

JUDGMENT : Mr. Justice Cooke : Commercial Court. 3rd March 2005

Introduction

1. The Claimant (SABO) is a company engaged in the manufacture, supply and installation of brick and tile making plant. It operates in Vassiliko, which is 95 kilometres from Piraeus. By a contract dated 30th June 2000 it agreed with Makkah Estate (Makkah), a company in Saudi Arabia, to supply machines, equipment and material for the existing Makkah brick plant in Jeddah. The agreed price was 3.5 Million DM on a CIF Jeddah delivery basis with transportation in containers. SABO was to pay all customs taxes, transportation and expenses up to delivery in Jeddah and was to receive 35% of the contract price against a bank guarantee in respect of failure to deliver and the remaining 65% (following amendment of the contract) 15 days after arrival of the last shipment in Jeddah. Payment was to be made under a letter of credit (l/c) against presentation of shipping documents, which included clean on board Bills of lading, an invoice, a packing list, the Insurance policy for the items delivered and a certificate of origin, together with additional bank guarantees.
2. There were to be three deliveries effected within five months from the date of the opening of the l/c. One of the deliveries was to come from Germany, the other two from Greece. The l/c was opened on the 6th September 2000 so that the third shipment had to arrive in Jeddah by the 6th February 2001, the date when the l/c expired. It provided for the shipments from Greece and Germany to Jeddah by conference line vessels in containers. It specifically provided that transhipment was not allowed. Amongst the documents required to trigger payment, in addition to those set out in the contract, was a certificate, as provided for in clause 3. This certificate had to be issued and signed by the owner, agent, master or shipping company setting out the details of the vessel upon which the cargo was carried and stating the ports of call en route to Saudi Arabia. The clause went on to provide that the certificate was not required if shipment was effected by the Defendant (UASC) or National Shipping Company of Saudi Arabia, provided that they identified themselves in the transport document as the carrier. If an accurate certificate was given which set out the ports of call, any transhipment would be apparent to Makkah and its bank, since transhipment was only likely to occur in circumstances where there was a need for a voyage on a feeder vessel to a hub port for transhipment onto a liner vessel running from that port to Jeddah.
3. The Defendant (UASC) is a carrier, which operates a number of lines, one of which runs from Northern Europe, through the Mediterranean into the Persian Gulf and back. This line does not include a call at Piraeus. The Hub Port for the Mediterranean is Gioia Tauro in Italy and feeder vessels run to that port from other ports in the Mediterranean. The evidence is unchallenged that there is only one carrier, MSC, which operates a direct line between Piraeus and Jeddah.
4. The dispute between the parties centres upon a cargo loaded at SABO's factory into UASC's containers for carriage to Jeddah. The containers were taken to Piraeus and were loaded on a feeder vessel, the Carl Metz to be taken to Gioia Tauro for transhipment to the UASC vessel, the Al Sabahia. The Carl Metz was not under UASC ownership but UASC, via its agents Hellenic Shipping Agencies Limited (Hellenic) in Piraeus had made arrangements for the cargo to be carried on this feeder vessel to Gioia Tauro. A bill of lading was issued to Hellenic for this leg of the voyage to Italy but a separate bill of lading was issued to SABO by Hellenic, on behalf of UASC which named the port of loading as Piraeus and the port of discharge as Jeddah and the carrying vessel ("the ocean vessel") as the Al Sabahia. There were no entries in the relevant boxes in the bill for the "local vessel" or for any feeder voyage. This bill of lading issued by UASC to SABO was dated 30th December 2000 and included the following stamp on the front: -
"Particulars of Sale Contract and/or Order and/or Bank Letters of Credit shown herein were inserted at Shipper's request and for their own personal convenience, in order to facilitate negotiation of the Bill of Lading. Such particulars were not checked by Carriers and/or Master and/or ship Agents nor were any documents related thereto presented to them..."
5. Alongside that stamp appeared details from the l/c including the following: -
*"Documentary Credit number RLC4402316
Partial shipment: Allowed
Transhipment: Not allowed"*
6. SABO informed its Insurers that the cargo was to be carried on the Al Sabahia and the Insurance certificate issued by those Insurers named that ship and covered the transit of the goods between Vassiliko and Jeddah. The Carl Metz stranded outside Gioia Tauro on 5th January 2001 and took in seawater into some of her holds with consequent damage to containers and cargo. Salvage took place under the standard Lloyds Form and the salvors exercised a lien and demanded salvage security. SABO called on its cargo insurers to provide such security but they declined cover, maintaining that the policy did not cover a voyage of the Carl Metz to Gioia Tauro. Makkah, on being told of these events did not accept the shipping documents, including the Bill of Lading and the insurance policy. SABO perceived that the whole contract was under threat, sent a representative to Jeddah and decided to supply a replacement cargo, which it duly did. The shipment from Germany took place without incident and a second shipment was made from Greece on 26th January 2001 and the replacement shipment thereafter, by arrangement with Makkah.
7. SABO's case is that UASC, through Hellenic, misrepresented the position to it in the making of arrangements for the carriage of the goods because it stated that there would be no transhipment, thereby inducing it to enter into a contract of carriage with UASC and to effect an insurance policy, which has so far proved to be ineffective,

