CA on appeal from QBD (Mr Justice David Steel) before Mummery LJ; Sedley LJ; Rix LJ. 17th June 2003.

JUDGMENT : LORD JUSTICE RIX

The problem

1. These proceedings were commenced to elucidate the parties to a voyage charterparty and an arbitration. The charterparty, which is on the Gencon form, is dated Hamburg, 27 December 1994 and provided for a voyage by the vessel *Elikon* from Gdansk to three ports in Algeria. It is made between Fercometal SA as charterer (there is no dispute about that) and "Sphinx Navigation Ltd, Liberia c/o Internaut Shipping GmbH" as owner ("Sphinx" and "Internaut" respectively). However, Internaut signed the charterparty under the heading "Owners" without qualification. This has led to a dispute as to whether Internaut and/or Sphinx are parties, qua owner, to this charterparty. The charterparty contained an arbitration clause providing for arbitration in London under English law. An arbitration has been commenced by the "owners" under the charterparty, but the uncertainty as to the identity of the owner has in due course led to uncertainty as to the identity of the party claiming arbitration.

2. Sphinx, a Liberian company, is the registered owner of the *Elikon*. Internaut is a small broking firm in Hamburg. There is no relationship between Sphinx and Internaut. Sphinx had time chartered its vessel by a time charter dated 19 December 1994 to Primary Industries ("Primary"). The time charter, which was for a trip to the Western Mediterranean, was of the whole vessel which had a summer deadweight of 28,000 tonnes, but Primary only had need of it for the carriage of 12,000 tonnes of steel rods from Klaipeda to Algeria. It is Internaut's case that Primary and Internaut entered into an oral joint venture whereby Internaut would fix the balance of the space of the vessel and that the costs and revenue of any additional cargoes would be shared between them. Internaut says that it fixed the charterparty to Fercometal pursuant to that joint venture. There is no documentary evidence of this joint venture.

3. In principle, of course, only parties to the charterparty and thus to the arbitration agreement contained in it can refer a dispute to arbitration, or have arbitration claimed against them.

4. During the voyage there was delay at the discharging ports and this led to a claim against Fercometal for demurrage and/or damages for detention. The arbitration was commenced on the instructions of Internaut's P & I Club, Assuranceforeningen Gard of Norway ("Gard"). On 6 April 1995 Gard instructed Mr Paul Herring of Messrs Ince & Co to commence arbitration on behalf of the owner under the charterparty. There is no documentary evidence of those instructions. On 11 April 1995 Mr John Schofield sent a fax to Mr Herring headed "*Elikon* – C/P 27.12.94" as follows: *"Thank you for the message left on my answering machine earlier today.*

   "I would be very pleased to and do hereby accept appointment on LMAA terms as Arbitrator to be appointed by your Clients, the Disponent Owners of this vessel."

5. The reference in that fax to "Disponent Owners" is some evidence that Gard's instructions to Mr Herring and Mr Herring's appointment of Mr Schofield were themselves on behalf of "disponent owners". The message on Mr Schofield's answering machine has not survived, and there is no other documentary evidence of Mr Schofield's appointment. In the parlance of the shipping trade, a disponent owner is someone, other than the registered owner, who has title to dispose of the services of a vessel.

6. On 21 April 1995 Gard faxed Fercometal, with copies to Ince & Co (and to a Bremen insurer), as follows:
   "M/V Elikon – Gdansk/Oran – C/P DD 27.12.94
   Demurrage at discharge port – USD 148,916.67
   …Pursuant to Clause 39 of the governing charterparty we hereby give notice that we have appointed Mr John Schofield as owner's arbitrator."
   It will be observed that that notice did not refer to Gard's member as a "disponent owner".

7. On 24 April 1994 Penningtons, acting for Fercometal, notified Gard of its appointment of Mr Bruce Harris as Fercometal's arbitrator.

8. There was then an interval of over a year before the arbitration got under way. It will be necessary to refer below to some of the events which took place during that year. For the present it will suffice to say that it was only on 9 September 1996 that points of claim were served in the arbitration, and they were then served by Ince & Co in the name not of Internaut, but of *Sphinx*! They were served under cover of a

letter from Ince & Co to Penningtons, copied to the two arbitrators, which read as follows: *"We refer to our previous correspondence in this matter which appears to rest with your fax of 23rd November 1995. You will recall that Owners appointed Mr John Schofield and Charterers appointed Mr Bruce Harris as arbitrators in this matter. Our clients have decided to pursue their claim for demurrage by way of arbitration in London against your clients."*

9. The points of claim name Sphinx as "Claimants (Owners)" and go on to plead that the *Elikon* was let *"by her owners Sphinx…("Owners")"* under the charterparty. The pleading was subscribed as "*Served…by Messrs Ince & Co…Solicitors for the Claimants"*. The status of Sphinx as owner was admitted in Fercometal's points of defence and counterclaim. Fercometal's evidence states that *"pleadings, correspondence and Witness Statements…were carried on for Sphinx as Owners of the vessel"*. Those pleadings included points of reply and defence to counterclaim and amended and re-amended versions of that document. Various preliminary issues were dealt with in an interim award dated 23 March 1999, made in the name of an arbitration between Sphinx and Fercometal and resulting in decisions in Sphinx's favour. Mr Robert Gaisford had in the meantime been appointed as third arbitrator, presumably in an arbitration at least purportedly between Sphinx and Fercometal.

10. It was not until December 2000 that, as a result of disclosure pressed for by Fercometal and resisted by the "owners", it finally became apparent that Sphinx and Internaut had different interests and were, or might be, unconnected. It is said by Mr Herring that all that had happened in the meantime was a mere "misnomer" and that Penningtons always knew that Ince & Co had been instructed by Internaut. It is said by witnesses for Fercometal that they had always believed that Sphinx was the owner under their charterparty and that Internaut was involved, if at all, only as Sphinx's manager or agent.

11. Matters came to a head on 19 December 2000 when Ince & Co (Mr Herring) wrote a letter to the arbitrators. It was in part responding to a letter dated 17 August 2000 from Mr Schofield on behalf of the tribunal. In that letter Mr Schofield asked Ince & Co to say what the connection was between Sphinx and Internaut, and whether they accepted that all documents in the possession and control of Internaut were disclosable. In Ince & Co's letter Mr Herring wrote as follows: *"As a result of investigating the questions raised by Mr Schofield, it has come to light that although the arbitration was commenced by us, on behalf of disponent owners, Internaut, another party (i.e. Sphinx) was named as the Claimants in the claim submissions. This is a misnomer and our proposals for rectifying the position are set out below…*

A. For the avoidance of any doubt, Internaut request that Mr Schofield act in respect of Internaut's claim in the existing arbitration against Fercometal.

B. Amendments to the Points of Claim so that the Claimants are identified as Sphinx Navigation <u>and</u> Internaut are now necessary. Although we believe that it is clear from the terms of our appointment of Mr Schofield that he was appointed on behalf of disponent Owners, and it has been known to the parties throughout that we were acting on behalf of and are instructed by Internaut, we consider that the course to be adopted is for Internaut to be named as claimant <u>in addition to Sphinx</u> to cover the eventuality that Sphinx are held to be the disponent owner under the charter with Fercometal. Internaut/Sphinx therefore seek permission from the Tribunal to amend the Points of Claim to add Internaut firstly on the basis that there has simply been a misnomer and in the alternative on the basis that they are being joined to the proceedings…

In any event, in order to protect Internaut's position, (without prejudice to application for leave to amend the Points of Claim/joinder application), we intend to appoint Mr Schofield on behalf of Internaut and call upon Penningtons to appoint Mr Harris."

12. On the same day, Ince & Co faxed Mr Schofield as follows:
"Elikon – C/P 27.12.94
"Further to our earlier fax [sc the letter of the same day], we write to appoint you on behalf of our clients, Internaut Shipping GmbH in relation to their dispute with Charterers, Fercometal…
"This appointment is made without prejudice to our application to amend the Points of Claim and Joinder application in the existing application.
"Since the limitation period is approaching, we would be grateful if you could confirm by return whether you accept this appointment."

By return fax of the same date Mr Schofield said he *"would be pleased to accept this further appointment on LMAA terms"*.

13. I understand this exchange of faxes between Mr Schofield as relating entirely to a *new* appointment in a *further* arbitration, between Internaut and Fercometal. A further fax dated 20 December 2000 from Ince & Co to Penningtons giving notice of this new appointment in a further arbitration "without prejudice to our application for leave to amend the Points of Claim and joinder application in the existing arbitration" is consistent with that understanding. In that further arbitration Penningtons have appointed not Mr Harris, but Mr Mark Hamsher, as Fercometal's arbitrator.

