Neutral Citation Number: [2024] EWHC 2371 (Comm)

Case No: CL-2020-000627

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

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

Date: 18/09/2024

Before :

CHRISTOPHER HANCOCK KC SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

(1) YANGTZE NAVIGATION (ASIA) CO LIMITED **(2) BERGE BULK SHIPPING PTE LTD**	**Claimants**
- and -	
(1) TPT SHIPPING LIMITED **(2) TPT FORESTS LIMITED** **(3) TAUMATA PLANTATIONS LIMITED** **(4) TIAKI PLANTATIONS COMPANY** **(5) OTPP NEW ZEALAND FOREST INVESTMENTS LIMITED**	**Defendants**

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- -

Timothy Young KC and Michal Hain (instructed by **Holman Fenwick Willan LLP**) for the **Claimant**
Simon Rainey KC and Christopher Jay (instructed by **Campbell Johnston Clark Ltd**) for the **Second Defendant**
David Bailey KC and James Goudkamp (instructed by **Herbert Smith Freehills LLP**) for the **Third to Fifth Defendants**

Hearing dates: 3 and 4 July 2024

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Wednesday 18 September 2024.

Introduction.

1. This is an application made under CPR Part 11 by the Second Defendant ("**Forests**") and the Third to Fifth Defendants ("**the Exporters**") to set aside service of the claim form issued against them by the Claimants ("**Owners**").

2. The action concerns claims by the Owners under three letters of indemnity ("**LOIs**") which were provided in the absence of bills of lading relating to New Zealand logs bound for India, whose allegedly lawful holders subsequently made misdelivery claims against the Owners and made various ship arrests in support.

3. The Owners' claims relate to three shipments in late 2019 and early 2020 carried onboard the Owners' vessels pursuant to three charterparties ("**the Charters**").

4. The LOIs were in the Club-recommended form, were expressly subject to English law and contained the usual London jurisdiction clause requiring each and every person liable under the indemnity to submit to the jurisdiction of the High Court.

5. Claims under the LOIs were made against their nominal giver, the First Defendant ("**Shipping**"), which was placed into voluntary administration on 20 October 2020 and is now in liquidation.

6. The underlying claim by the Owners is that Shipping was the agent for one or more of the other Defendants, who are now alleged to be liable as principals to the LOIs. Those other Defendants now challenge the jurisdiction of the English court to determine the Owners' claims. It is common ground that the central question is whether, as the Defendants allege, there is no sufficiently good arguable case that they were indeed principals to the LOIs.

7. There is also an issue as to whether the Owners have lost any right they had to sue these Defendants by reason of pursuing Shipping, under the doctrine of merger or election.

The legal tests in relation to service outside the jurisdiction.

8. Mr Young KC, who appeared for the Owners, very helpfully made clear at the beginning of the hearing that he was only in fact relying on Part 6.33 of the CPR. I am grateful for that helpful clarification.

9. Part 6.33 provides as follows:

> "**Service of the claim form where the permission of the court is not required – out of the United Kingdom**
>
> 6.33…
>
> *2B) The claimant may serve the claim form on a defendant outside the United Kingdom where, for each claim made against the defendant to be served and included in the claim form—*
>
> *(a) the court has power to determine that claim under the 2005 Hague Convention and the defendant is a party to an exclusive*

choice of court agreement conferring jurisdiction on that court within the meaning of Article 3 of the 2005 Hague Convention;

(b) a contract contains a term to the effect that the court shall have jurisdiction to determine that claim; or

(c) the claim is in respect of a contract falling within sub-paragraph (b)."

10. Part 11 provides that the Defendant may apply to set aside service of the claim form if the relevant jurisdictional gateway is not satisfied.

11. The relevant legal principles were common ground between the parties.

12. I start with the leading decision of the House of Lords in Seaconsar v Bank Markazi [1994] 1 AC 438. The headnote to that decision records the following holding:

> *"Held, allowing the appeal, that in considering whether the jurisdiction of the court had been sufficiently established under one or more of the paragraphs of R.S.C., Ord. 11, r. 1(1) the standard of proof was that of the good arguable case; but that in respect of the merits of the plaintiff's claim under rules 1(1) and 4 it was sufficient for the plaintiff to establish that there was a serious issue to be tried in that there was a substantial question of fact or law or both arising on the facts disclosed by the affidavits that the plaintiff bona fide desired to have tried; that the plaintiffs' asserted cause of action gave rise to serious issues to be tried; and that, no question arising as to the jurisdiction of the court, they should have leave to serve the proceedings out of the jurisdiction".*

13. More recently, in relation to the approach to the establishment of the jurisdictional gateway and the approach to whether the Claimant had established a good arguable case in this regard, it was agreed that on a jurisdictional application such as this one, the correct approach was that adumbrated in Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV and ors [2019] EWCA Civ 10. In that case, the Court of Appeal said the following:

> *"70. An opportunity to clarify the test arose in Goldman Sachs. Lord Sumption (giving a judgment with which Lord Hodge, Lady Black, Lord Lloyd-Jones and Lord Mance agreed), essentially repeated his formulation in Brownlie. To the extent that there was disagreement in Brownlie about the reformulation of the Canada Trust test the Supreme Court has now spoken with a single voice and the route forward lies with that reformulation. In paragraph [9] Lord Sumption stated:*
>
> *"9. This is, accordingly, a case in which the fact on which jurisdiction depends is also likely to be decisive of the action itself if it proceeds. For the purpose of determining an issue*

about jurisdiction, the traditional test has been whether the claimant had "the better of the argument" on the facts going to jurisdiction. In Brownlie v Four Seasons Holdings Inc [2018] 1 WLR 192 , para 7, this court reformulated the effect of that test as follows:

"... (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it."

It is common ground that the test must be satisfied on the evidence relating to the position as at the date when the proceedings were commenced."

71. Any dispute about whether the three-limbed test is obiter *has accordingly now vanished. The test has been endorsed by a unanimous Supreme Court. But the Court has not gone further than in Brownlie and has not expressly explained how the test works in practice nor as to what is meant by " plausible " nor how it relates to " good arguable case " nor how the various limbs interact with the relative test in Canada Trust .*

G. How to apply the three-limbed test in Goldman Sachs

72. Notwithstanding, when one stands back in order to determine what was sought to be achieved and when one takes into account pre-existing case law which was not in question in Brownlie and in Goldman Sachs , it is in my view possible to make sense of the new, reformulated, test.

Limb (i)

73. It is in my view clear that, at least in part, the Supreme Court confirmed the relative test in Canada Trust . This is plain from the express endorsement of that test in Brownlie and nothing in Goldman Sachs detracts from that analysis but on the contrary operates upon the basis that Brownlie was correct. The reference to " a plausible evidential basis " in limb (i) is hence a reference to an evidential basis showing that the Claimant has the better argument. It is perhaps relevant that in the Court of

Appeal in Brownlie Arden LJ expressly linked the formulation of Lord Justice Waller in Canada Trust with a concept of relative plausibility (ibid paragraph [23]). The use of " plausibility " as a guiding relative principle in Brownlie and in Goldman Sachs was not therefore a novelty plucked from a jurisprudential void.

