JUDGMENT : The Hon. Mr Justice Langley : Commercial Court. 8th March 2007

The Claim

1. The Claimant ("FCL") seeks an order that an arbitral tribunal (Mr Robert Gaisford and Mr Clive Aston) has substantive jurisdiction to determine claims made by FCL against the Defendant ("A&O Nevis") in an arbitration commenced by FCL on 22 August 2005. The tribunal, by letter dated 31 January 2006, gave permission for FCL to make the present application and this court gave leave to do so on 28 April 2006 as required by, and to satisfy the provisions of, section 32(2)(b) of the Arbitration Act, 1996.

The Issue

2. The Issue can be stated shortly. FCL contends that there was a binding charterparty made between FCL and A&O Nevis. A&O Nevis contends that there was not. It is not in issue that if there was a binding charterparty it contained an arbitration clause which was effective to give jurisdiction to the tribunal such that FCL would be entitled to the order it seeks.

3. A&O Nevis have raised various arguments in support of their contention, including want of authority on the part of the individual (Mr Juan Lee) who negotiated with Mr Borriello (the broker for FCL). But at the hearing the only point at issue was whether or not there was ever an agreement to a charterparty to which FCL was a party. As will be seen, some of the documentation exchanged referred to "Front Carriers Inc" not Front Carriers Ltd. The evidence is that there is no company or legal entity called Front Carriers Inc ("FCI").

FCL

4. FCL is a shipping company incorporated in Liberia in 1994. It is a member of the well-known "Golden Ocean" group of shipping companies. The Golden Ocean group demerged from the also well-known "Frontline" group of companies in December 2004. The principal shareholder and chairman of both groups is Mr John Fredriksen. The brokers for FCL were Simpson, Spence & Young ("SSY") Naples acting by Mr Borriello. Witness statements were served on behalf of FCL from Mr Borriello (who also gave oral evidence) and Mr Flaaten (a senior chartering manager of Golden Ocean Management AS which provides management services for the Golden Ocean group including FCL) and Mr Billung (the chief executive officer of Golden Ocean Management AS). Neither Mr Flaaten nor Mr Billung were required by A&O Nevis to give oral evidence and their witness statements stand as unchallenged evidence on this application.

A&O Nevis

5. A&O Nevis is a company within the "Atlantic & Orient" group. It is principally involved in the chartering of vessels. The A&O group is, on the limited evidence before the court, controlled by Mr Murray Wilgus. The A&O Group ("A&O") includes A&O Singapore Pte Ltd ("A&O Singapore"). A&O Singapore is a commercial manager for various companies including A&O Nevis. It also acts as commercial managers in relation to the sale and purchase of vessels. A company called Amstec Shipping Pte Ltd ("Amstec") is, again on the limited evidence before the court, also controlled by Mr Wilgus. It acts or came to act as exclusive sub-brokers to A&O Singapore. It is also incorporated in Singapore.

6. A&O Nevis served two witness statements, made by Mr Juan Lee and Mr Wilgus. FCL notified its wish to cross-examine both. A&O Nevis, after repeated requests from FCL's solicitors, on 21 February 2007, by the company's solicitors (Clyde & Co), said that "neither Mr Wilgus nor Mr Lee will be attending the hearing". The following day (the Thursday before the trial began on Monday 26 February) notice was given of the intention to rely on the statements pursuant to CPR Part 33. The notice stated, in the case of Mr Wilgus, that he would not be called as a witness because he was resident in Thailand and "suffers from chronic health problems and travelling from the Far East to London to attend the trial will be against medical advice". The notice, in the case of Mr Lee, stated that he would not be called as a witness because he is resident in Singapore and "having joined a new employer in October 2006, is yet to complete his 6-month probationary period and his new employers are not willing to permit him to leave to give evidence at the trial".

7. Mr Raphael, for FCL, did not mince his words about these witness statements and the failure of the makers to give oral evidence. He said they were not attending "because they know their evidence is false and would not stand up under cross-examination". He submitted the statements were either inadmissible or should be given no weight. No explanation was offered for the delay in serving the notices; yet the matters relied upon must have been known for months. No documents were produced to support either notice. At the court's request, Clyde & Co sought further information. A medical report on Mr Wilgus was to be made available on 1 March (two days after the hearing concluded). But the report subsequently produced was dated 2 March and related to a consultation on 1 March. It contains little to justify and is arguably inconsistent with what was said before the trial began. Clyde & Co wrote on 27 February saying that Mr Lee had declined to give details of his new employers who were "a third party shipping company", and A&O had no control over him and could not compel him to attend the hearing.