although SABO is currently pursuing the insurers for recovery under it. SABO contends that it was expressly agreed with Hellenic, UASC's agents, that there would be no transshipment and that representations were made that UASC ran a direct service from Piraeus to Jeddah, that it was UASC's intention to carry the cargo directly to Jeddah and that the cargo was shipped on the Al Sabahia from Piraeus to Jeddah. The representation of actual shipment appears in the Bill of Lading and was also made in a telephone conversation with Mrs Tzani when she asked for the name of the ocean vessel and additionally in a freight invoice, which referred to such shipment. UASC, to the contrary, maintains that at all times there was agreement that there would be transshipment and that it was agreed that the Bill of Lading should be issued at Piraeus in the form which it actually took, so that SABO could submit a conforming bill of lading under its I/c in order to obtain payment for the cargo. The crucial issue therefore is whether UASC, through Hellenic, deceived SABO or whether both attempted to deceive Makkah and Makkah's bank, the paying bank under the I/c.

The Critical Events

The Quotations

8. The business of obtaining quotes for the carriage of goods from the factory in Greece to Jeddah was entrusted to SABO's Quotations Manager, Mrs Tzani and to Mrs Laderou, his secretary, by Mr Makrigiannis, the Commercial Manager, to whom Mrs Tzani was also responsible. Between the 25th September 2000 and 6th November 2000, a number of quotes were obtained. The first came from MSC who gave a quote, which was valid only until 15th October 2000. A series of other quotes was obtained, one of which came from Medcargo Shipping Agencies on 26th October, which referred to the duration of the journey from Piraeus to Jeddah as "*7 days direct according to the schedule of the shipping company*". This could only be a reference to an MSC voyage, as this was the only company which did effect direct shipments from Piraeus to Jeddah. Other companies quoted for the business giving differing transit times varying from six to ten days to ten to fifteen days.
9. These quotations were obtained by Mrs Tzani and Mrs Laderou. Mrs Tzani's evidence was that, in telephoning to obtain a quote in each case she made it plain that what was required was direct shipment, because of the prohibition of transshipment in the I/c. It was however Mrs Laderou who telephoned Hellenic and obtained a quote from it which gave a voyage duration of ten to twelve days. That quotation was submitted by Mr Nikolaides of Hellenic who also gave evidence. As with all these quotes from carriers or agents, it set out a rate for ordinary dry van containers (DV) and Open Top Containers (O/T) since machinery was to be carried, some of which would require loading by crane into the container, rather than through the doors.
10. Notwithstanding Mrs Tzani's evidence, it is clear that the request made for quotations cannot have been made on the basis of direct shipment since none included that as a term and each and every quotation relating to carriage other than by MSC, could not be for a direct voyage as the other carriers could only effect shipment by a feeder ship and transshipment to an ocean vessel for carriage to Jeddah. If the request had been for a quotation for direct carriage, SABO would only have obtained 2 quotations, unless all the rest were deceitful. I find therefore that when Mr Nikolaides of Hellenic quoted for UASC, he was, as he said in evidence, therefore unaware of any prohibition on transshipment and was giving a quotation for shipment on a feeder vessel to Gioia Tauro and onward shipment on an ocean vessel from thence to Jeddah.

The telephone conversation with Mr Tsimas and the booking.

11. On receipt of the quotations, although the evidence was unclear, I find that Mrs. Tzani sifted through them. None of the quotations except that from Medcargo referred to direct shipment, and the contrast between that and the others and the different transit times was obvious and gave cause for enquiry. As Quotations manager, (although her primary function was to deal with outward quotations), her function was to analyse them to see what was being offered. She said she did not know which companies had direct sailings and could not judge from transit times whether or not there was transshipment. In essence, however she maintained that every quote sought was on the basis of "no transshipment" but I reject her evidence on this. It is clear from Mr. Tsimas' evidence that, when he received a copy of Hellenic's quotation it had written on it, in Mrs. Tzani's handwriting, the words "*United Arab OK regarding credit*", partly in English and partly in Greek. When she was asked about this, she explained that she knew that UASC was the company mentioned in the I/c and regarded it as a company requested by Makkah with the result that any Arab bank would know of them. She said that: -
"For me as long as they are referred to in the – mentioned in the I/c, and since the I/c ask that no transshipment takes place, it is certain that they comply, they fulfil all the terms."
She therefore said that she chose UASC as the carrier because of this term in the I/c which she regarded as "*showing us that this particular carrier, the bank and the client were at peace that everything goes well*".
12. It was Mr. Tsimas' evidence that he spoke to Mr. Nikolaides on the telephone because he wished to ensure that UASC could meet the delivery timetable. Mr. Tsimas was SABO's factory manager and his role in the transaction was to ensure that the various components and systems were manufactured to meet Makkah's specification and the agreed delivery timetable. He said that the commercial aspects of the contract, namely banking, insurance and carriage of the goods were not matters for him. In his statement he said that he phoned Hellenic and spoke to Mr. Nikolaides who assured him that UASC would be able to handle a December shipment. The reason for the December shipment was that, as appears from the correspondence, SABO had promised Makkah that the first shipment would be loaded before the 25th of December. At one point it was anticipated that there might be a shipment in November, but as this would mean 4 shipments, which was not envisaged by the I/c, this idea was abandoned in favour of a larger shipment of containers in December.