74. What is the correct name for the test? In Aspen Underwriting Ltd v. Kairos Shipping Limited [2017] EWHC 1904 (Comm) , on appeal [2018] EWCA Civ 2590 (" Aspen "), the Court of Appeal construed Brownlie as endorsing the " good arguable case " test which boiled down to who had (relatively) the better of the argument (ibid paragraph [34]). Aspen was however heard before the judgment in Goldman Sachs was handed down, and, even though it was handed down afterwards, it does not take account of that judgment. It is notable that in Goldman Sachs the Court does not use the terminology of " good arguable case" save in respect of limb (iii) where it is combined with plausibility. In limb (i) – which is the basic test – the test is plausibility alone. Yet it is true (as the Court of Appeal accepted in Aspen) that in the Supreme Court judgments the Court was seeking to restructure the good arguable case test. In my view, provided it is acknowledged that labels do not matter, and form is not allowed to prevail over substance, it is not significant whether one wraps up the three-limbed test under the heading " good arguable case " and since this was the understanding in Aspen there remains currency in this rubric.

75. Various points surrounding the test were not in issue in Brownlie or in Goldman Sachs . The burden of proof remains upon the Claimant: see eg VTB Capital plc v Nutritek International Corpn [2013] UKSC 5 at paragraphs [90] - [91]. For the avoidance of doubt the test under limb (i) is not balance of probabilities: See eg Cherney v Deripaska (No2) [2008] EWHC 1530 (Comm) at paragraph [44]; and Brownlie in the Court Appeal per Arden LJ [2015] EWCA Civ 665 at paragraphs [22] and [23]. The expression " balance of probabilities " is apt for use at trial when the court can weigh the evidence in its totality but is not therefore an appropriate expression for use at the interim stage. The test is context specific and " flexible ": See eg Canada Trust at page 555H per Waller LJ; and Brownlie per Arden LJ in the Court of Appeal at paragraph [21].

76. In expressing a view on jurisdiction, the Court must be astute not to express any view on the ultimate merits of the case, even if there is a close overlap between the issues going to jurisdiction and the ultimate substantive merits: see eg per

Waller LJ in Canada Trust (ibid) page 555F, Teare J in Antonio Gramsci Antonio Gramsci Shipping Corp v Recoletos Ltd [2012] EWHC 1887 (Comm) (" Antonio Gramsci ") paragraph [39]; and Aikens LJ in JSC Aeroflot Russian Airlines v Berezvsky [2013] EWCA Civ 784 (" JSC Aeroflot") at paragraph [14].

77. Next, the adjunct " much " in the Canada Trust formulation must be laid to rest. This was the view expressed by a variety of judges prior to Brownlie (see for instance per Aikens LJ in JSC Aeroflot at paragraph [14]) and the word was, rightly in my view, deemed superfluous in Brownlie by Lord Sumption. There is no discernible logic for saying that jurisdiction arises if the claimant, having established that it has the better case (relatively), then has to proceed upwards and onwards and show that it has " much " the better case. A plausible case is not one where the claimant has to show it has " much " the better argument.

Limb (ii)

78. Limb (ii) is an instruction to the court to seek to overcome evidential difficulties and arrive at a conclusion if it " reliably"can. It recognises that jurisdiction challenges are invariably interim and will be characterised by gaps in the evidence. The Court is not compelled to perform the impossible but, as any Judge will know, not every evidential lacuna or dispute is material or cannot be overcome. Limb (ii) is an instruction to use judicial common sense and pragmatism, not least because the exercise is intended to be one conducted with " due despatch and without hearing oral evidence" (see per Lord Steyn in the House of Lords in Canada Trust ([2002] AC1 at page [13]; and per Lord Rodgers in Bols at paragraphs [27] and [28]). It should be borne in mind that it is routine for claimants to seek extensive disclosure (as was done on the facts of the present case) from the defendant in the expectation (and hope) that the defendant will resist, thereby opening upon the argument that the defendant has been uncooperative and is hiding relevant material for unacceptable forensic reasons and that this should be held against the defendant. Where there is a genuine dispute judges are well versed in working around the problem. For instance, it might be possible to decide an evidential dispute in favour of a defendant on an assumed basis and ask whether jurisdiction is nonetheless established. Equally, where there is a dispute between witnesses it might be possible to focus upon the documentary evidence alone and see if that provides a sufficient answer which then obviates the need to grapple with what might otherwise be intractable disputes between witnesses.

Limb (iii)

79. The relative test has been endorsed " in part " because limb (iii) is intended to address an issue which has arisen in a series of earlier cases and which has to be grappled with but which as a matter of logic cannot satisfactorily be addressed by reference to a relative test: see eg Antonio Gramsci (ibid *) at paragraphs [39] and [44] – [48] per Teare J citing WPP Holdings Italy Sarl v Benatti [EWCA Civ 263 (" WPP ") at paragraph [44] per Toulson LJ. This arises where the Court finds itself simply unable to form a decided conclusion on the evidence before it and is therefore unable to say who has the better argument.*

80. What does the Judge then do? Given that the burden of persuasion lies with the claimant it could be argued that the claim to jurisdiction should fail since the test has not been met. But this would seem to be unfair because, on fuller analysis, it might turn out that the claimant did have the better of the argument and that the court should have asserted jurisdiction. And, moreover, it would not be right to adjourn the jurisdiction dispute to the full trial on the merits since this would defeat the purpose of jurisdiction being determined early and definitively to create legal certainty and to avoid the risk that the parties devote time and cost to preparing and fighting the merits only to be told that the Court lacked jurisdiction. In Antonio Gramsci and in WPP the Court recognised that a solution had to be found. In WPP Lord Justice Toulson stated that the Court could still assume jurisdiction if there were " factors which exist which would allow the court to take jurisdiction " (ibid WPP paragraph [44]) and in Antonio Gramsci Teare J asked whether the claimant's case had " sufficient strength " to allow the court to take jurisdiction (ibid paragraph [48]). The solution encapsulated in limb (iii) addresses this situation. To an extent it moves away from a relative test and, in its place, introduces a test combining good arguable case and plausibility of evidence. Whilst no doubt there is room for debate as to what this implies for the standard of proof it can be stated that this is a more flexible test which is not necessarily conditional upon relative merits."

14. This approach was accepted by Henshaw J in the more recent case of Clifford Chance v Societe Generale SA [2023] EWHC 2682 (Comm) where he said:

"79. The party alleging a binding jurisdiction agreement needs to show a good arguable case. In practice this means that:

i) The party relying on the existence of the agreement must supply an evidential basis showing that it has the better argument (and not much the better argument).

ii) If there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so.

iii) The nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the existence of the agreement if there is a plausible (albeit contested) evidential basis for it.

