IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
**[2022] EWHC 288 (Comm)**

No. CL-2020-000696

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday 21 January 2022

Before:

HIS HONOUR JUDGE MARK PELLING QC

(Sitting as a Judge of the High Court)

B E T W E E N :

ARAMCO TRADING FUJAIRAH FZE — Claimant

- and -

GULF PETROCHEM FZC — Defendant

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MR J. KHURSHID QC (instructed by Reed Smith LLP) appeared on behalf of the Claimant.

MR G. SHIRAZI (instructed by Mills & Co.) appeared on behalf of the Defendant.

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**J U D G M E N T**

**( v i a M i c r o s o f t T e a m s )**

(Please note this transcript has been prepared without the aid of documentation)

JUDGE PELLING QC:

1 This is the claimant's application for declarations and money judgments following upon the striking out of the defendant's defence and judgment being entered against the defendant as a consequence of the defendant's failure to comply with an order made by me.

2 It is not necessary that I set out in detail the factual background to this dispute. In essence, the defendant as seller and the claimant as buyer entered into a sale contract dated 7 July 2020 for a cargo of 20,000 metric tons of fuel oil. Under the terms of the sale contract, if the bills of lading and certain other documents were not available when the cargo was made available for delivery, the claimant was required to pay for the cargo against the defendant's commercial invoice and a letter of indemnity.

3 On about 9 July 2020, 19,000-odd metric tons of fuel oil was shipped on the MV KRONVIKEN ("the Vessel") and bills of lading were issued. The original bills of lading were not made available to the defendant and the claimant was asked to pay the sum due under the contract of sale, some US$4 million-odd, to the defendant against the defendant's invoice and a letter of indemnity dated 13 July 2020, referred to in these proceedings and in this judgment as "the LOI". It was in reliance upon the LOI that the claimant paid over the purchase price of over US$4 million on or about 16 July 2020. The LOI was on the defendant's letterhead. It was addressed to the claimant and signed ostensibly on behalf of the defendant and stamped with the corporate stamp of the defendant.

4 Insofar as is material for present purposes, the LOI provided:

> "In consideration of your paying the provisional purchase price of US$4,707,802.29 ... we hereby expressly warrant that we have marketable title to the goods and that we have full right and authority to transfer such title to you and to effect delivery of the said cargo and that the origin of the cargo is Singapore. We further agree to make all reasonable efforts to locate and surrender to you as soon as possible the full set of the original bills of lading ... and to protect, indemnify, and hold you harmless from any and all damages, costs, and expenses, including reasonable attorney fees which you may suffer by reason of the bill of lading and other shipping documents remaining outstanding, including but not limited to any claims and demands which may be made by a holder or transferee, the original bills of lading and other original shipping documents, or by any third-party claiming an interest in the cargo or proceeds thereof. This letter of indemnity should be governed by and construed in accordance with the laws of England and each party expressly submits to the exclusive jurisdiction of the English courts in London..."

As I have said, a manuscript signature appeared at the bottom of the letter of indemnity just below the corporate stamp of the defendant.

5 The defendant did not provide to the claimant the original bills of lading and has not done so to date. Instead, in proceedings which have been commenced before High Court of the Republic of Singapore, bearing the number HC/ADM217/220 ("the Singapore Proceedings), the lender to the defendant, Banque Cantonale de Genève ("BCGE") claims to be the lawful holder or transferee of the originals of the bills of lading and, in accordance with that case, that the cargo had been wrongfully delivered to the claimant. On 27 August 2020, BCGE

caused the Vessel to be arrested in Singapore and demanded that security in the sum of SS$7,866,823.44 be paid into the Singapore court in order to bring about the release of the Vessel.

6 In the evidence which has been filed in the Singapore Proceedings, it is alleged and does not appear to be in dispute that the defendant, or one of its subsidiaries, had purchased the cargo from Glencore Singapore Pte Limited and that the defendant had obtained finance for that purchase from BCGE. Rather than requiring the claimant to pay the purchase price for the cargo into an account in the name of the defendant with BCGE, the defendant instead asked the claimant to pay and the claimant paid the purchase price into an account held by the defendant with Barclays Bank PLC in Dubai.