13. Mr. Nikolaides' evidence of this telephone conversation was that Mr. Tsimas rang him to confirm that Hellenic were agents for UASC and took cargo to Jeddah. He said that he had machinery of various sizes and weights which would require O/T containers for a shipment to Jeddah. He was told that SABO had to comply with time restrictions provided under a l/c and that he needed to ship the first part of the machinery by the end of December 2000. He was asked whether Hellenic could arrange carriage of such machinery within the time required and he confirmed that this was possible. Mr. Tsimas pressed Mr Nikolaides to visit the factory to see the machinery to ensure that there were no problems with transport of it in appropriate containers.
14. Despite evidence from Mr. Tsimas that additional matters were discussed, including the terms of the l/c and the question of transshipment in this conversation, I find that this did not happen and that the conversation was essentially limited to the matters of which Mr Nikolaides gave evidence. Mr Tsimas' evidence was that he never saw the terms of the l/c but had the terms explained to him in a management meeting. It is in my judgment inconceivable that Mr Tsimas would have discussed the terms of the l/c with Mr Nikolaides on the telephone without the l/c in hand and it would not appear to be his function to do so. Mr Tsimas' evidence was that he had the Hellenic quotation in hand, with Mrs Tzani's notation on it ("*United Arab OK regarding credit*") before Mr Nikolaides' factory visit, but he did not know whether he had it in hand before the telephone conversation. I find that he did have it in hand and it was upon this basis that his telephone call took place. Mrs Tzani had selected the UASC quote and referred it to Mr Tsimas for him to check the operational details with Mr Nikolaides. With a note from Mrs Tzani, there was no reason for him to enquire as to transshipment, because he had the assurance that UASC met the l/c terms, which Mrs Tzani said she had concluded from reading clause 3 of the l/c itself. It is noteworthy that he said in evidence that this was the only overseas shipment in which he was ever involved and it seems therefore that Mrs Tzani was making any management decisions about commercial terms (as might be expected), whilst Mr Tsimas, as manufacturing manager, was involved from the operational standpoint to satisfy himself about the logistics of getting the cargo ready and delivered in time and the issue of collection and loading into appropriate containers for that purpose. Mr Makrigiannis seemed to be saying in his evidence that the decision fell to be made by them as a team.

The Meeting at the Factory

15. The evidence is that Mr Nikolaides' visit to the factory took place shortly afterwards but I find that this did not occur before Mrs. Tzani made a booking with Mr. Nikolaides by a fax of 9th November. That fax specifically refers to the quotation of 6th November "*and your conversations with Mr. Tsimas*". It does not refer to any meeting, which it would have done if that meeting had already occurred with Mr Tsimas and herself. I find therefore that the telephone conversation took place between the date of the Hellenic quotation of 6th November and the booking of 9th November and that the meeting took place later. Mrs. Tzani's booking for SABO was for 2 O/T containers with an estimated loading time of 17th to 20th November 2000, (although this was subsequently altered when it was decided to have one shipment only in December instead of one in November and one in the following month).
16. A meeting did take place at SABO's premises when Mr Nikolaides visited the factory, which I find must have been shortly before 17th November 2000, when a copy of the l/c was sent to him. This meeting was the subject of major dispute between the witnesses who said they were present. Mr. Nikolaides in his statement maintained that he had met only with Mrs. Tzani and Mr. Tsimas but, having seen Mr. Makrigiannis and Mr. Kiliaris in court, he accepted in evidence that he had been introduced to them both whilst at the factory. He said that he saw nothing further of Mr. Kiliaris after the introduction but that he came across Mr. Makrigiannis in the production area of the factory, when viewing the machinery. He maintained however that the meeting where issues were discussed was conducted for SABO by Mrs. Tzani and Mr. Tsimas alone. The evidence of the SABO witnesses was that Mr. Tsimas, Mr. Makrigiannis and Mrs. Tzani were all present at the meeting with Mr. Nikolaides when they made it plain, as they said Mrs Tzani and Mr Tsimas had done before, that transshipment was prohibited. They said that they obtained confirmation from Mr. Nikolaides that UASC would adhere to the terms of the l/c and would provide a bill of lading which conformed to it.
17. I have already found that there had been no prior mention of the question of prohibition of transshipment before this meeting took place. Mr. Nikolaides' evidence was that Mr. Tsimas guided him around the factory to look at the machinery to be containerised. SABO had all the lifting equipment and would load the containers but Mr. Tsimas wanted to be sure that no problems would arise in relation to the type of containers to be supplied, whether O/T, flat rack or standard DV. Mr. Nikolaides said that he regarded this meeting as a sales opportunity with a company with whom Hellenic had not previously done business. His evidence was that he handed over to Mr. Tsimas the UASC sailing schedule to show him the services UASC offered, from which it was plain that the line did not call at Piraeus. It then emerged from SABO's side that there was a prohibition upon transshipment in the l/c. Mr. Tsimas told Mr. Nikolaides that SABO had already been in contact with MSC (the dominant container carrier in Piraeus) but said that MSC did not at the time have available the required containers for the machinery, meaning O/T and flat rack. This is consistent with the quote obtained from MSC which was valid only up until 15th October and the absence of any quotation for any period thereafter. (Moreover Mr. Nikolaides testified that he had spoken to MSC following this meeting, because he wished to check on SABO's bona fides, and ascertained that this was the true position). Mr. Nikolaides informed Mr. Tsimas that Hellenic could effect the necessary carriage with the appropriate containers within the required time, pointing out that, in accordance with the brochure, there would be a feeder voyage for carriage to Gioia Tauro and transshipment onto the vessel going to Jeddah.