8. These explanations were hardly impressive. They must also be seen in a context in which the disclosure made by A&O Nevis has rightly been subjected to significant criticism.

9. Nonetheless, because they had been referred to widely, I felt it right to permit the statements to be formally in evidence, but, of course, as Mr Croall for A&O Nevis rightly acknowledged, subject to the obvious and compelling comments about the weight to be attached to them. Indeed, as the hearing proceeded I think it a fair comment that the statements did as much harm as good to the case of A&O Nevis.

The Facts

10. By a recap, dated 16 February 2005, SSY on behalf of FCL fixed a newbuilding being built by Imabari Shipbuilding Co Ltd. The vessel was described as the "MV Imabari TBN". She became the Double Happiness after she was launched. The fixture was "Acct Front Carrier Ltd wholly owned by Golden Ocean Group Ltd". It was a time charter for a minimum of 24, maximum of 26 months. Laycan was 1 June to 30 September 2005 and hire USD 28,500 a day. The recap did not name the disponent owners but they were in fact Dieulemar Compagnia Di Navigazione SPA ("Dieulemar"). Dieulemar were themselves charterers. The charterparty was to be back to back with the charter to Dieulemar "with logical amendments as per M-terms agreed". The head owners and purchasers from Imabari were Taiheiyo Kisen Kaisha.

11. SSY Naples were instructed by Golden Ocean to fix the Imabari TBN out to prospective charterers.

12. The market was, at the time, buoyant. That changed at about the end of March and rates fell more sharply at the end of April. Between the end of March and early August 2005 spot market rates fell from around USD39,000 to close to USD10,000 a day.

13. Between 23 February and 4 March 2005 negotiations took place between Mr Borriello and Mr Lee. On 23 February, Mr Borriello proposed the vessel to Mr Lee, whom he had dealt with before, and with whom he was negotiating on other vessels at the time. The proposal was for 2 years at USD31,500 a day. It set out various terms and stated "otherwise as per owns btb head C/P dated 17th Feb 2005 logically amended as per Main Terms". "17th Feb" was an error for 16 February.

14. Shortly afterwards, Mr Wilgus telephoned Mr Borriello. He asked who the owner of the vessel was. Mr Borriello told him it was "a Golden Ocean vessel". Mr Borriello said Mr Wilgus understood at once that meant it was a "Fredriksen" vessel as he knew the association between Golden Ocean, Frontline and Mr Fredriksen and that there could therefore be no doubt about the financial backing of the disponent owners. Mr Borriello did not name any particular "Golden Ocean" company as disponent owner, nor was Mr Wilgus concerned to ask.

15. Also on 23 February SSY circulated internally a working copy of the charterparty with Dieulemar. The copy named the charterer as "Front Carrier Inc., wholly owned by Golden Ocean Group Ltd., Charterers of the City of Bermuda". That was undoubtedly an error. There is and was no company called "Front Carriers(s) Inc". The reference to Bermuda was correct for Golden Ocean Group Ltd. The reference could, as a matter of language, be read as applicable to FCI. The evidence is, however, that all Bermudan companies are properly named "Ltd" whereas Liberian companies can be named either "Inc" or "Ltd". A&O did not know that there was no company called FCI.

16. On 24 February, Mr Lee e-mailed Mr Borriello, in respect of the vessel:

    "OK we will also take this vsl at usd 31,500 pd for 23/25 months .. try lower… need to amend the main terms to fix asf…."

17. The e-mail then set out proposals for the amendment of the terms set out in Mr Borriello's e-mail sent on 23, February.

18. In the course of a number of telephone conversations between them:

    i) Mr Borriello made it clear that the terms of the charterparty were not open to negotiation and had to be back-to-back with the Dieulemar charterparty;

    ii) Mr Lee made it clear A&O was looking to charter out the vessel to lock in a profit in the then rising market;

    iii) Mr Borriello sought information as to the precise style of the proposed charterer and was told to "ask around" in the market to enable disponent owners to satisfy themselves about A&O;

    iv) At no time was any importance placed by Mr Lee, or anyone else at A&O, on the exact style of the disponent owners save that both Mr Lee and Mr Wilgus knew that it would be a company in the Golden Ocean Group. This was the unchallenged evidence of Mr Borriello and is borne out by the fact that no company had yet been referred to.