(Dicey § 12-083, summarising the restatement in Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV [2019] EWCA Civ 10 of the tests as formulated in Brownlie v Four Seasons Holdings Inc [2017] UKSC 80 , and Goldman Sachs International v Novo Banco SA [2018] UKSC 34)"

15. As I have already indicated, it is common ground that the LOIs included English law and jurisdiction clauses. Accordingly, it is clear that, if there were indeed contracts between the Owners and the various Defendants, those contracts would be subject to English jurisdiction. As such, Owners would be entitled to serve outside the jurisdiction under Part 6.33. The real question for me, as the parties agreed, is whether there were such contracts. Given that there is a dispute of fact in relation to this, that requires a consideration of the evidence currently available to ask whether I can reliably conclude that the Owners have the better of the argument on this issue. Only if I cannot reliably conclude one way or another should I move to stage (iii) of the test identified above, to ask whether there is a plausible evidential basis for the Owners' contention.

The law as to undisclosed principals.

16. Once again, there was little dispute in relation to the law on undisclosed principals, as opposed to the application of the legal principles to the facts in this case.

17. I start with the decision of the Privy Council in Sui Yin Kwan v Eastern Insurance [1994] AC 199 at 207, (referred to by all of the parties) where Lord Lloyd said this:

"(1) An undisclosed principal may sue and be sued on a contract made by an agent on his behalf, acting within the scope of his actual authority.

(2) In entering into the contract, the agent must intend to act on the principal's behalf.

(3) The agent of an undisclosed principal may also sue and be sued on the contract.

(4) Any defence which the third party may have against the agent is available against his principal.

(5) The terms of the contract may, expressly or by implication, exclude the principal's right to sue, and his liability to be sued. The contract itself, or the circumstances surrounding the contract, may show that the agent is the true and only principal."

18. Mr Bailey KC, who appeared for the Exporters, drew my attention to the more recent decision in Playboy Club v Banca Nazionale del Lavoro LPV [2018] 1 WLR 4041, in which Lord Sumption quoted the above five-limbed test, but added a sixth, as follows:

> *"To this I would add that the third party must irrevocably elect whether to sue the agent or the undisclosed principal."*

19. I take the above, as I am bound to do, as an accurate statement of the law. I return below to the question of election, in the context of the merits of the Owners' claim.

20. Next, I was referred to the decision of Leggatt J, as he then was, in The Magellan Spirit [2017] 1 All ER (Comm) 241. In that case, Leggatt J said:

> *"18. The question whether an undisclosed agency relationship was created must depend in principle, as I see it, not on the state of mind of the supposed agent at the time of contracting, but on whether the supposed agent had communicated to the supposed principal an intention to contract on its behalf. The principle is confirmed by further binding House of Lords authority. In Garnac Grain Co Inc v HMF Faure & Fairclough Ltd [1968] AC 1130 at 1137, Lord Pearson (with whose speech the other law lords agreed) stated the principle as follows:*
>
> *"The relationship of principal and agent can only be established by the consent of the principal and the agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it ... But the consent must have been given by each of them, either expressly or by implication from their words and conduct."*
>
> *See also Yukong Lines Ltd v Rendsburg Investments Corp, The "Rialto" [1998] 1 WLR 294 , 303. This statement of the law makes it clear that if on an objective analysis of their words and conduct Mansel and VSA consented to the creation of a relationship of agent and principal between them, it matters not that Mr Fransen (or anyone else involved in the transaction) did not subjectively intend or perceive this to be the case….*
>
> *... 28. A further, and in my view surer, basis for the decision in The "Rialto" was that the ordinary intention of someone who conducts trading activities through the vehicle of a one-man company is precisely to avoid incurring personal liability under contracts made by the company; and it would be inconsistent with that intention for the company to contract as agent for its beneficial owner. That point can, I think, be generalised in this way. Where a contract is made by or on behalf of a named legal person and there is nothing in the terms of the contract or surrounding circumstances to indicate to the other contracting party that the named person is making the contract as an agent, then the presumption must be that the named person is*

contracting as a principal. That presumption is capable of being displaced; but in order to displace it, convincing proof is needed that the named party was – contrary to appearances – contracting on behalf of an undisclosed principal.

Implication from conduct

29. The most obvious method of proof would be to point to an express agreement establishing an agency relationship. There was in the present case, however, no relevant written agreement between Mansel and VSA and there is no evidence of any relevant oral agreement. In these circumstances the argument that an agency relationship was created has to be based on conduct. In principle what must be shown is conduct from which (i) a reasonable person in the position of Mansel would have understood that it was authorised to enter into the charter as agent of VSA and (ii) a reasonable person in the position of VSA would have understood that Mansel was agreeing to do so. As in any case where an agreement is sought to be implied from conduct, it is not enough to point to conduct which was consistent with an agreement or mutual intention that Mansel would contract as agent of VSA. It is necessary to identify conduct which was only consistent with such an agreement or mutual intention and inconsistent with any other intended relationship between the two Vitol Group companies. Put another way, it must be fatal to the implication of an agency relationship if the parties would have or might have acted as they did in the absence of such a relationship: see, by analogy, cases such as The "Aramis" [1989] 1 Lloyd's Rep 213 and The "Gudermes" [1993] 1 Lloyd's Rep 311 ….

…33. For the Owner, Mr Hill submitted that the court should look at the substance of the arrangements, which is that the "Magellan Spirit" was chartered solely for the use and benefit of VSA and with the intention that Mansel would make no profit and suffer no loss from chartering the vessel. I agree that this is the effect of the evidence. I do not accept, however, that these facts are sufficient to show that Mansel intended to enter into the charter as agent for VSA. It is true that, if the evidence showed an intention that the vessel would or might be operated by Mansel for its own profit, that would have been inconsistent with an agency relationship. But the converse is not true. It is perfectly possible to have an arrangement between parties dealing as principals whereby one agrees to make a ship or other property available for the other's use in return for reimbursement of all operating costs. The critical difference between such an arrangement between principals and an agency relationship is that a principal may sue and be sued on a contract made by an agent on its behalf. In order to infer an intention that Mansel should charter the "Magellan Spirit" as agent of VSA, it

would therefore be necessary to identify conduct which signifies an intention that VSA would have rights directly against or liabilities directly towards the Owner. There is nothing in the practices adopted by the Vitol Group where vessels were time chartered by Mansel "at cost" which indicates such an intention. On the contrary, those practices are all explicable on the basis that the only party with rights and obligations enforceable by and against the Owner would be Mansel."