14. On 26 January 2001 Internaut applied for permission from the arbitrators for leave to amend the points of claim to add Internaut as a second claimant. The application was opposed. Quite apart from the difficulties which had arisen as to the parties to the arbitration, there was now also a dispute as to who the owner under the charterparty was. In the circumstances, the application was a complex one. It was brought by both Sphinx and Internaut. Mr Herring made a witness statement which annexed a draft re-amended points of claim. Unfortunately that draft is not in our papers, but Mr Herring's witness statement is. From that the following appears. The title of the statement referred to "an arbitration between" (1) Sphinx and (2) Internaut as claimants and Fercometal as respondent. Mr Herring said Ince & Co had been instructed on behalf of Sphinx "the first named Claimants" and Internaut "the proposed second named Claimants". He said that when in April 1995 he had appointed Mr Schofield as arbitrator he did so (and Mr Schofield accepted) "on behalf of whoever was the "disponent owner" under the charterparty". Then, when in September 1996 his firm prepared and served points of claim in the arbitration, "I intended to name whoever were the disponent owners under the Charterparty…I believe that I was in error in naming Sphinx (though it is still possible that the Tribunal in this arbitration could ultimately find that I was correct in doing so)". He continued:

> *"23. If this be the case then the naming of Sphinx Navigation in the Points of Claim was a misnomer, as the actual name of the disponent owners (the disponent owners being the party to the arbitration agreement and this arbitration) was Internaut and it would be appropriate for the Points of Claim to be amended to reflect this. Equally it remains possible (though less likely) that Sphinx might ultimately be found by the Tribunal to be the disponent owners…If Sphinx are found to be the disponent owners, then there has, of course, been no misnomer and the Points of Claim accurately state the name of the disponent owners. It would not therefore be appropriate to amend the Points of Claim to remove Sphinx's claim, and the most sensible course is to amend the Points of Claim to add the name of Internaut in addition to the name of Sphinx to address both eventualities, and permission is sought to do so.*
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> *"24. To the extent that permission to join Internaut is necessary (and Internaut's primary case is that only leave to amend is required on the basis that Internaut falls within the category of disponent owner in the original appointment of Mr Schofield) permission to join Internaut is also sought, without prejudice to Internaut's primary position which is that Internaut is already a party to the arbitration."* (emphasis added).

15. Mr Herring ended his witness statement in these terms:

> *"28. Finally, and for the avoidance of doubt, I can confirm that Sphinx Navigation have ratified our commencement of the arbitration in their name and my firm is authorised to proceed with the arbitration on their behalf."*

16. There was a hearing in early April 2001. On 9 April 2001 the tribunal wrote to the parties as follows: *"I refer to last Friday's hearing of the application to re-amend the Points of Claim so as to **add** Internaut shipping GmbH as second Claimant in these arbitration proceedings*. [emphasis added]

> *"While we see the attraction of acceding to the application, we have reluctantly come to the conclusion that we do not, in the circumstances, have power to make such an order, which would have the effect of including two different companies as claimants in the capacity of principal parties to the charterparty (and the arbitration agreement) when only one of them can have been such a party.*
>
> *"In the absence of any agreement giving us power to decide the issue as to which of those companies was the owner (or disponent owner) under the charterparty and therefore party to the arbitration agreement, we cannot but think that the parties' interests would be best served in seeking a decision from the Court as to this, and sooner rather than later."*

17. At this stage the following seems to me to have been the position. There were, on the face of things, two arbitrations. The "original" arbitration was commenced in April 1995, innominately but by the owner or disponent owner under the charterparty. That original arbitration had been conducted in the name of Sphinx, who thus had been identified as being the claimant owner (or disponent owner) under the charterparty. A "new" arbitration had been commenced in December 2000 expressly by and in the name of Internaut (alone). There was also an attempt to *join* or *add* Internaut to the original arbitration, which the arbitrators were unwilling to do. That application appears to have recognised that Sphinx was an existing party and that Internaut should be joined as an additional claimant. There are two senses in which Internaut might be said to be "joined" or "added" to the arbitration. On one possible basis, Internaut had never been a party to the arbitration and would require to be added as a party, in addition to Sphinx. On another possible basis, Internaut had always been a party to the arbitration, even if it had given way to Sphinx, and merely needed to be added by amendment to the points of claim in the arbitration. On either basis it appears to have been recognised by Ince & Co on behalf of their clients (now clearly both Internaut and Sphinx) that Sphinx was an existing claimant in the arbitration and should remain so.

18. There is or was, however, an entirely distinct possible approach to these procedural complexities, and that is or was to take the position that Internaut had always been the original claimant to the arbitration and remained so, and that all reference to Sphinx was a complete error and was always intended to be a reference to Internaut: and that the solution to this error was simply to *substitute* Internaut for Sphinx in the pleadings by way of amendment. Amendment by way of substitution is of course a different process to amendment by way of addition. Such an application would recognise that Sphinx had never been or become party to the original arbitration. It is not at all clear to me from Mr Herring's January 2001 statement or from the arbitrators' letter of 9 April 2001 that this last possibility had been adopted in the arbitration by Ince & Co and their clients. It is nowhere mentioned in the arbitrators' April 2001 letter. Thus, Internaut is described by Mr Herring in his statement as "the proposed second named Claimants". He does not propose "to remove Sphinx's claim". One reason for this may be that Mr Herring's clients were unwilling to decide *between* themselves as named claimant to the arbitration *before* the arbitrators had decided *who* the owner under the charterparty was. However, it was standard law prior to the Arbitration Act 1996 (and the original arbitration was commenced under the previous regime) that the arbitrators could not determine their own jurisdiction. Thus they could not decide (unless the parties vested them with specific jurisdiction to do so) who was the owner under the charterparty. One reason, it would seem, why an application simply to substitute Internaut's name for Sphinx in the arbitration may never have been made to the arbitrators is that *if* it were to emerge that the true owner under the charterparty was indeed Sphinx and not Internaut, then it would remain necessary for Sphinx to stay (or become) a party to the arbitration. There has never been any application to *join Sphinx* to the original arbitration, or to commence a new arbitration in the name and on behalf of Sphinx.

19. As for *joining* Internaut to the original arbitration as a new party, on the basis that the original appointment did not suffice, or did not survive the identification of Sphinx as the claimant, there is no documentation in which Mr Schofield ever appears to have been asked to accept a fresh appointment as an arbitrator in the *original* arbitration on behalf of Internaut, or to have accepted such an appointment.

The court proceedings

20. These proceedings were commenced in December 2001 to elucidate these difficulties. The claimants (in this court, the respondents) are both Internaut and Sphinx, and Fercometal is the defendant (and here, the appellant). The claimants sought declarations: (1) that Internaut, alternatively Sphinx, alternatively both Internaut and Sphinx, are party to the charterparty; (2) that Internaut has been party to the original arbitration since its commencement, alternatively since 19 December 2000; and (3) that the arbitrators have power to grant permission to amend the points of claim to *substitute* the name of Internaut for that of Sphinx, if Internaut so applies and the arbitrators in their discretion see fit to do so. The concept of *substituting* Sphinx's name by Internaut's is, I think, a development upon the analysis with which the arbitrators had been faced. This is presumably because, if the court were to decide that Internaut and not Sphinx was party to the charterparty, then Sphinx could be simply dispensed with and substituted by Internaut. It is not quite clear to me, however, what the claimants' position would be if the court were to

conclude that Sphinx is party to the charterparty. The inference appears to be, however, that Sphinx is already party to the arbitration.

21. Even before these proceedings had been commenced, the claimants had sought to use a previous action, which Fercometal had commenced against Sphinx and Internaut in 1995 (1995 Folio No 1774, the "1995 action"), as the 2001 platform for the elucidation of these issues. Fercometal had commenced the 1995 action to prevent Sphinx and Internaut from involving it in proceedings in Algeria against the Algerian receivers. Fercometal had obtained an injunction from the English court to prevent such involvement, on the basis that any proceedings against Fercometal under the charterparty should be by way of arbitration in London. The action had then become dormant, but Sphinx and Internaut sought to revive it in July 2001. In Mr Herring's July 2001 statement in the 1995 action, he again said that he was acting for both Sphinx and Internaut and supported their request for issues to be stated as to whether one or another or both of them were party to the charterparty, and as to which of them was party to the original arbitration. That statement in the 1995 action referred to and relied on Mr Herring's January 2001 statement in the arbitration (the "arbitration statement") as to the circumstances which governed the commencement of the original arbitration and ultimately led up to the April 2001 application to the arbitrators. Mr Herring went on to say that there were "three bases on which it was sought to add Internaut", viz (1) to reflect the proposition that the original arbitration had always been started in Internaut's name (the "misnomer" basis, relying on *Unisys v. Eastern Counties* [1991] 1 Lloyd's Rep 538); (2) to reflect the proposition that Internaut had become a party to the original arbitration in December 2000 on the ground that Mr Schofield had then agreed to act as Internaut's arbitrator in the original arbitration, relying on *The Smaro* [1999] 1 Lloyd's Rep 225 at 243; and (3) on the basis that the arbitrators were entitled to permit joinder of Internaut to the original arbitration in the future, again relying on *The Smaro*. I would again comment (see para 19 above) that the factual basis for (2) above is not apparent, in that although Mr Schofield was asked on 19 December 2000 to accept a fresh appointment as Internaut's arbitrator in a new arbitration, there is no evidence that he was ever asked to accept a fresh appointment as Internaut's arbitrator in the existing original arbitration. Presumably it was uncertainty as to the factual support for basis (2) that led Mr Herring to put forward his additional basis (3).