19. On 4th March, Mr Borriello and Mr Lee agreed on the terms of a fixture between the disponent owners (still un-named) and A&O Nevis subject to charterers' reconfirmation latest 10.00 hours London time on Monday 7 March 2005. At 1615 hours on 4 March, Mr Borriello sent Mr Lee a recap. The recap set out the agreed terms: "Plsd to confirm having agreed as follow:…." The recap specified that the agreement was "for acct Atlantic and Orient of Nevis". The disponent owner was not identified. It stated it was subject to reconfirmation by 10.00 on 7 March. It also stated "Otherwise sub minor review as per Owners B-T-B C-P". The recap opened with the words "Pls find attached CP".

20. The "CP" attached was the draft head charterparty between Dieulemar and "Front Carrier Inc, wholly owned by Golden Ocean Group Ltd, Charterers of the City of Bermuda" (see paragraph 15).

21. On the morning of 7 March, Mr Lee enquired of Mr Borriello "Pls adv who actually ordered Imabari to build the vsl?? Frontline-Frederick is the main contractor with Imabari??"

22. Mr Borriello did not respond to these questions at the time. As Mr Raphael submitted, the questions further demonstrate (unsurprisingly) that Mr Lee had no interest in the exact style of the Golden Ocean /Frontline

company concerned, albeit he had by now a copy of the draft Dieulemar charterparty with the mistaken reference to "FCI" in it.

23. Later on 7 March, Mr Lee e-mailed to Mr Borriello:

"O.K. Take it and Subj lifted.

Pls treat as strictly PNC and do not repeat do not broadcast in the market."

24. It is FCL's case that the fixture was agreed on receipt by SSY of this e-mail.

25. Mr Borriello, following receipt of the e-mail, again recapped the fixture using the words "Plsd to confirm having fully fixed with CP DD 7th Mar. 2005". This recap, after setting out again various specific terms, concluded:

"- otherwise as per frontcarrier inc/ dieulemar cp 16th eb 2005 with logical amendment only as per m-t agreement".

26. Mr Croall, for A&O Nevis, submitted that this recap was the relevant contractual document including the express reference to "frontcarrier inc".

27. Later on 7 March, Mr Flaaten noticed the error in the company name in the draft head charterparty and two other drafting points. These were circulated within SSY and on 8 March Mr Borriello sent them on to Mr Lee in these terms:

"Imabari NB/Front Carriers Ltd cp dd 16 Feb 2005.

Please note Charterers style is "Front Carriers Ltd" (line 12)

In base cp line 56 the stipulation "always within IWL" is omitted (not vital as covered elsewhere in cp).

In cl 85 the prefixes b, and c (2b and 2c) are deleted (also not vital).

Regards …."

28. These matters were expressed by reference to the Dieulemar charterparty. Mr Borriello said they were not "changes" to the deal done on the previous day but "corrections" or "minor clerical amendments". The language supports him. He said he spoke to Mr Lee but his oral evidence about the conversation was not very clear. He said Mr Lee had said "OK" when told of the corrections but also that Mr Lee had asked to be sent the amendments and he would let Mr Borriello know if they were OK. In his witness statement, Mr Borriello said Mr Lee had raised no objection nor indicated any problem with the change of style to FCL which, I accept, was expressly mentioned.

29. A working copy of the charterparty was sent by Mr Borriello to Mr Lee on 10 March. The e-mail read:

"RE: IMABARI NB TBN/A. AND O. CP DATED 07.03.05

Attached Working Copy of above CP- Can you let me know if OK before I issue the original.

Brgds …."

30. The attached working copy stated that it was concluded on 7 March 2005 between "FRONT CARRIER LIMITED of Monrovia, Liberia as Disponent Owners" and A&O Nevis.

31. There was no response from Mr Lee or anyone at A&O. Mr Croall submitted this e-mail was putting forward a variation to what had been agreed on 7 March. The words used belie that. They refer to a charterparty "dated" 7 March. Insofar as it may be relevant, I am quite satisfied that Mr Borriello understood and believed that the fixture had indeed been made on 7 March, that the terms of this e-mail were no more than common courtesy or politeness in the context of seeking to complete the formal charterparty, ("to ensure all was written right") and nothing he said to Mr Lee or Mr Lee said to him can sensibly be said to have been in any way inconsistent with that.

32. Delivery of the vessel was June to September 2005. On 21 April, Mr Borriello sent Mr Lee the Original of the Charterparty signed on behalf of FCL "for Charterers counter-signature". The letter sought the return of executed copies and thanked A&O "very much for this fixture". Again, there was no response from A&O. The market was moving into severe decline.

