JUDGMENT : The Hon. Mr Justice Langley. Commercial Court. 25th January 2001

INTRODUCTION

1. This appeal against an interim final arbitration award is brought by the charterers with the leave of David Steel J. Subject to a number of important procedural points, it raises in stark circumstances a question which Mustill LJ (as he then was) in ***The Mexico 1*** [1990] 1 LL: Rep 507 at 510 left open for "*detailed exploration*" should it arise in future, namely what are the rights of owners to demurrage and charterers to despatch when a charterparty provides for a notice to be given at the discharge port to trigger the start of laytime but only an invalid notice is given, and yet the vessel commences and completes discharge over an extended period in circumstances in which a substantial claim to demurrage would otherwise have arisen. The arbitrators decided that laytime commenced to run as if the notice had been correctly given at the first opportunity. The charterers say that was wrong and as no valid notice was ever given no demurrage ever became payable but, to the contrary, they have a claim for despatch.

THE FACTS

2. The Happy Day was chartered on an amended Synacomex form which contained the following clauses of potential relevance to this appeal:

   Cargo to be ... discharged at the expense and risk of ... Receivers/Charterers .... Discharging to be effected at the average rate of 1,500 metric tons per weather working day of 24 consecutive hours pro rata. Laytime to be non-reversible. ....

   Laytime at loading ... ports shall commence ... if written notice of readiness to load is given....

   Demurrage is payable at the rate of US$ 4,500 per day .... Owners to pay Charterers despatch money for working time saved in loading/discharging at the rate of US$ 2,250 per day of 24 consecutive hours or pro rata. ....

   10. ...At discharging port Owners to appoint agents nominated by Charterers.

   23. The freight is payable as follows: 95% less commission, brokerage, estimated despatch in loading, if any and Owners' contribution towards extra insurance payable within three banking days after signing all the required number clean Bills of Lading ... Balance plus demurrage or less despatch as the case may be payable after completion of discharge against Timesheets, Statements of Facts and Notices of Readiness. ....

   28. If by reason of congestion the vessel is unable to enter the loading/discharging ports, Master has the privilege to tender Notice of Readiness in accordance with the Charter Party by cable radio and laytime is to commence as per clause 6, 30 and 31, whether in berth or not, whether in port or not, whether in free pratique or not, whether entered customs or not, provided vessel has arrived in the commercial area of the port or any anchorage designated by Port Authorities. Shifting time from anchorage or place of waiting to loading discharging berths not to count. ....

   30. At first or sole discharging port notice to be given to Receivers/agents during normal local office hours and laytime to start counting at 8 am next working day whether in berth or not, whether in port or not, whether in free pratique or not, whether customs cleared or not.

   Time from Friday 5 pm until Monday 8 am ... not to count even if used.

3. Clause 3 of the charterparty provided that the vessel "Being so loaded shall proceed direct to 1-2 safe berth(s) anchorage(s)" out of a number of named ports in charterers' option. An addendum to the charterparty added the port of Cochin, India to the list of discharge ports. The arbitrators found that the charterparty was a berth charter, rejecting an argument to the contrary which had been advanced by the owners in relation to the port of Cochin. That finding is not in issue in this appeal.

4. The HAPPY DAY completed loading 23,000 mts of wheat at Odessa on 6th September 1998 and departed for Cochin where she arrived off the port on Friday 25th September 1998 at 1630 hours. At the time of her arrival off the port the vessel was unable immediately to enter the port because she had missed the tide. Nevertheless, the master purported to give notice of readiness at 1630 hours on 25th September 1998. The vessel was only able to resume her voyage into the port on the next tide at 1016 hours on Saturday 26th September, berthing at 1315 hours. In circumstances where the charter was a berth charter and there was no congestion at the berth, the notice of readiness given from outside the berth on 25th September 1998 at 1630 hours was invalid when given: see ***The Kyzikos*** [1989] 1 Lloyds Rep 1. No further notice of readiness was ever given. Discharge commenced on Saturday 26th September but was not completed until 25th December. Also on 25th December the Statement of Facts concerning the vessel's arrival at Cochin was signed by the vessel's agents, the receiver's agents and the vessel. So far as material it recorded:

