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Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc [2000] FCA 660 (18 May 2000)

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FEDERAL COURT OF AUSTRALIA

Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc [2000] FCA 660

HI-FERT PTY LTD v KIUKIANG MARITIME CARRIERS INC

NG 778 OF 1996

TAMBERLIN J

SYDNEY

18 MAY 2000

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY NG 778 OF 1996
IN ADMIRALTY

BETWEEN: HI-FERT PTY LIMITED

FIRST PLAINTIFF

CARGILL FERTILIZER INC

SECOND PLAINTIFF

AND: KIUKIANG MARITIME CARRIERS INC

FIRST DEFENDANT

WESTERN BULK CARRIERS (AUSTRALIA) LTD

SECOND DEFENDANT

JUDGE: TAMBERLIN
DATE: 18 MAY 2000
PLACE: SYDNEY

REASONS FOR JUDGMENT

1 The first plaintiff ("Hi-Fert") bought a cargo of fertilizer of 40,196 metric tons ("the cargo") from Cargill Fertilizer Inc ("Cargill"), a United States Corporation. The cargo was loaded in bulk form at Tampa, Florida, on the vessel "Kiukiang Career" ("the ship") which was owned by the first defendant ("KMC"). During the relevant period, between March and June 1996, the ship was time-chartered by KMC to the second defendant ("WBC") under a charterparty dated 19 August 1995 ("the Time Charter"). WBC had earlier entered into a Contract of Affreightment ("the COA") with Hi-Fert in the form of a Gencon Charter in respect of the carriage of cargo from Tampa to Newcastle, New South Wales and other ports in Australia. The COA was dated 11 November 1993.

2 KMC employed the Master and crew of the ship. At the Tampa port on 24 March 1996 the Master issued three Bills of Lading in the Congen Bill edition 1978 Form in respect of the cargo. The cargo was made up of three different types of fertilizer comprising 21,600 metric tons of what I will describe as DAP, 9,299 tons of what is referred to as GMAP and 9,297 tons of what is referred to as GTSP. Nothing turns on the precise chemical differences between the three products. The cargo was expressed to be destined for carriage to Australian ports. The shipper was named as Cargill. The consignee nominated was Hi-Fert which was also named as the party to be notified.

3 Prior to loading inspections were carried out by a Tampa firm of surveyors known as Commercial Testing & Engineering Co ("CTE"). The CTE inspection found the holds to be clean and ready to receive the cargo. However, when the ship entered the Port of Newcastle in New South Wales on 26 April 1996 it was prevented from discharging the cargo as the fertilizer was immediately quarantined by the Australian Quarantine Inspection Service ("AQIS"). AQIS found wheat residues in the holds and quarantined the cargo on the basis that it was contaminated with a quarantineable disease known as "Karnal Bunt", a disease associated with wheat.

4 Hi-Fert and Cargill claim that as a consequence of the contamination of the cargo they suffered loss. They have sued KMC on a number of causes of action including negligence, bailment, breach of contract, and breach of duty as a carrier. The plaintiffs also allege improper or negligent stowage and a failure to exercise due diligence on the part of KMC to make the ship "seaworthy" within the meaning of the US *Carriage of Goods by Sea Act 1936* (US) ("COGSA") and the Hague Rules.

5 WBC is sued by Hi-Fert for misleading and deceptive conduct under the *Trade Practices Act 1974* (Cth) ("the TPA") arising from alleged misrepresentations made by WBC to Hi-Fert concerning inspections in relation to cleanliness of the vessel prior to loading. WBC is also sued on the alternative basis that the misrepresentations were negligent, or amounted to collateral warranties to the COA of 11 November 1993. In addition WBC is sued on the ground that it was the carrier under the COA and breached its obligations as carrier. The COA contains a London Arbitration clause and this latter part of the proceeding has been stayed for arbitration in London. It is not the subject of this judgment.

6 The amount of damages claimed is in the order of $9 million dollars plus interest and costs.

7 Apart from denials KMC's first line of defence is that the Bills of Lading were not evidence of any contract of carriage and did not attract the obligations in COGSA but were merely **receipts** for cargo received on board the ship. KMC also says that despite the absence of a COA binding it, the duty of care in negligence and bailment would reflect the terms of the COA particularly clauses 16 and 20 which relate to inspection of the ship prior to and on loading. Accordingly, KMC submits that because the CTE inspection found the holds to be clean and ready they had not met the required standard of cleanliness and therefore no liability arose on KMC.

8 KMC however does concede that if the Bills of Lading were contracts of carriage then COGSA would apply. KMC says however that if the Bills of Lading amounted to a contract of carriage then the contract was subject to the COA particularly cll 16 and 20 which were not be rendered inapplicable by COGSA. This is said to arise from notations on the face of the bills.

9 A defence of estoppel is also raised against Hi-Fert to the effect that it is estopped from alleging a breach of contract by reason of the condition of the holds because of the certification by CTE. KMC alleges CTE performed the inspection as agent for Hi-Fert.

10 KMC also says that it exercised due diligence to make the ship seaworthy and that the holds were fit and safe for reception of the cargo as required by s 3(1) of the COGSA. It also says that it is relieved from liability by s 4(2) of US COGSA. Finally, as to damages, there is an allegation of failure by Hi-Fert to mitigate its loss.

11 The defence of WBC consists of a denial that there were any misrepresentations. Alternatively assuming there was a breach of the TPA it denies that there was any reliance by Hi-Fert or that there was any loss flowing therefrom. Both defendants challenge the quantum of damages and allege a failure to mitigate damages. They also dispute the legal basis for the award of certain of the damages claims.

