LLOYD'S LAW REPORTS

Editor:
Miss M. M. D'SOUZA, LL.B.
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LLOYD'S LAW REPORTS

Editor: Miss M. M. D'SOUZA, LL.B., Barrister

COURT OF APPEAL

Oct. 14, 1983

MOSVOLDS REDERI A/S
v.
THE FOOD CORPORATION OF INDIA

(THE "KING THERAS")

Before Sir JOHN DONALDSON, M.R.,
Lord Justice MAY and
Lord Justice DILLON

Charter-party (Voyage) — Laytime — Lightening operation — Laytime and demurrage only to apply to discharging from lightening vessels — Four lightening vessels used — Calculation of laytime.

By a charter-party dated May 23, 1974, the owners let their vessel *King Theras* to the charterers for the carriage of a cargo of wheat from the U.S. Gulf to Calcutta. Since the vessel was too large to berth at Calcutta a special form of charter-party was used adapted from the Baltimore Berth Grain charter and this provided inter alia:—

> 36. At the discharging port of Calcutta, cargo to be discharged . . . free of risk and expense to the dry cargo lightening vessels at the average rate of 1,000 tons . . . per weather working day of 24 consecutive hours, Saturdays after noon, Sundays and holidays excepted even if used . . .
>
> 38. For each lightening vessel, at discharging port or place, time to count from 24 hours after receipt of Master's written notice of readiness to discharge, given to Charterers or their agents during ordinary office hours on a weekday before 4 p.m. . . . Any time lost in waiting for a berth at Calcutta due to lightening vessels being over 515 feet length overall not to count as laytime. At Calcutta if vessel is unable to give notice of readiness by reason of congestion at Calcutta time shall commence to count at 8 a.m. on the next business day after notice of vessel's arrival off Sandheads has been given . . . and received . . . Whilst waiting off Sandheads Sunday and Saturdays after 12:00 noon till 8 a.m. Mondays not to count unless vessel is already on demurrage . . .
>
> 43. At the point outside . . . Calcutta . . . no demurrage or despatch to be considered for the time used by the mother vessel to discharge into the lightening vessels . . . For laytime calculations of the laytime used at Calcutta by the lightening vessels, the laytime used by each of these vessels is to be added in order to arrive at a single figure of time saved or lost in relation to the total time allowed for discharging such lightening vessels. If lightening vessels are detained longer than the total time allowed to discharge such vessels at Calcutta, Charterers to pay demurrage at the rate of U.S. Dlrs 3,000 U.S. Currency per day or pro-rata for part of a day for all time used in excess of the total laytime allowed . . .

It was agreed that 19,860.723 tons of wheat were loaded at Pascagoula in the U.S. Gulf. Four lightening vessels were used and it was agreed that the total laytime allowed was 19 days 20 hours and 39 minutes.

The owners contended that that period was exceeded by some 69 days and claimed demurrage of U.S. $203,000. The charterers admitted that some demurrage was due and paid U.S. $48,000.

The dispute was referred to arbitration. The charterers contended that the laytime actually used by each of the four lightening vessels should be ascertained from the time sheets. These four periods made up a total of 36 days and 15 minutes and the charterers were only liable for demurrage for 16 days, three hours and 36 minutes. Alternatively the charterers submitted that the proper method was to calculate for each of the four vessels the time allowed on the basis of the quantity of cargo on board. Once the time lost and saved by each of the vessels had been so established then in accordance with cl. 45 the net time lost or saved by all four vessels would be calculated and this figure then compared with the allowed laytime to establish whether demurrage or dispatch was payable.

The owners however argued that a time sheet should be drawn up covering the whole operation of discharging the lightening vessels. The

calculation was made each day of how much laytime had been used, if any, by each of the four vessels and then by all of them put together and when the total laytime of 19 days had been consumed by some, or one, or all of them, all four were then on demurrage.

The arbitrators stated an interim award for the opinion of the Court.

———*Held*, by STAUGHTON, J., that the question of law would be answered "in accordance with the owners' method".

