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Case Nos: CL-2017-000627 & CL-2017-000637

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: 2 March 2018

Before :

MR JUSTICE ANDREW BAKER

- -

Between (Case No. 627):

SONGA CHEMICALS AS	**Claimant**
- and -	
NAVIG8 CHEMICALS POOL INC	**Defendant**

Between (Case No. 637):

NAVIG8 CHEMICALS POOL INC	**Claimant**
- and -	
GLENCORE AGRICULTURE BV	**Defendant**

- -

Alistair Schaff QC & Jocelin Gale (instructed by **Clyde & Co LLP**) for **Songa Chemicals AS**
Oliver Caplin (instructed by **Ince & Co LLP**) for **Navig8 Chemicals Pool Inc**
Timothy Young QC & Luke Pearce (instructed by **Reed Smith LLP**) for **Glencore Agriculture BV**

Hearing dates: 13, 14 February 2018

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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.

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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

Introduction

1. This judgment is the third in what will be a trilogy of judgments concerning a key feature of the International P&I Clubs' standard form for letters of indemnity ('LOIs') for delivering cargo without production of original bills of lading, following the judgments of Teare J in *The Bremen Max* [2009] 1 Lloyd's Rep 81 and *The Zagora* [2017] 1 Lloyd's Rep 194, all against the backdrop of the decisions of Cooke J and the Court of Appeal in *The Laemthong Glory* [2005] 1 Lloyd's Rep 632, 688. For this case concerns, as did *The Bremen Max* and *The Zagora*, whether a delivery made against such an LOI was to a party delivery to whom was requested by the LOI.

2. LOIs on the standard form are addressed to the owners of the carrying ship and, after opening with brief details of the ship, the voyage, the cargo and the bills of lading issued, make a request that the owners deliver the cargo "*to [R] at [P] without production of the original bill of lading*". 'R' is the receiver delivery to whom without production of the bill of lading is requested; 'P' is the requested place of delivery. The blank standard form provides that 'R' should be "*X [name of the specific party] or … such party as you believe to be or to represent X or to be acting on behalf of X*" and says for 'P', "*[insert place where delivery is to be made]*".

3. *The Bremen Max* is authority for the proposition, accepted before me, that delivery must have been made to 'R' as defined in the LOI delivery request, as a pre-condition to any possible liability under the substantive indemnification provisions of the LOI. When that case was decided, the standard form provided for 'R' to be defined simply as the name of the intended receiver. The wording by which delivery to a party believed to be, to represent, or to be acting on behalf of the named intended receiver is now sufficient was introduced to the standard form in response to that decision and was considered in *The Zagora*.

4. In this case, the named intended receiver under the relevant LOIs was Aavanti Industries Pte Ltd ('Aavanti') and it is common ground that the carrying ship, the m.t. *Songa Winds*, delivered the relevant cargo to Ruchi Soya Industries Ltd ('Ruchi').

5. If in taking delivery from the ship Ruchi in fact represented or was acting on behalf of Aavanti, the *Bremen Max* pre-condition was fulfilled without reference to the new wording of belief. Delivery to Ruchi as representative of Aavanti was delivery "*to Aavanti*". Likewise delivery to Ruchi acting on behalf of Aavanti. Whilst that was not formally conceded before me, I regard it as unarguably correct.

6. The main questions for determination by this judgment, if they can be determined now, are as follows:

    i) Was Ruchi, in taking delivery from the ship, representing or acting on behalf of Aavanti?

    ii) If not, did the shipowner believe that in taking delivery from the ship, Ruchi represented or acted on behalf of Aavanti?

iii) If not, was the relevant delivery from the ship deemed to be delivery to the party delivery to whom had been requested, by operation of clause 4 of the relevant LOIs?

7. For the reasons set out below, I find myself answering those main questions as follows:

i) Yes.

ii) I cannot say on the evidence as it stands; the question is not suited to final determination at this stage.

iii) No.

8. A further main question arises specific to claim no. 637 (I explain the procedural position below, when setting out the facts), namely whether the claim is defeated by clause 38 of the voyage charter between the parties. For the reasons set out below, my answer to this further main question is 'No'.

9. I consider at the end of this judgment the appropriate relief to be granted at this stage in the light of those answers. That gives rise to a number of further questions as to the meaning and effect of the relevant LOIs.

The Basic Facts

10. *Songa Winds* is an oil and chemical tanker owned by Songa Chemical AS ('Songa'), the claimant in claim no. 627. Pursuant to a pool agreement dated 27 November 2013, she was time chartered to Navig8 Chemicals Pool Inc ('Navig8'), the defendant in claim no. 627 and the claimant in claim no. 637, on time charter terms based on the Shelltime 4 form. On 2 February 2016, Navig8 fixed her on voyage terms based on the Vegoilvoy form to Glencore Agriculture BV, at the time called Glencore Grain BV, ('Glencore'), the defendant in claim no. 637, to carry a minimum of 19,000 m.t. of crude sunflower seed oil from Ilychevsk, Ukraine, for delivery at safe ports in the New Mangalore/Kakinada range in Glencore's option.

11. Pursuant to both charters, Interocean Shipping India Pvt Ltd ('Interocean') was appointed by Navig8 to act as agent at the discharge ports in India. The precise role played by Interocean arises for consideration under some of the arguments now before the court.

12. The vessel was chartered by Glencore, in part, so it could fulfil a contract concluded in late January 2016 to sell 6,000 m.t. of crude edible grade sunflower seed oil in bulk to Ruchi Agritrading (Pte) Ltd ('Agritrading'), a subsidiary or affiliate of Ruchi. The delivery term was C&F pumped out New Mangalore or Kakinada. The sale contract provided for property to remain with Glencore until payment.

13. The vessel loaded under the voyage charter at Ilychevsk in March 2016 and bills of lading consigned to order were issued dated 13 March 2016 naming Ruchi as the notify party.