Outline chronology

12 By contract dated 11 November 1993 WBC as disponent owner and Hi-Fert as charterer entered into the COA which embodied a Voyage Charter. This was in the form of a GENCON Charter. By the COA the parties agreed as to freight rates applying to carriage from Tampa to various ports in Australia. The Charter was for an initial period from December 1993 to 31 October 1995 with an option for Hi-Fert to take up an additional period of one year from 1 November 1995 Hi-Fert exercised this option. The shipment the subject of this proceeding was the sixteenth shipment under the COA and was the subject of an addendum (No 15) dated 12 March 1996 to the COA. Under that addendum the ship was nominated and accepted as the carrier to load a cargo ex Tampa. The previous five cargoes carried by the ship, referring to the most recent cargo first, were sulphur, coal, wheat, bauxite and sulphur in that order. It was the residue from the **wheat** cargo which is of central importance to the present dispute as it was the contaminant of the fertilizer.

13 By the Time Charter (in the New York Produce Exchange Form as Amended of 19 August 1995) between KMC as owners and WBC as charterers the ship was chartered for a period up to twenty-six months which included the relevant period in the present case.

14 On 9 January 1995 Cargill as seller and Hi-Fert as buyer entered into a Sales Agreement for the purchase of fertilizer over an eleven month period. The Agreement provided for up to six shipments annually and the Kiukiang shipment was the third shipment for the 1995/1996 year, which commenced in October 1995 and ended in September 1996. The ship was required to lift all fertilizers at Cargill's East Tampa berth at a load rate of 6,000 metric tons per weather working day.

15 On 12 March 1996 WBC instructed Sea & Land Shipping Inc ("SLS") to appoint P & L Marine in Tampa to perform a "Full Conditions on Hire and Bunker Survey".

16 On 16 March 1996 the ship arrived at Tampa anchorage en route from Mexico. On Sunday 17 March at 00.55 the ship berthed and the Master tendered a "Notice of Readiness" for loading. At the same time P &L Marine Survey commenced the Conditions Survey. At 03.30 the cargo holds were approved for loading by CTE who had inspected the holds. They were accepted as clean on arrival. At the same time the Notice of Readiness was acknowledged by Cargill. Loading commenced of a parcel of GMAP in bulk at 04.00 on 17 March. Subsequently there were some delays but loading continued and was completed at 00.35 on Sunday 24 March 1996. The vessel then sailed for Newcastle via the Panama Canal.

17 On 17 March P & L Marine issued a Certificate which stated that "cleanliness passed 03.30, 3.17. 96." The Certificate also stated "Holds clean. Limewash residues in top 1/3. Lower hopper and cross hoppers within one metre of Tank tops need recoating .".

18 On 18 March CTE, which had inspected the ship in the early morning hours of 17 March, wrote to SLS enclosing Certificates of Hold Cleanliness. These certificates were addressed to SLS and referred to the load port as "Cargill Fertilizer Inc Tampa, Florida". The certificates were to the effect that CTE had attended the vessel and inspected the holds, where accessible, and found them to be clean, dry, and ready to receive the intended cargoes comprising fertilizer in bulk. In fact it is now evident from the material before me that this was not correct.

19 On 24 March 1996 "clean on board" Bills of Lading were issued by the Master of the ship. They contained the following endorsements:

> *"FREIGHT PAYABLE AS PER CHARTER PARTY*
>
> *SUBJECT TO ALL TERMS, CONDITIONS AND EXCEPTIONS OF THE GOVERNING CHARTER PARTY, INCLUDING ARBITRATION CLAUSES, ARE DEEMED TO BE INCORPORATED HEREIN."*

20 As a consequence of the non delivery of the cargo Hi-Fert took steps to acquire replacement stock. It purchased some stock within Australia and borrowed some stock which it later repaid in kind. It purchased stock from New Zealand, South Africa and the United States which in total amounted to 33,822 metric tons. In so doing it incurred expenses and losses which it claims involved the cost of relocation of existing Hi-Fert's stock in Australia, on another vessel and the extra cost to replace stock. The total amount of cargo which Hi-Fert was unable to replace was 6,374 metric tons. Hi-Fert claims that it suffered loss of profit on stock unable to be replaced and the incurred costs of administering the replacement purchase in terms of unit operating costs per ton.

21 In respect of this claim there is a dispute as to the figures relied on by Hi-Fert. These principally relate to the claims for replacement costs, administration costs, loss of profit and a number of adjustments and discounts made by the expert accountant Ms Lindsay called on behalf of KMC.

22 I now turn to consider the main issues raised.

Were the bills of lading mere receipts or did they evidence a contract?

23 The general principle is that a Bill of Lading may serve three purposes. First, it can operate as a receipt for the goods. Second, it can evidence the terms of the contract of carriage between the shipper and the carrier. Third, it can operate as a negotiable document of title, by the endorsement of which property in the goods in respect of which it is issued may be transferred: see *Scrutton on Charterparties* 20th ed 1996, Article 2 at 2.

24 KMC submits that the bills of lading issued in the present case were not evidence of any contract of carriage **between Hi-Fert** and **KMC** but only operated as a **receipt** for the cargo to the effect that the fertilizer had been received on board. This is said to be so because the contract of carriage was to be found in the pre-existing COA between Hi-Fert and WBC entered into in 1993. It is then said that this is the only contract which controlled the carriage of cargo on the ship, including the fertilizer cargo. Of course KMC was not a party to the COA. In support of this submission the defendants say that there was no need for any contract of carriage to arise from the Bill of Lading because Hi-Fert already had in place the COA with WBC and the trip was nominated pursuant to this COA. Therefore it is said that because there was no carriage contract in existence then there could be no assignment of rights by virtue of s 50A of the *Sale of the Goods Act 1923.* Accordingly, Hi-Fert was not entitled to sue KMC in respect of the contaminated cargo.

