Privy Council Appeal No. 11 of 1984

(1) Grace Shipping Inc. and
(2) Hai Nguan & Co. (A firm) — *Appellants*

v.

C.F. Sharp & Co. (Malaya) Pte. Ltd. — *Respondent*

FROM

THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH DECEMBER 1986

Present at the Hearing:

LORD BRIDGE OF HARWICH
LORD BRANDON OF OAKBROOK
LORD OLIVER OF AYLMERTON
LORD GOFF OF CHIEVELEY
SIR IVOR RICHARDSON

*[Delivered by **Lord Goff of Chieveley**]*

There are before their Lordships two related appeals from the Court of Appeal of the Republic of Singapore, brought by leave of that court. The case is one of some complexity; and it may be helpful if their Lordships set out the background before explaining the nature of the appeals themselves.

The case is concerned with the making of a contract of affreightment for the carriage of cargoes of fertiliser from Romania to Indonesia. The fertiliser in question was the subject of a sale contract dated 30th November 1974. The sellers under the sale contract were Azoexport of Romania; for the buyers, the contract was made by a Mr. Hiswara of an Indonesian company called P.T. Bina Alam ("Bina Alam"), though he purported to act, and to sign the contract, on behalf of a substantial international company called Phillips Petroleum International Inc. ("Phillips"). It appears that, subsequently, Phillips (acting through a Mr. de Guzman) agreed that the contract should be in their name as buyers, on the condition that Bina Alam should pay to Phillips a [57] sum of US$80,000. A separate agreement to this

effect was entered into between Bina Alam and Phillips.

Under the sale contract with Azoexport, a quantity of 40,000 metric tonnes of fertiliser was to be purchased, to be shipped from Constanza in four shipments of about 10,000 metric tonnes each. The sale was on f.o.b. terms; and it was therefore necessary for the buyers to find the necessary tonnage. Mr. Hiswara asked Mr. Lim Kuy Bak ("Mr. Lim"), a partner in a firm of brokers called Hai Nguan & Co. ("Hai Nguan"), the appellants in the second appeal, to charter in vessels for this purpose. It appears that, in addition, Mr. Hiswara asked Mr. de Guzman of Phillips to charter in a vessel for the first shipment. These dual instructions were likely to, and did, lead to some confusion. Hai Nguan, in their turn, instructed another firm of brokers, C.F. Sharp & Co. (Malaya) Pte. Ltd. ("Sharp"), the respondents in both appeals; while Phillips instructed as brokers Stolt-Nielsen Singapore Pte. Ltd. ("Stolt-Nielsen"). Hai Nguan, Sharp and Stolt-Nielsen all carry on business in Singapore.

Sharp then entered into negotiations for the chartering of tonnage for all four shipments. The shipowners concerned were Grace Shipping Inc. ("Grace"), the appellants in the first appeal. Their principal was a Mr. Ode, who acted through a company in Hamburg called Transatlantic. The brokers instructed by Mr. Ode on behalf of Grace were Polfracht of Gdynia; though the direct communications between the parties were through Polfracht (Australasia) Sydney Pty. Ltd. ("Polfracht Sydney") on behalf of the shipowners, Grace, and Sharp on behalf of the charterers. The communications between Polfracht Sydney and Sharp were by telex, and were conducted with reference to the NUVOY Voyage Charter Party 1964 standard form. It has been the case of Grace that, by an exchange of telex messages between Polfracht Sydney and Sharp, a concluded agreement was entered into on 5th February 1975 between Grace and Phillips for the carriage of all four shipments of fertiliser from Romania to Indonesia, which would have been binding on the parties but for the fact that, as subsequently transpired, Sharp had no authority to act on behalf of Phillips.

At all events, after the alleged agreement had been reached, a contract of affreightment between Grace and Phillips was drawn up by Polfracht Sydney on the NUVOY form and, having been signed by Polfracht Sydney on behalf of Grace, was despatched by air to Singapore for signature by Phillips. A meeting was convened in Singapore on 8th February 1975. But at that meeting Mr. de Guzman refused to sign the contract on behalf of Phillips; moreover it

transpired that, on 5th February 1975, Stolt-Nielsen had entered into another charter on behalf of Phillips for the carriage of the first cargo to be shipped under the sale contract. In consequence, the contract of affreightment drawn up between Grace and Phillips was never signed or implemented.

So on 8th September 1975 Grace commenced proceedings in the High Court of Singapore against both Phillips and Sharp, claiming damages from Phillips as first defendants for breach of the contract of affreightment and, in the alternative, damages from Sharp for breach of warranty of authority. Sharp, in their turn, joined Hai Nguan as third parties, claiming an indemnity from them on the ground that, in purporting to contract on behalf of Phillips, they had acted on the instructions of Hai Nguan. Hai Nguan did not however join Bina Alam or Mr. Hiswara as fourth parties.