14. After shipment, on or about 21 March 2016, Glencore's contract of sale with Agritrading was replaced by a contract to sell 6,000 m.t. to Aavanti on terms

materially back-to-back (save as to price) to those of two contracts dated 18 February 2016 by which Aavanti had contracted to sell (in aggregate) 6,000 m.t. to Ruchi.

15. In the event, c.4,000 m.t. was delivered to Ruchi from the vessel at New Mangalore and c.2,000 m.t. was delivered to Ruchi from the vessel at Kakinada. The exact quantities delivered are in evidence but do not matter for my purposes. Neither delivery was made against presentation of any original bill of lading.

16. Delivery otherwise than against bills of lading was requested by and on the terms of LOIs on the International Clubs' standard form, as follows:

    i) By two LOIs addressed to Glencore and dated 22 March 2016, Aavanti requested that delivery without production of bills of lading be made to Ruchi (or to such party as Glencore believed to be, to represent, or to be acting on behalf of Ruchi) ('the Aavanti LOIs'). One of these LOIs requested delivery of 4,000 m.t. "*at the port of MANGALORE, INDIA*", the other requested delivery of 2,000 m.t. "*at KAKINADA, INDIA*".

    ii) By LOIs addressed to Navig8 and dated 6 April and 13 April 2016, for 4,000 m.t. and 2,000 m.t. respectively, Glencore requested that delivery without production of bills of lading be made to Aavanti (or to such party as Navig8 believed to be, to represent, or to be acting on behalf of Aavanti) ('the Glencore LOIs'). Both of these LOIs requested that delivery be "*at New Mangalore or Kakinada, India*".

    iii) By LOIs deemed to have been issued by Navig8 addressed to Songa, otherwise on terms identical to the Glencore LOIs, Navig8 requested that delivery without production of bills of lading be made to Aavanti (or to such party as Songa believed to be, to represent, or to be acting on behalf of Aavanti) ('the Navig8 LOIs'). The deemed issue of the Navig8 LOIs, by operation of clause 87 of the time charter, is common ground between Songa and Navig8.

17. By paragraphs 1 and 2 of each pair of LOIs, the following substantive indemnification obligations were accepted if delivery was made as requested:

    1. *To indemnify you, your servants and agents and to hold all of you harmless in respect of any liability, loss, damage or expense of whatsoever nature which you may sustain by reason of delivering the cargo in accordance with our request.*

    2. *In the event of any proceedings being commenced against you or any of your servants or agents in connection with the delivery of the cargo as aforesaid, to provide you or them on demand with sufficient funds to defend the same.*

18. In relation to discharge at New Mangalore, clause 87 of the time charter was invoked, so that the first Navig8 LOI was deemed to be issued, by an email from Navig8 to the master of the vessel, copied to Interocean, on 6 April 2016 attaching a copy of the first Glencore LOI of that date and stating as follows:

    Please be advised the Charterers have presented the LOI as attached and same is acceptable to us, basis the contract we have with these charterers.

> *Navig8 hereby invoke the Owners P and I wordings to discharge the cargo without presentation of the OBL's at the Discharge port as Per Clause 87 of the governing TCP. Discharge to be carried out in line with instructions received by agents/terminal.*
>
> *The Receiver/ Quantity details as per the attached voyage charterers LOI.*
>
> *…*
>
> *Kindly Confirm all in order and master has been authorized accordingly to discharge to the named receiver as per the LOI.*
>
> *RIC: Agents / Please note the LOI invocation and have the cargo discharged accordingly to the rightful receivers.*
>
> *…*

19. A materially identical email was sent on 13 April 2016 invoking clause 87 of the time charter in relation to discharge at Kakinada, by reference to the second Glencore LOI of that date. I shall refer to these as the 'Navig8 Emails'.

20. In relation to the 4,000 m.t. delivered to Ruchi at New Mangalore, Glencore was also the beneficiary of a letter of undertaking issued by Mangalore Liquid Impex Pvt Ltd ('MLI') dated 31 March 2016 ('the MLI LOU'). That letter referred to an email request from Ruchi, stated that MLI would be receiving 4,000 m.t. "*In Favor Of Receiver [Ruchi] through MT Songa Wind*" and then stated MLI's undertaking "*that we will not give delivery of the cargo of 4000.000 MT to [Ruchi] till written instructions are given by [Glencore] and to / via local shipping agent [Interocean]*". The letter then stated that the release of the cargo in question would be fully in the charge of and controlled by MLI. At the date of the MLI LOU, Glencore had not been paid by Aavanti under the sale contract between them.

21. The MLI LOU was obtained by Aavanti and provided to Glencore at Glencore's request to enable Glencore to "*discharge to the third party tank*". Aavanti asked Glencore by email when providing the MLI LOU on 31 March 2016 to arrange to berth the vessel immediately. It is apparent, however, that Glencore did not do so, but waited for payment from Aavanti. That payment arrived on 6 April 2016 generating, firstly, confirmation by email from Glencore to Aavanti that Glencore would give its order for discharge immediately, secondly, the first Glencore LOI and thus in turn the first Navig8 Email and first Navig8 LOI, and, thirdly, an email from Aavanti to Glencore, in response to Glencore's confirmation that it would give the order for discharge, thanking Glencore for that confirmation and stating as follows:

> *Kindly note that, vessel arrived on 29.03.16 and we were ready to receive our cargo and have provided you with our LOI AND tank farm LOU as well to avoid a delay in berthing of vessel but due to late presentation of documents and non receipt of DO [i.e. delivery order] vessel could not get berthing on time. So, we will not be responsible for demurrage on this vessel.*

22. At New Mangalore, the vessel had arrived ready to discharge on 29 March 2016. After discharging 7,000 m.t. at Berth No.9 on 7-8 April 2016, for the account of a

different receiver, she shifted to Berth No.6 and there discharged the 4,000 m.t. for the account of Ruchi that gives rise to the arguments before me, completing that discharge at 06:30 hrs on 9 April 2016, and a final quantity of 2,000 m.t. for a third receiver, that discharge taking place between 09:54 hrs and 21:00 hrs that day. (Again, the precise quantities discharged were not those round figures, but that does not matter for present purposes.)