18. On Mr. Nikolaides' evidence, this presented a problem for SABO in the light of the terms of the I/c because they were unwilling to seek an amendment to it. He then suggested a solution which he had encountered in the past which was to state the relevant terms of the I/c on the Bill of Lading. He said he would need to check with his management whether Hellenic would be willing to state the relevant terms of the I/c on the bill and that he would confirm the position having done so. He was not, he said, shown a copy of the I/c during his visit, which must be the case as Mr Tsimas said that he never saw a copy and it was common ground a copy was sent to Hellenic thereafter. Mr Nikolaides checked the position with management on his return and confirmed the position to SABO, receiving a copy of the I/c by fax on 17th November.
19. The evidence of Mrs. Tzani, Mr. Tsimas and Mr. Makrigiannis was that there were a number of different purposes for this meeting. First, there was the need to show Mr Nikolaides the machinery to be loaded in the containers to ensure that there would be no problems in loading and carrying such plant. That is accepted by UASC. Secondly, there was a need to discuss Mr. Nikolaides' quotation; thirdly there was a concern to ensure that UASC could comply with the shipment terms imposed by the I/c. They denied that MSC had been approached and had said that it could not commit itself to effect the shipment with O/T and flat rack containers in the period required.
20. Mr Tsimas' evidence was that Mr. Makrigiannis and Mrs. Tzani made it clear to Mr. Nikolaides that there must be direct shipment from Piraeus to Jeddah without transshipment. His evidence was that, as far as he recalled, Mr. Nikolaides said that this would be done. At no stage did Mr. Nikolaides show them a copy of the sailing schedule or hand it over, or explain to them the need for a feeder voyage and transshipment in Italy. Mrs. Tzani and Mr. Makrigiannis said that the meeting was requested by Mr Tsimas and they were there for the commercial department because they wanted to make certain that the carriage arrangements and any bill of lading received from Hellenic would meet the requirements of the I/c. Mr Makrigiannis said that the main reason he was there was to inform Mr Nikolaides of the terms of the I/c and that he and Mrs Tzani did that. They both said that these were discussed, including the need for direct shipment, without any transshipment. They said that Mr. Nikolaides told them that this would be done and likewise maintained that there was no mention of sailing schedules, feeder voyages to Italy and onward shipment to Jeddah following transshipment. Mrs Tzani said that the decision to use UASC was made after the meeting and the confirmation had been given that there would not be transshipment, but, as I have already found, a booking had already been made on 9th November.
21. Following the meeting a copy of the I/c was, as I have already mentioned, sent to Hellenic on 17th November.

Conclusions on the conflict of evidence about the Meeting

22. In my judgment, there is only one sensible explanation for the history of events relating to the supply of the I/c and the form of the Bill of Lading. If there had been a full discussion at the meeting of the terms of the I/c and the need for the shipment to comply with it, a copy would have been produced at that meeting, which on everyone's evidence it was not. If all that was really required was a bill of lading which conformed to clause 2 of the I/c (as Mrs. Tzani suggested in evidence, although it did have to comply in either respects also) it is hard to see why there was such a focus on its detailed terms. Clause 2 required a full set of clean onboard bills of lading issued to the order of Riyadh bank, marked "notify applicant" and "freight prepaid" showing the beneficiary as consignor/shipper and stating the name and full address of the carriers' agent at the part of discharge. The I/c forbade transshipment but did not require the Bill of Lading to state this, whilst clause 3 of the I/c dealt with the issue of ports of call. On the SABO witnesses' evidence there would appear little need to send Hellenic a copy of the I/c itself at any stage. If however the Bill of Lading was expressly to refer to the specific terms of the I/c and to set them out in the Bill, as Mr Nikolaides maintained was agreed, it would make sense to send a copy of the I/c to Hellenic to ensure verbal accuracy. That I/c was sent with a fax from Mr. Tsimas on 17th November in which he confirmed SABO's expectation of containers arriving on 20th and 21st November, identified SABO's customs officer as Mr. Chatzicharambous and included the following wording in bold type: -
"Bills of lading: as with the credit note (letter of credit) we have attached (draft of the bills of lading to be sent for checking before issue)."
23. In response, on 13th December, Hellenic sent a draft of the Bill of Lading wording including the wording from the I/c which was to be included in it, specifically as wording from the I/c. On 28th December Mrs. Tzani sent to SABO a list of the containers into which cargo had been loaded, the weights of cargo in each and the description of the merchandise. The fax once again emphasised the need for the Bill of Lading to take a particular form. Thus: -
*"Terms of the Bill of Lading in accordance with the I/c we have sent to you and the sample of the Bill of Lading you have prepared.
To be sent to us by fax before sending it to our bank for checking."*
24. In accordance with that request, a final draft of the Bill of Lading was provided by Hellenic with the words "for checking" upon it which included the wording from the I/c on the bill and the stamp stating that the particulars of the sale contract and/or order and/or bank letters of credit had been inserted at the shippers' request and for their own personal convenience. A small amendment was made to this form of words by SABO and this led to the Bill of Lading being issued in that agreed form on 30th December 2000.
25. This is entirely consistent with Mr Nikolaides' version of events and does not tally with that of the SABO witnesses.
26. It is moreover inherently unlikely that Mr. Nikolaides would lie to SABO's personnel about the service offered by UASC because such a lie would be bound to come to light. The routes operated by UASC were published in its brochure and could be ascertained by anyone who was prepared to take the trouble to find out. Moreover, the