On appeal by the charterers:

———*Held*, by C.A. (Sir JOHN DONALDSON, M.R., MAY and DILLON, L.JJ.), that the owners' suggested method better reflected the wording of the charter-party and the presumed intention of the parties than did either of the charterers' suggestions and the appeal would be dismissed (*see* p. 4, col. 2).

This was an appeal by the charterers, The Food Corporation of India from the decision of Mr. Justice Staughton ([1982] 2 Lloyd's Rep. 569) given in favour of the owners, Mosvolds Rederi A/S and holding in effect that the owners' method of calculating laytime best accorded with the words used in the charter.

Mr. Stephen Tomlinson (instructed by Messrs. Richards, Butler & Co.) for the owners; Mr. Giles Caldin (instructed by Messrs. Stocken & Lambert) for the charterers.

The further facts are stated in the judgment of Sir John Donaldson, M.R.

JUDGMENT

Sir JOHN DONALDSON, M.R. (*delivering the judgment of the Court*): This is an appeal about demurrage and it arises in unusual circumstances. Normally a vessel loads a cargo, carries it to its destination and discharges it. The agreed freight covers the ocean carriage and the detention of the vessel for purposes of loading and discharging for an agreed period or periods. Since these periods cannot be forecast accurately, the amount payable by the charterers to the owners in respect of freight is adjusted subsequently by the payment of demurrage, if the vessel is longer detained, or the receipt of dispatch, if the detention is less than was contemplated. For good commercial reasons, the dispatch rate is usually half the demurrage rate.

In the present appeal something different was agreed. The cargo, which consisted of grain, was to be loaded in the United States on board a bulk grain carrier of supertanker proportions. The quantity mentioned was 80,000 tons. It was then to be taken to a point off Madras or somewhere between Madras and Calcutta at shipowner's option. The shipowner was to provide a number of ocean-going grain-carrying vessels into which the cargo would be trans-shipped at this point and it was these vessels which would complete the ocean carriage, delivering the grain in Calcutta.

In the event, the cargo loaded in the United States was reduced to about 20,000 tons and the vessel into which it was loaded was a different and smaller vessel, *King Theras*. But the charter-party structure remained unaltered and the cargo was in due course transhipped into other vessels from *King Theras* (described in the charter-party as "the mother vessel") in the mouth of the River Hoogly off Saugor Island. The appeal concerns claims for demurrage in respect of these other vessels. No claim arises in respect of any detention of the *King Theras* herself and indeed the charter-party made no provision for loading port demurrage or for demurrage arising from her detention during transhipment operations, there referred to as "lightening operations".

Life would be much easier if shipowners and charterers would (a) refrain from making sophisticated bargains about demurrage and (b) express their bargains clearly. Indeed either by itself would help. In the present appeal the parties have done neither. Conventionally the extent of the detention which is allowed for in the freight is described as "laytime". It constitutes a reservoir of time which the charterers draw on for purposes of loading or discharging — discharging only in the present appeal. But not all detention of the vessel draws on this reservoir. Some detention does not count — typically Saturdays after 12 noon, Sundays and holidays or detention while rain has stopped operations or they are affected by a strike. The parties agree upon the event which will start the laytime clock ticking and it is then stopped for periods of excepted time. We assume that football referees use their stop-watches in just such a way. Saturdays, Sundays, etc. are to be regarded as injury time. If, despite these interruptions, the laytime clock reaches "zero" or "full time", the vessel comes on demurrage and, unless the parties have otherwise agreed, the charterers are liable to pay demurrage for all further detention, since the agreed exceptions relate to the time allowed for loading or discharging within the laytime and not to detention in excess of that laytime. As it is succinctly put in the industry, the general rule is "Once on demurrage, always on demurrage".