23. At Kakinada (with the same comment again about the precise quantities), the vessel arrived ready to discharge on 14 April 2016 and discharged at NRW1 South Berth a parcel of 4,000 m.t. for the account of a different receiver, discharging apparently between 12:30 hrs on 14 April and 19:42 hrs on 15 April and the 2,000 m.t. for the account of Ruchi, discharging between 10:18 hrs and 19:42 hrs on 15 April. I say that completion of discharge of the first parcel appears to have taken until 19:42 hrs on 15 April, because that is how Interocean's Statement of Facts for Kakinada reads. However, that same Statement of Facts also records a separate hose connection operation for the discharging of the Ruchi parcel. It is thus not clear to me that Mr Schaff QC is correct to submit, as he did, that Ruchi's 2,000 m.t. was discharged as a commingled part of a single discharge of 6,000 m.t. It may be that the 4,000 m.t. for the other receiver and the 2,000 m.t. for Ruchi were discharged at separate times (and the Statement of Facts, in error, recorded the completion of the second discharge twice); or it may be, again, that some of the 4,000 m.t. was discharged at the same time as the discharge of the 2,000 m.t., but through separate lines so there was no commingled discharge. As I explain below, this was effectively a summary judgment application; if the critical claim I identify below required a commingled discharge at Kakinada, there could be no summary judgment.

24. The purchase by Aavanti from Glencore appears to have been financed by Société Générale ('SocGen') and SocGen claims to be the lawful holder of the bills of lading for the quantities discharged against the LOIs. Neither Aavanti nor SocGen appears to have been paid for those quantities, whether by Agritrading, by Ruchi, or at all. Having obtained security for its claim by way of a letter of undertaking provided by Glencore, against a threatened arrest of the vessel or a sister ship under *in rem* proceedings commenced in Singapore, SocGen is now pursuing Songa in London arbitration under the bills of lading for damages for misdelivery.

25. Songa claims against Navig8, in claim no. 627 under the Navig8 LOIs, that in taking delivery from the vessel, Ruchi represented or was acting on behalf of Aavanti so that delivery was indeed to Aavanti as requested (see paragraph 5 above), alternatively that in effecting such delivery Songa believed Ruchi to represent or act on behalf of Aavanti, alternatively that the delivery to Ruchi is deemed by paragraph 4 of the Navig8 LOIs to have been delivery to Aavanti. In claim no. 637 under the Glencore LOIs, Navig8 makes the equivalent claim against Glencore.

26. By the Application Notices that came before me for hearing, Songa and Navig8 respectively sought what was described as interim declaratory and injunctive relief. The essential premise asserted in support of each application, however, was that there is no real prospect of defending the claim just stated (paragraph 25 above). Arguably that might not need to be established as to the merits, in order to justify interim relief if otherwise justified. However, Glencore having secured SocGen's substantive claim so that the claims for interim relief relate solely to funding the defence of that claim, I am not persuaded that damages would not be an adequate remedy for Songa,

respectively Navig8, were interim relief refused but with directions for an expedited process for the final determination of whether the LOIs have been triggered.

27. However again, if indeed there is no real prospect of defending the claim stated in paragraph 25 above, justice between the parties will be better served if on that basis I grant a final declaration by way of summary judgment, together with any further relief as may be appropriate at this stage upon the basis of such a final declaration. Very fairly, Mr Young QC for Glencore, and as a result Mr Caplin for Navig8, responding to the interim relief application, recognised and accepted that it had been made clear the merits were put as high as I have just indicated, that Glencore, respectively Navig8, had prepared and was prepared to seek to meet that claim as to the merits on its substance, and that he therefore did not resist what I have just said as to the proper course to adopt if I am persuaded by that claim.

28. As a result, the applications were argued upon the basis that in truth Songa, respectively Navig8, seeks a summary final judgment that the Navig8 LOIs, respectively the Glencore LOIs, were triggered by the deliveries to Ruchi. If and to the extent I need to do so in the circumstances, I allow the applications to be pursued on that basis, waiving any requirement to amend the Application Notices.

29. As will be apparent when I come to them, there are certain points that arise either only between Songa and Navig8 or only between Navig8 and Glencore. Except when dealing with those points, I shall refer to Songa's arguments and Glencore's arguments respectively as representing the case for and against the applications, reflecting the fact that in general Navig8, in the middle, passed those arguments on up and down the contractual chain. So as to avoid having to keep saying this in what follows, I make clear now, generally, that any conclusions on Glencore's liability expressed by reference to Questions (i)-(iii) are strictly subject to Question (iv).

Question (i) – Ruchi's Role

30. At the material time, Ruchi was Aavanti's buyer of the relevant quantities of sunflower seed oil but had not paid for them. It is not the most obvious of notions *a priori* to suppose that in taking delivery Ruchi represented or was acting on behalf of Aavanti. That is because in many cases a seller will no more want that its buyer get hold of the cargo without paying for it than that it be stolen by a stranger. But everything depends on the particular facts. In the present case, the evidence on these applications discloses the following facts.

31. Aavanti by its LOIs unconditionally requested Glencore to procure delivery to Ruchi although Aavanti had not been paid and without reference to whether it was going to be paid before delivery. (In contrast, Glencore only made its requests, by its LOIs, that delivery be made to Aavanti, after it had been paid by Aavanti.)