transit times given invited enquiry, as compared with the 7 day figure given by Medcargo in respect of direct transit to Jeddah. Although this could be explained by the number of ports of call, as opposed to transshipment, it is hard to imagine that there was no consideration at SABO of the difference between UASC's quote on the one hand and that of others in respect of duration of transit.

27. Furthermore, the name of the vessel upon which the cargo is actually loaded is invariably recorded in documents sent to the shippers' customs' agent, in this case Mr. Chatzicharambous, who then forwards the customs declaration to the shipper so that the shipper can obtain a certificate of origin from the Greek Chamber of Commerce. In the present case, a series of customs declarations for the different containers was sent to SABO between 15th and 29th December 2000 showing that the containers were to be loaded on the Dubai Trader, not the Al Sabahia. On 29th December, Mrs. Tzani enquired of Hellenic and was told by a lady in the documentary department there that the vessel to be named in the Bill of Lading was the Al Sabahia. Furthermore, the freight invoice dated 29th December also referred to the Al Sabahia. The discrepancy was obvious and although in fact the feeder vessel was the Carl Metz, the fact that the name of the feeder vessel would actually appear in the customs documents and that it would be known to both SABO and Hellenic that the name would so appear, militates against any idea of that Hellenic would seek to deceive SABO in this way. Hellenic could not hope to hide from SABO the fact that a feeder vessel was being used.
28. In this connection it was suggested that the name "Dubai Trader" was used in the customers declarations because it was a Middle Eastern name which might assist in the deception. This is hard to credit. If there was to be a deception, then the customs forms would have to show the name of the ocean vessel upon which the cargo was actually to be loaded at Gioia Tauro, namely the AL Sabahia. This would have to be achieved by corruption or forgery. The position was however that a different name appeared and would be known to appear in the absence of such corruption or forgery. What is more, these documents were to be, and were actually, studied by SABO in order to take the container numbers and weights off the forms when applying for the certificates of origin which were needed in order to obtain payment under the l/c.
29. It is also inherently plausible that a salesman, seeking to build business with a new client would show that client the UASC brochure with its sailing schedules in order to illustrate the extent of the services which could be offered. The UASC system of feeder vessels and a hub port at Gioia Tauro would be apparent from anything more than a cursory glance. If Mr. Nikolaides was to deceive SABO, he would need to avoid showing SABO personnel the sailing schedules, ensure they did not ascertain their contents from elsewhere, make sure that the goods were shipped by bills of lading which named only the ocean vessel and ensure that the customs declarations conformed to the misrepresentations in the bills. Additionally, as Mr. Nikolaides pointed out, UASC was not so desperate for business in respect of 13 containers that it needed to jeopardise its reputation with a new client with whom it was seeking to establish a long-term relationship.
30. The inherent unlikelihood of such a deception weighs strongly against this actually occurring, whilst the constant emphasis, as revealed in the correspondence, on the need for bills of lading to take a particular format strongly supports the evidence of Mr. Nikolaides.
31. Whilst it was suggested that Mr. Nikolaides had fabricated a story about the unavailability of MSC O/T and flat rack containers for the relevant period, there was no evidence adduced by SABO to show that MSC did have such availability at the time in question. The quotation obtained from MSC (albeit not that obtained from Medcargo) gives rise to the inference that MSC was not offering containers for the relevant period. O/T and flat rack containers are not the standard form of container and although they are not rare, the evidence of Mr. Nikolaides that there is always difficulty in obtaining a significant number of these at any one time in Piraeus is not implausible. Shipping companies do not stock containers but seek to utilise them on an "in and out" basis as quickly as possible. It is no doubt uneconomic for them to keep containers by for use by a particular customer or to bring in empty containers from elsewhere for use. At all events I found no reason to disbelieve Mr. Nikolaides in what he said about the information given to him by Mr. Tsimas and the information he obtained from MSC to much the same effect.
32. It is clear to me that SABO, in the persons of Mr. Tsimas and Mrs. Tzani regarded the "no transshipment" provision in the l/c as a matter of paper compliance, rather than actual compliance. To the extent that Mr. Makrigrannis had any involvement, I find that his attitude was the same, as was that of Mr. Kiliaris in connection with the shipment which followed the shipment in issue in these proceedings. It is striking that, when all these persons at SABO were, on their own evidence, aware of the stranding of the Carl Metz with the containers onboard, the second SABO shipment from Greece to Jeddah was effected by the same means as the first. On the evidence of the SABO witnesses, by the 18th January 2001 they knew what had happened, but they proceeded to load containers between 18th and 26th January and to ship those containers on 26th January by the same route and method as for the first shipment. The ocean vessel on that occasion was the Al Mutanabi and the Bill of Lading once again showed a voyage from Piraeus to Jeddah despite the existence of a feeder voyage on a different vessel from Piraeus to Gioia Tauro. Once again there were customs documents received by SABO which were utilised to obtain the certificate of origin from the Chamber of Commerce. Insurance was also obtained which named the ocean vessel only. Thus SABO, on its own case, knowingly utilised a bill of lading in materially identical terms to the first bill, referring alone to the ocean liner vessel, an insurance certificate which referred only to the ocean going vessel and a certificate of origin which was obtained on the basis of documents showing a feeder vessel, in order to trigger Makkah's bank obligation under the l/c. SABO had no compunction in doing this and