The trial of the action began in October 1979, before Choor Singh J. Evidence was given by a number of witnesses: they included (1) Mr. Ode, on behalf of Grace: (2) Mr. Windt and Mr. Tessensohn, on behalf of Sharp: (3) Mr. Lim and Mr. Eng Meng Ker ("Mr. Eng"), on behalf of Hai Nguan: and (4) Mr. de Guzman, on behalf of Phillips. There was no shorthand note taken of the evidence. Their Lordships have however the benefit of the Judge's note; and it appears that, in cross-examination at least, the evidence consisted mainly of questions submitted in writing and answers which were recorded verbatim by the judge. It also appears that, although both Mr. Lim and Mr. Eng spoke some English (Mr. Eng being more fluent than Mr. Lim), they gave evidence in Chinese through interpreters. Mr. Hiswara was not called as a witness. Subsequently, written submissions were placed before the judge on behalf of all four parties. On behalf of Sharp it was submitted (*inter alia*) that no concluded agreement had been reached on 5th February 1979 so that, even if Sharp had acted with the authority of Phillips, no contract would have been concluded on that date. The judge delivered his reserved judgment on 18th September 1980. He dismissed Grace's action against Phillips, holding that Sharp had no authority to act on their behalf. He concluded that a complete agreement had been reached as between Polfracht Sydney and Sharp on 5th February, and accordingly held that Sharp were liable in damages to Grace for breach of warranty of authority; but he dismissed Sharp's third party proceedings against Hai Nguan, holding that Sharp had not been authorised by Hai Nguan to enter into a contract on behalf of Phillips. The damages payable by Sharp to Grace were assessed at US$253,658.00, plus interest.

Sharp appealed to the Court of Appeal of the Republic of Singapore against both conclusions of the learned judge. The Court of Appeal (Wee Chong Jin C.J., Kulasekaram and Chua JJ.) allowed Sharp's appeal on both points. They held, first, that no concluded agreement had resulted from the telex exchange between Sharp and Polfracht Sydney, with the result that Sharp were under no liability to Grace for breach of warranty of authority. They further held that Hai Nguan had authorised Sharp to contract with Grace on behalf of Phillips. The effect of this latter conclusion was that, if Sharp had been liable to Grace, Sharp would have been entitled to be indemnified by Hai Nguan. As it was, they ordered Hai Nguan to pay the costs of the third party proceedings both in the Court of Appeal and in the court below.

Before their Lordships, with leave of the Court of Appeal, Grace appealed from the decision of the Court of Appeal that Sharp were under no liability to them for damages for breach of warranty of authority, and Hai Nguan appealed against their decision that they had authorised Sharp to contract on behalf of Phillips and so must pay the costs of the third party proceedings. Their Lordships will consider the two appeals separately, taking first the appeal of Grace.

(1) Grace's appeal

Two questions arise on Grace's appeal. The first question is concerned with the ground upon which the Court of Appeal allowed the appeal of Sharp from the decision of Choor Singh J., viz. whether a concluded agreement had been reached in the telex messages passing between Sharp and Polfracht Sydney. The second question is whether any agreement so reached was subject to a condition precedent, which was not fulfilled; this question the Court of Appeal did not have to consider, since they decided the appeal against Grace on the first question.

(a) Was there a concluded agreement?

This point their Lordships can consider briefly because, although it was the basis upon which the Court of Appeal decided the case against Grace, it was not relied upon strongly by Mr. Pollock for Sharp; he concentrated his argument rather upon the second point. The question whether there was a concluded agreement in the telex messages depends entirely upon a detailed analysis of the telexes which passed between Sharp and Polfracht Sydney between 28th January and 5th February 1975. Their Lordships have been taken through these telexes with very great care, both by Mr. Boyd for Grace and by Mr. Pollock; and they do not intend to burden their judgment with a detailed analysis of the telexes. It

was successfully argued by Sharp before the Court of Appeal that no agreement had been reached on four matters:

(1) Who would appoint the vessel's agent at the loading and discharging ports.

(2) Holiday time.

(3) Arbitration and proper law.

(4) Nomination of the vessel for the first of the four shipments.

Of these four points, points (1), (2) and (4) were resolved in the course of argument before their Lordships, due to careful analysis by Mr. Boyd and realistic concessions by Mr. Pollock. It became plain that, even if no agreement had been reached as to who would appoint the vessel's agent, this would make no difference to the existence of a concluded agreement; because, in the absence of agreement to the contrary, both the shipowners and the charterers could appoint their own agents. Again, it became plain, on a careful analysis of the telexes, that agreement had been reached both on holiday time and nomination of the vessel for the first of four shipments.

The only point upon which, in the end, Mr. Pollock placed any real reliance, was the matter of the arbitration clause. What happened was this. After the time when, on 5th February 1975, both Sharp and Polfracht Sydney believed that they had reached a concluded agreement on the basis of the NUVOY form, it was agreed between them that Polfracht Sydney would draw up the contract of affreightment. This they did and, when doing so, discovered that a blank in the arbitration clause in the form had not been filled by agreement in the telexes. The clause, which was clause 14 in the printed form, read as follows:-

> "Arbitration. Any disputes arising under this Charter shall be settled by arbitration in in accordance with the law and procedure prevailing there."