22. It appears that there was a hearing before Cresswell J in the 1995 action on 30 November 2001 in which he made an order for certain issues to be determined. That was before the commencement of the present proceedings, in which Internaut and Sphinx are claimants rather than defendants. However, the issues which Cresswell J then ordered appear to have been incorporated into the present proceedings. They may be stated or restated as follows:
    1. Whether Internaut or Sphinx or both are party to the charterparty.
    2. As to which of Internaut and Sphinx are party to the original arbitration.
    3. As to whether the arbitrators have power to grant permission to amend the points of claim in the original arbitration to substitute the name of Internaut for the name of Sphinx if Internaut applies to do so, and the arbitrators in the exercise of their discretion see fit to do so.

23. The points of claim in the present proceedings (the 2001 action) reflect Mr Herring's evidence in his arbitration statement and his July 2001 statement in the 1995 action. Thus they assert that the three issues should be answered in terms of the declarations sought (see para 20 above).

24. There is no further evidence from Mr Herring directly in the current proceedings. Nor is there any evidence from Gard. There has been no disclosure (which may well have involved a waiver of privilege) from the files of Ince & Co or Gard other than documents passing between the parties. There are, however, statements from a number of witnesses concerned with the making of the charterparty and the disputes underlying the arbitration, such as from Georg Siefeldt, a director of Fercometal's brokers, Fersped International Spedition GmbH & Co ("Fersped"), Michel Tueny, the in-house legal advisor of Fercometal, Samir Tannous, Fercometal's trading manager, Manfred Heinrichs, Internaut's managing director, and Jens Ruhnke, Internaut's chartering manager.

The first issue: Who is party to the charterparty?

25. This is a discrete issue which has nothing to do with the procedural or jurisdictional questions which have unfortunately overtaken the arbitration.

26. The charterparty contained the following provisions. The front page of the charterparty form, which is headed "Part I", contains a number of boxes with printed headings and room for matter to be inserted in type. Box 3 is in the following form:
"3. Owners/Place of business (Cl. 1) [the printed heading]
SPHINX NAVIGATION LTD, LIBERIA C/O INTERNAUT SHIPPING GMBH
STAVENDAMM 4A
28195 BREMEN" [the typed insertion]

27. Box 14 stated:
"14. Freight payment (state currency and method of payment; also beneficiary and bank account) (Cl. 4) [the printed heading]
FULLY PREPAID IN
USD CURRENCY
AS PER CL 20" [the typed insertion]

28. Box 21 stated:
"21. Additional clauses covering special provisions, if agreed. [the printed heading]
ADDITIONAL CLAUSES NO. 18 TO 41 ARE FULLY INCORPORATED AND IN FORCE" [the typed insertion]

29. At the foot of the front page there appeared two further boxes for signatures. The first box has the printed heading "Signature/Owners" (and the second box has the printed heading "Signature/Charterers"). The owners' signature box contains the stamp "INTERNAUT SHIPPING" and its address with a signature over the stamp. That is the unqualified signature of Internaut.

30. Just above the signature boxes there is this: *"It is mutually agreed that this Contract shall be performed subject to the conditions contained in this Charter which shall include Part I as well as Part II. In the event of a conflict of conditions, the provisions of Part I shall prevail over those of Part II to the extent of such conflict."*

31. Part II (on the reverse of the form) contained a number of printed clauses, some of which had been deleted and/or amended. Clause 1 is important:
"1. It is agreed between the party mentioned in Box 3 as Owners of the steamer or motor-vessel named in Box 5…and the party mentioned as Charterers in Box 4 that:…"

32. The additional (or "rider") clauses contained the following:
"Clause 20
Fully prepaid on signing/releasing Clean on Board Bills of Lading
Frt to be paid to:
Sparkasse in Bremen…
Beneficiary: Owner c/o Internaut shipping GmbH, Bremen
Under ref. M/V Elikon voy 613."

"Clause 26
Bills of Lading to be signed by or on behalf of Master/Owner…"

33. The judge held that the unqualified signature was ultimately determinative of who was the owner, basing himself on the general principle set out in *Scrutton on Charterparties*, 20th ed, 1996, at 45 that: *"Where a person signs the charter in his own name without qualification, he is prima facie deemed to contract personally, and, in order to prevent this liability from attaching, it must be clear from the other portions of the charterparty that he did not intend to contract personally."*

34. The judge held that contrary indications in the charterparty, in particular Box 3, pointing to Sphinx as being the owner fell "a long way short of indicating "clearly" or "plainly" that Internaut were not to be personally liable".

35. Although he reached that conclusion on a pure reading of the charterparty itself, he was also invited on behalf of Internaut to take into account evidence extrinsic to the charterparty, either as being part of the factual matrix, or as being evidence available to prove the identity of a contracting party in the event of ambiguity. The judge was willing to do so and concluded that this background supported the inference

of construction. Thus, as to factual matrix, the fixture telexes showed that there was no reference to any other principal and that the main terms were agreed in respect of an "Internaut TBN" (ie an Internaut vessel to be named). And as to other extrinsic evidence, the unchallenged evidence showed that Sphinx had already time chartered the vessel to Primary, that there was no relationship whatsoever between Sphinx and Internaut, and that in truth Internaut was acting for its own account (or, it might be said, for the account of its alleged joint venture with Primary).

36. On this appeal, Mr Hugo Page QC, on behalf of Fercometal, has submitted that the judge was in error. The pure exercise of construction had to be performed by taking into account the charterparty as a whole. The signature might be unqualified, but everything else pointed to the fact that the owner was Sphinx and thus that Internaut must be regarded as Sphinx's agent or manager. Thus Box 3 referred to "Sphinx…c/o Internaut" as owner, which in context could mean only that the owner was Sphinx and that Sphinx's address was "c/o" Internaut. Box 3 asked for "Owners/Place of Business" and that is what had been provided. Box 3 had to be read together with clause 1, which provided that the parties to the charterparty were defined (not by the signatures but) by the parties mentioned in Box 3 and Box 5. Thus whereas Box 3 merely defined the "owners", clause 1 defined the *parties* by reference to Box 3 (and Box 5). Sphinx was the party mentioned in Box 3. There was further support for this in clauses 20 and 26. Clause 20 provided that the beneficiary of payment of the freight was the "Owner c/o Internaut". That showed that Internaut was not the "Owner" but someone else. Clause 26 said that bills of lading were to be signed by or on behalf of "Master/Owner". If they were signed by or on behalf of the Master, then they would be owners' bills in the classic sense that they would bind the registered owner (Sphinx), whose master is its servant. If, however, they were signed by or on behalf of not Sphinx but the disponent owner under the charterparty (Internaut), then they would be not owners' bills in that classic sense, but charterers' bills. However, the grouping of "Master/Owner" in that way, showed that there was no intention to distinguish so fundamentally between bills signed by or on behalf of the Master or the Owner: both were intended to be owners' bills, ie bills issued by and binding the registered owner and the Master's employer, Sphinx.

37. On behalf of Internaut, however, Mr Simon Bryan submitted that the judge was right for the reasons which he gave. The unqualified signature was not definitive or overriding, but it was of particular significance in the absence of a plain and unambiguous contractual intention that some other party, viz Sphinx, was the only party to be entitled to take the benefit and burden of being privy as owner under the charterparty. The points relied on by Mr Page were not of that plain and unambiguous quality. Box 3 referred to both Sphinx and Internaut. Clause 1 simply referred back to Box 3. Clause 20 referred to "Owner c/o Internaut" which for these purposes was of even less use than Box 3, or simply went back to Box 3. The inference from clause 26 was too refined to determine the question of who was owner under the charterparty.

38. Mr Page submitted that the judge had not been entitled to look at extrinsic evidence on this question of construction. However, this court first has to be persuaded that the judge's decision on construction needed any further support from extrinsic material.

39. The issue does not come without the aid of authority. In ***Cooke v. Wilson*** (1856) 1 CB (NS) 153 the contract of carriage was *"agreed between Messrs J & R Wilson, of Liverpool, owners of the ship "Jessica" of Liverpool…and Samuel Cooke, of London, on behalf of the Geelong and Melbourne Railway Company…"* The contract was signed *"J & R Wilson. Samuel John Cooke"*. Mr Cooke sued on the contract, and was met by the argument that he was only an agent and had no right of suit. That argument was rejected. Cresswell J said (at 162): *"Prima facie, when a man signs a contract in his own name, he is a contracting party; and there must be something very strong upon the face of the instrument to prevent that liability attaching to him. I find no circumstances of that sort in this case…It is true, the words "on behalf of the Geelong, Melbourne Railway company," are added…a company existing abroad…But the plaintiff, residing in London, professes to make the contract; and he signs it with his own name."*

40. Crowder J said (at 164): *"I have always understood the law to be that, if a man signs a written contract, he is to be considered as the contracting party, unless it clearly appears that he executes it as agent only. There is nothing upon the face of this agreement distinctly shewing that the plaintiff was contracting as agent for others."*

He then went on also to point out that the railway company was in Victoria.