   NOR Tendered 1630 hours on 25/09/98

   NOR Accepted 1630 hours on 25/09/98

THE SUBMISSIONS TO THE ARBITRATORS

5. The owners submitted that, notwithstanding clause 30 of the charterparty, laytime commenced because (1) as regards Cochin the charterparty was a port charter so that the notice given from outside the berth was valid; (2) the charterers were responsible for the vessel's inability to enter the port due to tidal restrictions; (3) the charterers were estopped from contending that no valid notice of readiness was given because the notice that was given was marked "accepted" when tendered; and (4) in any event even if the notice was invalid laytime commenced no later than the commencement of discharge. The charterers' submission was simple : no valid notice was ever given and so laytime never commenced under Clause 30.

THE AWARD

6. The Arbitrators addressed these submissions in Paragraphs 30 to 33 of the interim final award dated February 22, 2000. I think it sensible for those paragraphs to be set out substantially in full in this judgment.

30. Cochin.

.... The vessel arrived off the port at 1630 hours on the 25th September and the NOR was tendered at the same time by cable. However the vessel was unable to immediately enter the port because she had missed the tide, and was only able to resume the voyage into the port on the next tide at 1016 on the 26th September, berthing at 1315 hours. The charterers submitted that as it was a berth charter the vessel should have completed the voyage i.e. reached the berth, before tendering the NOR, and that as she was not "at the immediate and effective disposition of the charterers" the NOR when tendered was invalid. Moreover, since a fresh NOR was not tendered on arrival at the berth, laytime never actually commenced and therefore no time counted against the charterers. In the alternative, if the tribunal held that the time used should count, the proper calculation would be that the NOR would not have been effective at the time of berthing since this was outside office hours being a Saturday. Therefore it would be (sic) become effective at 0800 hours on Monday 28th September, with laytime commencing to run at 0800 hours on Tuesday 29th September.

31. The owners contended that the charterers were estopped from advancing this argument, on the ground that the NOR had ben marked as "accepted" when tendered. Moreover, they said, the addendum to the charterparty whereby they agreed to discharge at Cochin instead of at one or more of the ports named in the charterparty converted this into a port charter instead of a berth charter. The effect of this was that the NOR could be tendered immediately on arrival at the port instead of only when the ship reached the berth. In addition the draft available at Cochin at the time of her arrival was only 30ft of brackish water, and as the vessel was drawing 32ft brackish water she was unable to enter the port immediately but had to wait for the next high tide. The time waiting for the tide should not count against them because, they said, in the charterparty the Charterers warranted that the ship could safely arrive on 32ft salt water. In the alternative, even if the NOR was invalid when tendered it was established law that laytime started at the commencement of loading or discharging, and the charterer's submission was not only legally misguided but produced a commercially absurd result.

32. In our view the owners were mistaken, in four respects.

Firstly, rather than it being established law that laytime starts as soon as loading or discharging operations are commenced, the authorities make it plain that in those cases this was a specific concession by the charterers concerned, and therefore the Courts have not so far been required to make a judgment on this aspect. The eminent judges who were involved in these cases drew attention to this situation. Mustill LJ in The Mexico 1 [1990] 1 LR 507 remarked that where a charterparty expressly related the commencement of laytime to the giving of a Notice of Readiness and where the notice was given at a time when the ship was not in fact ready to discharge the cargo, unless something happened after this notice was given to make the laytime start it never started at all, with the consequence that the owners earned no demurrage but also they were obliged to pay to the charterers despatch money for the whole of the laytime. This was upheld in The Agamemnon [1998] 1 Lloyds Rep 675, when Thomas J said that since the decision in The Mexico 1 it has been clear that if the charterparty requires that a Notice of Readiness be given to start laytime, then a valid notice must be given before laytime can commence. Unless something happened after the notice was given to make laytime start, it never started at all. If the consequence of reading a contract as if it meant what it said was that, for instance, a Master who was uncertain whether his ship was "arrived" or whether it was "ready" may find it prudent to give more than one notice - an inconvenient consequence - this came about not because Courts were more pedantic than commercial men, but because the commercial men who wrote the charterparty chose to make laytime refer to the happening of a particular event. He did not believe that any tribunal, whether Courts or arbitrator, did service to the interests of practical commerce by enforcing the parties' rights as if the contract had expressed the commencement of laytime in terms of some quite different event. Strictly in accordance with binding authority therefore the owners' case would fail, and none of the extremely lengthy period spent at Cochin count as laytime unless the charterers had conceded otherwise.