32. There was a standing practice, between Aavanti and Ruchi, for delivery to be made to Ruchi of cargo quantities sold to it by Aavanti without production of bills of lading. Indeed, Glencore says that practice was sufficiently well established, and known to SocGen, that SocGen's bill of lading claim against Songa should fail. Glencore has co-operated in the defence of SocGen's claim to date (the present dispute over funding that defence notwithstanding) with a view to enabling Songa to pursue that line of argument as effectively as possible. The direct evidence I have of the Aavanti-

Ruchi practice comes from an affidavit of Rajiv Khandelwal, a director of Aavanti, sworn in Singapore on 29 June 2016 in support of an application by Aavanti for temporary protection from its creditors. That affidavit does not quite state in terms that the practice extended to cases in which Ruchi had not paid for the cargo prior to delivery. But I agree with Mr Schaff QC for Songa that the plain tenor of Mr Khandelwal's evidence is that it did. The particular context for his explanation of the practice was precisely that of claims by banks, including SocGen, who had financed purchases by Aavanti but not been reimbursed; and the general context he gave for the Singapore application was that (a) Ruchi owed Aavanti c.US$135 million for products delivered to it under the practice he describes and (b) bills of lading held by SocGen where it had financed Aavanti's purchase of those products would not secure SocGen's lending except if it could claim against the bill of lading carriers, because the products were delivered straight to Ruchi.

33. I am in no position to assess SocGen's awareness, if any, of the practice Mr Khandelwal describes and I offer no view on whether such awareness might defeat its misdelivery claim (which is a matter for the London arbitrators). But I think it clear that delivery to Ruchi, at Aavanti's direction, though Ruchi had yet to pay for the subject quantities, was within the standard pattern of the trading between Aavanti and Ruchi.

34. Ruchi was provided by Aavanti with a copy of the Aavanti LOIs as issued to Glencore, enabling Ruchi in fact to procure delivery to it of the subject quantities. When asked to say how it was that Ruchi took delivery, Interocean explained that Ruchi had presented the Aavanti LOIs to Interocean and those LOIs had clearly stated that the cargo could be released to Ruchi without production of bills of lading. As a result, it is clear from all of the discharge documents generated by Interocean as vessel's agent appointed by Navig8, Ruchi was taken by Interocean to be the designated receiver nominated by Aavanti.

35. For the New Mangalore quantity, Aavanti had made arrangements, evidenced and given effect by the MLI LOU, for discharge to be to MLI, to be held by it to Glencore's order for release to Ruchi but only when Glencore so authorised. Those arrangements were made at a time when Aavanti had not paid Glencore and served to protect Glencore's interests as unpaid seller. But they did not contemplate Aavanti ever taking delivery itself, or any protection of Aavanti's interests as unpaid seller. The only question was whether there would be a delay in the release of the New Mangalore quantity (i.e. its delivery) to Ruchi while Aavanti sorted out paying Glencore.

36. Delivery was in fact effected to Ruchi from the vessel at both discharge ports. Perhaps because that is common ground on the pleadings, the evidence I have does not descend into much detail as to precisely how that occurred (beyond what I have said in paragraph 34 above). For example, I cannot say whether the New Mangalore quantity was discharged to MLI as contemplated by the MLI LOU but with release to Ruchi already or simultaneously authorised by Glencore, or whether it was simply discharged directly to Ruchi since, in the event, Glencore was paid before discharge so that there was no need to interpose MLI into the delivery chain.

37. Aavanti had no representative office or other presence in India and no right to import cargo into India. It had not appointed anyone to receive the subject quantities of

sunflower seed oil on its behalf at New Mangalore or Kakinada (unless it be Ruchi, by the arrangements I have described above). There is no evidence hinting at any possibility that Aavanti may have had an intention at any time to do so (subject to the same qualification). In fact, it is plain from Mr Khandelwal's explanations that Aavanti indeed did not have any intention at any time to appoint anyone to take delivery (unless it be Ruchi, as the effect of the arrangements I have described).

38. Ruchi by contrast had its own dedicated tanks at both ports, owned by it and bearing its insignia. The overwhelming likelihood is, and it is also Glencore's witness evidence as to what actually happened, that except if the New Mangalore quantity was discharged to MLI's tank, any quantities discharged at New Mangalore or Kakinada intended for Ruchi under purchases from Aavanti will have been discharged into those Ruchi tanks. As I noted above, if the New Mangalore quantity was still discharged to MLI's tank although Glencore had been paid before discharge, it is common ground that it was nonetheless delivered by the vessel to Ruchi.

39. The change in wording between the Aavanti LOIs and the Glencore/Navig8 LOIs, the former requesting delivery to Ruchi, the latter requesting delivery to Aavanti, originated with Glencore as recipient and beneficiary of the former, issuer and obligor under the latter, but it has not been explained in evidence by Glencore. It is plain, however, from the facts I have already summarised (and not only because if it were otherwise Glencore would be the party with evidence of it) that the change in wording did not result from a change of heart on Aavanti's part, having not yet been paid by Ruchi, as to whether the quantities in question should be delivered to Ruchi.

40. I think Mr Schaff QC was right to submit, in those circumstances, that the case for Glencore is the somewhat extraordinary one that delivery was made by the vessel precisely as intended, desired and requested at the time by Aavanti, yet LOIs predicated on delivery to Aavanti might not be engaged. The language of the Glencore and Navig8 LOIs does not suggest, let alone compel, such an uncommercial conclusion. To the contrary, as it seems to me the only sensible conclusion to be drawn from the matters of fact set out above is that in taking delivery from the vessel, as in fact intended and requested by Aavanti, Ruchi was acting for Aavanti, as against Glencore (as Aavanti's seller) and Songa (as bill of lading carrier). Thus, Aavanti expressed themselves legally accurately (as well as, no doubt, commercially) when saying that by the arrangements they had made, under which delivery was to be made to Ruchi, "*we [Aavanti] were ready to receive our cargo*" (see paragraph 21 above).

41. If Aavanti had been the lawful holder of the relevant bills of lading at the time, but unable for some reason to produce them to the master, that being the classic case catered for by the use of this type of LOI, no misdelivery claim by Aavanti could have succeeded. Songa faces a misdelivery claim not because it delivered to Ruchi rather than to Aavanti, but because it delivered to Ruchi (as intended and nominated by Aavanti) rather than to SocGen. (Again, I emphasise, I intend by that no comment as to the merits of the misdelivery claim. They will depend on the validity of SocGen's claimed title to sue as holder of the bills, the defence said to arise out of its alleged awareness of the trading practice between Aavanti and Ruchi, and any other issues that may be put before the London arbitrators.)