On 6th February, therefore, Polfracht Sydney telexed Sharp as follows:-

> "... WHEN FILLING IN CP NOTICED NO ARBITRATN PLACE AGREED BETWN PARTIES (LINE 88) PLS ADV CHTS WISHES AND LL TAKE UP WITH OWS. MYOP BEST WLD BE TRY TO AGREE = LONDON ..."

On 8th February, Polfracht Sydney again telexed Sharp as follows:-

"... RE ARBITRATION PLACE OWS ALSO NOTICED SAME OMITTED AND ARE AGREEABLE TO = LONDON ..."

Later on the same day, Sharp telexed Polfracht Sydney as follows:-

"... YTLS 6TH ARBITRATION LONDON AGREED."

By that time, however, it had already transpired at the meeting on 8th February in Singapore that Mr. de Guzman had refused to sign the contract on the ground that Phillips had not authorised it and, indeed, that Phillips had already, through Stolt-Nielsen, chartered another ship for the first voyage.

The Court of Appeal held that it was plain from these telexes, which came into existence after 5th February 1975, that the parties intended to agree on the place of arbitration and the law governing the contract but had overlooked these matters earlier; and therefore that, having failed to agree upon them on 5th February, there could be no binding agreement as at that date. Their Lordships are however unable to agree with this conclusion of the Court of Appeal. On the telexes which passed between Sharp and Polfracht Sydney, there was no mention whatsoever of the arbitration clause until the telex from Polfracht Sydney on 6th February quoted above. The point has to be judged at 5th February, the date upon which agreement is said by Grace to have been reached between the parties; and, in the opinion of their Lordships, the question whether the parties intended a binding contract to be dependent upon agreement being reached on the place of arbitration (and therefore upon the proper law) has to be ascertained from the communications passing between the parties through their brokers before and on that date. In the absence of any mention whatsoever of the arbitration clause by then, it is impossible to infer that the parties did intend that a binding contract was dependent upon filling in the gap in clause 14. That there was in fact no such intention is confirmed by the fact that a meeting took place for the signature of the contract at a time when, to the knowledge of both Sharp and Polfracht Sydney, no agreement had yet been reached on the place of arbitration; though logically this is of no relevance to the state of negotiations on 5th February. For these reasons, their Lordships are unable to accept the conclusion of the Court of Appeal on this point. It follows that they are satisfied that the judge was correct in holding that a complete agreement had been reached on all relevant points on 5th February 1975, as indeed both Sharp and Polfracht Sydney thought at the time.

(b) Condition precedent

This was the point on which Mr. Pollock, for Sharp, concentrated in his argument before their Lordships. The point arose in the following way. During the telex negotiations between Sharp and Polfracht Sydney, a question emerged about the nomination of the first vessel and her ETA at the loading port, Constanza, in Romania. In a telex to Polfracht Sydney dated 31st January Sharp stated:-

> "PLEASE ADVISE NAME AND PARTICULARS OF FIRST VESSEL AND ETA CONSTANZA SOONEST."

Subsequently, on 4th February, Sharp returned to the point in the following terms:-

> "KINDLY REQUEST OWNERS TO SUPPLY NAME AND DETAILS OF FIRST VESSEL AND ETA CONSTANZA SOONEST IN ORDER CHARTERERS ADVISE SHIPPERS AS TIME RUNNING SHORT."

Polfracht Sydney responded on 5th February:-

> "OWS WILL NOMINATE FIRST 2 VSLS STILL THIS WEEK BUT CAN DO SO AFTER BIZ FINALLY CONCLUDED."

Sharp then responded in a telex on 5th February upon which Mr. Pollock particularly relied:-

> "... THEY [the charterers] INSIST NAME FIRST VESSEL TODAY 1700 OUR TIME OTHERWISE BUYERS MAY CANCEL."

Polfracht Sydney replied:-

> "RE CHTS INSISTENCE NOMINATE FIRST VSL BY 1700 HRS SHALL CONTACT OWS FIRST OPENING EUROPE AND TRY RVT."

Polfracht Sydney then pressed Polfracht Gdynia to obtain an answer from Grace. Sharp came back on 5th February:-

> "... ANXIOUSLY AWAITING FIRST VESSELS NAME TODAY."

Meanwhile, that evening, Polfracht Gdynia informed Polfracht Sydney by telex that Grace intended to nominate the m.s. "Ostrogozhsk" or substitute in owners' option. It was however agreed between them that Polfracht Sydney on behalf of the owner should nominate Ostrogozhsk or substitute and not that the owners intended to nominate Ostrogozhsk or substitute. The end result was the same, but it sounded better. And so, late in the evening of 5th February, Polfracht Sydney telexed to Sharp as follows:-

> "OWS NOMINATE FOR FIRST VOY: MS = OSTROGOZHSK = OR SUB AT OWS OPTN."

The vessel was described as "ON T/C TO GRACE SHIPPING". Details of the vessel's movements were given, and it was stated that there was a good chance that the vessel would be ready at the beginning of the lay days. The telex continued:-

> "SHALL ISSUE CP TMROW AND AIRMAIL SAME TO U FOR CHTS SIGNATURE."

