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Am I my agent's keeper? *The Global Santosh* in the Supreme Court.

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To what extent is a charterer vicariously responsible for the acts or omissions of an independent contractor that is providing performance of the charterer's contractual obligations? That is the question that came before the Supreme Court in the *Global Santosh*. The vessel was time chartered on NYPE form to Cargill for one trip from Sweden to South Africa. Cargill sub-chartered to Sigma from whom, directly or indirectly, Transclear SA voyage chartered the vessel. Transclear SA had sold a cargo of cement to IBG Ltd pursuant to a cif free out sale under which demurrage became due if the unloading of the cargo was delayed. The vessel gave NOR at Port Harcourt on 15 October 2008 and on 18 December was called in to berth. The delay was due to congestion, caused in part by the breakdown of IBG's offloader. Transclear claimed demurrage under their sale contract with Sigma and applied for an arrest of the cargo. Unfortunately, by mistake the arrest also extended to the vessel and the vessel remained under arrest from to during which time discharge was prohibited. Cargill withheld hire for this period Clause 49 provided that the hire was to be suspended should the vessel be detained or arrested, until the time of her release, but subject to a proviso that this would not happen if the arrest or detention were occasioned by any "personal act or omission or default by the charterers or their agents".¹

¹ It was accepted that the vessel would not go off-hire by virtue of the provisions of cl. 15 which contained the additional words 'or by any similar cause whatsoever'. However, where cl. 15 includes the words 'or by any other cause whatsoever preventing the full working of the vessel', an arrest will lead to the vessel going off-hire. See, *The Mastro Georgis* [1983] 2 Lloyd's Rep 66 (QB).

The key issue was whether the proviso covered the arrest at Port Harcourt. Was this due to a personal act or omission of the Cargill's agents? This posed a further question – who were Cargill's agents for the purposes of cl. 49? The majority arbitrators found that Transclear had not acted as Cargill's agents and made no finding as regards IBG. The majority cited² part of the definition of Agency at para 1-001 of Bowstead and Reynolds on Agency, 19th Edition.

“The “fiduciary relationship which exists between two persons, one of whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts.”

They concluded that there was no evidential basis on which they could find that Cargill expressly or impliedly consented to Transclear detaining or arresting the vessel or her cargo. Transclear had not been performing Cargill's obligation to load or discharge, and, if it had been, it had been doing so as Cargill's sub-contractor or sub-sub-contractor, not its agent. Transclear's had been done on its own behalf, not for Cargill: Transclear had a claim for demurrage against IBG, Cargill did not.

The owners appealed the awards and Field J found that Transclear SA was not acting as Cargill's agent, but that IBG had acted as its delegate, bringing it within the proviso to cl.49 and that the issue of whether its failure to pay demurrage to Transclear SA had caused the arrest should be remitted to the arbitrators.³ Cargill, by subletting the vessel, had delegated or sub-delegated the performance of its responsibilities under the charterparty and

² [41] of the award.

³[2013] EWHC 30 (Comm); [2013] 1 Lloyds Rep. 458.

those ‘delegates’ could be Cargill's agents for the purposes of the proviso, irrespective of the precise contractual relationship between the delegate and the party above him in the contractual chain. However, the act or omission or default must have occurred in the course of the performance by the delegate of the delegated task. Here the delegated task was Cargill’s obligation to discharge the cargo and IBG were delegates for that task and it was arguable that their failure to discharge and pay demurrage had occasioned the arrest of the vessel. This issue should be remitted to the arbitrators. However, Transclear’s act in making the arrest was not an act done in the course of its delegated function of discharging the cargo.