42. As has become the habit, the parties' contentions as to the meaning and effect of the Glencore and Navig8 LOIs were prefaced by the citation of various recent authorities

at the highest level as to the principles generally to be applied in construing commercial contracts. In this case, Mr Caplin presented also a complex overlay concerning guarantees and other transactions intended to a greater or lesser degree to operate independently of underlying primary transactions or to be acted on by third parties without reference to the terms of such transactions.

43. But the case does not turn on any such considerations. So long as the opening proposition in paragraph 5 above is sound, so that delivery in fact effected to Ruchi can be delivery to Aavanti upon a proper reading of the LOIs, the issue is one of fact, or at most the characterisation of the facts, concerning the role Ruchi played.

44. Further, I am satisfied that there is no basis in the evidence for supposing that at a trial there might be any material change in or addition to the court's understanding of the facts in that regard. Echoing my observation in paragraph 30 above, on different facts there might be a need to investigate how it came to be that an unpaid seller's buyer managed to take delivery, if the contention was that the buyer took delivery from the ship on behalf of the seller but in doing so acted seemingly contrary to the seller's wishes or intentions. But here, Aavanti's wishes and intentions are documented by its contemporaneous communications and were that Ruchi should take delivery; and the evidence is that Glencore has undertaken a comprehensive search for additional material documents, finding none. The suggestion by Mr Young QC that something affecting the correct finding to make as to Ruchi's role might turn up in disclosure from Songa or Navig8 seemed to me to be entirely speculative.

45. Mr Young QC's argument for Glencore against the conclusion I have reached that Ruchi took delivery for Aavanti, within the meaning of the Glencore and Navig8 LOIs, to my mind failed to confront, and in any event had no answer to, the cumulative weight and effect of the full facts. It concentrated, rather, on countering each piece of evidence separately, contending in isolation that it did not prove the case. Thus, for example and most starkly, in supporting Navig8's application, Mr Biggs of Ince & Co, Navig8's solicitor, adopting a view advanced by Mr Theophani of Clyde & Co, Songa's solicitor, had said that when Aavanti wrote "*we were ready to receive our cargo*", that could only be read as a reference to Ruchi being ready to receive the cargo on Aavanti's behalf. Mr Young's submission in response was to say "*that is simply not what the email in question says*". In a superficial sense, he is right, the email says "*we were ready*" not "*Ruchi were ready on our behalf*". Beyond argument on the facts, however, the delivery arrangements to which Aavanti were referring when saying "*we were ready*" were the arrangements for delivery to Ruchi as Aavanti's nominated receiver, Aavanti being in no position and having no plan otherwise to take the cargo. Mr Biggs' interpretation of Aavanti's comment, given its context, is therefore plainly correct.

46. Similarly, Mr Young highlighted that the Aavanti LOIs nominating Ruchi to receive were issued two weeks or more before the Glencore LOIs referring to Aavanti and the deliveries themselves. Quite apart from the fact that Glencore has offered no evidence to explain its decision to alter the wording, any force in the consequent submission that the court cannot be sure that when the cargo was delivered Aavanti still wanted it to go straight to Ruchi, although Aavanti had not been paid, is removed by the clear evidence showing that is precisely what Aavanti still wanted. Far from having had any change of heart, Aavanti's stance was a complaint that Glencore had not procured delivery to Ruchi more promptly.

47. For all those reasons, in my judgment, and as Songa and Navig8 respectively contended, there is no real prospect of defending the claim that the cargo covered by the bills of lading referred to in the Glencore and Navig8 LOIs was delivered to Aavanti as requested in and by those LOIs. In short, the facts admit of only one answer to the question of Aavanti, nominally posed by paragraph 5 above, namely 'who was taking delivery for you?', that answer being 'Ruchi'. Pursuant to CPR 24 there will therefore be a declaration in each of the claims before the court, upon my determination that the subject cargo was delivered to Aavanti within the meaning of the Navig8 and Glencore LOIs respectively, to the effect that the paragraph 1 and paragraph 2 indemnification obligations under those LOIs were and are engaged. The precise wording can be considered when this judgment is handed down.

48. That makes it unnecessary to consider an argument that arose only between Songa and Navig8 for an alternative way, so Songa contended, in which I could answer Question (i) in Songa's favour. I shall therefore deal with it very briefly, for completeness only. The argument was that because the Navig8 Emails charged Interocean, reading in copy, to "*note the LOI invocation and have the cargo discharged accordingly to the rightful receivers*", if Songa discharged under and in accordance with arrangements or instructions made or given by Interocean, then it must be taken that delivery was to Aavanti (including, that is, to someone representing or acting on behalf of Aavanti – see paragraph 5 above) so as to satisfy the LOIs. In short, I agree with Mr Caplin that the argument puts a weight upon what was said to Interocean in the Navig8 Emails that it cannot sensibly bear.

49. The premise of the argument was that Interocean was Navig8's agent, not Songa's. Even if that were true, all it would mean is that the master had been made aware by a "*reading in copy*" comment to Interocean that Navig8, as Interocean's principal, expected Interocean to make sure the cargo went to the right receiver. That does not somehow mean Ruchi was, or somehow must be taken as having been, acting for Aavanti, if it was not. If Ruchi was not so acting, the Navig8 LOIs were not engaged (subject to the arguments under Questions (ii) and (iii), below); if that came about through Interocean's error, responsibility for that as between Navig8 and Songa would be a matter for the time charter between them, not the Navig8 LOIs. (I doubt the premise of the argument in any event. It was founded upon a suggestion that Navig8 as time charterers had some general responsibility for discharge operations. But not so – this was a tanker time charter on the Shelltime 4 form, and see Shelltime 4, clause 16, if required. Interocean was appointed by Navig8 as the vessel's, i.e. Songa's, agent at the discharge ports, pursuant to Shelltime 4, clause 13(a). Any claim for an indemnity in respect of the consequences thereof – and without expressing any view as to the prospects of any such claim in relation to the current facts – would be a claim under that clause 13 for resolution under the time charter arbitration provision.)