33. Secondly, as the charterers pointed out, the NOR was not marked as "accepted" but "received", which dealt with the owners' argument of estoppel, although a point which they had not taken up was that the Statement of Facts (signed by all parties) noted that the NOR had been "accepted".

Thirdly, the charter clearly does not contain a Charterers' warranty of 32ft salt water, but in fact precisely the opposite, namely the owners' warranty that the vessel's arrival draft at the first or sole discharge port shall not exceed 32ft salt water.

Fourthly, clause 3 of the charter provides for discharging at 1/2 safe berth(s)/anchorage(s) and that in the case of named ports (as they were in this charter) the owners acknowledged them as safe and suitable for this vessel. The owners claimed that the addendum, by simply naming Cochin, somehow converted the charter into a port charter, in effect amending it so as to exclude all of those printed and/or typed words mentioned above. We did not agree with the owners' contention. The addendum, although providing for the discharge port to be different from those named in the charter, against a lumpsum payment of US$ 17,500, also clearly stated that otherwise all other terms and conditions to remain unaltered. Accordingly the true construction of this addendum was that Cochin was a named port which the owners acknowledged as safe and suitable for this vessel, that the charterers

were entitled to discharge at 1/2 safe berth(s)/anchorage(s), and that it was a berth charter. As a result we find that laytime commenced at 0800 on Tuesday 29th September.

7. As Miss Healy submitted, the Arbitrators rejected all the submissions advanced by the owners yet in the final sentence of paragraph 33 of the Award, "as a result", and without any other apparent rationale, concluded that laytime commenced at 0800 on Tuesday 29th September which would represent the first occasion on which it could have commenced under Clause 30 had a valid notice been given in accordance with that Clause. Whilst that was, as recorded in paragraph 30 of the award, the alternative submission of the charterers, it was very much not a concession but only a fall-back position should the primary submission be rejected.

THE APPEAL

8. The charterers applied for permission to appeal on four "*questions of law*" but were granted permission only on the one issue to which I have referred, expressed as "*Can laytime commence under a voyage charterparty requiring service of a notice of readiness when no valid notice of readiness is ever served? If so, when does it commence?*"

9. Despite Mr Gross' submissions to the contrary, those questions are in my judgment plainly properly to be described as questions of law. They are not the less so because the answer to the first question is "Yes" if a charterer is estopped from contending otherwise or the charterparty is varied. In the context of the Award, the conclusion of the Arbitrators, expressed as it was to be the consequence of the previous reasoning, is one which is open to the submission that it is wrong in law. Indeed the question in ***The Mexico 1*** was of a similar nature.

10. In the first witness statement of Mr Spark, opposing the grant of permission, the only point taken in support of the Award was that the Arbitrators had proceeded on the basis that the notice of readiness had in fact been accepted by the charterers, a point which had not been taken by the owners and which the terms of the Award itself (the first sentence of paragraph 33) strongly suggest was not the basis for the conclusion the arbitrators reached. Indeed, had it been, it would also have been open to appeal. The conclusion expressed requires some legal analysis to support it, which is lacking. It is not a finding or conclusion of fact.