The Court of Appeal held that both Transclear SA and IBG were Cargill’s delegates.⁴ The dispute between the parties arose out of Cargill’s contractual arrangements. Under cl.8 of the trip charter Cargill was fully responsible for discharge of the vessel, even though they were under no obligation to discharge within a set time. The proviso was not restricted to situations when the personal act or omission or default of the delegate occurs in the performance by the delegate of the delegated task, as Field J had held. If a party became a delegate pursuant to Cargill’s exercise of its power of sub-letting, it remained a delegate, regardless of the legal nature of the relevant act or omission. Although Cargill were under no obligation to discharge the vessel in any given time, the dispute between Transclear and IBG arose out of Cargill’s trading arrangements for the vessel. The general scheme of clause 49 provided for the vessel to be off-hire in the case of detention or arrest for matters either on owner’s side of the line or the acts or omissions of third parties, unconnected to either party to the time charter, such as governmental authorities, but not for matters on charterer’s side of

⁴ [2014] EWCA Civ 403; [2014] 2 Lloyd’s Rep 103.

the line.⁵ This was subject to questions of causation and the Court of Appeal concluded that it was for the arbitrators to rule on this question and upheld Field J's decision on the question of remission.

And so to the Supreme Court.⁶ By a 4-1 majority (Lord Clarke dissenting) their Lordships allowed the appeal, with Lord Sumption giving the majority judgment. Neither Transclear nor IBG had been an agent in the strict sense, but the proviso in cl. 49 extended to parties who vicariously performed the time charterer's rights and obligations.⁷ Lord Sumption noted:

[r]eferences in a time charter to acts of the charterer's "agents" in the course of performance cannot necessarily be limited to persons doing those acts on his behalf in the strict legal sense of the term, or indeed to those standing in any direct legal relationship with him. As between the owner and the time charterer, the rights of the time charterer are made available to those further down the contractual chain, and

⁵ Using the phrase referred to by Rix LJ in *The Doric Pride* [2006] EWCA Civ 599; [2006] 2 Lloyd's Rep. 175 at para 33, of:

"... a basic distinction . . . entirely familiar to owners and charterers, between those matters which lie upon the owners' side of responsibility, essentially the vessel and crew, which the owners have to provide to the charterers, and those matters relating to the charterers' employment of the vessel and crew for their trading purposes, which lie upon the other side of the line . . ."

⁶ *NYK Bulkship (Atlantic) NV v Cargill International SA* [2016] UKSC 20.

⁷ In *The Mediolanum* [1984] 1 Lloyd's Rep 136 (CA) a refinery, although an independent contractor, was regarded as charterer's agent for the purpose of charterer's obligation under the charter to provide fuel: similarly, the shippers in *The Arctic Trader* [1996] 2 Lloyd's Rep 449 (QB), and the receivers in *The Goodpal*. [2000] 1 Lloyd's Rep 638(QB).

some at least of the time charterer's obligations are satisfied by the acts of subcontractors.⁸

Here, Cargill enjoyed the facility of directing discharge, and Transclear and IBG, as the parties ultimately entitled to the benefit of that facility, were for that purpose Cargill's 'agents'. But that did not mean that Cargill would be responsible for everything done by the sub-contractors. There had to be some nexus between the occasion for the arrest and the function being performed by Transclear or IBG as performing as Cargill's "agent". The relevant function in the instant case was Cargill's obligation, under cl. 8 of the charter, to carry out the discharge operation. Cargill was under an obligation to perform or to procure performance of whatever cargo handling operations occurred but was under no obligation to procure discharge within a particular time. The arrest had arisen out of IBG's failure to discharge the cargo between 15 October 2008 when notice of readiness was given and the start of discharge on 15 January 2009. The delay was caused by congestion due in part to the breakdown of IBG's offloader. However, an absence of cargo handling operations had nothing to do with Cargill. The delay did not amount to the vicarious breach of any obligation by Cargill under the time charter. Nor was the incurring or enforcement of a liability for demurrage under a sub-contract the vicarious exercise by Transclear or IBG of any facility granted to Cargill under the time charter. Lord Sumption went on to reject the broad approach of the Court of Appeal which had focussed on determining whether the arrest was caused by matters lying within the charterers' sphere of responsibility, namely those relating to the vessel's employment, or within the owners' sphere. It was difficult to accommodate this basic principle with Gross LJ's statement that the "agency" would not extend to some act of a sub-charterer or receiver which was "wholly extraneous or unrelated to sub-letting under the [sub-charter] or inconsistent with its scheme".