25 In support of this defence KMC referred to the Court of Appeal decision in *The "Dunelmia"* [1969] 2 Lloyd's Rep 476. That case concerned a charterparty under which the Master was authorised to sign Bills of Lading without prejudice to the charterparty. The Master issued a Bill

of Lading acknowledging receipt of cargo. The seller then endorsed that Bill of Lading to the charterers. A dispute arose between charterers and owners as to shortage of cargo on discharge. The Court decided that even though the charterers were **not** the shippers, nevertheless the relations between the parties were governed by the charterparty and **not** the Bill of Lading. As to the relationship between the Bill of Lading and the charterparty Lord Denning MR said (at 482):

> *"**The bill of lading here was not separate or severable from the charter-party**. It was issued in pursuance of it. The Italian sellers ANIC had already contracted to sell the fertilizer to the Government of India: and the Government had chartered the ship to carry it. The bill of lading was **a mere instrument to carry out those contracts. It did not evidence any separate contract** at all. As between charterers and shipowners it was only a **receipt** for the goods." (Emphasis added)*

26 As Counsel for Hi-Fert pointed out, however, this decision is distinguishable because in *The "Dunelmia"* the parties to the Charterparty and the Bills were effectively identical. In the present case they are not. The COA in the present case was between WBC and KMC and parties to the Bill of Lading are KMC and Hi- Fert. This in my view is an important difference because the Court is presently concerned with two separate contracts of carriage between **different** entities. In my view the extract from *The "Dunelmia"* provides no support for a conclusion in the present case that the Bill of Lading is a mere receipt.

27 Some support for the conclusion that the Bills of Lading are not mere receipts is to be found in the terms of the present Bill of Lading. On the front page of the Bills there are references to **terms, conditions and exceptions** including arbitration clauses being incorporated. There is also a reference to "this contract". Also the conditions of carriage contain mutual promises and agreements as to what is to happen in certain events and as to the operation of the charterparty. The Hague Rules are expressed to apply in isolation to "this **contract**". There is also a contractual obligation provided for in relation to contribution to general average.

28 The language of the Bill of Lading and the above reference are in my view inconsistent with the Bill being only a receipt for goods which acknowledges delivery of the goods in good order and having no other relevant operative effect as a contract of carriage. Having regard to these considerations each Bill of Lading in my view evidences a contract of carriage between Hi-Fert and KMC on which Hi-Fert is entitled to sue as endorsee.

What were the terms of the Bill of Lading?

29 Having concluded that the Bill of Lading evidenced a contract of carriage between Hi-Fert and KMC the next question raised on this aspect is whether the Bill of Lading operated to incorporate the terms of the Time Charter, the COA or the Hague Rules into the terms and conditions of carriage and, if so, which terms were so incorporated or enlivened.

30 The Bills of Lading expressly provides that **freight** is payable as per the Charterparty. In the present case there are two charterparties. This reference in relation to "freight" and the Charterparty is only consistent with the Charterparty meaning the COA and not the Time Charter. This is because it is the COA which relates to payment of freight. There is, in addition, a further endorsement which provides that each Bill is subject to "all the terms, conditions and exceptions of the **Governing** Charterparty including arbitration clauses" which are deemed to be incorporated into the Bill of Lading. This reference to "Governing Charter", as contrasted with the prior reference to Charterparty in relation to freight, indicates that apart from provisions relating to freight, the terms of the Time Charter are incorporated. It seems to me to be appropriate that the terms of that charterparty should apply to carriage of the cargo because it is the terms of the Time Charter which KMC, as party to it can be expected to be familiar. It cannot be expected to be aware of the terms of the COA to which it was not a party.

31 The expression used in relation to incorporation of the terms, conditions and exceptions of the governing charter is in the widest terms. See *Scrutton* (supra) Articles 37-40 at pp 75-79 inclusive.

32 The appropriateness of incorporating the terms of a head charter in a Bill of Lading is referred to in *The "San Nicholas"* [1976] 1 Lloyds Rep 8 at 11 where Denning MR said:

> *"It seems to me plain that the shipment was carried under and pursuant to terms of the head charter. ... The head charter was the only charter to which the shipowners were parties: and they must, in the bill of lading, be taken to be referring to that head charter. I find myself in agreement with the statement in* Scrutton on Charterparties *18th ed. (1974) at p 63:*
>
> `A general reference will normally be construed as relating to the head charter since this is the contract to which the shipowner, who issued the bill of lading, is a party.... It not infrequently happens that, when a printed form or bill of lading provides for the incorporation of the `charterparty dated ---`, the parties omit to fill in the blanks. It is submitted that the effect is the same as if the reference were merely `to the charterparty' and the omission does not demonstrate an intent to negative the incorporation.'
>
> I accept that submission."

33 KMC seeks to distinguish these comments by reference to other decisions which refer to the incorporation of the voyage charterparty rather than the relevant time charterparty. The first of these cases is *The "SLS Everest"* [1981] 2 Lloyds Rep 389 at 392. However that case is different from the present because the incorporating reference in the Bill of Lading was to "freight and other conditions" whereas in the present case the reference as far as the Charterparty is concerned is only to "freight" being payable as per the Carterparty. There is separate reference to the Governing Charter in respect of incorporation of the terms and conditions.

34 I am satisfied that the general principle referred to in *The San Nicholas* sets out the correct approach in the present case and my conclusion is that the "Governing Charter" which is incorporated is not the COA but the Time Charter, the charter to which KMC was a party.

35 The consequence of this conclusion is that the terms of the COA including cll 16 and 20 are not incorporated into the Bill of Lading and therefore KMC is not entitled to rely on the provisions of the COA in answer to the claim of H-Fert.