11. There is and was no cross-appeal by the owners against the rejection by the Arbitrators of the submissions they made to them. Nor did the owners serve a Respondents' Notice setting out alternative grounds for upholding the Award. No further findings of fact were therefore sought and Mr Gross accepted that the appeal had to be argued on the basis only of the findings made by the Arbitrators. That said, after permission to appeal was granted (on June 12, 2000) and the time for service of any formal documents had elapsed, in a second witness statement dated September 18, 2000 Mr Spark sought "to define further the grounds upon which the Respondent will contend that the award ... should be upheld." Those grounds, in my summary, were there stated to be:

(1) the acceptance of the notice of readiness recorded in the Statement of Facts and the contention that the charterers "cannot go behind" that acceptance by reason of the principles of estoppel or waiver or because of an inference of an implied agreement to vary the charter and accept the notice as valid.

(2) the acceptance of the notice as valid or as having been validly tendered by commencing discharge on September 26 in circumstances where the charterers had not rejected the notice as invalid relying on the same legal principles.

(3) The futility of serving a further notice when the charterers were aware, at least once discharge commenced, of all the information that would have been included in any further notice.

THE SUBMISSIONS TO THE COURT

12. Miss Healy submitted that the decisions of the Court of Appeal in ***The Mexico 1*** and of Mr Justice Thomas in ***The Agamemnon*** [1998] 1 LL Rep 675 were clear authority in support of the proposition that where a charterparty stipulates that a particular notice of readiness is to be given in order to commence laytime there is no room for a construction which allows a notice given in the wrong manner or from the wrong place subsequently to become effective or a construction which in effect dispenses with the requirement for a notice once the vessel has commenced discharging. Miss Healy acknowledged of course that in both ***The Mexico 1*** and ***The Agamemnon*** the charterers conceded that laytime should be treated as starting once discharge actually commenced even in the absence of a valid notice of readiness but she submitted the juridical basis for the concession was plainly questioned and it was not consistent with the judgment simply to conclude that the concession as such represented the law: something more was required be it estoppel, variation or an implied contract. Further she submitted that there were no findings of fact made by the Arbitrators which could in this case provide a proper foundation for any such estoppel or agreement. To the submission by the owners that such a conclusion was uncommercial and absurd Miss Healy's answer was to adopt the words of both Mustill LJ (at page 513) and Thomas J (at page 681) that the master should give more than one notice to cover the eventualities, that it was always open to parties to provide differently in their contract, for example by reference to the commencement of discharge or arrival, and that there was in any event much to be said for the certainty of a notice (or even notices) particularly where rights to demurrage under sub-contracts may also arise and be dependent upon them.

13. Mr Gross' submissions (other than the submission that the appeal involved no point of law and a submission that the "*acceptance*" of the notice was of itself conclusive against the charterers) were indeed founded on what he submitted was the commercial absurdity of the conclusion for which the charterers contended, a submission deriving some support from textbooks such as Davies, The Commencement of Laytime at page 260 and Tiberg, The Law of Demurrage at page 215. Granted the absurdity, Mr Gross was disarmingly frank in submitting that it did not much matter what the legal route was to the goal of sanity but any one or more of estoppel by

convention, variation, implied agreement or *"futility"* would provide an analytically acceptable course. The purpose of a notice of readiness was to inform charterers or their agents that the vessel was ready to perform cargo operations and that purpose was fulfilled at the latest when cargo discharge operations actually commenced. The basis, and the only basis of fact, on which these submissions depended was the statement of facts recording "*acceptance*" of the notice at the same time as it was given and the fact that discharge did commence on September 26.

14. It is these submissions which Miss Healy contended with some force were not open to the owners on this appeal because of their failure to raise them before the arbitrators and their failure to serve a respondents' notice in accordance with paragraph 20.3(3) of the Arbitration Practice Direction. She referred to the observations of Thomas J in ***The Agamemnon*** (at pages 682-3) about the importance of observing these provisions for example so that the judge considering the application for permission can also consider whether the matter should be remitted to the arbitrators for further findings of fact, and to the impropriety of placing extraneous material before the court on an appeal (in this case the Statement of Facts). Whilst I have some considerable sympathy with Miss Healy's submissions, I am not ultimately persuaded by them. I do think at least the thrust of the present submissions by the owners were before the Arbitrators, and I do not think it sensible to preclude from consideration a document which is expressly referred to in the Award. Moreover the submissions cannot be said to take the charterers by surprise or unprepared (as was the case in ***The Agamemnon)*** as they were flagged in Mr Spark's second statement. I see no real injustice to the charterers in now addressing them. But the basis for this approach is, as I have indicated, that the owners are strictly limited to and bound by the findings which were made by the Arbitrators and if and to the extent that they are insufficient to sustain the submissions they make then the submissions must fail.