⁸ *The Golden Santosh* [14]

Lord Clarke dissented. In his view the scope of the agency extended to the whole operation of the vessel from the giving of notice of readiness to the completion of discharge. “Throughout that time the vessel was complying with the orders of the charterers (ie Cargill) as to proceeding to a berth, waiting to discharge and subsequently discharging.”⁹ Cargill’s exercise of its right to sub-charter enabled it to generate the chain of contracts involved in the case, concluding with Transclear’s contract with IBG. Although Cargill could delegate performance, they could not delegate responsibility. Lord Clarke noted:

The arrest was intimately linked to the discharge functions thus delegated in turn to both Transclear and IBG. IBG’s failure to discharge the vessel properly (ie within the laytime stipulated in the sale contract) led to it incurring a demurrage liability to Transclear, but, because IBG then failed to discharge the lien on the cargo for that claim, Transclear sought security for it by the arrest of the cargo and (as it transpired) also the arrest of the vessel. The arrest prevented discharge of the cargo.¹⁰

Lord Clarke rejected Lord Sumption’s distinction between defective performance of discharging operations and their absence.

The distinction between “the defective performance of cargo handling operations” and “the absence of cargo handling operations” altogether seems to me to be too narrow. It would surely logically lead to the conclusion that NYK should not be paid hire while waiting to discharge because of breakdown of IBG’s offloader. The reason why it is not so suggested is surely that the charter is drawn up on the basis that the vessel will be on hire while carrying out the owners’ obligations under the charter. Those obligations include waiting to discharge cargo in accordance with the “orders and

⁹ [36].

¹⁰ [43].

directions of [Cargill] as regards employment and agency” in clause 8. The whole period of waiting during the period of congestion, including that caused by the breakdown of the IBG’s offloader falls within clause 8.¹¹

Cargill’s responsibility under the employment and agency provisions in cl.8 continued throughout the period when she was at anchor waiting for instructions to discharge the cargo, when she remained at anchor after the order of the Court, and thereafter when she proceeded to a berth and discharged the cargo.

The decision of the Supreme Court brings welcome clarity to the issue of a contractual party’s responsibility for the acts of its sub-contractors, These parties are not agents *stricto sensu* but as ‘delegates’ they are performing a non-delegable contractual obligation of a party higher up the contractual chain. Performance of that obligation may be delegated but not responsibility. Accordingly, in previous cases it has been accepted that such delegates can be considered as agents for the purposes of determining whether or not the charterer responsible for their acts or omissions in the course of performing a task undertaken by the charterer in their contract with the shipowner.¹² The line of responsibility extends down to sub or sub-sub-contractors who are acting as delegates for a party, in that they are performing undertaken by that party under the head contract. This issue has previously come

¹¹ [47].

¹² An exception is *The Mozart* [1985] 1 Lloyd’s Rep 239 (QB) which involved a clause suspending laytime for “ . . . any cause whatsoever beyond the control of the Charterer affecting . . . loading of the Petcoke.” Mustill J held that laytime was suspended for the period by which loading was delayed due to a breakdown in the conveyor belt used by the loading terminal. The terminal’s negligence was beyond the control of the charterers. The terminal were an independent contractor engaged by charterers agent. The fact that charterers were contractually responsible for loading did not mean that “[a]nything which goes wrong before or during the act of loading is to be treated as the charterers' "fault" for the purpose of cl. 3’.

up in connection with: frustration of a charter¹³; apportionment of cargo claims under the Inter-Club Agreement¹⁴; application of a laytime exception to delay caused by the terminal's illegal acts in commencing laytime¹⁵; and liability for the vessel's grounding while proceeding to a bunkering place.¹⁶

The critical question has always been identifying what task the delegate is being undertaken, and this underpins the majority's construction of the agency proviso in the off-hire clause in dispute in *The Global Santosh*. It is not enough to say that the delegate is only

¹³ *The Adelfa* [1988] 2 Lloyd's Rep 467 (QB) and *The Andra* [2012] EWHC 1984 (Comm); [2012] 2 Lloyd's Rep 587 (QB).