50. Finally, as regards Question (i), my primary answer also renders it unnecessary to resolve an argument put by Mr Caplin for Navig8 against Glencore. Mr Caplin submitted that the deliveries had been to Interocean acting on behalf of Glencore's nominated receiver, even if Interocean was also (and generally) the vessel's agent; in other words that the facts here were materially those of *The Zagora*. Mr Caplin's valiant efforts to persuade me otherwise notwithstanding, those are simply not the facts of this case.

51. Since Songa prevails by reference to Question (i), and not on a basis that is unique to claim no. 627, Questions (ii) and (iii) also do not arise. As with the additional wrinkles under Question (i), I shall therefore deal with them quite briefly, for completeness only.

Question (ii) – Songa's Belief

52. A preliminary point arises of whose belief matters. As I noted in describing the standard form, it is designed to be addressed to the bill of lading carrier who owes the bill of lading delivery obligation. So the reference to delivering to a party "*you believe*" to be (or to represent or be acting for) the named intended receiver seems designed to be a reference to the belief of that carrier; in practice, that belief will or should be found in the mind of the master of the carrying vessel at the discharge port (personally or through his chief officer in charge of cargo operations), the master being in charge, in fact and in law, of whether, when and to whom the cargo under his care is discharged.

53. Following what I believe may be a common practice, however, each of the LOIs issued up the sales and charterparty chain, from Aavanti to Glencore to Navig8 to Songa, was addressed to its issuer's contractual counterparty, so that only the Navig8 LOIs are addressed to Songa, the bill of lading carrier. Mr Young QC was minded to submit, as regards the Glencore LOIs, that "*you believe*" referred, and referred only, to a belief actively formed in the mind of an individual who had the mind of Navig8. He rightly submitted that there was no sensible evidence of Navig8's actual belief, if any. There was only a bare assertion by Mr Biggs, unattributed as to source, if any, that Navig8 believed Ruchi to be acting for Aavanti.

54. Mr Young QC therefore sought to submit that Navig8's claim by reference to Question (ii) failed come what may, whatever I might make of any evidence as to the master's state of mind (or Songa's state of mind, separate from that of the master, if relevant). In doing so, he had though overlooked that the point was decided against him in *The Zagora*, at [39]:

> *Fourthly, it is said that Oldendorff Carriers [who were materially in Navig8's position] is not entitled to rely upon the belief of Mr Sinclair [the shipowner's head of operations] and the master that in delivering to Sea-Road [the equivalent of Ruchi] delivery was being given to Xiamen [the equivalent of Aavanti]. However, Oldendorff Carriers' obligations as owner under the voyage charterparty can only be vicariously performed by the owners: see NYK Bulkship (Atlantic NV) v Cargill International SA (The Global Santosh) [2016] 1 Lloyd's Rep 629; [2016] 1 WLR 1853 at paras 14 to 19 for an explanation of vicarious performance in a chain of charters. That being so Oldendorff Carriers must also be entitled to rely upon the beliefs of the owners' servants when vicariously performing Oldendorff Carriers' obligations.*

Mr Young QC accepted that what Teare J said there was squarely against him, so his submission became that in that regard *The Zagora* was wrongly decided. He provided no reasoned argument in support of that submission, however; and in my judgment, what Teare J said is sensible and plainly correct. The obvious focus of a provision, that belief that the person to whom delivery is made is (or represents or acts for) the named intended receiver, is the belief of the person by whom the delivery in question

is made, *viz* the carrier acting by the master. An interesting question might arise, I suppose, if on unusual facts the master believed himself to be delivering to the named receiver or a party taking the cargo for that receiver, but unknown to him an intermediate disponent owner with the benefit of an LOI in the standard form knew different; or if, the other way round, the intermediate disponent owner believed the party to whom delivery was being made was, or was taking the cargo for, the named intended receiver, but the master knew different. I do not need to consider these issues any further on the present applications.

55. On the facts, I agree with Mr Young QC that if – which is the premise on which Question (ii) would arise – Ruchi did not actually take the cargo as agent for Aavanti, for the purpose of the LOIs, then I would be in no position to rule by way of summary judgment that the master of the *Songa Winds* (or, if relevant, anyone else) had a sufficient belief to trigger the LOIs. Songa's evidence, in a witness statement of its solicitor, Mr Theophani of Clyde & Co, took the matter no further, for Songa, than did Mr Biggs' statement for Navig8. Its gist was that Songa must have had a sufficient belief because the contemporaneous documentary record suggests objectively that Ruchi was acting for Aavanti. But if, contrary to my conclusion, Question (ii) had arisen, then *ex hypothesi* the documentary record would not suggest that sufficiently clearly for present purposes.

56. If Ruchi did not, in taking delivery, do so as agent for Aavanti for the purpose of the LOIs, then I could not say on the present evidence whether Songa and/or Navig8 believed, to the contrary, that Ruchi did so. Summary judgment could not have been granted by reference to the language of belief in the LOIs; there would have needed to be a trial.

Question (iii) – Delivery Deemed Correct?

57. Paragraph 4 of the International Clubs' standard form, and therefore paragraph 4 of the Navig8 and Glencore LOIs, provides that:

> *If the place at which we have asked you to make delivery is a bulk liquid or gas terminal or facility, or another ship, lighter or barge, then delivery to such terminal, facility, ship, lighter or barge shall be deemed to be delivery to the party to whom we have requested you to make such delivery …*

58. Like paragraphs 1 and 2, the main indemnification provisions, paragraph 4 is also on the face of things premised upon delivery having in fact been effected as requested. However, to read paragraph 4 as thus qualified would be a nonsense and none of the parties suggested that reading. Like the law and jurisdiction provision at paragraph 7, plainly paragraph 4 is intended to be and must be given effect as an agreement that was binding upon delivery being given without production of bills of lading whether or not that delivery was in fact to a party delivery to whom was requested by the LOI.