This was accepted by Sharp, in that on 6th February they requested Polfracht Sydney to air freight the charterparty to Singapore for signature by Phillips.

On the basis of these messages, it was submitted by Mr. Pollock that Sharp had made it a condition precedent to the formation of the contract that Grace should nominate the vessel for the first voyage under the contract. He further submitted that it was implicit that such a nomination should be a *bona fide* nomination, i.e. that it should be a nomination by Grace of a vessel which they *bona fide* believed to be available to them for the performance of the first voyage; and, relying on certain passages in Mr. Ode's evidence before the judge, he submitted that it was plain that Mr. Ode knew perfectly well that the Ostrogozhsk would not be available for the first voyage, and that he had admitted that he was simply making a nomination of the Ostrogozhsk in order to satisfy the charterers' requirement for a nomination, with an intention to deceive them. Accordingly, he submitted, the condition precedent of a *bona fide* nomination was never fulfilled, and so no binding contract ever came into existence.

Their Lordships are unable to accept this submission for a number of reasons. First, their Lordships, having studied the evidence of Mr. Ode, are satisfied that there was no evidence that Mr. Ode knew that the Ostrogozhsk was not available to him, or that he intended to deceive the charterers, as alleged by Mr. Pollock. In their Lordships' opinion, there was no evidence of deception, or even bad faith, on the part of Mr. Ode. On the contrary, it is plain that, as at 5th February, Mr. Ode was still negotiating with the owners of the Ostrogozhsk in the hope of chartering her for the first voyage. What Mr. Ode intended to do, and did do, was to protect his position by not giving a simple nomination of the Ostrogozhsk, but by nominating the Ostrogozhsk or substitute. A nomination in that form was accepted as being sufficient, and so Grace were free to nominate in due course a vessel other than the Ostrogozhsk. In any event, their Lordships are unable to construe the telexes as giving rise to any condition precedent upon the fulfilment of which the agreement depended. All that happened was that, before agreement was reached, there was a request for a nomination to be made for the first voyage in a

certain form, and a nomination was in fact made in a different form which was then accepted. The effect of the nomination was simply that, when the contract was made, Grace would become contractually bound to perform the first voyage in accordance with the nomination made by them - which, as accepted, gave them a liberty to nominate a substitute. In the circumstances, their Lordships can see no failure of any condition precedent to the agreement. It follows that the decision of the Court of Appeal that there was no complete agreement on 5th February cannot be sustained, and that Sharp are liable in damages to Grace for breach of warranty of authority.

Accordingly, their Lordships turn next to consider, in relation to Hai Nguan's appeal, whether Hai Nguan are liable to indemnify Sharp.

(2) Hai Nguan's appeal

This appeal is concerned with the question whether Sharp were authorised by Hai Nguan to contract on behalf of Phillips. The judge held that they were not. The Court of Appeal however reversed the decision of the judge, and held that they were. The crucial question before their Lordships is whether the Court of Appeal were entitled to interfere with the decision of the judge on what was essentially a question of fact.

In order to consider this question, it is necessary for their Lordships to refer to the evidence before the judge in some detail. The gentlemen dealing with the matter at Hai Nguan were Mr. Lim and Mr. Eng. Mr. Lim was a partner in Hai Nguan: Mr. Eng was the Assistant Manager. At Sharp, the gentlemen dealing with the matter were Mr. Tessensohn and Mr. Windt. Mr. Tessensohn was Assistant to the Managing Director; Mr. Windt was Assistant Office Manager of the Liner Department.

The initial contact appears to have been made between Mr. Eng and Mr. Tessensohn; though Mr. Tessensohn gave evidence that he then introduced Mr. Eng to Mr. Windt and asked him to contact Mr. Windt, because he (Mr. Tessensohn) was usually out of the office. Mr. Windt said that Sharp received their instructions from Hai Nguan mostly by telephone, or from one of the gentlemen from Nai Nguan who came to their office. The evidence of Mr. Lim and Mr. Eng was that, when they had dealings with Sharp on the telephone, it was Mr. Eng who spoke, because he had a better knowlege of the English language than Mr. Lim.

It is, their Lordships consider, important to bear in mind when considering the evidence given by these gentlemen that the events in question occurred in January and February 1975, and that the hearing

before the judge did not begin until October 1979, and that the evidence of the most crucial witnesses was not given until July 1980, over five years after the relevant events occurred. Much of the evidence was concerned with details of telephone conversations. With the best will in the world, it must have been very difficult for them to remember precisely what was said, by whom it was said, and when it was said.

The order of events was as follows. Hai Hguan received their instructions from Mr. Hiswara. He appears originally to have given his instructions to Mr. Lim on the telephone, from Switzerland. Mr. Hiswara was not called to give evidence; but Mr. Lim said that Mr. Hiswara gave his instructions on behalf of Bina Alam. However, in one of the earliest documents in the case, a telex dated 21st January 1975 sent by Mr. Hiswara to a colleague of Mr. Lim, it is stated that "YOU CAN ASK PHILIPPE PEROLEUM MR DE GUZMAN DESIGN [presumably to sign] CHARTER PARTY". From then on, there is a certain ambivalence as to whether Phillips or Bina Alam, or both, were to be parties to the charterparty.