¹⁴ *The Goodpal* [2000] 1 Lloyd's Rep. 638 (QB) where the receivers at the first port of discharge ordered the vessel to discharge cargo consigned to another party, resulting in a short delivery at the second discharge port. The resulting cargo claim was held to be the responsibility of owners under the Inter-Club Agreement. The claim was due to owners' decision to accede to the requests of the receiver at the first discharge port to deliver cargo covered by the bill of lading to the order of consignees at the second discharge port.

¹⁵*The Crudesky* [2013] EWCA Civ 905; [2014] 1 Lloyd's Rep. 1. The charterer, Trafigura, was held to be responsible for the acts of the terminal operator who commenced loading in violation of three breaches of the official Procedure Guides issued by the Nigerian authorities. The terminal operator's actions clearly involved charterer's obligation to load the vessel and the Court of Appeal held that the resulting delays did not fall within the half demurrage provisions of clause 21 of the BPVOY3 form, which provided: "Any delay(s) arising from . . . arrest or restraint of princes . . . shall, provided always that the cause of the delay(s) was not within the reasonable control of Charterers." For the purpose of the clause, the terminal were charterers' agents and the delay had been within their reasonable control.

¹⁶ *The Mediolanum* [1984] 1 Lloyd's Rep. 137 (CA). The charterers were not vicariously liable for the vessel's grounding pursuant to navigating to a bunkering place selected by the refinery when the original bunkering place arranged by the charterer's agents became congested. The Court of Appeal doubted whether the refinery could be treated as an agent of the charterers but in any event they had not been at fault in selecting the bunkering place.

on the scene because of the charterer's delegation of performance of its obligations under the charter, and therefore the charterer must be responsible for the acts or omissions of the delegate. The delegate must have been performing some obligation assumed by the charterer. As Lord Sumption stated: "There must be some nexus between the occasion for the arrest and the function which Transclear or IBG are performing as "agent" of Cargill."¹⁷ The focus on that nexus underpins two previous decisions on frustration of a charter due to the actions of the receivers. In *The Adelfa*¹⁸ the receivers refused to take delivery of a cargo they claimed was wet damaged which led to the port authorities banning the discharge of the cargo. This did not bar charterers from claiming that the resultant delay had frustrated the contract. The charterers were not responsible for everything the receivers did or did not do, but only for matters relating to the delegated performance of charterers' obligations to discharge the vessel. The vessel was detained by the arrest and there was no undertaking by the charterers that cargo owners would not arrest the vessel at the discharge port. In contrast, in *The Andra*¹⁹ the delay in discharge of the cargo was due to a decision by the receivers to interrupt discharge with a view to obtaining an immediate cash settlement of their cargo claim. This was within the scope of charterer's non delegable obligation to discharge, and therefore charterers were responsible for the delay and could not plead frustration.

In the *Global Santosh* there was no obligation under the time charter to discharge within any particular time, nor was there any facility given to the time charterer to arrest the vessel for claims against sub-charterers further down the contractual chain. The arrest of the vessel was clearly wholly extraneous to the contractual facilities afforded to the charterers.

¹⁷ *The Global Santosh* [21].

¹⁸ Fn 13

¹⁹ Fn 13

For the vessel to be put off-hire for such extraneous events, a different type of off-hire provision is now required, such as amending the proviso in cl. 49 so as to provide that the vessel should not go off-hire in the event of an arrest occasioned by a claim against the charterers, their agents, and delegates.