21. Again, I accept this as an accurate statement of the law.

22. Finally, I was referred to various statements in Bowstead & Reynolds on Agency, which Owners argued were accurate statements of the law.

i) It had to be shown that Shipping had *"actual authority to act so as to bind the principal, though this may of course be express or implied"* (Bowstead & Reynolds on Agency at §8-070).

ii) It had to be shown that Shipping subjectively intended to act on behalf of Forests or the Exporters. Owners argued that Shipping's subjective intention is relevant regardless of whether this has been communicated to the Owners: "[t]*he obvious situation for the operation of the doctrine is that where the third party does not know of the involvement of any principal"* (Bowstead & Reynolds on Agency at §8-073).

iii) It had to be shown that the LOIs did not, expressly or by necessary implication, exclude Forests' or the Exporters' right to sue and liability to be sued. In relation to this, Owners said, ordinary commercial contracts are interpreted with a beneficial assumption articulated by Diplock LJ in *Teheran-Europe v Belton* [1968] 2 QB 525 at 555:

> *"Where an agent has ... actual authority and enters into a contract with another party intending to do so on behalf of his principal, it matters not whether he discloses to the other party the identity of his principal, or even that he is contracting on behalf of a principal at all, if the other party is willing or leads the agent to believe that he is willing to treat as a party to the contract anyone on whose behalf the agent may have been authorised to contract.* ***In the case of an ordinary commercial contract such willingness of the other party may be assumed by the agent unless either the other party manifests his unwillingness,*** *or there are other circumstances which should lead the agent to realise that the other party was not so willing."*
> (emphasis added)

As Lord Lloyd held in *Eastern Insurance* at 208H-209A:

"If courts are too ready to construe written contracts as contradicting the right of an undisclosed principal to intervene, it would go far to destroy the beneficial assumption in commercial cases, to which Diplock [L]J referred in Teheran-Europe…"

23. I accept these statements.

The express contractual arrangements.

24. I turn next to the terms of the contracts between the various different parties.

The SSA

25. Forests was incorporated in New Zealand (initially as Trans Pacific Trading Company Ltd), and is a wholly owned subsidiary of TPT Group Limited. Its business is the provision of export marketing services to log producers, which appoint it as a sales and marketing agent. It has handled the exportation of around 60 million JAS m^3 of New Zealand logs in this capacity.

26. In March 2004, Mr Jason Smith was appointed as a director of Forests. Towards the end of that year, the TPT group was giving consideration to the question of how to insulate the wider business from the risks associated with, specifically, vessel chartering. As is evident from documentation in evidence before me, consideration was given to various factors, including the creation of a structure that would eliminate recourse to other companies in the group, transactional management to eliminate associated party interference, funding, and taxation issues.

27. In the result, Shipping was incorporated on 30th November 2004. A letter was sent to log producer clients of the time, including Plantations Company ("**Tiaki**") "(one of the Exporters)" explaining the role of the new company as follows:

"As part of the service provided by TPT Forests, we continue to consider options to improve shipping to off-shore markets. Our work in this area has led to the establishment of TPT Shipping Limited

*("**TPT Shipping**"), a wholly owned subsidiary of TPT Group Limited. From time to time, TPT Shipping will:*

- *charter ocean going vessels suitable for log shipment;*
- *enter into agreements with TPT Forests (acting as your agent) for the shipment of logs to off-shore markets;*
- *be responsible for the shipment of logs; and*
- *be paid by TPT Forests (acting as your agent) for shipping services performed.*

TPT Shipping operations will be kept separate to the operations of TPT Forests to ensure that the risks inherent in chartering vessels are effectively "ring-fenced". As you are aware we use Trans Pacific Carriers (TPC) for the majority of our CNF business, and from time to time charter vessels ourselves if there are significant benefits in doing so. As part of continuing to improve shipping services we have also reviewed the insurance we need to have in place to provide as risk free as possible export services to you. To this end we have decided to switch the P&I Insurance cover currently provided by TPC to our direct control as we are not confident of the cover in the event of actual loss."

28. At all material times, the commercial relationship between Shipping and Forests was governed by the SSA (dated 2012). The following terms of the SSA were said to be relevant to the present applications:

    i) Forests is defined as "Agent". Clause 3 of the agreement then goes on to provide:

    "*3.1 The Agent shall deal with TPT Shipping solely in its capacity as agent for its Export Clients and not in its own right.*

    3.2 The Agent warrants and represents that it is authorised to represent its Export Clients in all dealings with TPT Shipping. TPT Shipping agrees to accept instructions from the Agent in respect of the handling and shipment of Products on behalf of Export Clients.

    3.3 For the avoidance of doubt, and notwithstanding anything else in this Agreement, in providing the Services, TPT Shipping shall be deemed to be providing the Services to the Export Client and not to the Agent."

    ii) The "Services" provided by Shipping pursuant to the SSA are defined at cl. 1.1 as *"in respect of a particular consignment of Products ... all services for the handling and shipment of the Products from the time of receipt of the Products at the dispatch port to the agreed point of delivery at the destination Port."*

    iii) Cl. 5.3 addresses subcontracting of services. It provides that *"In the performance of the Services, TPT Shipping may subcontract the provision of the Services. TPT Shipping is solely responsible for paying and managing any of its subcontractors who perform the Services on its behalf, with costs being passed on to the Export Client where agreed with the Agent."*

<u>**The LMSAAs**</u>

29. The relationship between Forests and the Exporters is governed by the so-called "**Log Marketing and Sales Agency Agreements**" (or "**LMSAAs**").

30. The Taumata LMSAA Plantations Limited ("**Taumata**") (which, like the parties, I take as an exemplar) provided (*inter alia*) as follows:

i) Cl. 7 states that *"[a]ny transactions entered into by [Forests] in the performance of its obligations under this agreement shall be entered into by [Forests] as agent for Taumata and not as principal, or, if entered into in the name of [Forests], shall be appropriately identified on the books of [Forests] at the time of such transaction as being entered into on behalf of Taumata."*

ii) By cl. 1.7 *"[Forests] acknowledges and agrees that it has no power to enter into any agreement or bind Taumata in any way:"* without either *"the prior written approval of the Manager"*[1] or *"authority under any express provision of this agreement."*

iii) Cl. 4 dealt with marketing and payment terms. Pursuant to that clause, Forests was to be paid a marketing fee, made up of various components. That fee was to be deducted from the proceeds of sale of the logs, when those proceeds were received by Forests, acting on behalf of Taumata.

iv) Cl. 5.1 dealt with the terms on which Forests was authorised to sell Taumata's logs. For present purposes, it is relevant to note that the purchase price of the logs was to be paid by Letter of Credit in favour of Forests on behalf of Taumata (cl. 5.1.2) and that such Letter of Credit should ideally be in place 3 working days before the vessel's arrival, absent which *"the sale be managed under Request for Authorisation/Letter of Indemnity (RFA/LOI) policy, refer to Appendix 2"* (cl. 5.1.4).

v) Cl. 5.2 deals with the terms on which Forests is authorised to contract in respect of shipping, which were as follows:

> *5.2.1 TPT shall use its commercially reasonable endeavours to negotiate the most advantageous shipping terms to Taumata (taking into account availability of vessels, preferred dates of shipment, securing shipping services in advance and other variations outside the reasonable control of TPT) on the following terms and conditions:…*
>
> > *5.2.1(c) Subject to clause 5.2.1(f), the ship charter shall be between TPT [viz. Forests] and the shipping company on behalf of Taumata.*
> >
> > …
> >
> > *5.2.1(f) From time to time TPT may have access to vessels chartered by TPT Shipping Limited and may offer to the Manager shipment of Goods on such vessels. Any acceptance by the Manager of such offers shall be subject to TPT and the Manager reaching agreement as to the terms of the shipment (including, but not limited to, the timing of payments by Taumata to TPT for shipping).*

vi) Appendix 2 contains the "Request for Authorisation" (or "**RFA**") procedure, which covers four situations. The first three were situations in which the