THE AUTHORITIES

THE MEXICO 1

15. The charterparty provided that laytime was to commence on the next working day after delivery of a notice of readiness. Notice was given on January 25, 1995. It was invalid because the relevant cargo of maize was overstowed and did not become fully accessible for discharge until February 6. Discharge commenced on February 19. The relevant issue (because of the concession by charterers) was whether the notice became effective on February 6 or (as conceded) laytime began on February 19. The arbitrators found in favour of February 6. Evans J, [1988] 2 LL Rep 149, upheld their award on the basis (page 156) that the receivers of the cargo were agents for the charterers to receive the notice, to decide not to reject it, to proceed on the basis that it would become effective when the cargo did become accessible, and that they had in fact done so. The Court of Appeal allowed the appeal and held that laytime commenced when discharge commenced (as conceded) holding (Mustill LJ at page 516) that the award could not be interpreted as incorporating "a justifiable finding of waiver or the like". The other members of the court agreed with the judgement of Mustill LJ.

16. The relevant parts of the decision are, I think, accurately represented by the first two and fourth paragraphs of the headnote as follows:

(1) *the contract provided for laytime to be started by the giving of notice of readiness; the learned judge was right to reject the argument that the notice was a delayed-action device, effective to start the laytime automatically when at a later date the vessel became ready to discharge the contractual cargo; and was right to reject the submission that time began when the charterers knew or ought to have known of the readiness ;*

(2) *on the facts, waiver, estoppel or agreement could not be inferred; the notice of readiness was invalidly given but the arbitrators had found that it was accepted and since such acceptance must have been given in reliance on the master's implied assurance that the vessel was ready for discharge it could not have any value; when the ship was ready to discharge the contractual cargo there was no notification to the charterers or their agents nor was there anything in the award by way of intimation on the part of the charterers that they accepted that the laytime could now begin; and there was no basis in the award for finding that the laytime began before the operation of discharge;*

(3) *the charterers conceded that laytime began to run when the discharge of the maize actually commenced; the appeal would be allowed to the extent that laytime for the discharge commenced at the time when the discharge itself commenced.*

17. Thus the decision itself did not need to address the circumstances of this case as such. But on the basis there as here that the only notice was invalid when given, at page 510, Mustill LJ said:

"Thus, unless something happened after the notice was sent to make the laytime start, it never started at all, with the consequence not only that the owners have earned no demurrage, but also that they are obliged to pay the charterers despatch money for the whole of the laytime. Given that the discharge of the maize cargo kept the ship at the port for more than two months this proposition was unlikely to be well received by the arbitrators, and Counsel for the charterers prudently did not advance it, conceding that laytime began to run when the discharge of the maize actually commenced. Whilst this makes good sense, it is not easy to work out precisely how the conclusion should be reached. The arbitrators, who had many live issues to discuss, contented themselves with saying that by commencing discharge the charterers plainly waived any entitlement that they may have had to a fresh notice of readiness. I confess to some difficulty in finding the necessary elements of a waiver in the bare fact that a discharge was carried out. For example, ***in Pteroti Compania Naviera S.A. v National Coal Board****, [1958] 1 Lloyds Rep 245; [1958] 1 QB 469, where the charter provided that time would commence 24 hours after the vessel was ready to unload and written notice given,*

and where discharge began before the vessel had given notice of readiness it was held that laytime did not run until the expiry of 24 hours from the notice. The owners argued that:

... the charterers by requiring delivery earlier are waiving their right to notice of readiness before they start to unload ...(see p. 249 col. 1; p. 472 of the reports)...