41. The next year in ***Parker v. Winlow*** (1857) 9 Ex 942 the charter stated *"agreed between Captain W. Parker, of the good ship 'Celerity', himself master,…and G.W.Winlow, agent for E.Winlow & Son, of Devonport, merchants"* and it was signed *"G.W. Winlow"*. G W Winlow was sued for demurrage as the charterer. The court held that Winlow was liable on the contract, but that on the facts there was no demurrage due. Lord Mansfield CJ said (at 947): *"He makes the contract, using apt words to shew that he contracts; and the only ground suggested for rebutting his personal liability is that he says he is an agent for another…but on principle, and on the authorities cited, an agent is liable personally if he is the contracting party; and he may be so though he names his principal."*

42. Erle J said that he agreed and added (at 948): *"He says that he is agent for E. Winlow & Sons; but that is not enough to rebut the inference of personal liability arising from the rest of the contract."*

43. Crompton J said (at 949): *"Mere words of description attached to the name of the contractor, such as are used here, saying he is the agent for another, cannot limit his liability as contractor. A man, though agent, may very well intend to bind himself; and he does bind himself if he contracts without restrictive words to shew that he does not do so personally. It is important that mercantile men should understand that, if they mean to exclude personal recourse against themselves on contracts which they sign, they must use restrictive words, as if they sign per procuration, or use some other words to express that they are not to be personally liable."*

44. Nearly 150 years later, in ***The Frost Express*** [1996] 2 Lloyd's Rep 375, a chartering contract was entered into on the Gencon form. In Box 3 there was typed*: "Seatrade…as agents to Owners or as Disponent Owners"*. In the owners' signature box the managing director of Seatrade had signed his name without any qualification. It was known to the charterer, Geest, that Seatrade managed a pool of vessels whose owners had combined for this trade and had authorised Seatrade to obtain employment for their vessels on their behalf. Damage was suffered to cargo on a voyage of the *Frost Express*. Geest went to arbitration against Seatrade, who sought a declaration that they contracted only as agents to the vessel's registered owners. It was common ground that Seatrade's managing director had not incurred personal liability himself, but this court held that Seatrade was both a party to the contract and had contracted its own personal liability under it. The signature box was read together with Box 3, so that Seatrade had undertaken the obligations of owners "as agents to owners or disponent owners". The question posed was whether Seatrade, as agents, had contracted with or without personal liability. It appears to have been accepted that the registered owners as principals had personal liability in any event. Evans LJ emphasised the authorities (viz ***Parker v. Winlow***), the fact that Seatrade's signature was unqualified, and the fact that the Box 3 expression *"as agent for owners or as disponent owners"* (my emphasis) would mean that Seatrade would be liable whether or not Seatrade was interposed as a disponent owner between the registered owner and the charterer.

45. The judge had relied on these three authorities as supporting his holding on this point. Mr Page submitted that they were an unsatisfactory basis for his decision. ***Cooke v. Wilson*** was at least influenced by the old rule which favoured the personal liability of the English agent of a foreign principal. ***Parker v. Winlow*** was decided not on the basis of the signature but on the true construction of the body of the contract, and in any event was obiter. ***The Frost Express*** demonstrated what he described as the ***"modern rule"***, which was that you had to construe the signature with the whole of the rest of the contract. In any event, Seatrade had been described in *both* Box 3 *and* the signature box as "owners", which was not the case here.

46. It would appear that these three cases each turn on factors individual to themselves, and it is certainly true that ***Cooke v. Wilson*** was in part decided on the out of date basis of a strong presumption in favour of the personal liability of the English agent of a foreign principal (see *Bowstead & Reynolds on Agency*, 17th ed, 2001, at para 9-020); that the reasoning in ***Parker v. Winlow*** is not all of a piece; and that *The Ocean Frost* was a strong case for personal liability arising out of its own facts. What remains, however, is that in all three cases a party who was expressly said in the body of the contract to be an "agent" or to be acting on behalf of a principal was nevertheless adjudged to have personal liability in circumstances where, again in all three cases, the agent signed without qualification. This permits the extraction of a principle, which in my view can be found stated as at least part of the reasoning in those cases that the

way in which a party named in a contract signs that contract may be of particular strength in the overall question of whether he is a party to that contract with personal liability under it. That is in effect the principle stated by *Scrutton* and cited by the judge; and it is to be found stated in similar terms by *Bowstead & Reynolds on Agency* at 577 and by *Cooke on Voyage Charters*, 2nd ed, 2001, at para 2.9.

47. The locus classicus for this principle is probably now ***Universal Steam Navigation Company, Limited v. James McKelvie and Company*** [1923] AC 492, a case which is the other way round in that there the party signing was named as "Charterer" in the body of the charter but qualified his signature "(as Agents)": a situation which nevertheless sets up the same problem as to how a conflict or an apparent conflict between the body and signature of a document is to be resolved. In that case, Lord Shaw of Dunfermline spoke of the qualification as a "dominating factor" and Lord Sumner referred to it as a matter of "predominant importance" (at 499 and 500), albeit as something which ultimately has to be construed as part of the contract as a whole (see also ***The Starsin*** [2003] UKHL 12, [2003] 1 All ER (Comm) 625 per Lord Bingham of Cornhill at 633e and Lord Hoffmann at 652h). Moreover, Lord Parmoor spoke expressly of the situation in our case, at 505 thus: *"In such a case the intention of the parties is to be discovered from the contract itself, and the rule laid down in Smith's Leading Cases has been adopted as the rule to be followed. "That where a person signs a contract in his own name, without qualification, he is prima facie to be deemed to be a person contracting personally, and in order to prevent this liability from attaching, it must be apparent from the other portions of the document that he did not intend to bind himself as principal.""*

48. Mr Page points out on the other hand that Viscount Cave LC at 495 said that it remained to be seen whether decisions such as ***Cooke v. Wilson*** and ***Parker v. Winlow*** can stand with later decisions such as ***Gadd v. Houghton*** 1 Ex D 357. He was there, however, dealing with the slightly different point as to whether cases such as those were correct to view the expression "as agents" in the body of a contract as being a mere description of their business rather than as a definition of their contracting capacity. So be it. However, those cases are still, in my view correctly, relied on for the principle stated in the text-books.

49. In any event, Internaut is nowhere in the charterparty referred to as an agent. That Internaut might be an agent is merely a possible inference to be derived from the fact that Sphinx (or in clause 20 the "Owner") is referred to "c/o Internaut". Mr Page submits that that suggests that Internaut is Sphinx's manager. It would be perfectly natural, he says, for a registered owner, in effect a name-plate company in a flag of convenience state, here Liberia, to have a place of business c/o its manager: but its manager remains merely its agent. The difficulty of that submission, however, is that if Internaut is regarded as Sphinx's manager (a mere inference, which we know is actually wrong in fact), then there would in theory be nothing surprising about Internaut contracting in its own name. In practice if not in form, the manager is the owner. I would accept that it would be very unusual for a manager to enter into a charter in its own name on behalf of its principal, the registered owner: but it remains very unusual for a manager to sign a charterparty in its own name, full stop. So in my judgment that argument takes one nowhere.

50. One comes back therefore to the problem of construing as a whole a charter in which the owner is defined in the signature box and elsewhere in different terms. The signature box tells the reader that Internaut is the owner. It is not merely that Internaut signs the contract, for it signs the contract under the designation of owner: "Signature (Owners)". In effect, it signs as owner. On the other hand Box 3 and clause 1 tell the reader that the owner is "Sphinx…c/o Internaut". I would be prepared to assume that that, if it existed by itself, would mean that Sphinx is the owner. Clause 20 would be consistent with that ("Owner c/o Internaut"), and so would clause 26. On the other hand, when those provisions are read with the signature box, there is, on the basis of that assumption, plainly an inconsistency. One way to resolve that inconsistency is to infer that Internaut is an agent and signing because it is an agent. Another way is to infer that, although Sphinx is perhaps the registered owner (something that could be confirmed by consulting Lloyd's register of owners), nevertheless the contracting party under this contract is Internaut, either because it has some business association with Sphinx or perhaps because it is the disponent owner tracing its title from Sphinx. On the latter basis, the contracting party would be Internaut and only Internaut. But even on the former basis, unless the true construction of the contract would be that Internaut signs not merely because it is Sphinx's agent, but solely in the capacity of

Sphinx's agent, Internaut would be liable as contracting personally. Its principal, Sphinx, could also (or rather alternatively) be liable: but that is not inconsistent with Internaut's liability.

51. However, there is nothing whatsoever in the charterparty to say that Internaut, in signing under the designation of "Owners", is signing "as agents", ie in the sense accepted in ***Universal Steam Navigation v. McKelvie*** as meaning as agents only. In those circumstances there is every justification for construing the charterparty as a whole as one in which Internaut is accepting personal liability for the owner, even if perhaps Sphinx rather than Internaut is the registered owner or even if Sphinx is in fact Internaut's principal. When one adds the long established principle that the characterisation of a signature plays, prima facie at any rate, a predominant or dominating role for the purposes of this issue in the construction of the contract as a whole, or, to put the matter the other way round, that it must be clear from the body of the contract that the person signing without qualification does not intend to contract with personal liability, then, in my judgment, Internaut's liability is firmly established.