33. Nothing was written, said or done by either party after the letter of 21 April until, on 12 July 2005, Mr Lee sent an e-mail to Mr Borriello which stated:

"RE IMABARI – New Building

Retelcon as advd I did not have the authority to fix this Imabari vsl as I was no longer the employee of A+O since 07 Feb 2005. I thought I had the authority to fix this vsl but was found out later I did not have the authority to conclude this business and or to sign on behalf of A+O Nevis

Sorry for confusion. Brgds."

34. This e-mail, remarkable in itself, was the prelude to other conduct by A&O which was (rightly, in my judgment) subjected to stinging criticism by Mr Raphael. That conduct included A&O Nevis being apparently uncontactable and the attempted deployment of Amstec as an independent company then the employer of Mr Lee albeit using the same e-mail and fax addresses as previously used by or on behalf of A&O Nevis. The matters of some significance to the issues are that:

i) Mr Lee's first port of call to escape from the fixture (if such it was) was not to contest that he had made it but to make the (as later demonstrated and conceded) unsustainable assertion that he had no authority to make it;

ii) Mr Lee did not assert that the "change" from FCI to FCL, nor the fact that FCL was a Liberian company, were of any relevance, despite his knowledge of them and the context where escape from the fixture was plainly the commercial target of A&O;

iii) As Mr Croall acknowledged both parties had wanted and intended on 7 March 2005 to make a fixture and both indeed believed they had done so.

35. The FCI point was only taken after FCL had instructed solicitors. It was expressed in a fax (marked "without prejudice") dated 11 August 2005 from Amstec. A&O's first response was dated 24 August. It was there stated that "if A&O has been represented in an negotiation, legally, they are clear that they have never agreed to contract with Front Carrier or any company from Liberia without fully backed." Faced with this, by communications dated 17 and/or 31 August FCL accepted A&O Nevis' conduct as a repudiatory breach of the fixture and terminated the contract.

36. Mr Wilgus' witness statement contains (paragraph 20) the statement that to the best of his recollection "A&O Singapore have never entered into a charterparty with a Liberian company on behalf of a third party (such as A&O Nevis)". This statement was intended to suggest that the "change" from FCI to FCL was commercially significant. Yet disclosure on the subject was refused and it is belied by the terms of the enquiries which were made and satisfied by reference generally to Golden Ocean, Frontline and Mr Fredriksen. It is also belied by the lack of any response when FCL was expressly brought to Mr Lee's attention and included in the documentation. Further, Mr Borriello referred in his statement to a number of charterparties entered into by "A&O entities" with Liberian companies. At the lowest, Mr Wilgus' evidence was disingenuous; I am quite satisfied that whilst it was material to A&O that the disponent owner was a member of the Frontline/Golden Ocean group, it was not in any way material whether or not the particular member of the group was incorporated in Liberia or Bermuda.

The Submissions

37. Mr Raphael's primary submission was that the relevant contract was made when Mr Lee lifted the "subjects" on 7 March. That contract was made with the party having the characteristics of being the disponent owner of the vessel and a member of the Golden Ocean group. There was only one candidate with those characteristics, namely FCL. He submitted further that even if the reference to FCI did form part of the agreement, it was a simple "misnomer" for FCL. In a series of further alternatives, he submitted that if the "contract" was with FCI it should be rectified to FCL, or that there was an estoppel by convention, or that if the contract was concluded after 7 March, it was formed by the 8 or 10 March communications as offers and accepted by A&O's conduct or silence.

38. Mr Croall's submission was that the contract documents showed the party to be FCI and that it would require an agreed variation for FCL to become a party. That, he submitted, could not be found in the silence of A&O. Mr Croall readily and rightly acknowledged that if the contract was correctly to be analysed as one made between a company having certain characteristics (disponent owner and member of the Golden Ocean group) rather than a specific name, then A&O Nevis failed at the first hurdle and none of the other issues arose.

39. Counsel were also agreed that the question whether or not an agreement was made had to be determined by reference to the "objective intention of both parties based on what two reasonable businessmen making a contract of that nature, in those terms and in those surrounding circumstances, must be taken to have intended": per Brandon J in ***The Swan*** [1968] 1 Lloyd's Rep 5 at 12-13.

Conclusions

40. In my judgment, A&O Nevis' submissions do indeed fail at the first hurdle.

41. The documents and evidence are overwhelmingly to the effect that at 7 March 2005 both parties intended to fix the vessel and had a common understanding that they had done so. The obvious concern of both was that the fixture should be made with the disponent owner. Who that was was neither here nor there provided it fulfilled A&O's concern that it was a member of the Golden Ocean group. The concern on the part of Mr Borriello was that the terms of the fixture should be back to back with the Dieulemar charterparty. To those terms the name FCI was wholly incidental. As I have held, the expressed location of FCI and FCL was also of no importance to either party.