[1] The manager was Hancock Forest Management (NZ) Ltd.

payment terms have not been complied with under the sales contracts (notably, where a compliant letter of credit is not in place three days before commencement of loading). The fourth addresses the situation *"When LOI is required for discharging the cargo and documentation (specifically the Bill of Lading) has not been received by the agent at the discharging port."*

vii) The procedure for the latter case is described as follows:

> *"A LOI should be completed when the Bill of Lading(s) have not been received by the local agent at the Discharge Port (as advised by ship owner) requiring the cargo to be discharged at the port without holding up the vessel. If the vessel does get held up, ship owners can penalise the shipper(s). A LOI indemnifies the ship owner/operator against any comeback from discharging the vessel at the port.*
>
> *TPT [viz. Forests] will be required to indemnify the ship owner in the ship owners written LOI format, and the following process should apply for Taumata supplied wood:*
>
> - *RFA should be prepared by TPT and forwarded to the General Manager of HFM NZ on behalf of Taumata for authorisation from relevant signatories. The procedures for the RFA outlined above should be followed in all instances.*
>
> - *TPT should forward the ship owners format to the cargo receiver who should then indemnify TPT and provide a bank guarantee if we have not been paid.*
>
> - *Once this LOI has been received by TPT, they should then prepare an LOI directly to the ship owner for the release of the cargo. This will need to be signed by one TPT Director.*
>
> *PLEASE NOTE:*
>
> *If the cargo is going into bonded storage, then TPT should not require Taumata's authorisation, as the cargo is protected, however, if the cargo is delivered in any other way, authorisation must be obtained from Taumata."*

31. The Tiaki and OTPP LMSAAs are materially similar to the Taumata LMSAA, save that the OTPP LMSAA does not contain an "RFA" procedure. However, cl. 3.2 of the OTPP LMSAA provides that *"In no event shall TPT enter into any agreement, or incur any obligations, on behalf of OTPP, except as expressly set out in this agreement or otherwise agreed to in writing by OTPP"*

The Charterparties

32. Shipping entered into three relevant voyage charterparties with Owners on amended BEIZAI 1991 standard forms to carry cargoes of logs from New Zealand to Kandla, India (viz. the "Charters"):

i) The “**XZH**” Charter dated 20th January 2020, between Owners (as disponent owner) and Shipping (as charterer), in respect of m/v “Xing Zhi Hai”;

ii) The “**CH**” Charter dated 25th September 2019, between Berge Bulk (as disponent owner) and Shipping (as charterer), in respect of m/v “Cosmos Harmony”; and

iii) The “**TSI**” Charter dated 15th November 2019, between Berge Bulk (as disponent owner) and Shipping (as charterer), in respect of m/v “TS Index”.

33. In each case, the Charters provided (by rider clauses numbered 60 and 61, respectively) that any dispute arising from or in connection with them was to be referred to arbitration in London, and that English law governed.

The bills of lading.

34. The bills of lading that were issued for the cargoes were owners’ bills (in the sense of being issued by the head owners). Those bills each identified Forests as the “Shipper”, and the “Consignee” as being to order. In each case, a company called Amrose Singapore Pte Ltd (“**Amrose**”) was the buyer of the cargoes, and the “Notify” party was variously identified as Amrose or companies believed to be its financial backers (Excel Exports Co (S) Pte Ltd and Batavia Eximp & Contracting (S) Pte Ltd).

35. Original bills of lading were not available at the discharge port, and letters of indemnity were accordingly sought by head owners (and down the chain) in respect of the risks of discharging otherwise than against presentation of such bills. In this regard, the documents show that:

i) Owners issued a LOI in favour of head owners in respect of the XZH cargo. LOIs from Berge Bulk to head owners were not available in the bundles, but were assumed to exist.

ii) Shipping issued the LOIs in favour of Owners.

iii) Amrose issued LOIs in favour of Shipping.

36. The letters of indemnity were in conventional form and, as regards those issued by Shipping to Owners, were signed *“for and on behalf of”* Shipping by Jason Smith (materially, “Shipping Manager” and a director of Shipping) and provided for English governing law and English High Court jurisdiction.

The correspondence at the time of discharge.

37. At the time of discharge, in the context of the decision to issue letters of indemnity and to allow discharge, there was certain correspondence between, in particular, Forests and Shipping, which was relied on by Owners. Again, I take one of the shipments as an exemplar, namely the XING ZHI HAI, before looking briefly at the other two shipments.

i) Amrose produced its LOI on 19 March 2020.

ii) On 20 March 2020, Shipping emailed Forests, asking Mr Dearsley (of Forests), among others, to approve the issuance of a LOI.

iii) On the same day, Mr Dearsley emailed back, saying that since they were in possession of a clean letter of credit, he could confirm this if Jason Smith (of Shipping) agreed.

iv) Also on 20 March 2020, Mr Smith gave his approval, on behalf of Shipping.

v) Shipping issued a LOI on 20 March 2020.

38. The later vessels followed a similar pattern. In each case, Shipping sought Forests' approval before issuing a LOI on Shipping headed paper. However, there was a difference in relation to the later shipments.

i) In the case of the COSMOS HARMONY, which discharged in December 2019, there was one letter of credit missing at the time of discharge, with a value of $957,000. Despite this, Forests gave Shipping approval to issue an LOI.

ii) In the case of the TS INDEX, which discharged in January 2020, the letters of credit were again not clean at the time of discharge, with some $3,000,000 missing. Again, Shipping sought approval from Forests to issue a LOI, which was given by Forests, following consultation with Mr Smith of Shipping.

Events after discharge.

39. Following discharge, it appears that Arnav Shipping Pvt Ltd, the port agents, released the cargoes to Amrose against further letters of indemnity, but without requiring presentation of original bills of lading, that disputes arose between Amrose and its financial backers, and that, in the result, those financial backers arrested vessels and brought claims against head owners alleging misdelivery under the bills of lading contracts, which (in turn) resulted in a cascade of claims down through the letters of indemnity.

40. Amrose was reckoned to be insolvent (as determined, in the event, by Shipping's liquidators). Shipping called in administrators on 20 October 2020, ultimately leading to a liquidation process.

41. Owners (at that stage Yangtze) initially commenced these proceedings against Shipping, seeking (and obtaining) a mandatory injunction requiring it to perform its obligations under the XZH LOI. When Shipping failed to comply, Yangtze sought (and obtained) a worldwide freezing order against Shipping (subsequently varied to take account of the administration/liquidation). Berge Bulk were later added as Claimants, in relation to the other LOIs.

42. Thereafter, a significant amount of documentation has been requested and provided, and a number of witness statements have been produced as follows:

i) Mr Poynder of HFW, on behalf of the Owners, has produced six witness statements.

ii) Mr Short of CJC, on behalf of Forests, has produced four witness statements.

iii) Ms Johnson of HSF, on behalf of the Exporters, has produced two witness statements.

iv) Mr Ellem, of Hancock, also on behalf of the Exporters, has produced two witness statements.

v) I was told that several thousand documents have been produced by the Defendants, in response to requests from the Owners.