and alternatively that an agreement was to be implied that laytime was to start from the time at which loading in fact commenced. Each argument was summarily rejected. Since, however, Counsel in the present case are at one in stating that ***Pteroti*** *sheds no light on the problem now before us I say no more about it and I am content to accept the charterers' concession without further scrutiny, reserving the point for detailed exploration if it should arise in the future."*

18. In reaching the conclusion he did, Mustill LJ emphasised (page 513) that the contract itself provided for the commencement of laytime to be started by a valid notice "and in no other way", and as a result rejected the notion (adopted by the arbitrators) that an invalid notice could be treated as "inchoate" becoming effective when the cargo was or was known to be available for discharge. For my part, I can see no basis on which a different conclusion could be justified by substituting the time when discharge actually commences for the time when the vessel was or was known to be ready for discharge. That too, absent estoppel or the like, would be to re-write the contract in a manner which I think to be illegitimate and inconsistent with the reasoning of Mustill LJ.

19. To avoid this conclusion in the circumstances of a particular case, and again to quote Mustill LJ (at page 514) "*whatever precisely the doctrine, one would be looking for some kind of bilateral representation and action, on the basis that the contractual arrangement about laytime had been replaced by something new*". He continued:

"What do we find here? A notice invalidly given. The arbitrators have found, via the statement of facts, that it was "accepted". (Often this would be by countersignature of a document. Since the notice here was tendered by telex, we do not know the form of the acceptance). However, since, as the arbitrators point out, the acceptance must have been given in reliance upon the master's implied assurance that the ship was ready for discharge, it cannot have any value. What else? Nothing, so far as the award is concerned. When the ship was ready to discharge the contractual cargo, there was no notification to the charterers or their agents. Nor is anything found in the award by way of an intimation on the part of the charterers they accepted that the laytime could now begin. It seems that the moment when the ship became ready for discharge passed in complete silence.

These are thin materials indeed for the inference of any waiver, estoppel or agreement. "

20. Again, for my part, I can see no distinction in this case as regards the "acceptance" of the notice. Quite apart from the arbitrators' reference to the true position being that the notice was only marked "received" (which itself is a possible meaning of "accepted") as the statement of facts records the acceptance at the same time as the notice itself was sent any such acceptance must have been given on the basis of an implied assurance that the ship was at the berth and/or ready for discharge or, at the least, it is simply not open to the owners to contend otherwise on the findings (or lack of them) made by the arbitrators. I therefore reject Mr Gross' submission (which was not made by the owners to the arbitrators), that the statement of facts is conclusive in favour of the award because it evidences an agreement to accept the notice as a valid and effective notice for the purposes of laytime.

21. In this case, an inference of a bilateral agreement or variation, like estoppel by convention, would depend at the least on establishing that the parties had conducted themselves on the basis of a mutual assumption that their legal relationship was or was to be governed by the commencement of laytime on the commencement of discharge, notwithstanding the terms of the charterparty.

OTHER AUTHORITIES

22. I do not think ***The Agamemnon*** need be referred to in any detail. The decision followed ***The Mexico 1.*** Because of the concession (that laytime began when loading commenced) the present issue again did not arise directly: page 679. Although Mr Gross referred me to it, I do not think that some at least of the reasoning of Donaldson J in ***The Helle Skou*** [1976] 2LL Rep 205, in particular at 214, can stand with ***The Mexico 1.*** It represents an application of the "inchoate" notice concept which, as Thomas J said in ***The Agamemnon***, has not survived ***The Mexico 1.*** Nor, for the same reason, do I derive any real assistance from ***The Shackleford*** [1978] 1 LL Rep 191 in which Donaldson J found that the charterers by the receivers had "accepted" a notice of readiness which was "*premature*" when given because customs entry had not been obtained as required by the relevant clause of the charterparty and so were estopped by their conduct from alleging the notice was premature. In the Court of Appeal [1978] 2 LL Rep 154 the decision of Donaldson J was upheld but I think the question of "*acceptance*" turned on the meaning of particular documents (page 159) and Sir David Cairns (at page 160) expressly declined to "*consider further*" ***The Helle Skou.***