52. It is to be noted that it is not as if Internaut is not named in the body of the charter: it is named, and in the important Box 3. It may be that if an entirely distinct name, not found elsewhere in the body of the contract, is used in the signature box, then the prima facie weight of the applicable principle counts for less, or that the prima facie inference is more easily rebutted. Where, however, as here, Internaut's name is found in Box 3, it seems to me that the principle applies with its traditional force. It follows that Box 3 and clause 1 take the reader no further forward. Clause 20 reflects the style of Box 3, with this difference that Internaut is the only name expressly mentioned. Moreover, the beneficiary's bank is in Internaut's home town of Bremen. In these circumstances, it seems to me that clause 26 cannot carry Fercometal's argument home. While the role of Sphinx remains obscure, or ambiguous, such obscurity or ambiguity cannot outweigh the significance of Internaut's signature in the capacity as owner. It cannot provide that clear or plain objective evidence of an intention that the only party with the right to sue and be sued on the contract is Sphinx rather than Internaut.

53. It may be asked, indeed the question was raised in the course of argument, why the principle whereby particular attention is paid to the form of the signature, which is in effect a maxim of construction and not a rule of law, exists: from where does it take its force? I would answer that it reflects the commercial facts of life, the promptings of commercial common sense. The signature is, as it were, the party's seal upon the contract; and that remains the case even where, as here, the contract has already been made (in the fixture telexes). Prima facie a person does not sign a document without intending to be bound under it, or, to put that thought in the objective rather than subjective form, without properly being regarded as intending to be bound under it. If therefore he wishes to be regarded as not binding himself under it, then he should qualify his signature or otherwise make it plain that the contract does not bind him personally.

54. This case moreover proves the validity of the principle thus rationalised. Quite why the body of the charterparty was filled up in the way it was remains a mystery or even a matter for suspicion: but why Internaut signed as it did is not. In truth Sphinx had nothing to do with the charterparty other than as the registered owner of the vessel named under it: there was no relationship of agency between Sphinx and Internaut. Internaut was in fact contracting for its own account (or for the account of its alleged joint venture with Primary), and not for Sphinx's account. It is no mere chance nor error that Internaut signed in its own name. How could it honestly sign in Sphinx's name? If Sphinx were, on the true construction of this charterparty, the only party bound by it on the side of the owner, then the contract would have been made without authority and, subject to ratification of which there has been none, would have failed.

55. In my judgment, therefore, the judge was right to hold that Internaut was liable as owner under the charterparty, and that was so irrespective of the arguments deriving from extrinsic evidence. As to the latter, I would merely refer to what Lord Millett said in ***The Starsin*** at para 175: *"The identity of the parties to a contract is fundamental. It is not simply a term or condition of the contract. It goes to the very existence of the contract itself. If it is uncertain, there is no contract. Like the nature and the amount of the consideration and the intention to create legal relations it is a question of fact and may be established by the evidence. Such evidence is admissible even where the contract is in writing, at least as long as it does not contradict its express terms, and*

possibly even where it does: see ***Young v Schuler*** (1883) 11 QBD 651, *Chitty on Contracts* (28th edn, 1999) p 633."

56. As it was, this court did not reach the arguments on extrinsic evidence; but, if I were wrong as to the proper construction of the charterparty, on any view the matter would then be ambiguous, and the court would be entitled to take into account the acknowledged facts that Internaut was not acting as Sphinx's agent, had no relationship with Sphinx (other than possibly through its joint venture with Primary), and had no authority nor instructions from Sphinx.

57. The answer then to this first issue is, in my judgment, that Internaut is party as owner to the charterparty, and thus to its arbitration agreement. Even if, in theory, as a matter simply of construction of the charterparty document, it might have been possible for Sphinx also to have been privy to the charterparty, qua Internaut's principal, nevertheless on the facts Sphinx is not and has never even claimed to have been Internaut's principal (even if it has alleged that it has ratified the commencement of arbitration in its name). It therefore follows that Internaut and only Internaut is party to the charterparty as owner thereunder.

The second issue: who is the claimant party in the original arbitration?

58. In the last paragraph of his judgment the judge concluded that the answer to this second question led inexorably from the answer to the first issue – *"since the only fair construction of the exchanges in April 1995 leading to the appointment of the Tribunal was that the Arbitrators had been appointed to determine the disputes that had arisen between the parties to the Charterparty: see* ***Unisys v. Eastern Counties*** *[1991] 1 Lloyd's Rep 538."*

59. On this appeal, however, there was substantial argument between the parties as to the correct analysis of what had occurred. On behalf of Fercometal, Mr Page submitted that the judge had failed properly to take into account the identification of the claimant owner under the arbitration as being Sphinx. This was, he submitted, more than a mistake as to the correct name for Fercometal's contract partner, more than something which could be called a mere "misnomer": it went to the actual identity of the party to the arbitration. For nearly five years the arbitration had been carried on, consensually, on the basis that the claimant owner was Sphinx.

60. On behalf of Internaut, however, Mr Bryan submitted that the judge was right. The question was: who had invoked arbitration against Fercometal? It could only have been Internaut, because only Internaut was a member of Gard; and only Internaut could have been called a "disponent owner", since Sphinx was the registered, rather than the disponent, owner, and Mr Schofield had been appointed by Mr Herring for the "disponent owner", as Mr Schofield's letter of acceptance made clear. The fact that, at a later stage, over a year after the arbitration had been commenced, Ince & Co mistakenly said that Sphinx, rather than Internaut, was the owner, was a mistake as to the disponent owner's name under the charterparty and could not affect the fact that the arbitration had always been commenced on behalf of whoever might be the disponent owner. Mr Bryan also sought to show, on the evidence, that Fercometal had always known and recognised that its contract partner was Internaut, not Sphinx.

61. This is a perplexing issue, and there are a number of strands to it. It is perplexing because such an issue would appear to turn in part on the question of authority (who in fact authorised the appointment of Mr Schofield as arbitrator?), in part on the objective standards of the construction of documents (because an arbitration is commenced by the delivery of a notice calling on another party to the arbitration agreement to appoint an arbitrator), and in part on the inferences to be drawn from the identification of the claimant by the claimant itself as having a certain identity, especially when that identification is then agreed by the other party to the arbitration and an interim award is brought into existence in an arbitration reference so defined and agreed. It is also perplexing on a factual level, because the explanation of the mistake ("mere misnomer") is put forward in improbable circumstances on a bare assertion and without any voluntary disclosure of underlying documentation; and finally it is perplexing on a forensic level, because the issue was regarded, rightly or wrongly, as concluded below on a narrow basis, whereas the argument in this court has ranged more widely.

62. I shall begin with the question of authority, because I take it as axiomatic that if the arbitration (by which in this part of my judgment I mean to refer to the original arbitration) was commenced in fact on the authority of someone other than the true contract party, then (subject to any question or possibility of ratification) the arbitration would be invalid.

63. On the question of authority, I am satisfied that instructions came, via Gard and Ince & Co, from Internaut itself. There was in fact no corporate connection between Sphinx and Internaut. Internaut, not Sphinx, was a member of Gard. Internaut (or its alleged joint venture partnership with Primary) was the party with the financial and business interest in collecting the demurrage claimed under the charterparty. Sphinx's interest in the loss of time during discharge at Algeria was wholly covered by, and subject to the terms of, its time charter with Primary. Moreover, the reference in Mr Schofield's letter to "Disponent Owners" suggests that it was at any rate at that time Mr Herring's understanding that Gard's member, and the owner under the charterparty, was a disponent rather than the registered owner of the vessel.

64. The next question is as to the name in which the arbitration was claimed or commenced. This is not a pure question of authority. It crosses the line between the parties. Arbitration is a consensual process. This is not a pure question of fact, but a matter which must depend in large part on a process of construction. The critical document here is not the (lost) tape message on which Mr Herring left an invitation for Mr Schofield to accept appointment as an arbitrator, nor Mr Schofield's letter of acceptance, but the fax in which Fercometal was notified of his appointment, and thus of the reference of a claim to arbitration. That fax (see para 6 above) was sent by Gard and simply referred to Mr Schofield as "owner's arbitrator". It asked Fercometal to agree Mr Schofield as a sole arbitrator, or else to nominate its own arbitrator. That fax marked the commencement of the arbitration. The "owner" was left innominate.

65. To whom did the "owner" refer? One answer is: to Internaut, for only Internaut was privy to the charterparty on the owner's part. As a result of this litigation it has been established that that is so, in other words that the "owners" under the charterparty were Internaut *and not Sphinx*. Mr Bryan has given that answer, and he has also made two submissions in support of it. One is that the objective answer to the question must depend on the true construction of the charterparty, and that has now been settled. That is why the judge said that the answer to the second issue follows inexorably from the answer to the first. The other is that in any event Fercometal *knew* that Internaut was the owner.

66. That second submission ties into a large part of the evidence before the court. In brief, however, Mr Bryan says that correspondence and other documentation between the parties in the interval between the commencement of the arbitration and the service of points of claim in it show that Fercometal knew that the owner under the charterparty and the claimant in the arbitration was Internaut. That was the period during which there was a move to implicate Fercometal in litigation in Algeria and a riposte on the part of Fercometal by means of its 1995 action to enforce arbitration in London. Fercometal's witnesses, however, say that at this period they made no distinction between Internaut and Sphinx: they regarded them both as associated companies, Internaut as the manager and agent of Sphinx, and that in as much as litigation in Algeria was in the name of Internaut, that was a mere device to avoid the obligation of Sphinx as owner to arbitrate in London rather than litigate in Algeria; and it was for that reason that it brought its 1995 action against both Sphinx and Internaut.