7 Following the commencement of the proceedings in Singapore, the claimant required the defendant pursuant to the LOI to provide the sum necessary to obtain the release of the Vessel into the Singapore court as countersecurity for the sums that had previously been paid by the claimant. That call was ignored and the present proceedings were commenced.

8 On 29 October 2020, the defendant was ordered to pay S$7.866 million-odd into the Singapore court to secure BCGE's claim in the Singapore Proceedings. That order was no complied with.

9 On 6 November 2020, the defendant issued an application seeking discharge of that order. I heard that application between 14 and 15 December 2020 and on 22 December 2020 gave judgment dismissing that application. I revised the order by which the security was to be provided by extending the time for it to be provided to 22 January 2021 and I ordered the defendant to pay the claimant's costs which I assess summarily in the sum of £116,298.98. That order was not complied with by the defendant either and the claimant applied for an unless order in relation to that failure. I heard that application on 13 August 2021 when I directed that unless the sums required to be paid by the defendant were paid by 4.00 p.m. on 17 September 2021, the defence would be struck out and judgment entered for the claimant. The defendant did not pay as directed and, in consequence, the defence was struck out and judgment entered. I also directed the defendant to pay the claimant's costs of the application which I again summarily assessed this time in the sum of £40,000.

10 Against that background, the claimant seeks declarations in the following terms:

> "(1) The indemnity is engaged by BCGE's arrest of the Vessel, the Singapore Proceedings, and the claimant's demand under the indemnity, and the defendant is obliged to protect, indemnify, and hold harmless the claimant, its servants or agents from any and all damages, costs, and expenses including reasonable attorney fees which the claimant, its servants or agents have suffered and may in due course suffer by reason of the claims and demands which have been made by BCGE in the Singapore Proceedings as the holders and transferees of the original bills of lading.
>
> (2) Under the indemnity, the defendant is required to:
>
> (a) pay the sum of S$7,866,823.44 into the Singapore court to secure BCGE's claim in the Singapore Proceedings or provide such other replacement security in the Singapore Proceedings to secure BCGE's claim therein in order that the claimant may recover or otherwise withdraw the securities put up in the first instance to

secure the release of the Vessel from arrest, or, alternatively, provide countersecurity to the claimant in the sum of S$7,866,823.44 which the claimant has paid into the Singapore court, or pay the sum of S$7,866,823.44 to the claimant; and

(b) Pay the sums of Norwegian KR229,950, S$31,113.75, and £7,206.50 to the claimant which the claimant is liable to pay with respect to the legal costs incurred in connection with the arrest of the Vessel in Singapore and the Singapore Proceedings as well as the sum of S$536,399.58 in respect of the claimant's own legal costs incurred to date in the Singapore Proceedings and such other sums which the claimant may become liable to pay with respect to such legal costs or incur by way of its own legal costs in the future."

11 In addition, monetary remedies are claimed being payment of the sum of:

(a) S$7,866,823.44;

(b) S$536,399.58 being the claimant's costs to date in the Singapore Proceedings; and

(c) The Norwegian KR229,950, S$31,113.75, and £7,206.50 being legal costs incurred in connection with the arrest of the Vessel, together with consequential relief.

12 As I have said, the defendant was made the subject of interim mandatory orders concerning the payment of the security sum at a much earlier stage in these proceedings. Mr Shirazi made clear that his client objected to the money claims, or at least the first of the money claims for the sum paid by the claimant by way of security on the basis that unless and until there was a final order of the Singapore court, no loss had been suffered.

13 Mr Khurshid QC firmly maintained the claimant's claim to recover the security sum as the money judgment in these proceedings but maintained in the alternative that the claimant was entitled to a mandatory final order in the terms of the earlier interim orders in the alternative to recovering the security sum as a money judgment. It is not suggested that the claimant should not recover the other sums claimed. Accordingly, there will be judgment in the sums of S$536,339.58, S$31,113.75, Norwegian KR229,950, and £7,206.50.