The COA provisions

36 Assuming however, contrary to my above conclusion, that the terms of the COA apply to the contract of carriage between KMC and Hi-Fert, a question arises as to the meaning and effect of the COA terms on which the KMC relies.

37 Clause 6 of the COA concerns loading and the issuance of a Notice of Readiness. It provides for a written Notice of Readiness to be given by the Master and accepted by the shipper's representative.

38 Importance is attached by the defendants to cl 20 of the COA. It is entitled "Readiness to Load/Hold Cleanliness" and provides:

> *"20 Vessel's holds to be clean, dry and free from residue of any previous cargoes before commencement of loading to the satisfaction of an independent inspector appointed and paid for by Charterers.*
>
> *Should the Vessel not be ready to load in accordance with definite Notice of Readiness or*

> *to load quantity declared, Owners to be responsible at load port for stevedores standing by and any expenses incurred in disposing of shutout cargo, also demurrage on river barges ... in this connection, such expenses to be paid by Owners."*

39 "Owners" is defined to mean WBC.

40 Clause 42 provides for the Canadian/USA clause paramount (as applicable) to be incorporated in the COA and to apply to all Bills of Lading issued under it.

41 Clause 45 provides that for each approximate twelve month period, the contract is to cover 44 cargoes each of 36,000 metric tons, plus or minus five per cent at the Owner's option, together with two options. Such cargoes were to include fertilisers.

42 The COA also provides for the incorporation of COGSA into all Bills of Lading issued under it and states that if any term of such Bill of Lading is repugnant to COGSA then that term is void to the extent of the inconsistency.

43 Clause 2 in Part II of the COA, as modified, reads:

> *"2. Owner's Responsibility Clause*
>
> *Owners are to be responsible for loss of or damage to the goods or for delay in delivery of the goods ~~only~~ in case the loss damage or delay that has been caused by the improper or negligent stowage of the goods ... or by personal want of due diligence on the part of the Owners or their Managers to make the vessel in all respects seaworthy and to ensure that she is properly manned, equipped and supplied or by the personal act or default of the Owners or their Manager." (Crossing out in the original)*

44 The defendants submit that the effect of cl 20 of the COA is to negative any liability on the part of KMC. This is said to occur because the only duty of KMC in relation to "hold cleanliness" was to ensure that the holds were clean and free from residue to the satisfaction of an independent inspector appointed by, and paid by, Hi-Fert. Accordingly, it is submitted the satisfaction of such inspector defines the nature and extent of the obligation on the carrier to clean the holds. It is said to follow that if the inspector is negligent or fails to detect any contamination the carrier, KMC, is not liable because the obligation is only to clean **to the satisfaction** of the inspector. KMC submits that CTE were independent inspectors appointed and paid for by Hi-Fert and that they were clearly satisfied. Accordingly, it is submitted they are not liable because the duty of care has not been breached.

45 Hi-Fert responds that cl 20 does not diminish or affect the nature or effect of any obligations of KMC to clean the holds imposed by the Hague Rules or by the COA. It says that there must be clear words to effect and to bring about such an exclusion from those liabilities on KMC and that the wording in the present case does not meet this requirement.

46 Hi-Fert also submits that the provisions of COGSA come into operation because the goods were shipped from the US port of Tampa under a contract of carriage evidenced by the Bills of Lading.

47 Section 3(1)(a) and (c) of COGSA requires the carrier to exercise **due diligence** to make the ship seaworthy, and to make the holds fit and safe for the reception of goods to be carried. Section 3(8) then provides that any agreement in a contract of carriage relieving the carrier or the ship of liability for loss or damage arising from negligence, fault or failure in the duties and obligations provided in s 3, or lessening such liability, shall be of no effect.

48 Section 4(1) of COGSA concerns seaworthiness and provides that neither the carrier nor the ship shall be liable for loss resulting from unseaworthiness unless caused by want of **due diligence** on the

part of the carrier to make the ship seaworthy and to ensure that the holds and all other parts of the ship in which the goods are carried are fit and safe for their reception. Additionally, and importantly, it also provides that whenever loss or damage has resulted from unseaworthiness the **burden** of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under the clause.

49 The consequence of the above COGSA provisions and of cl 2 of Part II of the COA and the Hague Rules is that there were obligations on KMC to ensure that the holds were clean. The question which arises is whether the effect of cl 20 is to diminish or qualify those obligations. In my view cl 20 does not so operate.

50 In *Petrofina SA v Compagnia Italiana Trasporto Olii Mineraliso* (1937) 57 Lloyd's LR 247 the Court of Appeal had to consider the interaction of two clauses (16 and 27) of a charterparty which respectively were as follows:

> *"16 The captain is bound to keep the tanks, pipes and pumps of the steamer always clean, but at the expense of the charters if they load in the tanks oils of different nature to those previously shipped ..."*
>
> 27 Steamer to clean for the cargo in question to the satisfaction of the charterers' inspector."

51 Lord Wright, after referring to an argument that cl 27 limited the operation of cl 16, said at 251:

> *"....[this] argument is that that it a clause which is inserted for the owner's benefit, in this sense, that it cuts down what would otherwise be their general obligation to have the holds fit to receive the cargo at the time when they are loading.*
>
> *I find it impossible to accept that contention. We are here dealing with a contract of affreightment and it is necessary to bear in mind the well established view that has been stated so often, that if it is sought to effect a reduction on a general limitation of the overriding obligation to provide a seaworthy ship ... that result can only be achieved if perfectly clear, effective and precise words are used ...""*

52 His Lordship concluded that cl 27 was not sufficiently clear or specific to ground the general obligation to clean the tanks. He considered that it gave an added right to the charterers and did not delimit the owners' obligations.