So much for the general background. The parties contract against this background, but

they are free to vary it to any extent which appeals to them. We therefore turn to the relevant clauses of this charter-party. They are as follows:

> 36. At the discharging port of Calcutta, cargo to be discharged by consignees' stevedores free of risk and expense to the dry cargo lightening vessels at the average rate of 1,000 tons of 2,250 lbs. per weather working day of 24 consecutive hours, Saturdays after noon, Sundays and holidays excepted even if used, always provided vessels can deliver at this rate.
>
> 38. For each lightening vessel, at discharging port or place, time to count from 24 hours after receipt of Master's written notice of readiness to discharge, given to Charterers or their agents during ordinary office hours on a weekday before 4 p.m. (similarly before noon if on a Saturday) vessel also having been entered at Custom House and in free pratique, whether in berth or not. Any time lost in waiting for a berth at Calcutta due to lightening vessels being over 515 feet length overall not to count as laytime. At Calcutta if vessel is unable to give notice of readiness by reason of congestion at Calcutta time shall commence to count at 8 a.m. on the next business day after notice of vessel's arrival off Sandheads has been given by radio to Charterers' or their agents and received during ordinary office hours. Whilst waiting off Sandheads Sundays and holidays and Saturdays after 12.00 noon till 8 a.m. Mondays not to count unless vessel is already on demurrage. Time proceeding from Sandheads to Calcutta is not to count.
>
> 43. At the point outside Madras or Calcutta as the case may be, no demurrage or despatch to be considered for the time used by the mother vessel to discharge into the lightening vessels or by the lightening vessels to discharge into other lightening vessels. For laytime calculations of the laytime used at Calcutta by the lightening vessels, the laytime used by each of these vessels is to be added in order to arrive at a single figure of time saved or lost in relation to the total time allowed for discharging such lightening vessels.
>
> If lightening vessels are detained longer than the total time allowed to discharge such vessels at Calcutta, Charterers to pay demurrage at the rate of U.S. Dlrs 3,000 U.S. Currency per day or pro-rata for part of a day for all time used in excess of the total laytime allowed. If lightening vessels are discharged sooner than the total time allowed to discharge such vessels at Calcutta, Owners to pay despatch at the rate of Dlrs. 1,500 per day or pro-rata for all working time saved. Despatch and/or demurrage at discharging port should be adjusted in accordance with clause 15(B).

Sandheads, which is referred to in cl. 38, is a sea area 40 miles south of Saugor Island. In the events which happened there was and could have been no detention of the lightening vessels at Sandheads, since *King Theras* transhipped the cargo in Saugor Island Roads which is at least that much closer to Calcutta. There was, however, substantial detention of these vessels, as appears from the provisional time sheets, the first lightening vessel beginning to load on Friday, Dec. 27, 1974, and the last completing discharge at Calcutta on Wednesday, Feb. 12, 1975. Indeed it is common ground that some demurrage is payable. The dispute concerns the principles or methods which govern its calculation.

The charterers have advanced two different ways of calculating the demurrage and the owners a third. The dispute went to arbitration. The two party-appointed arbitrators, Mr. Cedric Barclay and Mr. Lawrence Henley, agreed upon an award and the umpire, Mr. J. P. Powell, was not therefore involved. The award was in the form of a special case and, subject to the opinion of the Court, affirmed the charterers' primary contention. The award came before Mr. Justice Staughton, who answered the questions in the award in such a way as to affirm the owners' contention (see [1982] 2 Lloyd's Rep. 569). The charterers have appealed from that decision and all three contentions are again in issue.

The charterers' preferred solution

This is based upon the second sentence of cl. 43. A time sheet is prepared for each vessel recording the laytime used. For this purpose, excepted days or parts of days are ignored, since they are not laytime and therefore cannot be "used" or, which is more accurate, cannot cause laytime to be used. At this stage no regard is had to the total agreed laytime and indeed each of the vessels could in theory "use" more laytime than was available to all four vessels. The total laytime so calculated is then compared with the agreed laytime and the excess is paid for at the demurrage rate.