14 The issues that remain are whether:

(a) It is appropriate to grant the declaration sought following the strike out of the claimant's claim, or any of them; and

(b) Whether the claimant is entitled to judgment of the security sum of S$7,866,823.44.

15 As to the first of these points, Mr Shirazi submits that I should not make the declarations sought because:

(a) The court generally will not grant declarations other than following a trial; and

(b) In any event, I should not do so here because, it is said, there is a real prospect of the defendant showing that:

(i) The LOI was signed and profit to the claimant by a person or persons with no authority to do so;

(ii) The LOI was not engaged because the claimant was not under any material obligation to provide the security on a true construction of the letter of indemnity granted to the disponent owner of the Vessel by the claimant.

16 Applicable principles:

(1) A court will normally not grant a declaration by consent or without a trial following a judgment in default - see *Patten v Burke Publishing Ltd* [1991] 1 WLR 527 *per* Millet J (as he then was) at 543(a) - (b); *New Brunswick Railway Co Ltd v British and French Trust Co Ltd* [1939] AC 1 *per* Lord Maughan LC at 22; and *Wallersteiner v Moir* [1974] 1 WLR 991 *per* Buckley LJ at 1021;

(2) Where judgment in default is entered and it is necessary to make clear on what basis relief has been granted, that should generally be done by recitals at the head of the order rather than by formal declarations - see *Wallersteiner v Moir* (*ibid.*) per Buckley LJ at 1029;

(3) The practice of not granting declarations is not a rule of jurisdiction but is a rule of practice only and will not be followed if the claimant cannot obtain the fullest justice to which he is entitled without such a declaration - see *Patten v Burke Publishing Ltd* (*ibid.*) at 544(b);

(4) Amongst the discretionary factors that may be taken into account in deciding whether or not to grant declarations other than following a trial, there are included:

(a) The effect of an order on foreign third parties who cannot be expected to understand the reluctance of an English court to grant a declaration but include a statement of the basis on which a judgment has been given - see *Patten v Burke Publishing Ltd* (*ibid.*) at 544(f); and

(b) The fact, if it be the fact, that the declarations sought cannot affect the rights of third parties - see *Patten v Burke Publishing Ltd* (*ibid.*) at 544(g).

17 As I have explained, one point taken by the defendant is that the letter of indemnity provided by Aramco (to use a neutral phrase for the present purposes) to the disponent owner of the Vessel was not binding on the claimant because it was issued by another Aramco entity, Aramco Trading Company (ATC). The claimant maintains it is obvious that this is clerical error. Although neither party referred to the relevant authorities in their skeletons, it became common ground that where such an assertion was made, the applicable principles are those set out in **Chitty on Contracts** (vol. 2) at para.5-060. In summary, a written instrument can be corrected as a matter of construction providing that:

(a) There is a clear mistake on the face of the relevant documents; and

(b) It is clear what correction ought to be made in order to correct the mistake

- see *East v Pantiles Plant Hire Ltd* [1982] 2 EGLR 111, *per* Brightman J at 112; and *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 101, *per* Hoffmann J at [22] - [24]). Although the mistake must be clear, it may be one that emerges from a consideration of the relevant contextual documents - see *State Street Bank and Trust Company v Sompo Japan Insurance Inc & Ors* [2010] EWHC 1461 (Ch) at [20]).