67. There is no need to set out this evidential material in full. It is sufficient to refer to the following. Mr Bryan relies on the facts that the freight invoice was sent to Fercometal on Internaut's headed notepaper and requested payment in its favour; that correspondence about the disputed demurrage was between Fercometal and Internaut, and that Fercometal spoke there of its contract partner in terms of "you", ie Internaut; that in a letter dated 11 September 1995 from Penningtons (Fercometal's solicitors) to Internaut, Penningtons acknowledged that "you [Internaut] commenced arbitration proceedings in London by the appointment of Mr Schofield"; that in a further letter from Penningtons to Gard dated 20 September 1995 Penningtons spoke of "two straightforward and undeniable facts", one of which was that "any dispute between Internaut and Fercometal is to be heard in arbitration in London"; and that in a letter dated 9 October 1995 from Ince & Co to Penningtons, Mr Herring said that his firm had been

"consulted by Internaut, the disponent owners of "ELIKON" through their Club, Gard, in relation to the demurrage claim…" Mr Page, on the other hand, relies on the facts that Internaut was never identified, not even in Ince & Co's letter of 9 October 1995, as the claimant in arbitration; that all Fercometal's witnesses speak to their understanding of Internaut as being the agent or manager of Sphinx; and that Fercometal's documentation in the 1995 action spoke contemporaneously (ie before the outbreak of this current dispute) of Sphinx and/or Internaut as being the owner of the vessel and party to the charterparty.

68. In my judgment Fercometal did not know that Internaut and not Sphinx was the owner of the vessel under the charterparty. To come to that conclusion would require me to conclude that all Fercometal's witnesses were either in bad faith or had suffered from a collective bout of self-delusion. I decline to come to that conclusion. The critical evidence is that presented to the court by Fercometal in the 1995 action, where Sphinx was named as first defendant (Internaut as second) and where an affidavit on behalf of Fercometal said:

> *"3. The Elikon is owned by [Sphinx] and/or [Internaut] and is managed by [Internaut]. It appears from the Algerian proceedings that the Defendants draw no distinction between [Sphinx] and [Internaut] for any material purpose, and I therefore refer to them collectively as "Owners".*
>
> *"4. By a voyage charterparty in the "Gencon" form…the Defendants agreed to let and [Fercometal] to hire the Defendants' vessel Elikon…*
>
> *"5. …Owners then commenced arbitration proceedings…The arbitration proceedings continue but pleadings have not been served."*

69. References to Internaut as the owner or claimant in arbitration therefore do not assist. It is perhaps a remarkable thing that Internaut at no time sought to say in the 1995 action that it alone was the owner under the charterparty, and that Sphinx had nothing to do with it. An injunction was granted against both Sphinx and Internaut in the 1995 action, an injunction which remained in force at any rate down to the commencement of the current proceedings in December 2001. The documents of September and October 1995 were written in the course of the dispute engendered by Internaut's Algerian proceedings, which Fercometal saw as an attempt to evade the arbitration clause binding on the owner under the charterparty, whose Box 3 referred to Sphinx. Fercometal knew nothing of Sphinx's time charter to Primary until it emerged relatively recently in belated disclosure in the arbitration.

70. The facts so far established, therefore, are that the arbitration was authorised by Internaut alone and commenced innominately in the name of the "owner", and that pending service of the "owner's" points of claim, Fercometal was unsure as to the identity of its contract partner. On the assumption that Internaut was Sphinx's manager, it was quite possible to Fercometal's understanding that *both* Sphinx and Internaut were privy to the charterparty. It was in these circumstances that points of claim came forward in the name of *Sphinx* and only Sphinx. For nearly five years no one thought that there was anything wrong with that. Quite apart from the material already discussed, it seems to me to be very difficult to say that Fercometal knew that Internaut and not Sphinx was the owner under the charterparty and the claimant in the arbitration, when it accepted the claimant's own designation of itself as Sphinx. In the light of the correspondence which had already passed, and the documentation of Fercometal's 1995 action, it is, if possible, even more remarkable for Internaut now to allege that Fercometal knew that Internaut and not Sphinx was the claimant in the arbitration. Not even Ince & Co knew that Internaut rather than Sphinx was the owner under the charterparty and its client. Why then should Fercometal have known?

71. What then is the significance that, as has now emerged and been established, Sphinx was not a party to the charterparty, and that the only owner under it has been Internaut? The judge regarded that as definitive, citing ***Unisys International Services Ltd v. Eastern Counties Newspapers Ltd*** [1991] 1 Lloyd's Rep 538, to which I therefore turn.

72. That dispute arose out of the sale of computer and software equipment by Unisys to Eastern Counties as buyers. The buyers (as I shall call them) commenced arbitration against Unisys some years later, and Unisys counterclaimed. Unfortunately, in the meantime the buyers had changed their name to Eastern Counties Newspapers *Group* Ltd (my emphasis), and given their old name, Eastern Counties

Newspapers Ltd, to a newly acquired subsidiary. The arbitration was brought in the buyers' original name, the name in which they had contracted. Some years after the arbitration had been commenced, the problem about the name emerged. The arbitration then went to sleep for some four years. When the arbitration awoke, Unisys commenced court proceedings to have it declared a nullity. At first instance, Hobhouse J held that since the arbitration had been commenced in the name of the subsidiary who was not party to the contract, there was no valid reference to arbitration: but he also held that there was an estoppel by convention which would have prevented both parties (Unisys and the new subsidiary) from alleging the true position – had not the whole arbitration been brought to an end in any event by abandonment.

73. On appeal, however, this court disagreed. The facts and documents showed that the party commencing arbitration was intended to be the contracting party. There had been nothing more than a "failure to insert the word "Group" between "Newspaper" and "Ltd"" (per Parker LJ at 350, who also agreed with the judgment of Ralph Gibson LJ, as did Balcombe LJ). As to the facts, Ralph Gibson LJ pointed out that the arbitration had in fact been authorised by the buyers and that they and their solicitors had always intended to commence arbitration on behalf of the buyers under the contract, and that that had been the understanding of everyone, including Unisys, for years (at 559). It was a mere case of misdescription in circumstances where no one had realised that the name of the buyers had been changed. It was against that factual background that Ralph Gibson LJ turned to the law, and held that the notice issued on the part of the buyers, calling on Unisys to arbitrate, in which Unisys concurred, had to be construed to decide what the reference to the buyers there amounted to. The notice was regarded not only as a document pursuant to contract but in itself as amounting to a contract. On that basis the reference to the buyers under their original name (omitting "Group") did not go to any matter of identity, but in effect, if I may be allowed to put it in this old-fashioned way, was purely a matter of *falsa demonstratio* or what in this case is called by Mr Herring as a *"mere misnomer"*.

74. On the facts of the present case, however, I do not find *Unisys* helpful, other than in its recognition of a familiar distinction between a mistake as to identity and a mere misnomer. Our case does not involve a notice which is treated consensually as identifying (albeit by a wrong description) the party to a contract. Our case involves in the first instance a notice which is innominate, and subsequently points of claim which to my mind plainly and intentionally name a person, Sphinx, whose identity is different from that of another person who has emerged as the party to the contract, namely Internaut.

75. I will return below to the question of the consequences of the fact that the points of claim are in the name of Sphinx, whereas the original notice which commenced the arbitration, albeit innominate, was served on behalf of Internaut. For the present I am concerned with the question whether Mr Herring is right to describe the naming of Sphinx in those points of claim as a mere misnomer and to submit that the facts of this case are to be found on the same side of the line as the facts in *Unisys*. In my judgment he is wrong. Mr Herring repeatedly states, for instance in his arbitration statement, that "I intended to name whoever were the disponent owners under the Charterparty" (see para 15 above). If so, he acted in the belief that *Sphinx* was the party to the charterparty. He may have been mistaken – it has emerged that he was – but he cannot possibly say that in naming Sphinx, he was really intending to name Internaut. Plainly, on the face of the charterparty itself, Sphinx and Internaut were two separate companies. This is entirely unlike the situation in ***Unisys*****,** where the arbitration notice named the original name of the buyers under the contract, and what went wrong was that its name had changed. Not only was there plainly a choice to be made, on the wording of the charterparty itself, between Sphinx and Internaut, but the very question of whether the contract party was Sphinx or Internaut, or indeed whether it did not matter because one was privy as the agent for the other, had been raised in the context of the Algerian proceedings and the 1995 action. The natural inference, at any rate in the absence of a frank explanation of what went wrong, is that Ince & Co simply were not told for whom they were acting, and chose the wrong party, possibly in the belief that it did not matter. If, on the other hand, one speculates that Ince & Co were instructed to name Sphinx as the claimant owner, then the naming of Sphinx is all the more clearly demonstrated to be deliberate (and deliberately false). That, however, is not the inference I derive, for I would not readily draw an inference of deliberate falsehood if another possible inference was at hand. As it is, the survival of the arbitration for nearly five years in the name of Sphinx, when it is

almost inevitable that the pleadings must have gone back to Internaut to be approved, is a most remarkable event, for which no explanation whatsoever has been offered. As late as Mr Herring's January 2001 arbitration statement, he is maintaining that Sphinx is already a party to the arbitration.