Mr. Tomlinson, for the owners, submits that this solution must be rejected for two reasons: (a) No individual lightening vessel can ever exhaust the laytime and come on demurrage. Yet cl. 38 expressly envisages that an individual vessel might be on demurrage prior to reaching Calcutta. The fact that in the event none of the vessels waited off Sandheads is immaterial for

purposes of construction. (b) This solution is inconsistent with cl. 43. That provides that the charterers shall pay demurrage for *all time* used in excess of the total laytime allowed. If this solution is adopted, the charterers do not have to pay for *all time* used, they only pay for such time used after the expiry of laytime as would otherwise rank as laytime, full effect being given to the various exceptions for Sundays, holidays, etc. Put more broadly, it also conflicts with the *prima facie* rule of construction that "once on demurrage, always on demurrage". Thus, for example, on charterers' own admission the last of the lightening vessels to complete discharge (*Moria*) came on demurrage before Feb. 3, 1975, yet she ceased to be on demurrage for 30 minutes on Feb. 7, 1975, when "rain stopped play" and again came off demurrage over the weekend of Feb. 8/9, going back on demurrage on Monday, Feb. 10.

The charterers' alternative solution

This involves calculating an individual laytime for each lightening vessel based upon the quantity of cargo transhipped into that vessel. A time sheet is then prepared for that vessel and once its own laytime has been exhausted, all time counts as time used. The total time used by all four vessels is then compared with the total laytime calculated in accordance with cl. 36 and the excess in demurrage time.

Understandably, this solution was not advanced as being the obvious answer to the conundrum. The objections include the following: (a) Clause 36 contemplates a single laytime which will be used (up) by each of the vessels in accordance with cl. 43. This suggestion involves separate laytimes in the preliminary stages of the calculation. For this there appears to be no warrant. (b) Laytime saved on one lightening vessel is set off against running time lost by another lightening vessel which has exhausted its laytime. In other words the full benefit of the laytime saved by one vessel is not transferred to another. This mixing of accounting units — laytime and running time — appears to be nowhere contemplated by the charter-party.

The owners' solution

This involves a composite time sheet for all four lightening vessels, each drawing from the stock of laytime and doing so simultaneously when they are operating simultaneously. Once the single stock of laytime was exhausted, any lightening vessels still operating would start losing time, calculated on a running basis, and this would be the period for which demurrage would be payable. Mr. Justice Staughton pointed out in his judgment that this method was far from being without blemish. If, for example, the first lightening vessel operates by itself and exhausts the stock of laytime, the other three lightening vessels would lose the benefit of all the exceptions and would be on demurrage from the moment they started to load cargo, throughout the voyage to Calcutta and throughout discharge. They would not even get the benefit of the initial 24-hour notice period. On the other hand, if the first three lightening vessels all discharged promptly, the laytime which was not used by them would be available for use by the fourth lightening vessel.

Mr. Justice Staughton concluded that the owners' method best accorded with the words used in the charter-party. It involves a single calculation of laytime in accordance with cl. 36, it involves time counting (against laytime) for each individual vessel in accordance with cl. 38 and it involves the addition of individually used laytime, in accordance with cl. 43, in order to arrive at a single figure for time saved or lost in relation to the total time (in the singular) allowed for discharging the lightening vessels.

Like Mr. Justice Staughton, we do not find that the drafting of this charter-party excites our admiration and there are points at which we think that the draftsman lost sight of the difference between "time" or "time used" which is a reality and "laytime" which is a pure unit of measurement or yardstick. However, again like Mr. Justice Staughton, we think that the owners' suggested method better reflects the wording of the charter-party and the presumed intention of the parties then does either of the charterers' suggestions.

The appeal will therefore be dismissed.

[*Order: Appeal dismissed with costs. Application for leave to appeal to the House of Lords refused.*]

COURT OF APPEAL

Oct. 24, 25, 26 and 27, 1983

K/S A/S OIL TRANSPORT
v.
SAUDI RESEARCH AND DEVELOPMENT CORPORATION LTD.