At all events serious negotiations involving Grace appear to have begun on 25th January. In a telex dated 28th January, Polfracht Sydney asked (*inter alia*) for charterers' full name. In that telex, Polfracht Sydney raised a number of matters. There was in evidence before the judge a copy of that telex in which answers to some of these questions were entered in the handwriting of Mr. Windt. Against the enquiry "CHTS FULL NAME" there was entered in Mr. Windt's handwriting the words "Phillips Petr. Intern. Inc., S/P". On the same day, a telex was sent by Sharp to Polfracht Sydney, answering the various queries raised by Polfracht Sydney in accordance with Mr. Windt's manuscript entries on the telex. Among the answers so given was "CHARTERERS PHILLIPS PETROLEUM INTERNATIONAL INC. SINGAPORE".

The evidence of Mr. Windt was that, at the time when he received Polfracht Sydney's telex of 28th January, he thought that the charterers were Bina Alam. However he read the telex of 28th January over the telephone to either Mr. Eng or Mr. Lim (he could not remember which); he wrote down on the telex the information he received over the telephone; and he then sent Sharp's telex reply to Polfracht Sydney. The statement that Phillips were charterers came therefore from Hai Nguan. Mr. Eng said that he spoke not to Mr. Windt, but to Mr. Tessensohn; and that he told Mr. Tessensohn that the charterers would be Bina Alam, but that Mr. de Guzman of Phillips Petroleum would be signing on behalf of Bina Alam. This was information which he got from Mr. Lim, who was present at the time. Mr. Lim gave evidence to the

same effect. Mr. Tessensohn was unable to assist on the telex; he presumed that Mr. Windt must have contacted Hai Nguan. So far as he was concerned, Sharp was simply passing messages to and fro like a middleman.

Next, in a telex from Polfracht Sydney to Sharp dated 29th January containing a full counter-offer from Grace, the counter-offer was expressed to be "STILL SUB APPRVL CHTS NAME". This telex was passed on by Sharp to Hai Nguan; and in a letter from Hai Nguan to Sharp dated 30th January, Hai Nguan set out their counter-offer which included the following terms:-

> "Charterer's party: PHILLIPS PETROLEUM INTERNATIONAL INC., Singapore, on behalf of P.T. BINA ALAM, JAKARTA, INDONESIA."

This counter-offer, including that term, was passed on by Sharp to Polfracht Sydney by telex on the same day. Somewhat surprisingly, Mr. Windt gave evidence that he was then under the impression that, following that message, the charterers were Bina Alam. Mr. Tessensohn seems always to have been under that impression.

However, less surprisingly, Grace were not satisfied with this information. On 31st January there came another counter-offer from them contained in a telex from Polfracht Sydney to Sharp, which was expressed to be "SUB APPROVAL CHRTS - PLS GIVE SOME MORE INFO". Under the heading "OUR COMMENTS", Polfracht Sydney added (*inter alia*): "PLS EXPLN WHO ARE BINA ALAM/ALSO SOME WRDS ABT CHTS STANDING". On the same day, Sharp responded with a telex setting out information about Bina Alam. Grace, however, were still not clear who were the charterers; and so, on 1st February, in a telex from Polfracht Sydney to Sharp, the owners' counter-offer was expressed to be:-

> "SUB CLARIFICATION WHO ARE THE CHRTS IN THE CONTRACT C/P PHILLIPS PETR INTERNL SPORE OR P T BINA ALAM JAKARTA."

On the same day, Sharp replied to Polfracht Sydney by telex that:-

> "AS ADVISED PREVIOUSLY CHARTERERS SIGNING C/P ARE PHILLIPS PETR. INT. SPORE STOP WE EXPLAINED YESTERDAY WHO BINA ALAM ARE."

It was that telex message which crystallised the identity of the charterers. There was no change in the charterers' identity before 5th February, when a concluded agreement was reached; and the charterparty drawn up by Polfracht Sydney gave the name of Phillips as the charterers.

It follows that it was by their telex to Polfracht Sydney dated 1st February that Sharp warranted their authority to contract on behalf of Phillips, and so questions were directed to this telex when the witnesses came to be cross-examined. Mr. Windt said that the telex was sent on instructions from Hai Nguan after consulting them. He could not remember whether he, or Mr. Tessensohn, or both of them, drafted the telex; but he stated that the information was given to Sharp in the form used in the telex, and they then relayed it to Polfracht Sydney. Mr. Tessensohn's recollection was that he did not deal with the matter; it was Mr. Windt who did so, though Mr. Tessensohn thought he saw a copy. On reading the telex, he understood that Phillips would sign the charterparty, and that the charterers would be Phillips on behalf of Bina Alam. Mr. Eng's evidence was recorded by the judge as follows:-

> "Tessensohn rang me up. Asked me about the draft Belawan. Don't remember if he read whole telex to me. He has asked who the charterers were and also about draft at Belawan. I told him I would find out from Lim. Lim told me that the charterers were same as before and as for draft he will check and let him know. I told Tessensohn the charterers were same as before - P.T. Bina Alam."