53 Romer LJ in that case said:

> *"In clause 16 the owner undertakes to keep the tanks ... always clean. In construing clause 27 you must do so with the knowledge of the fact that by clause 16 that obligation has been undertaken in plain terms by the owner. That being so it is plain that the true construction of clause 27 is this, that the owners is saying ... not only will I keep the tanks clean but I will keep them clean to the satisfaction of the charterers' inspector. ...If he keeps them clean, and does not obtain the approval of the charterers' inspector he has not fulfilled his contract; nor has he fulfilled his contract if he fails to keep them clean but the charterers' inspector has expressed his approval of the state of the tanks."*

This extract makes it clear that clauses such as cl 20 do not cut down the underlying obligation of the owners. See also *Scrutton on Charterparties* 20th ed. 1996 Artcile 51at 99, and Cooke et al *Voyage Charters* 1993 at 644-5 and *National Coal Broad v William Neil & Son* (1985) 1 QB 300 at 315.

54 In my view the position is that even if the COA were incorporated into the contract of carriage its

effect would be to impose a further obligation on KMCand that it does not operate to cut down the force or effect of the other obligations imposed by COGSA or the Hague Rules, or the COA, which require the holds to be clean.

Due diligence

55 The authorities do indicate that clause such as cl 20 can be taken into account when considering whether the owner in fact exercised due diligence.

56 Because the Bill of Lading operated, in my view, as a contract of carriage between KMC and Hi-Fert, the COGSA provisions apply. The question which then arises under s 3(1) is whether KMC had in fact exercised due diligence to make sure that the vessel was seaworthy, and whether the holds were fit and safe for reception, carriage and preservation of the cargo. The onus of proving due diligence in relation to seaworthiness is on KMC as carrier, whereas the onus of proof as to due diligence in relation to making the ship fit and safe for the cargo is on Hi-Fert.

57 In the final result however, nothing turns on this difference in onus of proof because on either basis I am satisfied that, on the evidence before me, Hi-Fert has clearly established that there was a failure on the part of KMC to exercise due diligence with respect to cleanliness and inspection. Likewise, I am satisfied that KMC breached cl 2 in Part II of the COA because it negligently stowed the fertilizer cargo in a hold contaminated by wheat residue, and because it failed to exercise due diligence to make the ship seaworthy. For reasons given above this requirement was not diminished by cl 20 of the COA. In this regard I note that the requirement is not that there be personal want of due diligence by the owners but that it includes failures by servants and agents for who they are responsible: see *Smith Hogg v Black Sea & Baltic* [1939] 64 Lloyd's Rep 81 at 89.

Evidence of breach

58 No witness was called by the defendants on the question of breach to establish that there had been an exercise of due diligence. Hi-Fert called three expert witnesses as to breach. Each of these witnesses was cross-examined in some detail but I am satisfied that the substance of their evidence as to due diligence and their conclusions to the effect that the vessel was not seaworthy ought to be accepted.

59 It is evident in this case that the stringency of Australian quarantine regulations in relation to wheat residues and diseases was highlighted to the Master and KMC before the loading in Tampa in March 1996. The material in evidence includes telexes sent to the Master by WBC between 6 and 8 March which emphasised the importance of hold cleanliness. For instance, on 6 March a WBC telex to the Master instructed him that on completion of the discharge he should proceed to clean the holds "to **grain standard** as usual". The reference to "grain standard" is a reference to the very high standard of cleanliness necessary to meet Australian AQIS requirements. The stringency of the requirements is again stressed in a further telex sent thirteen hours later on the same day, which foreshadowed the use of the vessel for carriage from Tampa to Australia of fertiliser cargo. The telex relevantly reads:

> *"As hold* ***cleanliness*** *for these fertilisers is* ***most important*** *you should commence cleaning immediately paying particular attention to high areas and to ensuring that no grain traces remain." (Emphasis added)*

60 On 7 March Special Instructions were sent by WBC to the Master by fax informing him that the ship "Kiukiang Carrier" had been nominated to load a fertilizer cargo and carry it from Tampa to Australian. Under the heading "Hold Cleanliness" the instructions to the Master were that:

> *"****Holds to be clean, dry and free from all residues of previous cargoes*** *to the satisfaction of an independent surveyor on arrival at the loading port.* ***It is particularly important***

> ***that there are no residues of previous grain cargoes*** *since discovery of grain residues in or on the cargo by Australian Quarantine Authorities could result in very expensive delays and treatment of the cargo." (Emphasis added)*

61 Further instructions were sent from WBC to the Master on 8 March as follows:

> *"It is essential that* **maximum attention is paid to hold cleanliness** *and to the water tightness of hatch lids and accesses.*
>
> ***On every occasion where holds are cleaned*** *they are to be cleaned for a grain cargo whether or not the cargo will in fact be grain, as in so doing the best maintenance of the holds will be ensured. Grain cleanliness guidelines are included in our standing orders (No 15) and should be read in conjunction with this.*
>
> *It should be noted that with fertiliser loadings it is absolutely essential that any grain residues are completely removed as such residues in even very small quantities are a prohibited import according to Australian Quarantine Regulations. (Emphasis added)*

62 The evidence given by the three experienced expert witnesses called by Hi-Fert was in substance that the requisite standard of good practice was not achieved and KMC breached their obligations because:

* Residues of the prior wheat cargo remained in the upper reaches of the ship's holds which appeared not to have been inspected.

* No proper equipment such as cherry-pickers were used to access these areas.

* There were no proper procedures in place to clean for grain to a grain standard and/or to monitor the cleaning.

* There were no specific instructions by KMC for cleaning the upper areas.