42. The essential terms of the contract were agreed between Mr Borriello and Mr Lee on 4 March and recorded in Mr Borriello's recap of that date (paragraph 19). Despite the attachment of the Dieulemar charterparty, referring to FCI, in my judgment it was not a term of the recap viewed objectively that the counterparty was or would be FCI. The recap was sent and received on behalf of the disponent owner. The reference to the Dieulemar charterparty was for its terms. It was to that, as I think, that Mr Lee was assenting when he lifted the subjects and made the fixture on 7 March (paragraph 23).

43. There was some debate about the extent to which it was permissible to take account in addressing this issue (which I think is essentially one of construction and so of the true intention of the parties) of the fact that FCI did not exist and the fact that when FCI was corrected to FCL (paragraph 27) it aroused no interest let alone concern on the part of Mr Lee. Neither matter is essential to the view I have expressed, but I do think both are legitimate factors to be considered. Granted both parties intended to fix the vessel, neither intended to "contract" with a non-

existent entity. The fact that FCI or FCL was of no interest to Mr Lee and A&O provides confirmation that it was not the name (or place of incorporation) of the counterparty which mattered but its characteristics as disponent owner and membership of the Golden Ocean group.

44. This conclusion makes it unnecessary for me to address the other ways in which Mr Raphael sought to put FCL's case. I was referred to a number of authorities. Some were said to establish a "doctrine" or "law" of "misnomer": see ***The Tutova*** [2001] 1 Lloyd's Rep 104, at paragraph 10, a decision of HHJ Mackie QC sitting as a Judge of the High Court. I would question whether there is such a "doctrine" or "law"; I think, as stated, that the issue is one of construction, which indeed is how HHJ Mackie addressed it, and that is an issue which I do not think has to be addressed blind to the fact that a "misnomer" has occurred. A similar point arose in ***Seb Trygg Holding AG v Manches*** [2005] 2 Lloyd's Rep 129 a decision of Gloster J upheld on appeal. Gloster J decided there (paragraph 30) that it was the characteristics of the party commencing arbitration proceedings, not the erroneous name used, which were determinative. As she put it (paragraph 38) "objectively viewed" the facts surrounding the initiation of the arbitration agreement "clearly support the contention that the mistake was one of misnomer and not as to the identity of the party which was bringing the claim". The facts surrounding the making of this fixture in my judgment clearly show that the mistake was one of misnomer and not as to the identity of the party to the fixture.

45. If it had been my judgment that a written fixture was made on 7 March of which, objectively viewed, it was a provision that the contracting party had to be a company named "FCI", I do think FCL could have successfully sought to rectify that contract to replace FCI with FCL. In my judgment that follows from my conclusion that it was the intention and understanding of both parties that the contracting party should be the disponent owner. On the other hand, if I had concluded that no fixture had been concluded on 7 March, or, that FCL were seeking to insist on a variation on or after that date, I think Mr Croall is right that FCL cannot spell out of the inaction and failure to respond of A&O either an acceptance of any offer from FCL or a "convention" sufficient to raise an estoppel. Mr Raphael submitted that because it must have been apparent to A&O that FCL believed there was a fixture, A&O had a "duty to speak" in effect to correct that belief so that FCL could, if so advised, seek as best it could to protect itself by arranging another fixture. But I do not think in this case a duty to speak can be founded on what occurred. Such communications as there were after 7 March were all one way and specifically requested a response from A&O which was not forthcoming. The language of "duty to speak", if apt at all, is, I think, apt only in circumstances where what is said or done by one party requires to be qualified or explained if it is not to be misleading to the other party. That is not this case. A&O said and did nothing.

46. I also had cited to me a number of authorities on the efficacy or otherwise of silence to give rise to binding obligations. I do not feel the need to address them. Absent exceptional or special circumstances (of which I see no sign in this case) silence is not effective for that purpose: ***Leonidas D [***1985] 1 WLR 925 per Goff LJ at page 937.

Consequence

47. FCL has established that there was a fixture concluded on 7 March 2005 by which A&O Nevis chartered from FCL the vessel which was subsequently named Double Happiness on the terms stated in the 4 March and 7 March recaps. FCL is therefore entitled to the order it seeks.

48. This judgment was sent to counsel in draft on 5 March. After it has been formally handed down I will hear the parties on any ancillary matters which cannot be agreed.

Mr T. Raphael (instructed by Ince & Co) for the Claimant
Mr S. Croall (instructed by Clyde & Co) for the Defendant/Respondent