Mr. Lim, shown Sharp's telex to Polfracht Sydney of 1st February, stated that that information was not given by Hai Nguan. He referred to Hai Nguan's letter to Sharp dated 30th January, and stated that they had put it in writing that the charterers were Bina Alam. The evidence of the witnesses is by no means easy to reconcile; but perhaps this is not surprising after a lapse of over five years.

The judge dealt with the matter as follows. In the introductory part of his judgment, he had this to say:-

> " The dispute in this case was caused by the fact that a contract of affreightment for all four shipments was concluded by the second defendants at a time when a vessel called the 'Montego' had already been fixed by Stolt Neilsen to carry the first shipment at a more favourable freight rate. When the second defendants made the contract, they did not know that there was any other broker acting. They had been instructed to make the contract by the third parties. Mr. Windt of the second defendants believed that the charterers were the first defendants. He also believed that the first defendants had authorised the third parties to instruct the second defendants to make the contract. But the second defendants did not ask the first defendants whether they had given their authority. In fact they had not. Although

> the second defendants were innocent brokers in the sense that they believed that they had authority, they had only themselves to blame for the confusion in which they found themselves because they did not take the trouble to verify that the first defendants were indeed the charterers."

Later, he dealt with the relevant communications. Referring to Hai Nguan's letter dated 30th January, he said:-

> "Mr. Windt realised that the information contained in this letter from the third parties was different from the earlier information he had received, namely 'Charterers Phillips Petroleum International Inc. Singapore'. He also realised that what he was being told now was that P.T. Bina Alam were in fact the charterers - the contracting party. Again without further inquiry from the first defendants he telexed off this new information to Polfracht Sydney ..."

Commenting on the crucial telex message from Sharp to Polfracht Sydney dated 1st February, he said:-

> "Mr. Windt who is responsible for this telex avoided answering the very direct question put by Polfracht Sydney ... It would appear that Mr. Windt was concerned whether the owner would accept Bina Alam as charterers without some form of guarantee. He also realised that the owners attached much importance to the identity of the charterers. He admitted this under cross-examination by counsel for the plaintiffs. Mr. Windt was anxious that somehow the first defendants had to be brought in as charterers otherwise the fixture might not be concluded. The second defendants stood to earn a commission of about U.S.$20,000/-. If he concluded the fixture it would be a notable achievement for him and accordingly be contrived to include the first defendants although he knew or should have known that the charterers named by the third parties were P.T. Bina Alam. The answer given by Mr. Windt in his telex of 1st February 1975 ... to the very specific question by Polfracht Sydney as to whether the charterers were Phillips Petroleum or P.T. Bina Alam was either dishonest or it was an act of gross negligence. The answer was clearly contrary to the written instructions received from the third parties in their letter of 30th January 1975 ... wherein they had stated quite clearly that the charterers were 'Phillips Petroleum - International Inc. Singapore, on behalf of Bina Alam, Jakarta, Indonesia."

His conclusion on the issue whether Hai Nguan instructed Sharp to act on behalf of Phillips was expressed in the following passage:-

" I accept the evidence of Mr. Lim Kuy Bak who is a partner of the third parties and also that of Mr. Eng Meng Ker the Assistant Manager of the third parties that they had expressly instructed the second defendants that the charterers were P.T. Bina Alam and that the charterparty would be signed by the first defendants on behalf of P.T. Bina Alam. Their evidence is supported by the third parties' letter of 30th January 1975 ... wherein they had clearly stated that the charterers were 'Phillips Petroleum International Inc. Singapore on behalf of Bina Alam, Jakarta, Indonesia'. This evidence is even supported by Mr. Tessensohn who told the court that throughout the negotiations he was always under the impression that P.T. Bina Alam were the charterers and that the first defendants would be signing the charterparty.

I therefore accept the submission of counsel for the third parties that having regard to the whole of the evidence, including Mr. Windt's conduct after the meeting on 8th February 1975, it is more probable than not that the telex ... was sent by the second defendants without the authority of the third parties. It was clearly contrary to the written instructions given by the third parties in their letter of 30th January 1975 ... As already stated, in sending the telex ... Mr. Windt acted not only irresponsibly but also dishonestly. There was gross negligence on his part and no agent is entitled to an indemnity against liabilities in respect of an unauthorised act or in consequence of his own negligence, default or breach of duty. Accordingly I find that the answer to the third question whether the third parties instructed the second defendants to act on behalf of the first defendants is 'No'."