* The Notice of Readiness should not have been issued until the holds were clean, dry and completely ready to receive the fertiliser.

* The Notice of Readiness submitted by the Master was incorrect because the holds were not clean or fit to receive the cargo.

* The required standard of cleanliness for Australian grain cargo calls for a zero tolerance in respect of grain residue.

63 The experts also referred to accepted authorities on hold cleanliness standards including Captain Isbester, *Bulk Carrier Practice* 1993 at 69-76.

64 Although in some respects the evidence was attacked in cross-examination I am not satisfied that any of the expert witnesses was materially weakened in any important respect so far as substance of their evidence was concerned. I accept the evidence of the experts as to the want of due diligence on the part of KMC and on the other matters referred to above.

65 The evidence regarding the amount of wheat contamination was set out in the reports of the experts and a marine surveyor together with numerous photographs put in evidence. As is evidenced from the extent of the contamination when the ship was inspected on arrival at Newcastle there is no doubt that the strict standards and procedures imposed were not met. The contaminating grain residues were substantial. This evidence supports the conclusion that the Master did not ensure that

the ship was clean before allowing loading and that there had been no provision for proper access to the upper parts of the holds for inspection and cleaning. It is apparent that the Master himself had serious misgivings about the standard of inspection by CTE in that it was carried out at night and without proper machinery, yet he did not report that it was not possible to carry out proper cleaning. Given the warnings given to the Master about the stringency of the cleanliness standard I am satisfied that the Master failed to perform his obligation to take reasonable steps to ensure that the vessel's holds were free from contamination.

66 The unavailability of the Master to give evidence was explained in a statement made by him dated 4 May 1996 which was admitted into evidence. I do not give any significant weight to this statement bearing in mind that it was made at a time litigation could be foreseen and that many of its assertions were of a self-serving nature. The evidence of Mr Clifford, which I accept, indicated that the Master admitted to him that he was concerned about the sufficiency of the survey carried out by CTE but that he did not raise this matter because the ship was "passed" and he feared that if he had stopped loading he would have been in trouble. While the Master's reactions to the commercial pressures are perhaps understandable the fact that he was in a dilemma does not mean that his failure to disclose his misgivings or take any practical measures to follow them up did not amount to want of due diligence.

Whose agent was CTE?

67 This question arises from the submission for KMC that cl 20 of the COA did not apply because it was not established that CTE was either appointed, or paid, by Hi-Fert.

68 The evidence satisfies me that although the CTE inspection report was addressed to Cargill, CTE was ultimately paid, albeit recently, by Hi-Fert which accepted financial responsibility for the inspector's work. I am satisfied that the report was commissioned on behalf of Hi-Fert and that Hi-Fert was effectively the entity which appointed the surveyor. The material indicates that in 1996 Hi-Fert was sent an account by Cargill in respect of the inspection and that it paid this account in 1999. Further, in my view Hi-Fert ratified the appointment and confirmed by payment that it was the relevant principal in relation to this report.

Conclusion of KMC liability

69 I consider that KMC was liable to Hi-Fert in respect of its failure to properly clean the holds of the ship.

Case against WBC - Representations

70 In substance Hi-Fert contends that WBC made misrepresentations to it on which it relied, and that it thereby suffered loss and damage. The claim alleges in the alternative that the representations constitute false and misleading conduct on the part of WBC under s 52 of the TPA or that they amount to negligent misrepresentations in breach of a duty of care owed by WBC to Hi-Fert. By way of further alternative it is alleged that the statements are collateral warranties which have been breached.

71 The uncontradicted evidence in relation to the statements relied upon by Hi-Fert is set out in par 17 of the affidavit of Mr Cole. Mr Cole is the Chartering Controller for Hi-Fert Mr McNeil, referred to in the affidavit, is the Operations Manager for WBC. The evidence of that conversation is as follows:

> *"17. In telephone conversations with Don McNeil prior to 28 September 1995, I [Cole] said to him words to the effect -*
>
> *`I am concerned about the problem of ship standards, with cargo handling equipment*

and with some vessel's watertightness and cleanliness of hatches and holds. You have had some disastrous situations recently and we want to make sure that this doesn't happen with our ships.'

I also said words to the effect -

` I am also worried about the DAP cargoes which are highly susceptible to moisture. Cable problems with cranes have also been of concern because they have been delaying ships.'

Don McNeil said to me words to the effect -

`We have a list of requirements for Masters already in place, but we feel we can no longer rely on Masters to put our policy into place, so we are arranging independent inspections to check watertightness of hatch lids, cargo handling equipment and vessel cleanliness.

We have an existing regime for pre-load inspections for timber exported from the US west coast to Australia, by independent surveyors. We will send our man on the US west coast to talk to P & L Marine Surveyors in Tampa, to put the same pre-load inspection regime into place in Tampa for phosphate cargoes, as already exists on the US west coast for timber cargoes.'"

72 Mr Cole then refers to facsimiles received from Mr McNeil. These are annexed to his affidavit. The first of these is dated 28 September 1995 and is on the letterhead of WBC addressed to Mr Cole. It reads:

"Fertilizer Vessels

As per our recent telcons we have been concerned that the standard of vessels' cargo handling equipment and, on some occasions, watertightness and cleanliness of hatches has not been to the level which we all expect. WBC has therefore implemented a stringent inspection procedure for all vessels at the loadport prior to proceeding towards Australia. To give you an indication of the items on which we are concentrating we attach our `Guidelines for Inspectors' and the letter we send to Masters advising them of the Inspection.

We anticipate that these inspections may result in a small delay to the commencement of loading after berthing. We therefore request that you advise your suppliers of these inspections and ask for their support and tolerance during any delay. We are sure that they will understand that the procedures are in the interests of all parties concerned."