18 As I have alluded to earlier, the defendant maintains that it has a more than fanciful case that the LOI on which the claimant relies is not engaged because it was signed by someone without authority. This late argument is one that has been deployed in other cases by the defendant in other claims against it by references to letters of indemnity apparently issued by it.. It is common ground that in deciding whether a signatory has ostensible authority to execute the LOI, English law applies to that question. Again, although no authority was cited by either party on the issue, In relation to apparent authority, on the basis that English law applies to the determination of that issue, it is common ground that the question in each case is whether the defendant has, as against the claimant, cloaked the signer with apparent or ostensible authority by:

> "...a representation made by the principle to the contractor intended to be and, in fact, acted on by the contractor that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the apparent authority so as to render the principal liable to perform any obligations imposed on him by such contract... The representation which creates apparent authority may take a variety of forms of which the commonest is representation by conduct, that is by permitting the agent to act in some way in the conduct of the principal's business with other persons. By so doing, the principal represents to anyone who became aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with other persons of the kind which an agent so acting in the conduct of his principle's business has usually actual authority to enter into... The commonest form of representation by the principal creating an apparent authority of an agent is by conduct, namely by permitting the agent to act in the management or conduct of the principal's business."

- see *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, *per* Diplock LJ (as he then was) at 503 - 505).

19 In relation to ratification, it is common ground that English law applies to that question. It is well established, as a matter of English law, that where a principal receives property with knowledge of the circumstances of a contract under which it is received, he will ratify that contract – see *Cornwal v Wilson* (1750) 27 ER 1173.As long as the principal (here the defendant) knows what the agent (here the signer) had done, the principal will be bound - see *ING RE (UK) Ltd. v R & V Versicherung Ag* [2006] 2 AER (Comm) 870 *per* Toulson J (as he then was) at [153] - [155].

20 Here, the Aramco party, to put it neutrally, was only obliged to take delivery if it was provided with an LOI because the defendant could not produce the original bills of lading. It is fanciful to suppose that a purchaser in the position of the claimant would pay for the cargo other than in reliance upon such an LOI in those circumstances. Whether it is characterised as an estoppel or a rectification, and each of these alternatives has been pleaded in this case, does not matter. The Aramco party, in the circumstances of this case, was willing to pay the purchase price and could only have been willing to pay the purchase

price because it was willing to accept the LOI. To suggest otherwise is fanciful. The defendant received the purchase price of over US$ million on that basis. It asserted a want of authority only after receipt of the purchase price. To permit the defendant in such circumstances then to rely upon an alleged want of authority on the part of the person signing, sealing, and tendering the LOI would be to permit approbation and reprobation of the starkest kind. Such an outcome would be commercially absurd. Indeed, as Steyn LJ observed in *First Energy UK Limited v Hungarian International Bank Limited* [1993] 2 LR 194 at [196]:

> "A theme that runs through our law of contract is that the reasonable expectations of honest men must be protected. It is not a rule or a principle of law. It is the objective which has been and still is the principal moulding force of a law of contracts. It affords no license to a judge to depart from binding precedent. On the other hand, if the *prima facie* solution to the problem runs counter to the reasonable expectations of honest men, this criterion sometimes requires a rigorous re-examination of the problem to ascertain whether the law does, indeed, compel demonstrable unfairness."

21 Against that background, I turn first to the issue concerning the letter of indemnity delivered to the disponent owner. If the defendant is liable to the claimant under its LOI, the claimant must have been liable in law to provide security to the Singapore court. It is common ground that it could only be so liable if it was liable under the LOI provided to the disponent owner. Applying the principles of construction referred to above, I am satisfied that the defendant has a no better than fanciful case on this issue and that the naming of ATC as the party offering the indemnity to the disponent owner was a clear mistake as is apparent from even a cursory perusal of the contextual documentation, and that it is clear that the upstream LOI, that is to say that offered to the disponent owner by the Aramco entity, should be construed as having been offered by the claimant not ATC.

22 My reasons for reaching that conclusion are as follows. First, the voyage charterparty by which the Vessel was let by the disponent owner named ATC as the charterer but, critically, it also provided "*in CHOPT*", that is in the charterer's option, that it could be the claimant. By an email of 7 July 2020, ADC supplied voyage orders for the Vessel. The relevant voyage orders were on the letterhead of the claimant and was sent to the disponent owner under cover of that email. I accept the claimant's submission that this was, in the circumstances, a nomination by the charterer given that the covering email was signed by ATC and I also accept the submission that, thereafter, ADC had no further involvement in the transaction. So far as this last point is concerned, for example, by an email of 11 July 2020 from the claimant's agent, a protest was lodged with the disponent owner concerning a loading error. The detail of that error does not matter for present purposes. What matters is the inclusion within the protest email of the statement:

> "Without prejudice, Aramco Trading Fujairah FZE ( i.e. the claimant) <u>as the charterer</u> hereby respectfully puts the owner on notice for any loss ... arising therefrom..."

