. is therefore also "Yes".

Conclusion

68. For the reasons outlined above, the preliminary issues are to be answered as follows:

Issue (1) – "Yes".
Issue (2) – "No".
Issue (3) – "No".
Issues (4) a.b.c. – "Yes".