59. The first issue under Question (iii) is whether the LOIs requested delivery at a bulk liquid terminal or facility (the other possibilities catered for by paragraph 4 being irrelevant on the present facts). In my judgment, they did not. They requested simply delivery at (the port of) New Mangalore or Kakinada. If and to the extent that greater specificity as to the place of discharge came outside the LOIs from Navig8, respectively Glencore, as charterers, any claim as regards the consequences of

following such orders would be a charter claim for arbitrators, not a matter for paragraph 4 of the LOIs.

60. Had the position been otherwise, it would then have been necessary to consider on the facts: whether greater specificity as to the place of discharge came from Navig8, respectively Glencore; the role of Interocean; and whether the discharge places were properly characterised as bulk liquid terminals or facilities. I am not persuaded that I would have been in a position to make summary final determinations on any of those points, but in the event they do not matter.

Question (iv) – Voyage Charter Clause 38

61. This final question, arising in claim no. 637 between Navig8 and Glencore, concerns the effect, if any, of clause 38 of the voyage charter on Glencore's liability under its LOIs. Glencore says that it has no liability because no claim on the Glencore LOIs was made by Navig8 within three months after the LOIs were respectively issued. Mr Caplin therefore referred to this as a contractual 'time bar' defence. Mr Young QC cavilled at that because, as he developed it, the argument is that the Glencore LOIs had a limited but renewable period of validity that expired without being renewed. Thus analysed, the defence is one of 'not covered' rather than 'covered but claim made too late'.

62. Taking the analogy of liability insurance, Mr Young QC's argument was that because of clause 38 of the voyage charters, the Glencore LOIs provided a three-month 'claims made' period of cover, renewable at Navig8's option but not in fact renewed. Mr Caplin contended that clause 38 of the voyage charter had no impact at all on Glencore's liabilities under its LOIs, since the LOIs did not incorporate the provision in clause 38 relied on by Glencore, and in any event that provision, if it applied to the LOIs, did not create a 'claims made' period of cover, it merely qualified paragraph 5 of the LOIs in a way that had no impact on the facts of the case.

63. Clause 38 of the voyage charter was in the following terms:

> *IF BILLS OF LADING ARE NOT AVAILABLE AT THE DISCHARGE PORT, OWNER TO RELEASE A CARGO AGAINST RECEIPT OF CHARTERER'S LETTER OF INDEMNITY IN THE FORM OF OWNERS P&I CLUB WORDING BUT SAME WITHOUT BANK GUARANTEE AS PER OWNERS P&I CLUB WORDING.*
>
> …
>
> *THE PERIOD OF VALIDITY OF ANY LETTER OF INDEMNITY WILL BE 3 MONTHS FROM DATE OF ISSUE. THE PERIOD MAY BE EXTENDED, AS NECESSARY, UPON OWNERS WRITTEN REQUEST FOR FURTHER EXTENSION AND CONFIRMATION (AT TIME OF EXTENSION REQUEST) THAT 1/3 ORIGINAL BILLS OF LADING HAVE NOT BEEN SURRENDERED TO OWNER. IN ABSENCE OF EXTENSION REQUESTS THE INDEMNITY WILL EXPIRE AT THE END OF INITIAL THREE MONTH PERIOD, OR ANY FURTHER EXTENSION PERIOD.*
>
> …

64. Paragraph 5 of the Glencore LOIs was as follows:

> *[We hereby agree] as soon as all original bills of lading for the above cargo shall come into our possession, to deliver the same to you, or otherwise to cause all original bills of lading to be delivered to you, whereupon our liability hereunder shall cease.*

65. The language of clause 38 falls to be construed in the light of that LOI language, since it is the language of the International Clubs' standard form LOI contemplated by clause 38. Both on its own terms, and read in the light of paragraph 5 of the LOIs, in my judgment clause 38 does not have the effect contended for by Mr Young QC. The language of clause 38 neither says in terms, nor conveys nor implies, that there is a limitation upon the validity of any LOI issued pursuant to clause 38, or upon Glencore's liability under any such LOI, by reference to a period for claims to be made by Navig8. The subject matter is delivery without production of bills of lading, effected by the vessel at the request of Glencore as voyage charterer. To say in that context that any LOI issued is to be valid for a period of three months is to say that it covers such deliveries effected during that three-month period, unless there is language indicating a different intention.

66. That reading is reinforced by the provision that the three-month period was to be renewable, at Navig8's option, by reference to whether the bills of lading remained in circulation, not by reference to whether Navig8 had made a claim. To my mind, that provision in turn had reference to, and reflected, paragraph 5 of the standard form LOI wording. By paragraph 5, LOIs on the standard form have indefinite validity, expiring, if at all, only when the original bills of lading are returned to the carrier. Mr Young rightly (in my view) did not contend that paragraph 5 operated to discharge liability otherwise already accrued under the LOI. To my mind, clause 38 provided only for a modest modification of that regime, namely that any LOI issued by Glencore was to have fixed, but renewable, three-month paragraph 5 validity. The deliveries to Ruchi were made within any such three-month period of validity, so clause 38 does not assist Glencore on the facts.

67. I did not find it helpful to consider how often in practice a delivery might take place more than three months after an LOI had been issued. But voyage delays and delays at discharge ports, occasionally very substantial delays, are hardly unfamiliar. When construing paragraph 5 and/or clause 38, there is no basis for assuming even that any LOIs will only be issued shortly before delivery is intended to be made, let alone that if they are so issued delivery will not then be substantially delayed. I therefore see nothing uncommercial about giving effect to what I see as the natural meaning of those provisions.

68. There is thus no real prospect of Glencore's clause 38 defence succeeding even if, as Mr Young QC submitted, clause 38 conferred on Glencore some contractual right capable in principle of defeating a claim under the LOIs as issued even though they did not incorporate any provision reflecting the language of clause 38 relied on. A satisfactory analysis of how that might be the case proved elusive, not least because the enforcement of any contractual right founded upon clause 38 would not be a matter for this court but for voyage charter arbitrators.