23. Mr Gross also referred me to the decision of Horridge J in ***Franco-British Steamship Company v Watson & Youell*** [1921] 1LL. L. Rep 282. He did so, because he submitted that in this case as in that the requirement for a notice of readiness could have been met by an oral notice and in such a case it was easier to infer a waiver of the requirement for a notice from knowledge of the facts which it should contain and easier to apply the "*futility*" argument in such a case. In my judgment, however, the basis for the decision in that case was that an oral notice was in fact given (see page 284) and such a contention is not, as he accepts, open to Mr Gross in this case. I should add that Miss Healy submitted that had this point been taken before the arbitrators the charterers would

or at least might have sought to argue that the charterparty did require a written notice, relying on the circumstances in which clause 6 came to be amended.

24. The authority to which Mustill LJ expressly referred in the first passage I have quoted from his judgement in ***The Mexico 1*** was the decision of Diplock J in ***Pteroti v National Coal Board, The Khios Breeze*** [1958] 1 QB 469. In that case the charterparty provided for laytime to commence 24 hours after written notice was given that the vessel was ready to unload. In fact the charterers began to discharge the cargo as soon as the vessel berthed and notice was only given a few hours later. The owners claimed laytime ran from the commencement of discharge. Diplock J held there had been no waiver of the notice clause which applied as written. Whilst this was an attempt to accelerate the commencement of laytime, if it were the law or a proper inference that the fact of commencement of discharge alone created an estoppel by convention or implied variation of the charterparty then the decision would have been otherwise. The decision is also I think inconsistent with the *"futility"* argument.

25. That argument derives from the decision of the Court of Appeal in ***Barrett Bros (Taxis) Ltd v Davies*** [1966] 1 WLR 1334 and in particular the judgment of Lord Denning MR with which Danckwerts LJ agreed. The facts were striking. The assured motor-cyclist collided with a taxi. It was a condition precedent to the liability of insurers under the policy that the assured should give particulars of any accident and provide any notice of intended prosecution to insurers as soon as possible. The assured did not do so, but the solicitors for the taxi driver did inform his insurers about the accident, and they learnt from the police about a later notice of intended prosecution. The insurers wrote to the assured on May 23 1964 asking why he had not given them the information about the accident and sending a claim form, and also wrote to him on June 23 following the information from the police referring to wishing to arrange his defence. They did not ask for a copy of the notice itself. All the members of the court decided the case in favour of the assured on the basis that the insurers had waived the condition. As Salmon LJ put it as regards the notice at page 1340:

It is conceded that when the motor-cyclist received this letter (June 23), he would still have been in time to give the notice and forward the summons. In my judgment any reasonable person receiving that letter would have concluded that the insurers, having learnt all about the intended prosecution, no longer required him to notify them of it or send them the summons. All they wanted was to be told why he had not done so already.

But Lord Denning (at page 1339) also relied on a wider statement of "principle" which he stated to be that because the insurers had received the information from the police "it would be a futile thing to require the motor-cyclist himself to give them the self-same information. The law never compels a person to do that which is useless and unnecessary".

26. In the context of charterparties, reference has been made to this principle on two occasions to which I was referred. In ***The Chanda*** [1985] 1 LL Rep 562, Bingham J at page 566 referred to it in the context of a clause requiring "due notice" to be given to allow deduction of time for a stoppage in loading where the notice given did not identify the cause of the stoppage relied upon but the cause had been clearly specified in a telex sent on the previous day. In ***The Mozart*** [1985] 1 LL Rep 239 Mustill J relied upon it in a similar context to decide that a requirement to give "due notice" could not sensibly be understood to require notification of something which the person to be notified knew perfectly well already.

27. Both these decisions, however, are I think and as Miss Healy submitted, to be read as ones where the principle was employed as an aid to enable an actual notice to be read as valid or compliant with the particular contractual provisions in question, by looking to the substance and not the form of the notice. That is not of itself material to the issue in this case.