despite the witnesses' efforts to suggest that this course of action was forced upon them by the need to keep the customer happy in Saudi Arabia and to preserve the contract, it is hard to imagine how, if they had been deceived by Mr. Nikolaides, they would not have been prepared to explain this to Makkah, explain the problem in obtaining direct shipment and request a variation in the l/c arrangements or an extension of time to ship goods with MSC on a direct voyage. SABO did none of these things and instead utilised the same form of documents to operate the l/c in the full knowledge that those documents did not reflect the transshipment which was planned and which did in due course occur.

33. This second shipment is compelling evidence of SABO's approach. It seems that its representatives did not regard the question of transshipment as one of any importance provided that the documents could be utilised to trigger the l/c payment. It may be that there would have been real difficulty in obtaining a variation of the l/c since Makkah does appear to have placed some importance on the prohibition on transshipment. As soon as Makkah ascertained that the Al Sabahia had arrived in Jeddah without the containers onboard, it immediately complained to SABO that transshipment was not allowed by the terms of the l/c. The existing l/c had been issued tardily and there appears to have been difficulty over a straightforward amendment to refer to the German shipment, of which everyone was well aware. SABO personnel may well have anticipated difficulty in procuring an amendment to the l/c between 18th January and 6th February (when the l/c expired) with regard to the second shipment and may well have anticipated similar difficulty in November when planning shipments in November and December.
34. Whether or not SABO personnel were aware that MSC was the only carrier who shipped cargo direct from Piraeus to Jeddah (Mr. Tsimas being the only witness who was prepared to admit that he knew that MSC said that it did so) I find that, by the conclusion of the meeting which took place shortly before 17th November, those present were well aware that UASC did not ship cargo direct but took it to Gioia Tauro for transshipment.
35. Having heard the witnesses and observed them in the witness box and considered all these matters, I accept the evidence of Mr Nikolaides about the meeting. I reject also the versions of the meeting put forward by Mr Tsimas and Mrs Tzani. I reject that of Mr Makrigiannis, which was inherently unreliable and inconsistent, as between his statement and his oral evidence, as to the time of the booking vis a vis the meeting. I find that Mr. Makrigiannis was not present in the office when these issues were discussed. There is no reason for Mr. Nikolaides to lie about this and I am satisfied that his evidence is correct. He did meet Mr. Makrigiannis in the production area when looking at the plant and machinery to be carried. I do not accept Mr. Makrigiannis' evidence that he was present at the discussion, in part for the reasons just mentioned, but also because his evidence was originally adduced in a witness statement dated 19th November 2004 which was exchanged with the Claimant's evidence at a time when it appears that SABO was uncertain whether Mr. Tsimas, who had left its employment, would give evidence. The latter's statement is dated 17th December 2004 and was provided to the Defendant later than the earlier exchange. Mr. Makrigiannis' evidence was produced to bolster the evidence of Mrs. Tzani about the meeting at a time when it was doubted that Mr. Tsimas' evidence would be available to SABO.
36. It was put to Mr. Makrigiannis but not to Mr. Tsimas or Mrs. Tzani that, on finding out that MSC could not effect the carriage required (which they knew to be by way of a direct voyage to Jeddah) SABO, knowing that direct shipment was impossible, chose to use UASC because there would be no need for a certificate showing the ports of call of the vessel which would reveal if any transshipment had taken place. I cannot find that this is the position on the evidence but it is a suggestion which does make sense. UASC's quotation was the cheapest for open top containers but the SABO witnesses did not suggest that this was the reason for the choice of UASC. At all events, whether or not UASC was specifically selected because of the certificates point, I am entirely satisfied that by the conclusion of the meeting with Mr. Nikolaides, the relevant personnel at SABO, Mr Tsimas and Mrs Tzani, knew exactly what the position was and then embarked upon a course, in conjunction with Hellenic of producing documentation which would satisfy the l/c even though transshipment was actually scheduled to take place. Inasmuch as Mr. Makrigiannis was the commercial manager, I am satisfied that he knew the position full well and in a small business concern like SABO it is impossible that this could not have been discussed between him, Mrs. Tzani and Mr. Tsimas. His denials of any responsibility in relation to the second shipment not only rang hollow in relation to that shipment but also suggests that he was fully aware of the position on the first shipment and his willingness to give evidence of a meeting which he did not attend in relation to that shipment indicates his share of responsibility for what took place.
37. It is also significant that, even on its own case of knowledge obtained on 18th January, SABO wrote no letter of complaint about the transshipment. The letter from Makkah to SABO specifically raised the problem of transshipment. It gave rise to a formal letter from Mrs. Tzani to Mr. Nikolaides which did not refer to transshipment as such but referred to their client's enquiry as to why the containers were not on the Al Sabahia when it reached Jeddah. The letter asked Mr. Nikolaides to inform them as to the containers' whereabouts and the date of prospective delivery to Makkah so that SABO could pass on this information. The same day, SABO wrote back to Makkah stating that there might be damage to the cargo which was on a ship stuck at Gioia Tauro. SABO said that it had followed the l/c strictly and cooperated with one of the biggest shipping companies which had been informed that the l/c terms did not allow transshipment.
38. Despite their clear appreciation at this point (even if not earlier) that this was the position, there was no complaint made by SABO about transshipment until a lawyer's letter on 20th February 2001. If the prohibition on transshipment had been made plain as SABO contends, it is virtually inevitable that, on discovering that this had