(THE "GUDERMES")

Before Lord Justice ACKNER and Lord Justice OLIVER

Practice — Summary judgment — Claim in respect of demurrage — Defendants denied they were a party to charter-party — Whether defendants should have been given unconditional leave to defend — Whether defendants should be granted leave to produce further evidence.

The claim in this action related to a voyage charter on the vessel *Gudermes* of which the plaintiffs were the desponent owners. There was no dispute as to the claim itself which involved inter alia claims for demurrage, but the defendants denied that they were a party to the charter, and they were in fact not named as charterers in the charter.

The named charterers were Arab African Energy Corporation of Bermuda (Arafenco).

The plaintiffs applied for summary judgment against the defendants pursuant to R.S.C., O. 14.

———*Held*, by MUSTILL, J., that on the evidence the defendants were the undisclosed principals to the charter entered into in the name of Arafenco and that the three letters written by Arafenco and the defendants showed that an unlimited authority was given to Arafenco to enable their name to be used as a front for the defendants; the plaintiffs were entitled to summary judgment.

The defendants appealed contending that (i) on the material before Mr. Justice Mustill they should have been given unconditional leave to defend the claim; (ii) alternatively they should be granted leave to adduce further evidence and that that further evidence would persuade the Court to grant them leave to defend.

———*Held*, by C.A. (ACKNER and OLIVER, L.JJ.), that (1) on the material before the learned Judge, he was fully entitled to give summary judgment in favour of the plaintiffs (*see* p. 8, cols. 1 and 2);

(2) the submission by the defendants that although the evidence could with reasonable diligence have been made available to the Court on the hearing of the O. 14 application there were special grounds for its admission would be rejected; the facts of this case did not provide any justification for relaxing the requirement that it had to be shown that the evidence could not have been obtained with reasonable diligence and the appeal would be dismissed (*see* p. 9, col. 2; p. 11, col. 1).

The following cases were referred to in the judgment of Lord Justice Ackner:

Copiapo Mining Co. Ltd., In re, (1893) 10 T.L.R. 180;

Ladd v. Marshall, [1954] 1 W.L.R. 1489;

Langdale v. Danby, (H.L.) [1982] 1 W.L.R. 1123;

Nash v. Rochford Rural District Council, [1917] 1 K.B. 384;

Shedden v. Patrick, (1869) L.R. 1 H.L. Sc. & Div. 470;

Skone v. Skone, [1971] 1 W.L.R. 812;

Wallingford v. Mutual Society, (1880) 5 App. Cas. 685.

This was an appeal by the defendants, Saudi Research and Development Corporation Ltd. from the summary judgment of Mr. Justice Mustill given in favour of the plaintiffs, K/S A/S Oil Transport, against the defendants pursuant of R.S.C., O. 14.

Mr. Peter Gross (instructed by Messrs. Lovell White & King) for the defendants; Mr. Stephen Males (instructed by Messrs. Sinclair, Roche & Temperley) for the plaintiffs.

Neither Mr. Peter Gross nor Messrs. Lovell White & King represented the defendants at the original hearing of the O. 14 summons before Mr. Justice Mustill on Dec. 23, 1982.

The further facts are stated in the judgment of Lord Justice Ackner.

JUDGMENT

Lord Justice ACKNER: On Dec. 23, 1982, Mr. Justice Mustill gave summary judgment in favour of the plaintiffs against the defendants pursuant to R.S.C., O. 14 in the sum of U.S. $227,981.45, together with costs. The defendants now appeal against that judgment, contending firstly that, on the material before Mr. Justice Mustill, they should have been given unconditional leave to defend the claim; alternatively that they should be granted by this Court leave to produce further evidence and that that further evidence should persuade this Court to grant them leave to defend.

The claim relates to a voyage charter-party on the vessel *Gudermes*, of which the plaintiffs were the desponent owners. There is no dispute as to the claim itself which involves inter alia claims for demurrage, but the defendants deny that

they were a party to the charter-party. The defendants were not the named charterers under the charter-party, but the plaintiffs' claim, to which Mr. Justice Mustill held the defendants had no answer, was that the defendants were the undisclosed principals of the named charterers.