The Court of Appeal, having decided that there was no concluded agreement with Grace, dealt only briefly with the question whether Sharp had been authorised by Hai Nguan to act on behalf of Phillips. Referring to the crucial telex from Sharp to Polfracht Sydney dated 1st February, in which Sharp stated that as advised previously charterers signing charter were Phillips, they said:-

"Sharp's case is that they said this on the express instructions of Hai Nguan but this is denied by Hai Nguan. It is to be observed that Sharp's telex also contained replies to other questions raised by Polfracht. In our opinion it would have been inconceivable, having regard to the manner in which Sharp took instructions from Hai Nguan throughout every stage of the negotiations that Sharp's telexed reply of 1st February 1975 was not in accordance with Hai Nguan's express instructions."

They continued:-

> "The learned judge in his judgment found that 'it is more probable than not that (Sharp's reply) was sent ... without the authority of (Hai Nguan)'. With respect we disagree and in our opinion the probabilities are the other way. Hai Nguan had copies of all incoming and outgoing telexes. They never corrected Sharp if in fact Sharp had not sought their instructions before saying to Polfracht that Phillips would be the charterers. They, not Sharp, arranged for the meeting to be held at Phillips' office on 8th February 1975 for the signing of the charterparty.
>
> Even if Sharp had replied without taking express instructions from Hai Nguan they were entitled to reply as they did as Hai Nguan had earlier expressly instructed them that the charterers were Phillips. In any event we are of the opinion that Hai Nguan, having regard to the course of dealings between them, had implicitly ratified Sharp's reply that Phillips are the charterers signing the charterparty."

Before their Lordships Mr. Hunter, for Hai Nguan, submitted that the issue on this point was essentially one of credibility; and that, by interfering with the decision of the judge, the Court of Appeal had failed to have proper regard to the many statements by the House of Lords regarding the limited circumstances in which an appellate court may interfere with a conclusion of a trial judge on such an issue. The classic statement of principle is perhaps that of Lord Thankerton in *Watt (Thomas) v. Thomas* [1947] A.C. 484, when he said (at pages 487-488):-

> " I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus: I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be

> satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

Lord Thankerton however added this rider to his statement of principle:-

> "It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question."

That is indeed the case. And it is not to be forgotten that, in the present case, the judge was faced with the task of assessing the evidence of witnesses about telephone conversations which had taken place over five years before. In such a case, memories may very well be unreliable; and it is of crucial importance for the judge to have regard to the contemporary documents and to the overall probabilities. In this connection, their Lordships wish to endorse a passage from a judgment of one of their number in *Armagas Ltd. v. Mundogas S.A. (The Ocean Frost)* [1985] 1 Lloyd's Rep. 1, when he said at p.57:-

> "Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth."

That observation is, in their Lordships' opinion, equally apposite in a case where the evidence of the witnesses is likely to be unreliable; and it is to be remembered that in commercial cases, such as the present, there is usually a substantial body of contemporary documentary evidence.

The Court of Appeal did not refer to *Watt v. Thomas*, or to any other of the relevant authorities, in their judgment. But their Lordships are very conscious that the Court of Appeal were dealing with this particular issue only briefly; and they have little doubt that they had the authorities in mind, and that, having considered the overall probabilities in a case where the oral evidence was, in the nature

of things, likely to be unreliable, they concluded that these pointed overwhelmingly to a different conclusion from that reached by the judge. Having considered the evidence and the judgment of Choor Singh J., their Lordships have come to the conclusion that the Court of Appeal were fully justified in acting as they did.

Their Lordships turn first to the judgment of Choor Singh J. On this, they have a number of comments to make. First, the judgment appears to contain an internal contradiction which, struggle as they may, their Lordships have been unable to resolve. This is that: (1) in the first passage from his judgment quoted above, it is stated that, when Sharp made the contract, Mr. Windt believed that the charterers were Phillips, and that Phillips had authorised Hai Nguan to instruct Sharp to make the contract, and (2) in the second passage, it is stated that, before sending to Polfracht Sydney the telex dated 28th January 1975 stating that Phillips were the charterers, Mr. Windt had been so informed by Hai Nguan; whereas (3) in the last passage quoted above it is stated by the judge that he accepted the evidence of Mr. Lim and Mr. Eng that they had expressly instructed Sharp that the charterers were Bina Alam and that the charter would be signed by Phillips on behalf of Bina Alam. This latter finding is not consistent with the judge's conclusion relating to the conversation preceding the telex dated 28th January 1975. Nor is it consistent with Mr. Eng's evidence as to what passed before the crucial telex of 1st February 1975 (viz. that the charterers were the same as before - Bina Alam); nor indeed is it consistent with the letter dated 30th January 1975 (on which the judge relied), viz. that the charterers were Phillips on behalf of Bina Alam.

Second, the judge concluded that Mr. Windt "contrived" to include Phillips in the crucial telex of 1st February 1975, although he knew or should have known that the charterers named by Hai Nguan were Bina Alam, because he was afraid that Sharp might lose their commission of about US$20,000. Their Lordships find it very difficult to understand this conclusion. It does not make sense that a broker should try to save a transaction (and therefore his company's commission) by naming as party somebody who has not authorised him to act; because that party will inevitably disown the transaction. In other words, to act in the way attributed to Mr. Windt would not have saved the transaction but would rather have destroyed his company's chances of earning its commission.