occurred, it would have made the most vociferous complaints. The absence of such complaints again demonstrates the complicity of SABO in the proposed transshipment. Moreover, although there was a dispute of fact about this, I can see no reason in the circumstances why Mr. Nikolaides would not, as he said he did, notify SABO by telephone when he first heard of the casualty on 8th January. It would be absurd for him not to do so in circumstances where it would inevitably come to light in any event. I find therefore that he did so by telephone on that day and that from that moment onwards SABO personnel were aware of the stranding, whilst living in hope that the problem was a minor one which would be resolved with on- carriage to Jeddah. When Makkah complained at non-delivery on 18th January, letters had to be written, but even then, SABO did not hold Hellenic or UASC liable for what had taken place.

39. In my judgment, it is likely that Mrs. Tzani, despite her professed ignorance of the process of transshipment, appreciated on receiving the Hellenic quote that it involved an indirect voyage and transshipment. She told the court that all quotations had been sought on a non-transshipment basis, which meant that she professed to understand enough of the process to exclude it. She cannot have asked for quotations on this basis since all the quotations obtained (save those relating to MSC) involved transshipment. Whilst she did not speak to Hellenic, the quotation can only be understood as one involving transshipment or, at the very best from her standpoint, one where the subject of transshipment had not been raised. Her explanations for the choice of UASC as the shipping line, by reference to the clause which required certificates relating to ports of call, from carriers other than UASC and one other, does strongly indicate a knowledge of transshipment since the production of a certificate would otherwise be of no importance. If she was conscious of this it is inherently unlikely that she did not inform Mr. Tsimas and Mr. Makrigiannis as and when either of them took any interest in the matter and authorised, approved or ratified the booking with UASC. Although I cannot find this as a fact, there are strong indications that this is the case.
40. There is no reason to think that Mr. Kiliaris had any knowledge of the matter until after the casualty, but he must have been involved in the decision to utilise the same procedure in relation to the second shipment.
41. I make no express finding as to the exact stage at which each of these persons obtained knowledge of the transshipment process but find that it is clear that all those involved in making the arrangements for the December shipment were fully aware of the position, at the latest, by the end of the meeting with Mr. Nikolaides, or shortly thereafter if not present, but in any event before the sending of the copy I/c on 17th November 2000.
42. In consequence, it is clear that the contract for the carriage of containers from Piraeus to Jeddah was a contract in which transshipment at Gioia Tauro was part of the agreed delivery process. There was no misrepresentation to SABO at all nor any breach of contract on the part of UASC in engaging the Carl Metz for the feeder voyage. Whilst there was a misrepresentation in the Bill of Lading by UASC insofar as it referred to the Al Sabahia as the carrying vessel from Piraeus to Jeddah, that misrepresentation was not relied on by SABO but was a misrepresentation to which SABO was privy and which was intended to deceive subsequent holders of the bill and in particular the paying bank under the I/c.