This demonstrates the understanding of all concerned. It is consistent with what had gone before. If what was expressly stated, namely that the claimant was the charterer was wrong, then the disponent owner could be relied upon to say so in the clearest terms given the nature of the communication. This material demonstrates that at the date when the upstream LOI was sent by Aramco to the disponent owners, ATC had no role to play in that relationship.

23 That this is so is consistent with the email from the charterer's agents to the owner's agents dated 25 July 2020. The email contained the heading on which the defendant relies but that heading simply reproduces the original email heading that had been used in relation originally to the provision of the recap charterparty. In the body of the email, it was stated that:

> "Charterers advise that the entity from their end in this fixture will be [the claimant]. However, in the attached LOI, the following is yellow (ATC) has been used. Just for good orders sake only ... they have proposed to resend all the LOI as [the claimant]..."

I accept the claimant's submission that this email has at least one typo in it, that is to say the word "is" before the word "yellow" should plainly be "in" because the name of ATC is highlighted in yellow in the document. The words "charterers advise" should more grammatically correctly read "charterers had advised" because that is consistent with all the preceding communications. The owners declined to accept what was proposed only because, by then, the cargo had been delivered. It is entirely consistent with that being correct that it was agreed that the freight invoice would be reissued so that it was addressed to the claimant (see the emails of 28 July 2020). The owner would not have agreed to revise the invoices in this way and in these circumstances, unless in truth, the charterers were understood, by all concerned, to be the claimant.

24 I those circumstances, I reject the submission that I should decline to grant the declaration sought on the simple basis that the claimant was not the charterer of the Vessel and was not, in truth, the indemnitor under the upstream LOI. The defendant has not demonstrated a more than fanciful case on this issue.

25 The other issue concerns authority. I can address this much more quickly. As I have explained, the question whether the signatory had apparent authority to execute the LOI on which the claimant relies is to be decided applying English law. The defendant has no more than a fanciful case on this issue. My reasons for reaching that conclusion, in summary, are as follows.

26 First, the LOI on which the claimant relies is on the defendant's letterhead and has the defendant's stamp on it. As the authority referred to earlier makes clear, the representation that founds apparent authority allegations can arise from permitting an agent to act in the management or conduct of the principal's business. Allowing the signatory to use the defendant's letterhead and its corporate stamp is clear conduct of this sort. It is also such conduct, for what it is worth, to permit the agent concerned access to email systems within the defendant's organisation and to use the defendant's email systems for sending email at any rate in combination with allowing the signatory to use the defendant's letterhead and stamp. However, as I have said earlier and as Mr Khurshid submits the key point is that the claimant paid over $4 million for a cargo in reliance upon the LOI tendered by the defendant. Without the LOI there would have been no payment because the defendant was never in possession of the original bills of lading. To permit the defendant to rely upon the alleged want of authority now asserted in such circumstances would be unprincipled and is a complete answer to the alleged lack of authority point whether it is characterised as ratification or estoppel. For these reasons, the defendant's contention concerning authority has no merit and is merely fanciful.

27 Before finally deciding whether or not a declaration should be granted in or broadly in the terms sought, it is necessary that I resolve the other issue that remains, namely whether the

order should include a money judgment for the sum of S$7,866,823.44. It was submitted on behalf of the defendant that it should not on an application of first principles because, it was submitted, the claim should properly be characterised as a damages claim and damages are to be assessed by reference to the sum that places the claimant in the same position as if the contract had been performed. The defendant submits that since the sum that has been paid has been paid by way of security and thus, at any rate theoretically, may be repaid in the future, payment of the sum of the claimant on an unconditional basis would not satisfy this rule and that unless and until the payment made by the claimant becomes an unconditional payment, no loss quantified by reference to the sum claimed can be maintained.