43. The submission was therefore made that this was a case which fell within the strictures of the Court of Appeal in paragraph 78 in the Kaefer case, which I have cited above.

Evidence as to the flow of funds and the evidence of Mr Short.

44. I turn next to certain evidence as to the flow of funds which assumed a greater alleged importance as a result of events after the hearing.

45. At the hearing, I was referred to the following evidence which was said to be of relevance.

i) First, I was shown freight invoices which were sent by Shipping to Forests, and then by Forests to the Exporters. Those invoices were said to show that the freight paid by Shipping was then recharged to the Exporters, through Forests, but that this recharge was net of address commission, which was said to have been retained by Shipping. This latter submission was based on a witness statement of Mr Short, the solicitor for Forests.

ii) Secondly, I was then shown certain spreadsheets which purported to show the accounting position between Shipping, Forests and the Exporters in relation to these and other shipments. It was submitted that it could be seen from these spreadsheets that Shipping did not retain address commission, nor did it retain despatch or pay demurrage. Instead, it was submitted, all income and expenditure was simply recharged to the Exporters. Shipping made no money out of these transactions.

46. After the hearing, I received a further witness statement from Mr Short, in which he sought to correct what was said to be erroneous evidence in his earlier statements as to address commission in particular. He made clear in this later witness statement that address commission, contrary to certain of the submissions made at the hearing, was not retained by Shipping, but was accounted for by Shipping to the Exporters.

47. In addition, I received submissions both at the hearing and after the hearing as to the relevance of Shipping's accounts. Mr Short gave evidence as to these in his first witness statement, deposing to a belief that profits of over a million NZ dollars were made in each of three years through carrying the Exporters' cargoes. I was shown Shipping's audited accounts which did indeed show a surplus of over million NZ dollars in each of those three years. I deal below with Owners' arguments based on those accounts.

Submissions and discussion.

48. In the light of this discussion of the evidence, the relevant legal principles and, in particular, the express terms of the contracts, I turn to each of the claims made by the Claimants. In my judgment it is necessary to consider the claims made against Forests and the claim made against the Exporters separately, in view of the fact that many of

the points made by the Claimants only applied, as Mr Young KC fairly accepted, against some of the Defendants. I start with the claim against Forests.

The claim against Forests.

49. I turn to the parties' respective submissions, before setting out my conclusions.

Forests' submissions.

50. Mr Rainey KC, for Forests, having taken me through the contractual provisions which I have set out above, sought to summarise his case in ten propositions.

51. The first three related to the argument that Forests was a party to the Charters. Those propositions were as follows:

    i) There was no plausible evidential basis for the suggestion that Shipping was not acting as principal in chartering the vessels. Thus:

        a) The circumstances in which Shipping was set up suggested that it would act as principal and not agent, since otherwise it would not serve to insulate the TPT group from chartering risks.

        b) There was no linkage between the cargoes being shipped and the Charters being entered into, and, indeed, the Charters were entered into before the tonnage was allocated to a particular vessel.

        c) If the Hancock entities (ie the Exporters here) did not use all of the space on a vessel, Shipping used the spare space for its own purposes.

        d) Shipping never did say that it was not acting as principal, and nor has its liquidator argued this.

    ii) There is no plausible evidential basis for the suggestion that Forests was principal under the Charters.

    iii) There is no plausible evidential basis for the suggestion that the Exporters were parties to the Charters, as opposed to using space on ships chartered by Shipping, in the manner set out in the witness statement of Mr Short. This is also consistent with the arrangements being in line with those contemplated in clause 5.2.1(f) and 7(2)(e) of the LMSAA agreement, where the Exporters do not become a party to the contract with the shipowner, through Forests as agent, but instead make use of space provided by Shipping on ships chartered in by Shipping.

52. Mr Rainey then turned to the assertion that Forests were principals to the LOI contracts. His starting point was that this assertion had to be viewed against the background of my conclusions as to whether or not Forests were parties to the Charters. In this regard, his fourth proposition was in the form of a question, namely why would Forests, in the light of the provisions of the SSA, which made clear that they only ever acted as agent, suddenly agree to act as principal? In that regard, he placed reliance on The Magellan Spirit.

53. The rest of his propositions can be shortly summarised.

i) His fifth proposition was that the same logical argument as under his fourth head applied equally to the Exporters.

ii) His sixth proposition was that the correspondence at the time of the issuance of the LOIs did not plausibly suggest that Shipping was asking for authority to issue LOIs which would bind Forests. Again, reliance was placed on The Magellan Spirit, on the footing that the documentation was not only consistent with the conferral of authority to issue LOIs which would bind Forests.

iii) His seventh proposition was that even if the request from Shipping could be construed as a request for authorisation to issue an LOI, Forests, to Shipping's knowledge, could only have been making such a request to Forests as agents for the Exporters because of the terms of the SSA.

iv) This led on to his eighth proposition, namely that the only potential parties to such a LOI would be the Exporters, and not Forests.

v) However, his ninth proposition was that unless Forests had authority to enter into the LOIs on behalf of the Exporters, then the only result would be that Forests would be in breach of its warranty of authority to Shipping. That could give rise to a claim by Shipping against Forests, but would not assist the Claimant Owners.

vi) His tenth proposition, which harks back to one of his earlier propositions, was that Shipping, and its liquidators, have never asserted that it issued the LOIs on behalf of Forests or the Exporters, nor have they asserted any claim for breach of warranty of authority.

Owners' submissions.

54. I turn to Owners' submissions, beginning with the Charters. In their written submissions prior to trial, Owners concentrated on the claim against the Exporters, relying on clause 5.2.1(c) as indicative that Forests were entering into a charter as agent for the Exporters, and relying also on the fact that demurrage was paid by the Exporters and despatch credited to the exporters.

55. In oral argument, I put to Mr Young KC that these points went to the claim that the Exporters were party to the Charters, and not an argument that Forests were, and he, again very fairly, accepted that.

56. As I read the skeleton argument served following the hearing, this remained Owners' position, since that skeleton dealt with the position of the Exporters in relation to the Charters, but not that of Forests.

57. I turn therefore to the LOIs. Here, the Owners argued that the LOIs were clearly approved by Forests, as was apparent from the correspondence between Shipping and Forests at the time of discharge. Thus, Shipping clearly required the approval of Forests to issue the LOIs. This, Owners contended, was only explicable on the basis that Forests were authorising the issuance of the LOIs and therefore making themselves liable on those contracts.

58. Owners therefore submitted that there was clear evidence of the giving of authorisation by Forests to Shipping to issue LOIs on their behalf, so as to render Forests liable on those LOIs to Owners.

59. Following the hearing, they also submitted that, at the very least, Mr Short's belated acceptance that he had been wrong in relation to the question of address commission meant that their evidence was suspect overall, which in turn gave Owners at least a plausible evidential basis for an argument that Shipping entered into the LOIs on Forests' behalf.

60. In relation to Shippings' accounts, Owners submitted that the very small amount of money earned by Shipping and the absence of evidence of substantial turnover was only consistent with Shipping generally acting as an agent and not a principal. Had Shipping acted as a principal, then the amount of turnover shown in their accounts would have to have been much larger, since the freight income that they earned and the payments that they made out would have been much greater than the amounts shown in their accounts.