The counterclaim

43. As a result of the grounding of the vessel at Gioia Tauro the ship and cargo required salvage. The containers were offloaded at the port and have remained there ever since. The salvors sought salvage security from the cargo owners but SABO declined to provide it when their insurers declined cover. As the salvors had a lien for salvage purposes, the cargo stayed where it was and was not transported to Saudi Arabia. As it was significantly damaged by seawater, it would not have been acceptable there in any event. SABO did not however abandon the cargo in the containers because, it appears, of potential ramifications on the insurance action which it is pursuing. It did however in August 2003 make it plain to anyone who was concerned that it had no interest in the containers themselves and that should UASC wish to unpack them and remove the empty containers from their current location, SABO had no objection.
44. The cargo remains at a quay in Gioia Tauro stuffed in the UASC containers in which it was shipped, despite the low value of the cargo and the fact that the incident occurred over 4 years ago. Storage charges were imposed by the port until 18th February 2003 but thereafter no charges have been made.
45. The evidence shows that UASC has been unable to obtain possession of its containers because the Gioia Tauro port authority will not allow UASC to unstuff its containers without arrangements being made for the warehousing of the cargo for which there is no room in the port. SABO however is the only party which can move its cargo to an area or warehouse outside the port because of EC rules regarding the reintroduction of cargo which originates in the EC. The shipper has to provide the customs authority with a completed T2L form which can only be issued at the cargo's port of origin and only at the request of the shipper or an authorised agent.
46. It appears that UASC investigated the possibility of disposing of the cargo by selling it to scrap buyers in Spain and Italy at the beginning of 2003. It is accepted on all sides that the cargo is worth little. A scrap sale would seem the most likely prospect. However SABO's consent is required before any sale can be effected. No consent has ever been given, presumably for much the same reasons as there has never been an abandonment of the cargo. Why the insurers and SABO cannot agree to this course without prejudice to their respective rights, I do not know. Absent an application to the Italian Courts, only SABO can deal with the cargo. I do not know why an application has not been made, unless it be for reasons of exposure.

47. UASC have incurred rental and storage charges in respect of the containers since the completion of salvage services. UASC says that it purchased 2 containers in order to mitigate losses in respect of continuing rental charges. It counterclaims all these costs in addition to the costs of 11 containers which are said to be damaged beyond economic repair due to prolonged storage after suffering water damage in the casualty.
48. The Salvors have abandoned their salvage lien and the goods are apparently available for collection, should SABO wish to do so. No evidence was put before me of a formal abandonment of the Bill of Lading voyage to Jeddah although it is alleged in the defence and counterclaim that the carriage to Jeddah could not be performed and/or became commercially impracticable and/or the carriage was abandoned by UASC. It is said that, as an implied term of the contract of carriage, upon such events occurring SABO was bound to collect or dispose of its cargo or alternatively, as bailor was under a duty to collect or dispose of it.
49. I am unpersuaded by the contentions of UASC in this respect. There is no evidence to show that any damage to containers was the result of prolonged storage after suffering water damage as opposed to the condition being due to the casualty itself or anything else. Whilst there may be no commercial purpose in forwarding the goods to Jeddah, on the evidence before me there has been no formal abandonment of the voyage nor any demand to SABO to collect its cargo. Matters have simply remained as they were since the Salvors abandoned their salvage lien with UASC attempting unavailingly to obtain SABO's consent to dispose of the cargo and to retrieve its own containers. There may be frustration of the contract of carriage but no claim is based on that alone.
50. In these circumstances, if a breach of contract or duty was established, it may be that UASC could recover container rental charges in the sum of \$22,562.00 as at 26th January 2004, plus charges for storage of containers in the amount of E14,485 and \$4,207.49 representing the costs of purchasing 2 containers in mitigation of continuing storage charges. No other sums would be recoverable. I am however left in the position where UASC has not established on the balance of probabilities that SABO is in breach of any contractual or other duty from the moment the Salvors abandoned their lien, on whatever date that was. Absent a formal abandonment of voyage or request to collect goods, the cargo remained in the hands of UASC as bailees and carriers for reward. Whilst there is no evidence in support of SABO's contentions that UASC were under a duty to continue with the voyage to Jeddah or that it failed to take due and proper care of the cargo, the position is one where the focus of the argument was elsewhere in this action and neither of the parties have established their contentions on this aspect of the dispute and where the position remains wholly uncertain.
51. It is clear that the parties should cooperate with the insurers in order to make recovery of whatever value is left in the goods and that the containers can then be released but the absence of tripartite cooperation thus far has prevented this practical solution from being realised, whilst the parties' rights in law remain unclear, because neither party has established the relevant facts to support its position.

Conclusions

52. For the reasons given earlier, there was no breach of contract on the part of UASC in carrying the goods by the Carl Metz to Gioia Tauro for transshipment to Jeddah. Equally there was no misrepresentation to SABO in the Bill of Lading or in giving SABO the name of the ocean vessel prior to or after shipment. SABO knew full well what the position was. Whilst the Bill of Lading contained a misrepresentation, that was intended to mislead the receivers and the paying bank. It did not mislead SABO which was party to the making of it and therefore it did not constitute a misrepresentation as far as it was concerned.
53. In these circumstances SABO's claims against UASC cannot succeed and I need not deal with any of the subsidiary issues which arose in relation to loss and damage.
54. Equally, for the reasons set out above, UASC's counterclaim is not made out and it behoves the parties to make arrangements as speedily as possible to reach agreement with SABO's insurers (who have declined cover) so that, without prejudice to rights all round, the goods can be disposed of and the containers released for further use.
55. Unless there are special circumstances of which I am unaware, it appears to me that costs must follow the event and that UASC must be entitled to an order for the payment of costs by SABO in respect of its claim. A small deduction of the order of 10 percent might be appropriate in respect of costs relating to the counterclaim which took very little time at the hearing. Before making any order on these lines, I will hear the parties' submissions.

Charles Holroyd (instructed by Richards Butler) for the Claimant
Michael Davey (instructed by Hill Taylor Dickinson) for the Defendant