28 The claimant's first answer to this point was that the defendant's submission was based on a misunderstanding of what an indemnity requires, which is that the party to be indemnified shall never be called upon to pay the sums in respect of which the indemnitor had agreed to indemnify the indemnified - see *Firma C-Trade S.A. v Newcastle Protection and Indemnity Association (The Fanti)* [1991] 2 AC 1 *per* Lord Goff at pp.35 - 36. In other words, that it requires the indemnifier to prevent the loss or expense being suffered by the indemnified. However, Mr Shirazi submits that that does not answer the point he was making, that is that the provision of security is, by definition, conditional and if repaid would mean that the claimant had recovered more than his loss. No alternative damages claim based on the loss of use of the money used to make the payment to the Singapore court has been advanced and, in those circumstances, the money claim must fail. This led Mr Khurshid to submit that this was a point devoid of merit because on payment by the defendant to the claimant of the sums claimed, the defendant would, by operation of law, be subrogated into the shoes of the claimant and thus, if ever any recovery of the security occurred, it would be received by it.

29 No authority was cited by either of the parties on this issue. This was surprising given the nature of the issues that arose on this application. The doctrine of subrogation applies where payment is made under a contract of indemnity - see **MacGillivray on Insurance Law** (14th edition) at para.24-001. Where it applies, subrogation entitles the indemnifier to receive all the rights and remedies of the indemnified against third parties which, if satisfied, would extinguish or diminish the ultimate loss sustained - see **MacGillivray** (*ibid.*) at para.24-002 - and to claim from the insured any benefit conferred on the indemnified by third parties with the aim of compensating the indemnified for the loss in respect of which the indemnifier has indemnified him - see **MacGillivray** (*ibid.*) at para.24-005. There being no dispute that the LOI is a contract of indemnity and that its terms do not exclude any right of subrogation, I am satisfied that the doctrine will meet the point made by Mr Shirazi if and when payment is made by the defendant pursuant to its obligations to indemnify the claimant under the LOI. In those circumstances, I am satisfied that the claimant is entitled to judgment for the sum claimed.

30 I return now to the declaration issue. I am satisfied that each of the substantive reasons suggested by the defendant as reasons for not granting the indemnity sought are mistaken for the reasons that I have identified earlier in this judgment. The question that remains is whether it is necessary to grant the declarations in order to ensure the fullest justice can be obtained by the claimant. This is not a case where the declarations are being made by consent or on admissions but are being made following a fully contested hearing at which the defendant has been fully professionally represented. The declarations are not simply the consequence of the default judgment that has been entered. That is why CPR r.12.42 requires an application to be made where relief of the sort I am now considering is required. This claim is not based on fraud or negligence but is framed firmly in contract by reference to the terms of the LOI.

31 Without the declarations, it will not be immediately apparent the basis on which the money judgments have been entered. It was submitted by the claimant, and I accept, it is highly likely that the order I make following the determination of this application will have to be enforced abroad. In those circumstances, I accept that declarations are more appropriate course to adopt rather than a statement in recitals of the footing on which the order has been made applying *Patten v Burke Publishing Ltd* (*ibid.*) at p.544(f).

32 I also accept that the declarations sought cannot affect, in practice, the rights of anyone other than the parties and those claiming through them (see *Patten v Burke Publishing Ltd* (*ibid.*) at p.544(g)). Had the defendant been able to satisfy to the summary judgment standard, that is that it had a more than fanciful claim, the substantive points I have considered and rejected earlier, I would have refused the declarations sought. However, the defendant has not satisfied me that it has a real prospect of succeeding on either of these points.

33 In principle, therefore, I am satisfied, subject to any drafting points that arise, broadly that declarations in the terms sought should be granted and the money judgment sought should also be granted for the reasons I have explained.

**CERTIFICATE**

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.