Third, the judge in his judgment persistently criticised Mr. Windt for failing to check with Phillips whether they were indeed the charterers. But Sharp were taking their instructions not from

Phillips but from Hai Nguan; it was no part of their function to communicate direct either with Bina Alam or with Phillips.

Fourth, the judge relied upon Mr. Windt's conduct after the meeting of 8th February as supporting his conclusion that the telex of 1st February 1975 was sent by Sharp without the authority of Hai Nguan. Their Lordships have been unable to discover any evidence of such conduct by Mr. Windt which supports that conclusion. Mr. Hunter suggested that the judge might have been referring to a telex sent by Sharp to Polfracht Sydney on 8th February 1975 after the meeting on that date; but their Lordships do not consider that that telex, which was plainly sent upon instructions, supports the judge's conclusion. What is far more telling is the evidence of what transpired at the meeting on 8th February, which revealed not only that Mr. Windt was visibly shocked when Mr. de Guzman of Phillips refused to sign, but also that he asked for an explanation and received none, either from Mr. Lim or Mr. Eng, or from Mr. Hiswara who was also present. Neither at the meeting itself, nor thereafter, was it ever suggested that Sharp were not authorised to contract on behalf of Phillips. On the evidence in the case, the events at the meeting of 8th February and thereafter strongly support the conclusion that Sharp were indeed so authorised.

These matters are themselves sufficient to undermine the conclusion reached by the judge. But they do not stop there. First, the judge did not deal with Mr. Windt's evidence about the telex dated 28th January 1975, upon which he had noted in his own writing answers given by Hai Nguan to a number of queries raised by Polfracht Sydney, including Phillips as the name of the charterers. It is obvious that all the other manuscript entries by Mr. Windt on the telex constituted a correct record of answers given to him on the telephone by Hai Nguan; and it is inconceivable that his note of Phillips as the name of the charterers was not made at the same time. Second, the judge did not deal with the evidence of Mr. Windt and Mr. Tessensohn that they simply acted as a conduit between Hai Nguan and Polfracht Sydney, passing messages to and fro. Third, there was the most important point, on which the Court of Appeal laid emphasis, that it is plain from the evidence that all copies of incoming and outgoing telexes were passed by Sharp to Hai Nguan, and in particular that a copy of the crucial telex of 1st February 1975 must have been at Hai Nguan's office by 4th February and must then have been read by Mr. Hiswara. If Sharp had acted without authority in naming Phillips as the charterers in that telex, plainly Hai Nguan would have drawn their attention to this before 5th February. The conclusion is

inevitable that Mr. Hiswara, and therefore Hai Nguan, intended Phillips to be named as parties to the charter. The last few answers given by Mr. Eng in cross-examination, with reference to the crucial telex of 1st February, are most revealing:-

"Q. Did you see a copy of this telex later?
A. Yes, eventually.

Q. Before the end of the negotiations?
A. I can't remember.

Q. Did you see what was written there about Phillips Petroleum?
A. Yes. I noticed that.

Q. And you never told Sharp that they had said something that you never told them to say?
A. I only acted on instructions."

Their Lordships wish to add the following observation. They can see no sensible reason why the name of Phillips should have been introduced by Mr. Hiswara as a signatory of the charterparty, unless he had intended that they should become bound thereby as a party to the contract. If he just needed somebody to sign on behalf of Bina Alam, as agents only, because (as was suggested) he might be abroad when the contract was signed, he could easily have authorised brokers to sign on his company's behalf. Yet, from the beginning, he appears to have been determined that Phillips, and Phillips only, should sign. The conclusion on the evidence is, their Lordships consider, inescapable that he did intend Phillips to be named as a party, no doubt to give an appearance of substance to the shipowners. It is very striking that, even in Hai Nguan's letter to Sharp dated 30th January 1975, the description given of the charterers is - Phillips on behalf of Bina Alam. Mr. Windt may have thought that this meant that Bina Alam alone would become a party to the contract; but Mr. Windt was very inexperienced, and plainly he was wrong. The naming of Phillips as charterers, even on behalf of Bina Alam, shows, in the absence of any indication that they were to sign as agents only, an intention that Phillips were to be bound.

With all respect to the learned judge, their Lordships, having considered the contemporary documents, conclude, in agreement with the Court of Appeal, that the probabilities point overwhelmingly to the conclusion that Sharp were indeed authorised by Hai Nguan to contract on behalf of Phillips.

It follows that their Lordships allow Grace's appeal against Sharp, but that they dismiss Hai Nguan's appeal against Sharp. The order of Choor

Singh J. that Sharp do pay to Grace the sum of US$253,658.00 with US$127,591.36 by way of interest must be restored, and Hai Nguan must indemnify Sharp in respect of those sums. Sharp must pay the costs of Grace before Choor Singh J., the Court of Appeal and their Lordships' Board. Hai Nguan must pay the costs of Sharp before Choor Singh J., the Court of Appeal and their Lordships' Board, and must indemnify Sharp in respect of the costs payable by them to Grace as aforesaid and in respect of the costs payable by them to Phillips as ordered by Choor Singh J.