The named charterers are "Arab African Energy Corporation of Bermuda". It is common ground that as at the date of the charter-party (October, 1980), there existed an entity, Arab African Energy Corporation Ltd., but that this was incorporated in the Bahamas. At a later date, about a year later, there came into existence another company with a very similar name which was incorporated in Bermuda. This point was not taken before Mr. Justice Mustill, presumably because at the material time, i.e., the date of the charter-party, there was only one Arab African Energy Corporation Ltd., to which I refer hereafter as "Arafenco". The fact that it was mis-described by the omission of the word "limited", and its place of incorporation was wrongly stated, was perhaps thought to be of no significance.

An affidavit put in opposition to the O. 14 proceedings ends in the penultimate paragraph:

> In view of the above facts, [the defendant] believes that it is entitled to a full judicial hearing of this matter to determine whether there was a relationship between Arafenco and [the defendant] in respect of this charter of such a nature that [the defendant] should be held liable for the charterers' obligations.

To my mind that carries with it a clear admission that Arafenco was, in fact, the named charterer and it waives any point that might have been open on the question of the mis-description. Had the point been taken, the plaintiffs would doubtless have sought leave to put in further evidence to explain the mistake. In my judgment it is now too late to take this point.

When the matter came before Mr. Justice Mustill he had before him in support of the plaintiffs' contention that the defendants were the undisclosed principals to the charter-party entered into in the name of Arafenco, a lengthy affidavit with supporting documents which set out the basis of the plaintiffs' case. It was averred that the true principals under the charter-party were not Arafenco but the defendants who are generally known (and this is common ground) as "Redec". Mr. Knox, the deponent, of the plaintiffs' solicitors, produced a bundle of documents obtained from Arafenco's brokers, Thelhead Ltd., which it was contended demonstrated the relationship between themselves, the defendants and Arafenco. There are three letters in particular in that bundle which the learned Judge considered were fatal to the defence, to which I will refer later. Mr. Knox, in his affidavit, stated that he was informed by Mr. Choynowski, a director of Thelhead Ltd., inter alia that it was mentioned to Mr. Choynowski by Mr. Bouguerra of Mediterranee Courtage (referred to hereafter as "M.C.") of Paris, a company which he understood to be financed by the defendants, that Arafenco was being set up so that instead of the defendants chartering vessels in their own name, as they had previously done in the past, they would charter in the name of Arafenco so as to avoid the risk of vessels being detained or delayed at ports when demurrage or other claims arising out of previous Redec charges were still outstanding.

> Whoever was named as charterers, however, the cargoes would be the defendants, freight payments would be made on the instruction of "M.C." and the same personnel would be involved.

Mr. Choynowski informed Mr. Knox that he subsequently received from M.C. the three letters to which I will refer later—

> . . . and the arrangement described above was put into operation. In the case of the *Gudermes*, the name of Arafenco had to be used because the same vessel had been fixed to the defendants in June 1980 and demurrage had not been paid. The defendants were therefore concerned to avoid any arrest of the cargo on the voyage, which was for their account.

In the large bundle of documents annexed to Mr. Knox's affidavit there are documents from which it appears that the voyage instructions, which were passed by Thelhead Ltd. to the plaintiffs were sent to Thelhead by M.C. for and on behalf of Redec Petroleum Division. Secondly, the payments of freight were routed into Thelhead's bank account with the First National Bank of Boston for subsequent transfer to the plaintiffs by the order of Redec. Documents were also exhibited from which it was apparent that Thelhead were passing the plaintiffs' messages to the defendants through M.C. rather than to Arafenco and that on July 13, 1981 Thelhead advised that documents should be sent to Redec International Corporate in Paris.

The affidavit and its exhibits were provided to the defendants early in October, the summons being returnable on Nov. 26. Neither Mr. Gross nor his instructing solicitors were involved in the preparation for the resistence to that summons nor did they appear on its hearing on Nov. 26. The affidavit filed on behalf of the defendants was sworn in London on Nov. 25, 1982, by Mr.