73 On the same day a standard form Draft Letter to Masters of Vessels was furnished by WBC. It reads:

"Dear Captain,

On arrival at (Loading port) we have arranged for your vessel to be inspected by (Nominated surveying company). This inspection is in addition to any cleanliness surveys which may be performed on behalf of voyage charterer/shipper and is being performed to assist in identifying any problems which may exist that could adversely affect the lading/carriage/discharge of your cargo. We refer to our `INSTRUCTIONS TO MASTERS' which has been faxed to you and please note that the inspection will cover all items contained therein.

You are requested to give maximum co-operation to the inspectors so that the inspection can be completed in minimum time to avoid delay to cargo work. The inspector, in conjunction with the agent, will advise whether they require the inspection to commence with hatches open for cleanliness inspection or secured ready for hose testing.

With the exception of hold cleanliness your vessel will not "fail" the inspection in that we will have no intention to place the vessel off-hire until any faults are rectified. The intention is to identify items that must be rectified so that cargo claims can may be avoided or cargo gear faults (which may lead to off-hire situations at the discharge ports) may be rectified before they become problems. Many problems will of course be rectified very quickly and some, such as watertightness of hatches, must be rectified prior to sailing. Others may be rectified on passage. The inspectors will agree with you a schedule of work to be performed.

Please acknowledge receipt."

74 In addition WBC sent a document entitled "Guidelines for Inspectors" which has a sub-heading "Fertilizer Loadings for Australia" and that reads:

"Fertilizer Loadings for Australia

As you have been advised, this company require [sic] that you vet our vessels with regard to hold cleanliness, watertightness of holds and condition of cargo gear (cranes and grabs) to ensure that the company's guidelines and instructions are being followed.

On your visit to vessels loading for Australia, it is essential that you arrive prior to the vessel and make arrangements to hose test hatch lids and hold access where possible.

All of our contracts for fertilisers to Australia require that the hold cleanliness be passed by an independent surveyor appointed by the Charterer....

...

It is our concern that everything possible is done to ensure that the vessel is in a fit condition to load and discharge our charterers' cargo with no delay because of ship's gear or equipment and no avoidable shortfalls on the ship's side of any nature.

Upon completion of your checks, a report is to be submitted to this office enumerating tests carried out and confirming that gear meets Australian requirements with regard to markings and that equipment is well looked after."

75 The representations which are alleged to arise from the statements in par 72 are pleaded as follows:

"15. In September 1995 the Second Defendant, by its servant or agent Mr Don McNeil, made certain representations to the First Plaintiff by its servant or agent Mr Ian Cole and made certain written representations to the First Plaintiff.

Particulars

(a) That the Second Defendant has prepared a detailed list of instructions to Masters to ensure watertightness and cleanliness of hatches and holds and will communicate these to masters prior to

loading.

(b) That the Second Defendant has in place a system of independent inspections of holds and ships prior to loading on ships in U.S. ports to ensure a high standard of cleanliness.

(c) That the system referred to in (b) will operate as a check on the vessel so as to accord with Australian standards.

(d) That the Second Defendant has a rigid regime of inspecting timber cargoes on its U.S. west coast vessels and will ensure that the inspector appointed by it in Tampa adopts the same high standard of inspecting of holds for phosphate cargoes.

(e) That a stringent hold inspection procedure has been implemented for all vessels at U.S. load ports prior to proceeding to Australia.

(f) That everything has been or will be done to ensure that the vessel is in a fit condition prior to loading and discharging charterer's cargo and that there are no shortfalls on the ship's side of any nature.

(g) That the Second Defendant has and would continue to have the intention to act and carry out the matters referred to in (a) to (f) during the business relationship between the paries."

76 It is then pleaded that each of these representations was relied on and was false and misleading.

77 Hi-Fert submits that when regard is had to the **context** in which the communications were made it is apparent that it was seeking additional assurances as to hold cleanliness beyond the cleanliness surveys that it had previously been receiving from Cargill. The "context" relied on by Hi-Fert to support this conclusion includes AQIS circulars of 22 and 23 August 1995 referring to the fact that fertilizer shipments would be carefully inspected for evidence of grain contamination. These circulars were sent to WBC on 24 August. In addition there are the facsimiles sent on 28 September 1995.

78 Hi-Fert says that contrary to the representations of Mr McNeil, WBC did not establish or maintain a proper system of inspection of hold cleanliness. It says that no proper instructions were given to surveyors and that no proper measures were taken by WBC to ensure that the ships used were fit for loading.

79 Alternatively, it submits that the representations were collateral warranties given in consideration for Hi-Fert exercising its "additional options" for carriage in respect of the ship. The statements, so it is said, were calculated to induce Hi-Fert to continue to deal with WBC.

80 WBC contends that there were no representations as to any program for ensuring the hold cleanliness inspections. It also contends that there was no **reliance** by Hi-Fert on them (if any relevant representations were made).

81 As to WBC's submission, the evidence indicates that there were a number of different types of inspection surveys such as "On Hire Surveys", "Australian Condition Surveys", "Hold Cleanliness Surveys" and "Draft Surveys". Although cleanliness is an aspect of some of these surveys, the standard of cleanliness required varies according to the purpose and requirements of each vessel. The sections and parts of the vessels certified under such surveys may vary.

82 There was considerable discussion in evidence and submissions as to the meaning of the word "hatch" as used in relation to inspections and surveys. WBC referred to the evidence as to the different ways in which the expression "hatch" is used in maritime undertakings and various other documents. In some contexts it is used inter-changeably with the expression "hold" and at other times

it is used in the sense that it means a "hatch cover" over the hold or an open area at the top of a ship's hold.