69. In the circumstances, it is not necessary to reach a final conclusion on that aspect of the argument. Provisionally, however, it seems to me that the renewable three-month validity provision stated in clause 38 was solely for Glencore's benefit and so was

waivable by it. By issuing LOIs in the standard form wording without building in the clause 38 qualification, Glencore indeed waived that qualification. In that regard, I think Mr Young QC was wrong to suggest that Glencore could not have insisted on that qualification because clause 38 provided for LOIs to be on the standard form. In truth, it is that entitlement of Navig8's, *viz.* to have an LOI on the standard form before any delivery without production of bills of lading, that is qualified by the part of clause 38 relied on by Glencore. Glencore could have insisted that its LOIs contain wording qualifying paragraph 5 in accordance with clause 38. It did not do so.

Summary Judgment Conclusion

70. For the reasons set out above, in my judgment there is no real prospect of defending the claim that in taking delivery from the vessel, Ruchi represented or was acting on behalf of Aavanti so that delivery was indeed to Aavanti as requested by the Navig8 and Glencore LOIs. The substantive indemnification provisions in paragraphs 1 and 2 of those LOIs were and are engaged. In the case of the Glencore LOIs, clause 38 of the voyage charter does not provide any defence to Navig8's resulting claims for relief under those LOIs.

71. Had it mattered, I could not have said, in the alternative, that when the vessel effected delivery to Ruchi, Songa (or, if relevant, Navig8) believed Ruchi to represent or act on behalf of Aavanti if Ruchi did not in fact do so. Had that claim mattered, a trial would have been required to determine it.

72. Delivery to Ruchi was not deemed by paragraph 4 of the Navig8 and Glencore LOIs to have been delivery to Aavanti (or to a party representing or acting on behalf of Aavanti). If indemnification under the LOIs depended upon the operation of paragraph 4, I would have dismissed these claims; if the claims had been proceeding to trial on Question (ii), I would have struck out such parts of the Statements of Case as assert a claim by reference to paragraph 4.

Relief To Be Granted

73. As it is, and as I have already said, there will be final declaratory relief in terms that I shall settle with the assistance of Counsel when this judgment is handed down.

74. In relation to the operation of paragraphs 1 and 2 of the LOIs, as triggered by the deliveries to Ruchi:

    i) Navig8 is obliged by paragraph 1 to indemnify Songa in respect of any liability upon, or reasonable settlement of, SocGen's claim, and in respect of Songa's reasonable costs and expenses incurred responding to and defending that claim.

    ii) Navig8 is obliged by paragraph 2 "*to provide [Songa] on demand with sufficient funds to defend*" SocGen's claim.

    iii) The reference in paragraphs 1 and 2 of the Glencore LOIs to "*you [Navig8], your servants and agents*", respectively "*you [Navig8] or any of your servants or agents*", covers Songa as the agent by whom Navig8 effected the requested delivery (see *The Laemthong Glory*, *supra*).

iv) Therefore, Glencore is under a contractual obligation, owed to Navig8, to indemnify Songa in respect of SocGen's claim and to provide Songa on demand with sufficient funds to defend that claim.

v) Further, Navig8's liability to Songa under paragraphs 1 and 2 of the Navig8 LOIs is and will be loss, damage or expense against which Navig8 is entitled to indemnity under paragraph 1 of the Glencore LOIs.

vi) Further again, claim no. 627, Songa's claim in this court under the Navig8 LOIs, seems to me to constitute proceedings against Navig8 in connection with the delivery requested by the Glencore LOIs so that Glencore was and is obliged by paragraph 2 of the Glencore LOIs to provide Navig8 on demand with sufficient funds to defend that claim; and to the extent Navig8 has reasonably incurred cost, not having been put in funds by Glencore, responding to and defending claim no. 627, that represents loss, damage or expense against which Navig8 is entitled to indemnity under paragraph 1 of the Glencore LOIs.

75. The case featured an exchange of suspicion and counter-suspicion between at any rate Songa and Glencore as regards whether Glencore should take over the defence of SocGen's claim. For its part, Glencore expresses suspicion that Songa simultaneously asserts that liability under the LOI chain is clear yet will not relinquish control over defending the SocGen claim. But Glencore was disputing the LOI liability, so Songa's caution is unsurprising. Meanwhile, Songa expresses suspicion that in open offers with a view to avoiding this hearing, Glencore was willing to provide funds for the defence of SocGen's claim if it could take over the defence of that claim and only if it were agreed that that would be strictly without prejudice to LOI liability. But Glencore was disputing the LOI liability, so Glencore's caution is unsurprising.

76. Now however, liability under the Navig8 and Glencore LOIs is resolved in favour of Songa and Navig8 respectively. Whilst I can neither require nor guarantee this, I rather suspect that in those changed circumstances it may well be possible for the parties to resolve the practicalities of dealing with SocGen's claim in their joint interest to defend it or resolve it amicably as cost-effectively as reasonably possible.

77. Mr Young QC raised in argument points of detail as to the meaning and operation in practice of the obligation to furnish "*sufficient funds to defend*" a claim. For example, must that mean, or at least can it mean (and if so when does it mean) that an amount estimated to be sufficient to defend SocGen's claim through a contested arbitration up to, and including, a final, oral hearing, must be provided 'up front'? What if funding thought to be sufficient (on whatever basis that has been assessed) and provided does not prove adequate? I have no doubt that in the converse case, where funding is provided on demand but proves to be more than is actually required, the beneficiary must reimburse the indemnifying party for the excess. That is inherent in the LOIs being contracts of indemnity. But how might the practicalities of that fall out?

78. For the purpose of this judgment and any order made on it, I prefer not to seek to answer any of those questions. Rather, the parties should be given time to work out the practicalities of defending the SocGen claim, including matters of reimbursement of costs already incurred and the funding of ongoing costs, with liberty in each action for either party to apply further in the absence of agreement, either for additional

substantive relief (final or interim), or for directions. I shall invite assistance from the parties as to that, and whether, for example, there should be a stay of further proceedings in court for the time being, when this judgment is handed down.