Whitbeck, who lives in Paris, and who is "General Counsel to Redec International, the French service company for the defendants". He is a member of the Bar of the State of New York. Mr. Whitbeck's affidavit was short. Its principal paragraph was par. 3, which was in these terms:

> Redec gave a certain restricted authority to Mr. Slimane Bouguerra, Managing Director of Mediterrannee Courtage . . . to trade in oil on its behalf; and in certain circumstances that authority may have been extended to the chartering of ships in fulfilment of oil trading contracts. Redec wishes to say, however, that this particular charter was outside the relevant authority, and that the true charterer was actually the company named in the charter. Redec has now procured a copy of a Brokerage Agreement between Arafenco and Mr. Bouguerra's company, Mediterrannee Courtage, which makes it plain that Arafenco was engaged in oil trading on its own account. A true copy of this Agreement is now shown to me marked "JW 1". Redec was not actually aware of any company by the name of Arab African Energy Corporation Limited (Arafenco) or any similar name until after the termination, in May/June 1981, of its relationship (pursuant to a brokerage agreement dated July 18, 1980) with Mediterrannee Courtage S.a.r.L.

This paragraph was described by the learned Judge in his short judgment as being "woefully inadequate". Mr. Gross, who has argued this appeal with very great skill, as has indeed his opponent, Mr. Males, was virtually constrained to concede that the Judge's comment was quite justified. It is well settled that a defendant, seeking to resist summary judgment, should state clearly and concisely what his defence is and what facts are relied upon as supporting it. No particulars were given of the "circumstances" in which authority was given to Mr. Bouguerra for the chartering of ships fulfilment of oil trading contracts, nor of that authority. Although Mr. Whitbeck said that Redec "wishes to say" that the particular charter was outside the relevant authority, strangely enough neither he nor anyone else has stated any belief in the absence of the defendants' liability. The brokerage agreement which was annexed gave no support to the defendants' case. Above all, the paragraph did not challenge the genuiness of the three letters, which I shall shortly describe; in fact it did not even refer to them.

The fourth paragraph of the affidavit was in these terms:

> 4. Since the termination of such relationship and in connection with litigation undertaken by Redec to recover not less than USD 3,000,000 of which Redec was defrauded by Mr. Slimane Bouguerre, and companies controlled by him, Redec has learned of the Existence of two Arafenco companies, incorporated in Bermuda and the Bahamas respectively, and a Panamanian company named "United Petroleum Development S.A." which were used by Mr. Bouguerra to defraud Redec of such sums. Mr. Bouguerra has admitted in court proceedings in England, Switzerland and France that he directly controls both Arafenco companies and that he had a power of attorney to represent United Petroleum Development S.A. Corporate search has also revealed that, while the Bermuda Arafenco is owned of record (except for qualifying shares) by a nominee company of the law firm of Appleby Spurling and Kempe, the Bahamian Arafenco is owned of record (except for qualifying shares) by Mr. Bouguerra in his personal capacity.

In regard to this paragraph, the learned Judge quite properly observed:

> There is an unparticularised allegation of fraud in paragraph 4 of Mr. Whitbeck's affidavit. It is not said if the present transaction formed part of that. Something much more than that would be required for leave to defend. A defendant must come out and say fraud with particularity.

I now refer to the three letters exhibited to Mr. Knox's affidavit. They were in these terms. Firstly a letter on Arafenco's paper, dated June 27, 1980, signed on behalf of the company, in these terms:

> *To whom it may concern*
>
> We hereby authorize Messrs Redec Petroleum Division, Jeddah to use our name for the purpose of fixing ships for their irrevocable undertaking to assume full responsibility for any expenses, claims, interests of whatever nature in doing so, and provided they undertake to hold us harmless of any consequences which may arise from our letting them do so.