Discussion and conclusions.

61. I start with the position in relation to the Charters. In my judgment, these are only relevant as background to the claims under the LOIs. I reach this conclusion for the following reasons.

   i) First, there is no claim in the claim form for breach of the Charters. That in itself would seem to me to be enough to deal with this point.

   ii) Secondly, in oral argument, as I have noted, Mr Young accepted that the points that he was making were all relevant, and only relevant, to his clients' claim against the Exporters.

   iii) Thirdly, in his post-hearing skeleton, served to deal with the Fifth Statement of Mr Short, to which I have made reference above, his summary of the issues did not include any argument in relation to the question of whether Shipping acted as Forests' agents in entering into the Charters.

   iv) Overall, I have little hesitation in rejecting any suggestion that Forests were an undisclosed principal to the charter contracts. I reach this conclusion for the following reasons.

      a) The contractual documents that have been disclosed (both the LSMAAs and SSA) show quite clearly that Forests were only ever intended to act as an agent for the Exporters and not as a principal. I see no reason to doubt the veracity of these documents.

      b) Whilst the Owners argued that this position might have been varied over time, this seems to me to be highly unlikely. There has been a very large amount of disclosure over time in this case, and various witness statements have been sworn by representatives of Forests and the Exporters all of which are consistent with the documentation.

c) I accept the argument that the timing of the Charters is inconsistent with the idea that those Charters were entered into on behalf of Forests. As both Forests and the Exporters argued, entering into a charter at a time when Shipping did not know whose cargo would be shipped on the vessel is inconsistent with the idea that that charter was made pursuant to an express authority given to Shipping by Forests.

d) The suggestion that there might be further documentation which would give the lie to what has been disclosed to date is in my view simply speculative. The same is true of the suggestion that cross-examination of witnesses might lead the Court to reject what, on the face of it, the documents show.

e) The evidence as to the flow of funds does not seem to me to be supportive of a submission that Forests were parties to the Charters as an undisclosed principal. That evidence all goes to the flow of funds between Shipping and the Exporters, albeit that invoices were rendered to Forests in its agency capacity.

f) This leaves the question of the accounts. I am afraid that I cannot derive anything from these, particularly in the absence of any expert assistance.

62. This leaves me with the issue of the LOIs.

63. Here, I accept that there was indeed a system whereby Forests were asked for their approval before the LOIs were issued by Shipping. However, I do not consider that this justifies a conclusion that Forests were indicating consent to be bound by, and liable on, the LOIs which were issued. I reach this conclusion for the following reasons.

i) My start point is that Forests were not parties to the Charters, as I have held.

ii) In these circumstances, as Mr Rainey put it, any obligation to issue a LOI would be placed on Shipping, as Charterer. Whilst I accept that the Charters did not impose an obligation on Shipping, it was Shipping who had the right to request discharge against a LOI.

iii) I accept Mr Rainey's submission that, against the background of the rationale for incorporating Shipping, Forests would not wish to open itself up to a liability that it had studiously avoided by virtue of that incorporation of Shipping in circumstances where it was not party to the Charters and was not in any way obliged to issue a letter of indemnity or able to request discharge without production of the bill of lading.

iv) I also accept Mr Rainey's submission that there is an obvious reason why Shipping would want to seek Forests' approval for the issuance of a LOI and the discharge of the goods, which was that the goods represented security for payment for those goods. When those goods were discharged, that security would be lost.

v) Mr Young suggested that the Defendants (or at least the Exporters) might have had an interest in avoiding demurrage or earning despatch sufficient to justify

Forests in authorising a LOI and accepting potential liability under it. This submission was not really developed in relation to Forests and, given the evidence as to the flow of funds to which I have made reference, it would seem to me that the party with a real interest in demurrage or despatch would be the Exporters.

vi) Finally, following the hearing, and as I have indicated, Owners suggested that Mr Short's late concession meant that Forests' evidence was generally unreliable and that this meant that their, Owners', case had a plausible evidential basis. I do not think that this follows. First, I do not accept that the fact that Mr Short corrected one point in his evidence means that he, or his client, is to be generally disbelieved – indeed, the fact that what was accepted to be wrong, when this discovery was made, was put right, seems to me to make his evidence more and not less credible. Secondly, I do not think that the fact that one party's evidence is said to have become less reliable makes the other party's evidence more reliable.

64. For all of the above reasons, I hold that the Owners have no good arguable case against Forests that this Court has jurisdiction. Accordingly, service as against Forests should be set aside.

65. In these circumstances, I do not need to deal, in relation to Forests, with the issue of election.

The claim against the Exporters.

66. I turn to the claim against the Exporters, who, broadly speaking, adopted the submissions of Forests in relation to the issue of undisclosed principal, adding only a few points.

<u>Owners' submissions.</u>

67. By the time that the hearing had finished and further skeletons had been exchanged, Owners' case was as follows:

i) The contractual documentation was consistent with Forests acting as agent for the Exporters in making shipping arrangements.

ii) The shipments in question herein were made under clause 5.1.2(c) of the LMSAAs. Had the shipments been under 5.1.2(f), then there would have to have been further documention showing shipping space being offered by Forests on Shipping vessels, which there was not.

iii) The evidence as to the flow of funds, following Mr Short's fifth witness statement, showed that all of the income that Shipping received (including address commission, contrary to the submissions made at the hearing before me) went to the Exporters, who met all of the expenses, with nothing being retained by Shipping.

iv) This latter evidence was only consistent with agency, since it could only be explained on the footing that Shipping were incurring no liabilities, because it was their principals who were under such liabilities.

v) This latter point was also supported by the accounts, which did not show large amounts of turnover going through Shipping.

vi) The argument based on the time when Charters were entered into by Shipping did not, argued Owners, assist me. Owners said that the Exporters' argument had, on analysis, to be that Shipping did not intend to act on behalf of the Exporters in entering into the charters, because they did not know whose cargoes would be loaded on board the vessel at the time the charter was made. However, they said that this did not follow. First, it was the arrangement for the *shipment* of Exporters' cargoes which mattered, and the timing of the *sales* was irrelevant. That shipment was arranged later. Secondly, they argued that since the vast bulk of cargoes carried were those that belonged to the Exporters, Shipping knew that it was likely that the ships chartered in would be used for those cargoes.

vii) As regards the LOIs, the fact that the Exporters, as charterers, would benefit from a more rapid discharge, by way of a reduction in demurrage or an increase in despatch, provided an evidential basis for the assertion that the Owners have the better argument that the LOIs were issued on the Exporters' behalf. At the very least, particularly given the late amendment to Mr Short's evidence, the Court cannot reliably determine whether the Owners have the better argument, and Owners have put forward a plausible evidential basis for their position.

The Exporters' submissions.

68. On behalf of the Exporters, Mr Bailey KC, having adopted the submissions of Forests and argued that Shipping made the Charters as principals, argued also that even if the Exporters were undisclosed principals to the Charters, then they were not undisclosed principals to the LOIs, because Forests had no authority to bind the Exporters to LOI contracts.