76. It seems to me therefore that a much better exemplar of the situation in this case is ***The Antares*** [1987] 1 Lloyd's Rep 424, itself discussed but distinguished in *Unisys*. There bills of lading were issued by MSC on its form. The form contained a demise clause, and MSC was neither registered owner nor demise charterer of the vessel. However, the bill of lading holders (wrongly) assumed that MSC was the carrier. The bills of lading also contained an arbitration clause. The holders claimed arbitration against MSC. Of course they intended to claim arbitration against the carrier, their contract partner under the bills, but they were mistaken as to who that was. Before the mistake was discovered, the one year Hague Rules time limit had passed. What could be done? The holders applied to the court under section 27 of the Arbitration Act 1950 to extend time for the commencement of a fresh arbitration against the carrier. It was held that section 27 was excluded by the Hague Rules. In the alternative the holders argued that the commencement of the arbitration against MSC amounted to the commencement of arbitration against the carrier on the basis that MSC was authorised under the bills to accept service of notice of arbitration against the carrier. Lloyd LJ rejected this argument (at 430): *"…and in any event the letter dated Jan. 31, 1985 does not purport to claim arbitration against the defendants but against MSC. The fact that the plaintiffs thought that MSC were the owners, as they obviously did, might have been a ground for extending time under s. 27 of the Arbitration Act had s. 27 applied, but it cannot alter the plain meaning of the letter of Jan. 31, 1985."*

77. Finally, the holders argued that rules of court were applied by section 34(1) of the Limitation Act 1980 by analogy to arbitration, and thus the name of the carrier could be substituted for that of MSC under the old RSC Order 15, rule 6 or Order 20, rule 5. However, Lloyd LJ disagreed that such an analogy could apply such rules of court to arbitration. In the circumstances the application of those rules was never reached (at 432).

78. If, however, the application of those rules had been reached, the standard test was to distinguish between a mistake as to mere description and a mistake as to identity: see ***The Sardinia Sulcis and Al Tawwab*** [1991] 1 Lloyd's Rep 201, applying ***Evans Constructions Co Ltd v. Charrington & Co Ltd*** [1983] 1 QB 810. As Stocker LJ said in ***The Sardinia Sulcis,*** where there is a mere error of description *"Falsa demonstratio non nocet cum de corpore constat"* (at 208). That certainly applied to the situation in ***Unisys,*** but not in my judgment to the situation here. There was no agreement that Internaut was owner under the charterparty. It was not as though "Sphinx" was just another name under which Internaut, as owner or disponent owner, was known or might have been known. As Mr Herring has repeatedly said in his evidence, his intention was to act for what he describes as the "disponent owner" under the charterparty (or, as I would say, the party described as "owners" under the charterparty) "whoever" that might turn out to be. It is impossible on the evidence to say that he had in mind that he was acting for Internaut, but by some unfortunate (but inexplicable and unexplained) concatenation of circumstances put forward in error the name of Sphinx. He had to decide who the owner (or disponent owner) under the charterparty was, and the decision was that it was Sphinx.

79. The question must now be faced: what is the significance of the mistake in naming the claimant owner as Sphinx in the points of claim, against the background that the party who authorised the original claim for arbitration was Internaut? In this connection the court itself drew counsel's attention to a recent decision of this court in ***Hussmann (Europe) Limited v. Pharaon*** [2003] EWCA Civ 266. The facts were complicated, but in essence Hussmann claimed arbitration against its contract partner, Mr Pharaon trading as Al Ameen Development and Trade Establishment ("Establishment"), a business name registered in Saudi Arabia. Since the contract, Mr Pharaon had incorporated his business under almost the same name, viz Al Ameen Development & Trade Co (the "Company"). This led to confusion. Hussmann's claim to arbitration and pleadings both defined the respondent in terms which were a mixture of the old Establishment and the new Company. The court had to construe this definition and held that it was a reference to Establishment: after all, that had been the name of the contract party. In the course of the arbitration, however, Hussmann received advice from a Saudi Arabian lawyer that Establishment had been deleted from the register (which it had) and had ceased to exist (which it had

not, since Mr Pharaon of course continued to exist). This advice led Hussmann to desire to clarify the status of the respondent in the arbitration and to seek to amend its pleadings to make it clear that the respondent was indeed Mr Pharaon (trading as the Establishment). The respondent, however, who was also a counterclaimant for a sum larger than the claim against it, opposed the application, insisting that it was the Company and requesting an award in the name of the Company.The arbitrators refused the amendment and made its first award in the name of the Company. Thomas J held in ***Hussmann (Europe) Ltd v. Al Ameen Development & Trade Co*** [2000] 2 Lloyd's Rep 83 that the arbitrators had been in error in treating the Company as the respondent. Mr Pharaon (the Establishment) then sought to enforce the first award in his own name. The matter returned to court, and in a second judgment Thomas J held that the award had to be set aside as having been made without jurisdiction. The reference thereafter reverted to the arbitrators, who made a second award, this time in favour of Mr Pharaon (the Establishment). The matter then returned a third time to court, with Hussmann attacking the second award as having been made without jurisdiction on the ground that the arbitrators had become *functus officio* after making their first award. On this occasion Mr Michael Brindle QC, sitting as a deputy high court judge, held that the second award was valid. It was this third judgment which came on appeal to this court, and was upheld by it.

80. In the course of its judgment, which had to review the whole history of the proceedings, this court ultimately addressed two issues: (1) Who was respondent to the arbitration (at paras 67/77) and (2) Was the tribunal *functus officio* (at paras 78/87)? As to the first issue, this court said this:

> *"68. (1) The Establishment was Hussmann's contract partner and thus, subject to a process of novation whether by consent or statutory process under Saudi law, could be the only party against whom Hussmann could validly or sensibly invoke arbitration. There is therefore a strong inference that Hussmann intended to make the Establishment the respondent to its application for arbitration and to the reference.*
>
> *"69. (2) Despite the confusion introduced by Hussmann's statement that "Al Ameen" was also known as "Al Ameen Development & Trade Co" and was a limited company, we agree with both Thomas J and Mr Brindle that the better way to read the definition of Hussmann's respondent is as a reference to the Establishment…"*

81. That passage was relied on by both Mr Page and Mr Bryan. Mr Page emphasised para 69 as indicating that it was appropriate to look at the pleadings to decide who the parties to the arbitration were; Mr Bryan emphasised para 68 as indicating the strong inference that a party intends (and is understood to be intending) to sue its contract partner and not some other party. For my part, I do not doubt that both matters are relevant (and other factors, such as those with which the judgment in *Hussmann* continued, for example the question of who gave instructions for the appointment of an arbitrator, see para 76). In the present case, however, the document which started the arbitration was innominate, and the pleadings, which for the first time unequivocally named the claimant, came later.

82. Of greater relevance, therefore, are other passages in *Hussmann*, such as paras 39, 75 and 84/85. Para 39 records the refusal of Thomas J to enforce the first award in the name of Mr Pharaon: *"…and Mr Andrew Bird [counsel for Mr Pharaon]…asked the judge not to set it aside but to enforce it, declaring it to be an award in favour of Establishment. He submitted that although the arbitrators thought that they were making an award between Hussmann and the Company, in fact it was made between Hussmann and the Establishment. The judge could not, however, accept that view of the matter: it was clear to him both from the terms of the award itself and from the arbitrators' refusal of Hussmann's application to amend its pleadings that the arbitrators intended to make their award against and in favour of the Company only."*

83. Para 75 makes the point that if the arbitration started as one against Mr Pharaon, that position never changed: *"We accept the submission, as Mr Brindle did below, that if the reference began life with Mr Pharaon as a respondent to it, that position never changed. Hussmann always pursued an award against its contract party. It never submitted that Mr Pharaon, if he had become a respondent to the reference, abandoned his role in the arbitration, or resigned from it (if indeed he could do so unilaterally), or abandoned or withdrew his counterclaim. There was no such submission before the tribunal at the time of the submissions leading to the second award (see para 47 above). Nor is there any sign in the third judgment that such an argument was raised before Mr Brindle."*

84. Moreover paras 84/85 dealt with the possibility that the respondent's insistence that it was the Company and *not* Mr Pharaon (the Establishment) might have raised an abuse of process or estoppel argument, but concluded that that was something for the arbitrators, not for the court:

> *"84…Rather [Mr Kinsky, counsel for Hussmann] placed his emphasis on what he said were the exceptional facts arising out of Mr Pharaon's opposition to Hussmann's attempt to amend and the insistence on an award for or against the Company…Thus Mr Kinsky says that an arbitration in which the respondent in a situation of conflict seeks to name its true identity will come to an end with a final award which adopts that submission. Such an award will either survive attack or may be nullified as a result of a challenge to substantive jurisdiction, but in either event the arbitration will be at an end.*
>
> *"85. The trouble with this submission, however, as with the more homespun argument that Mr Pharaon was trying to have "two bites at the cherry", is that, properly analysed, it constitutes a submission that Mr Pharaon had irrevocably elected to have his rights in the arbitration determined solely on the basis that the respondent was the Company; or that he had waived the right to an award in the name of himself or the Establishment; or that the attempt to seek a second award in the name of himself or the Establishment would amount to an abuse of process (see* ***Henderson v. Henderson*** *(1843) 3 Hare 100,* ***Johnson & Gore Wood & Co*** *[2002] 2 AC 1). We are far from saying that such a submission could not succeed; but it goes either to matters of substantive law (election, waiver) which are for the arbitrators to decide, or to matters of procedure which are equally for the arbitrators…"*

85. I have therefore asked myself what the effect of the naming of Sphinx in the points of claim is in this context. In my judgment the position in this case is partly similar to, but also partly unlike, the position in ***Hussmann.*** There the attempt by the respondent to identify itself with the Company was opposed by the claimant, Hussmann. Nevertheless, the arbitrators were misled by that confusion into making an award (the first award) in the name of the Company. That could not be said to be a "mere misnomer" so allowing the first award to be enforced (by amendment) in the name of Mr Pharaon. So here, the conduct of the arbitration in the name of Sphinx cannot be said to be a mere misnomer, and an interim award in the name of Sphinx cannot be said to be an award in the name of Internaut, even though the arbitration was commenced by Internaut and Sphinx has, as it were, been interposed by Internaut like a cuckoo in its own nest. However, unlike the position in Hussmann, where the attempt of the Company to impose itself on the arbitration was opposed by Hussmann, here the identification by the claimant of itself as being Sphinx was unwittingly adopted by Fercometal. I also infer that the third arbitrator was appointed for the first time only when the arbitration got going in 1996 and was thus appointed in an arbitration in the name of Sphinx.

86. Moreover, as matters have now developed, it appears that the difference in the identity of the owner may well affect the arguments adopted in the arbitration (I speak only of arguments, not of their solution). If the claimant owner were Sphinx, the registered owner, then there may well be an argument that it cannot recover demurrage, as liquidated damages for delay, when it has already time chartered the whole vessel in return for charter hire from Primary. Or it may be said that it is in no position to charter out for a second time part of a vessel the whole of which it has already let to Primary. There is also a point raised in the arbitration that demurrage is not available, because a condition precedent for the earning of demurrage was not fulfilled, and that therefore if any remedy for delay in discharging Fercometal's cargoes is available, it has to be found in damages for detention. Once the remedy is not in liquidated damages but in damages whose quantum has to be proved, the argument that Sphinx is unable to prove those damages (because it has already been compensated by Primary's hire payments) is also available. If, however, the claimant owner is Internaut, then the arguments may change. First, Internaut may have to be able to prove that it has a proper title as disponent owner, a title which it can trace from Sphinx, a matter which as I understand it is in dispute. Secondly, if it has no obligation to pay for the vessel (other perhaps than as a joint venture partner with Primary, which takes one back to a point in dispute), it too may have difficulty in proving damages, if it is remitted to a claim other than in demurrage, but for a reason different from that which might apply to Sphinx.

87. In these circumstances, it seems to me that there are the following theoretically possible alternative analyses of the situation. (1) The arbitration started as one between Internaut and Fercometal, the

naming of Sphinx was a mere misnomer, a mere case of *falsa demonstratio*, and can be cured, if the arbitrators see fit to do so, by a mere amendment of the title to the arbitration. That was the judge's solution. (2) The arbitration started as one between Internaut and Fercometal and, despite everything that has happened since, always remained (and still remains) an arbitration between Internaut and Fercometal. That is so, even though the naming of Sphinx was more than a mere misnomer. Despite that, the misnaming of Sphinx remains an incident of the arbitration which it is within the competence of the arbitrators to manage. The arbitrators should therefore have dealt with the application of Internaut to amend the title to the arbitration. On such an application, it would be open to Fercometal to oppose, using inter alia any of the arguments canvassed for instance in *Hussmann*, such as that there had been an abuse of process, or an estoppel of some kind. But it was for the arbitrators to adjudicate such issues. (3) The arbitration started as one between Internaut and Fercometal, but metamorphosed into one between Sphinx and Fercometal. Such an arbitration is a jurisdictional impossibility, either because the court has now determined that the true owner under the charterparty is Internaut and not Sphinx or because in any event Ince & Co were never instructed by Sphinx (albeit they now say that Sphinx has ratified an arbitration commenced in its name), or for a combination of those reasons. Since that is a matter going to jurisdiction, this court is entitled to say, and should conclude, that the conduct of the arbitration in the name of Sphinx is a nullity. That leaves the question of whether the original arbitration between Internaut and Fercometal is still in being, and, if it is, what the possible consequences for that arbitration are.

88. In my judgment, for reasons which I have already sought to give, alternative (1) is not correct. That leaves a choice between alternatives (2) and (3). Given the relative ignorance that this court has about the detail of the arbitration proceedings, there is a temptation to say that these matters should all return to the arbitrators, for them to deal with as they see fit. I have concluded, however, that that would be wrong in principle, and that alternative (3) is the correct one. Once the decision has been taken that the identification (and acceptance) of Sphinx as the arbitrating party goes beyond a case of mere misnomer, then it seems to me that the consequence must be that the further conduct of the arbitration in the name of a claimant who was never in truth a party to the charterparty or to the arbitration agreement was a nullity, and it is for this court to say so. Sphinx therefore never had any possible role to play in the arbitration, and cannot ratify what has been done in its name. The arbitrators, in declining to deal with Internaut's (and/or Sphinx's) application to amend and/or to join Internaut, showed a proper caution. However, it has been established that the arbitration was in fact invoked and commenced by and on behalf of Internaut. Such an arbitration is valid, and has not been concluded. It is therefore still in being. It survives the wreckage of Internaut's nest. Thus the second arbitration invoked by Internaut in December 2000 may well not be needed. That, however, depends on what happens to the original arbitration. It is possible, although I am not to be taken in any way as suggesting that that would be a sound course, that Fercometal may raise arguments before the tribunal which would echo arguments canvassed in *Hussmann*. If so, those would be for the arbitrators to deal with. The status of the third arbitrator will also have to be considered.

89. I am somewhat reluctant to come to these conclusions because they have the consequence that all that has occurred in the arbitration to date may have been wasted, and the parties have in effect to start again. It seems to me, nevertheless, that that is the necessary, proper, and ultimately safest course. Now that Internaut has been shown to be the correct party as owner under the charterparty, the dispute between the parties, if it is to proceed, can emerge in its proper light; the issues in the arbitration can now be formulated with clarity; disclosure, if it has not already taken place, will proceed on a sound footing; and the arbitrators will for the first time be afforded a proper view of the dispute. In the meantime, of course, a lot of effort has been wasted, although it may be that some of what has been done, albeit formally ineffective, will not have been worthless. I fear nevertheless that the costs of these essentially preliminary and procedural disputes have been considerable. There may be argument both before this court and before the arbitrators as to how those costs should be dealt with.

90. This court has not been referred to any provisions of the Arbitration Acts. I have assumed, however, that the arbitration with which we have been concerned, which was commenced in April 1995, is governed by the Arbitration Acts 1950 to 1979, and not by the Arbitration Act 1996.

Conclusion

91. In sum, I would answer the issues restated in para 22 above as follows:
    1. Internaut is, but Sphinx is not, a party to the charterparty.
    2. Internaut is, but Sphinx is not and has never been, party to the original arbitration. However,
    3. That arbitration, so far as it was conducted in Sphinx's name, is a nullity, but survives in its origin. The future conduct of that arbitration is a matter for the two arbitrators who were appointed to it. The third arbitrator may well have to be reappointed.

92. Matters of costs will have to be considered. It is possible that Fercometal or in due course the arbitrators will look beyond Internaut, eg to Ince & Co and/or Sphinx, for some part of their costs.

Lord Justice Sedley:

93. I agree.

Lord Justice Mummery:

94. I also agree.

Order: 1. The issues in the action ordered to be tried pursuant to the order of Cressell J dated 30 November 2001, as re-stated in para 22 of the judgment of this court, be answered as follows:
(1) Internaut is, but Sphinx is not, a party to the charterparty.
(2) Internaut is, but Sphinx is not and never has been, party to the original arbitration.
(3) That arbitration, so far as it was conducted in Sphinx's name, is a nullity, but survives in its origin. It was invoked and commenced by and on behalf of Internaut, and is valid and has not been concluded. The future conduct of that arbitration by Internaut is a matter for the two arbitrators who were appointed to it.

2. Paragraphs 1(1) and 1(2) of the order of David Steel J accordingly be upheld, and the appeal be dismissed.

3. Paragraph 1(3) of the order of David Steel J be varied and replaced with paragraph 1(3) of this order.

4. Fercometal to pay one third of Internaut's costs here and below (assessed in this court at £19,017.50; figure assessed below to remain unchanged).

(Order does not form part of the approved judgment)

Mr Hugo Page QC (instructed by Messrs Penningtons) for the Defendant/Appellant
Mr Simon Bryan (instructed by Messrs Ince & Co) for the Claimant/Respondent