Then a letter dated July 1, 1980, on the defendants' notepaper, which is addressed to Arafenco in the Bahamas, giving their address:

> Dear Sir,
>
> Further to our conversation of June 27th, 1980 we confirm our agreement as follows:
>
> Redec will need from time to time to fix tankers for the transportation of Petroleum

products, mostly within the Mediterranean and North West Europe areas.

We hereby irrevocably undertake to hold you harmless of any damages or whatever expenses you may incur in the fixing of ships on our behalf whenever required.

Being as the market situation is extremely fast moving our request will be made either by telex or telephone. Whichever the case, we fully guarantee to pay for any consequences which may result from the fact that ARAFENCO agree to fix these ships, this being done under our sole responsibility.

Then the third letter, again on the defendants' notepaper, addressed to Sloane Oil, Sloane Street, London, in these terms:

Dear Sir,

Further to our various conversations, enclosed please find a letter agreement authorizing us to use Arab African Energy Corp Ltd. (Arafenco) name under our sole and full responsibility for fixing ships on our account.

The learned Judge said this in relation to these letters:

If these letters are genuine, they are fatal to the defendants in two ways. First, they destroy the credibility of the statement of Mr. Whitbeck that Redec was not aware of any company by the name of Arafenco. If the letters are genuine, that cannot be true. Mr. Whitbeck must be misinformed. I do not suggest that he is deliberately misleading. Secondly the letter of July 1 read with the letter of June 27 is fatal to the defence itself as they show an unlimited authority given to Arafenco to enable their name to be used as a front for Redec. There may be an explanation which is consistent with what Mr. Whitbeck says. Perhaps Mr. Bouguerra had got hold of blank notepaper and typed up the letters. That would be fraud. No such suggestion is even mentioned.

In my judgment the learned Judge was fully justified in the comments which he made and, upon the basis of these three letters alone, was entitled to give summary judgment. He referred to a fourth document headed "Credit Ticket" which, on its face, showed that the crediting of freight originated from Redec. He said that this itself showed that Mr. Whitbeck cannot be right because—

. . . It is inconceivable that the defendants would pay freight on a transaction of which they had no knowledge.

He went on to say that there may be an explanation such as that the money may not really have come from Redec but from some other source and the credit ticket may be misleading. But he rightly commented that the defendants had not sought to deal with the document at all.

Before us it is urged that, as the entirety of the cargo was Redec's cargo and indeed occupied the full capacity of the vessel, payment could be explained on the basis that it merely recognised Redec's cargo interests and was not named because Redec had charterers. That indeed might well be the explanation but this was not put forward by Mr. Whitbeck in his affidavit, nor by anyone else on behalf of the defendants.

I, therefore, conclude that the learned Judge was fully entitled, on the material before him, to give summary judgment in favour of the plaintiffs. I do not think that it is without some significance that Mr. Whitbeck never dealt in his affidavit with the explanation given, which I have quoted, for Arafenco's name being used instead of the defendants, and in particular that the very vessel, *Gudermes*, had been fixed to the defendants in June, demurrage had not been paid, and that the defendants were therefore concerned to avoid any arrest of their cargo on the voyage.

Mr. Gross referred us to the recent additional words in O. 14, "or that there ought for some other reason to be a trial": and argued that the suggestion of fraud perpetrated by Mr. Bouguerra was sufficient to make a trial desirable.

I do not agree. I do not think it is out of place to quote the short observations made by Lord Blackburn in the well-known case of *Wallingford v. Mutual Society*, (1880) 5 App. Cas. 685 at p. 704, where the learned Law Lord stated:

. . . You must satisfy the Judge that there is reasonable ground for saying so. So again, if you swear that there was fraud, that will not do. It is difficult to define it, but you must give such an extent of definite facts pointing to the fraud as to satisfy the Judge that those are facts which make it reasonable that you should be allowed to raise that defence. And in like manner as to illegality, and every other defence that might be mentioned.

Allegations of the imprecision made by the defendants before Mr. Justice Mustill should not, in my judgment, prevent the plaintiff obtaining summary judgment where no triable issue has been disclosed.