28. I do not find it easy to draw a distinction of substance between the principle as stated by Lord Denning and the judgment of Mustill LJ in ***The Mexico 1***. But, as is pointed out in ***Davies,*** at page 221, there is a distinction between a notice provision which is intended only to provide information and one which is the prescribed trigger for the running of time on the elapse of which specified contractual obligations arise. If those obligations are to arise other than as provided for then the contract will have been re-written in substance. In any event, if I have to choose between the two, I prefer the judgment of Mustill LJ which addresses the context with which this case is concerned and is also, in my judgment, more in accordance with principle in its approach to commercial contracts. I would add that perhaps because this submission was not made to the arbitrators in the detail it was addressed to me there are no findings of fact to support it, and the submission has therefore to be advanced on the basis that in every case in which a vessel commences discharge a notice of readiness otherwise required by the charterparty can be dispensed with as futile.

CONCLUSIONS

29. In my judgment, Mr Gross faces an ultimately insuperable difficulty in his submissions. Clause 30 is clear in its terms. Laytime starts at 8am on the next working day after a valid notice of readiness has been given in accordance with its terms. No such notice was ever given. The notice that was given was not "accepted" by the charterers in any sense on which reliance can be placed by owners. The arbitrators found that it was only "received". In any event, as I have said, when it was (if it was) accepted it was misleading. There is no basis for a finding that it was ever "accepted" subsequently. The only facts on which it is open to the owners to rely are that discharge did commence on Saturday 26th September 1998 and continue thereafter and (if it is correctly so described) that the invalid notice was not rejected. If, as Mr Gross submitted, the commencement and continuation of discharge is to have the effect of validation of an invalid notice or is in some way to amount to a notional

notice given on the first available opportunity which would comply with Clause 30, that in my judgment would be inconsistent with the judgment of Mustill LJ in ***The Mexico 1*** rejecting the concept of an inchoate notice and would also be to re-write the parties' contract in effect to delete the clear requirement for a particular notice.

30. Nor do I think it possible to infer any agreement or convention from the mere facts of commencement and continuation of discharge and that an invalid notice was not rejected. It does not necessarily follow that charterers must have agreed to give up their right to a notice, particularly so when discharge commenced at a time when a valid notice could not have been given. It is also perhaps of some relevance that in circumstances of overstowage or contamination or the like a vessel may not be ready to discharge even though discharge has in fact commenced. Again, if such an inference were possible, then it would be in effect to re-write Clause 30 so that it contained additional words such as "*and in any event laytime to commence when discharge commences*". Consistent with the judgment of Mustill LJ and, I think, principle something more is required to establish an agreement or estoppel (and the parties are agreed that "waiver" is no different) and Mr Gross cannot point to anything more because of the findings of fact to which he is restricted.

31. Miss Healy also submitted that there was also no finding which would enable it to be concluded that the receivers of the cargo were or were authorised to act on behalf of the charterers to make any variations of the charterparty or to establish any "*convention*". A similar point was raised and rejected in ***The Shackleford*** (pages 159-60). But it was there said that the point was one of mixed fact and law, and the arbitrator had or was held to have made a finding that the receivers were acting as agents for the charterers. Mr Gross cannot point to such a finding in this case, nor to any evidence as to the usual or ostensible authority of such an agent. Moreover, I think the implication of agency as regards an express statement as to the running of laytime as in ***The Shackleford*** may more readily be drawn than an inference of agency to make an agreement derived only from the fact of commencing discharge.

32. For these reasons in my judgment this appeal should be allowed and the finding in the last sentence of paragraph 33 of the Award must be set aside. The consequence is also that the owners' claim for demurrage fails and the charterers' claim for despatch succeeds. I will hear the parties on the precise terms of the order to be made and any consequential matters.

Miss S Healy (instructed by Messrs Richards Butler for the Appellants)
Mr P. Gross QC and Mr M. Ashcroft (instructed by Ince Consultants O E for the Respondents