69. Looking at the first of these arguments, Mr Bailey made the following points.

i) First, he emphasised that the natural meaning of clause 5.2.1(f), which was the provision that he submitted applied here, was that Forests would arrange for shipment of goods on vessels which had been chartered by Shipping. Thus, Shipping would charter vessels itself, because that was what the clause said. This was to be distinguished from 5.2.1(c) which contemplated that Forests would enter into contracts with shipowners as agent for the Exporters, who would therefore be the Charterers.

ii) Secondly, he reiterated Mr Rainey's point that Shipping had been set up to charter vessels in its own right, and thus to insulate others from the risks inherent in chartering.

iii) His third point was that Shipping made profits itself. This point is clearly impacted on by the change in Mr Short's evidence, which I have already mentioned, and I come back to the overall relevance of this below.

iv) His fourth point was that the 2012 agreement between Forests and Shipping did not serve to appoint Shipping as an agent for Forests or the Exporters. Under that agreement, Shipping provided services to the Exporters.

v) His fifth point was the timing point which Mr Rainey had explained, namely that Shipping chartered ships before a decision was taken as to which goods would be loaded on board the particular ship. In essence, Shipping had space available on board ships that it had chartered in, and it thereafter allocated that space to the Exporters or other third parties. This was, he submitted, wholly inconsistent with the idea that, at the time of the charter, Shipping had been given actual authority by the Exporters to make the charter. In addition, charters sometimes had a range of discharge ports, which reflected the fact that Shipping did not know at the time of making the charter whose goods would be carried.

vi) His last point was that Shipping's liquidators had never made a claim against Forests or the Exporters and, indeed, had accepted in Court proceedings in New Zealand that they were liable to the Owners. This was, he submitted, wholly inconsistent with the idea that Shipping were acting as agents for the Exporters in entering into the Charters.

70. Turning to the second of Mr Bailey's two submissions, namely that even if his clients were parties to the Charters, they were not parties to the LOIs, this was premised on the simple submission that the authority given by the LMSAA did not extend to authorising an LOI on the Exporters' behalf unless a particular regime was followed, which was not followed in relation to any of the three shipments in question before me.

71. In more detail:

i) The only source of Shipping's authority came from the LMSAAs. That agreement gave Forests authority (under clauses 5.2.1(c) or 7.2(c)) to bind the exporters to charters with third parties, and also gave Forests authority (under clauses 5.2.1(f) or 7.2(e)) to make arrangements with Shipping for the shipment of the Exporters' goods.

ii) However, when it came to the procedure for RFAs, which were used when there was a problem at the loadport because the letters of credit were not available, or the LOIs, used at the discharge port, there was a separate system, which was not covered by the general authority given in clause 5 or 7. Instead, a separate request had to be made by Forests for authority from the Exporters to authorise the loading of the cargo without a clean letter of credit, or to authorise discharge without a bill of lading.

iii) Mr Ellem's evidence is that no requests were made to the Exporters for authority to issue a LOI binding the Exporters, and no such authority was ever given. He has checked his files in order to be able to make this statement.

iv) The consequence of all of the above is that any LOIs which were authorised by Forests would have been issued without authority. In such circumstances, whilst Shipping might have had a claim for breach of warranty of authority against Forests, no such claim has been made, and any such claim would enure to the benefit of Shipping and not the Owners.

Discussion and conclusions.

72. Overall, I have concluded that the Exporters' case on this aspect is to be preferred. I reach this conclusion for the reasons set out in the following paragraphs.

73. I start with the Charters.

i) The contractual documents provide some support for Owners' case over and above that in relation to Forests, in that the documents make clear that in making shipping arrangements, Forests act as agent only, and act as agents for the Exporters.

ii) However, in my judgment, Forests and the Exporters are correct in saying that the LMSAAs envisaged a dichotomy between situations in which vessels were chartered in by Forests acting as agent for the Exporters under clause 5.2.1(c) (in which case Exporters would be the charterers) and situations in which Shipping made space available on board ships chartered in by them from third-party owners (the situation catered for under clause 5.2.1(f)).

iii) In the current cases, it is clear, in my view, from the very fact that Shipping were involved, that this was a clause 5.2.1(f) situation.

iv) This is also consistent with the fact that Shipping chartered in the vessels before they knew whose cargoes would be carried on board. I do not accept the submission made by Owners that, just because most of the cargoes carried on board Shipping vessels would belong to the Exporters, this meant that Shipping could assume, at the time of the charter, that they were entering into that contract on behalf of the Exporters.

v) Turning to the documents relating to the flow of funds and accounting, I do not myself derive very much assistance from these, particularly in the absence of any expert evidence on accounting issues. It was submitted by Owners, as I have noted, that the audited accounts of Shipping were only consistent with it being a pure intermediary, as I understand it, because those accounts did not show a large turnover, encompassing both large incomings and large outgoings. I do not think that this submission was made good, on the basis of the documentation that I was shown, particularly in the absence of any expert accounting evidence.

vi) Overall, therefore, I conclude that in entering into the Charters with Owners, Shipping acted as principals and not agents for the Exporters.

74. Turning to the LOIs, once again I prefer the submissions of the Exporters, for various reasons.

i) I have already found that Forests have the better of the argument that the LOIs were issued by Shipping on their own behalf. If I am right in this conclusion, then this argument falls away, since there is no evidence that the Exporters authorised the issuance of the LOIs other than through the agency of Forests.

ii) Accordingly, this claim is a hypothetical one, and arises if I am wrong in my findings in relation to Forests.

iii) On this hypothesis, then the claim would be that the Exporters were bound by the LOIs because those LOIs were issued by Shipping on the authority of Forests, who were in turn acting as the Exporters' authorised agents under the LMSAAs.

iv) However, as the Exporters pointed out, the LMSAAs provided for a particular regime for the request for authorisation for a LOI. The evidence is that this regime was not followed.

v) Although Mr Young suggested that this evidence might turn out to be incomplete, when further disclosure or cross-examination was available, I do not regard this as a proper basis for allowing a claim to continue at the jurisdictional stage. I must do the best that I can on the basis of what is before me, either to reach a conclusion, or to decide whether the Claimants have established a plausible evidential basis for their claim. I cannot proceed on the basis of speculation as to what might emerge from further disclosure or cross-examination.

vi) I accept, therefore, the submission that the most that Owners could say is that, if, contrary to my findings, Forests had indeed authorised the issuance of LOIs, then they would have had no authority to do so and this would in turn have given Shipping a claim for breach of warranty of authority, which they have never made. This would not take Owners, as opposed to Shipping, any further.

75. For these reasons, I hold that Owners have not established that they have the better of the argument that there was an agreement containing an English jurisdiction clause between them and the Exporters.

76. It follows that I do not need to decide the election argument, which goes to the merits of the Owners' claim.

77. Overall, therefore, I find that the application to set aside service on the Defendants succeeds, and Owners' claim must therefore be dismissed. I would be grateful if the parties could draw up an order to give effect to this judgment.