83 WBC contends that the statements referred to by Mr Cole in his evidence related to the cleanliness of "hatches" in the sense of "hatch covers" over the holds and not to the holds themselves. The distinction in the meaning which sought to be drawn assumes importance because Mr Cole refers to both watertightness and cleanliness of "hatches" and "holds" and to the problems with equipment. He says that the "context" in which the assurance was given, was that WBC was arranging inspections to check "watertightness of hatch lids, hard cargo handling equipment" and "vessel cleanliness".

84 Given the circumstances in which the expressions are used and the uncontradicted evidence of the statements given by Mr Cole I am satisfied that the statements by Mr McNeil could reasonably be and were in fact, understood by Mr Cole as referring to "holds". The concern expressed by Mr Cole, in response to which Mr McNeil made the statements, concerned cleanliness of "hatches and holds" and to his perception of a problem with the standards of inspection being achieved. He also referred to "disastrous problems" and said that he wanted to ensure that it did not happen with "our ships". There is no reference in the conversation to Australian grain standards but the statements made did convey, in my view, a need for a strict standard of hold cleanliness as well as a need for water tightness of hold covers or hatches.

85 It is also said for WBC that the reference to establishing "**the same** pre-load inspection regime in place in Tampa for phosphate cargoes, as already exists on the US west coast for timber cargoes", fixes a lower standard, ie that suitable for timber cargo. However, this approach in my view is unrealistic and requires an excessively technical and literal reading of the statement. The facsimiles sent by Mr McNeil on 28 and 29 September 1999 reinforce my view that WBC had represented that a stringent inspection procedure for fertilizer vessels was or would be in place for future shipments to ensure cleanliness of holds for the loading of phosphate cargoes.

86 I am therefore satisfied that the relevant representations were made.

Continued operation of representation

87 Nevertheless, for reasons given below, I am not satisfied that the representation continued to operate as at March 1996. By that time Mr Cole and Hi-Fert had become aware of the true facts with respect to the type of inspection surveys being furnished by WBC: see *Brown v Jam Factory Pty Ltd* (1981) 35 ALR 79. That decision was followed by Woodward J in *Collier v Electrum Acceptance Pty Ltd* (1986) 66 ALR 613 at 652 where his Honour said:

> *"If it can be established that any of the applicants had actual or imputed knowledge of the accident and the consequences before entering into the partnership ... it follows that the respondent's failure to inform those applicants cannot be actionable under s 52."*

88 I am satisfied on the evidence discussed below under the heading of "Reliance" that Mr Cole must be taken to have been aware that from at least December 1995 through to May 1996 that WBC had been arranging an Australian Condition Survey and that this was not a Hold Cleanliness Survey as represented. I am also satisfied that, as understood by Mr Cole, the Australian Conditions Survey was designed to check compliance with safety requirements under Australian Marine Order 32 rather than hold cleanliness.

89 I am also not satisfied that the parties intended to enter into any contractual or collateral warranties, or that this was the effect of the conduct and discussions relating to hold cleanliness. The statement by Mr McNeil regarding arranging of independent inspections and talks with P & L Marine in order to put a pre-load inspection regime in place, is a statement or representation, and there is no basis for a conclusion that it was ever intended to amount to a contract or collateral warranty. It is simply a response to a concern and worry about phosphate cargoes on the part of Mr Cole. The

attempt to spell out a contractual arrangement from this conversation read in context is in my view artificial and lacks substance. This view is supported by the "parties" ensuing conduct.

Reliance

90 WBC submits that even if any representations were made there was no reliance upon them by Hi-Fert. In support of this submission Counsel for WBC refers to the failure by Mr Cole or Mr Garbellini, also of Hi-Fert, to draw to the attention of either Cargill, Hi-Fert, or its Tampa agents, over the six month period following September 1995, WBC's failure to provide any surveys or inspections of the type which Hi-Fert says WBC represented it would supply. A complaint could easily have been made by Hi-Fert as to the failure to comply if in fact it had relied on the misrepresentations. Such a complaint might reasonably have been anticipated if there was any such reliance.

91 Hi-Fert's principal witness on reliance was Mr Cole. He acknowledged in cross-examination that his initial evidence on reliance was incorrect and he withdrew important passages in his evidence which concerned reliance. In cross-examination the following exchange took place:

> *"Q It must follow mustn't it that you weren't relying on WBC through P L Marine to conduct a specific grain cleanliness survey at the port of loading?*
>
> *A No, there was no follow up.*
>
> *Q When you said `No, there was no follow up', can I just repeat the question. It must follow mustn't it that you weren't relying on WBC to arrange what you have described in your statement as a specific hold cleanliness survey in Tampa?*
>
> *A No Yes, correct.*
>
> *Q ... Do you mean, yes, you agree with me that you weren't relying on WBC to arrange a specific hold cleanliness survey in Tampa?*
>
> *A I find it difficult to give a specific yes and no. No.*
>
> *...*
>
> *Q And you didn't do that really in all honesty because **you weren't relying on WBC to organise a specific hold cleanliness survey, that's the true position, isn't it?***
>
> *A **Yes***
>
> *...*
>
> *Q And similarly, Mr Cole, when you received the telexes and faxes for the loading of the Kiukiang Career in March of 1996, I suggest to you that again, P.L. Marine was recorded as only conducting an Australian Condition Survey?*
>
> *A Yes.*
>
> *Q And again, you made no contact with Mr McNeil or WBC complaining that P.L. Marine was only conducting an Australian Condition Survey, did you?*
>
> *A No" (Emphasis added)*

92 Shortly thereafter while Mr Cole was being cross-examined about the correctness of his affidavit the following statements were made:

> *"Q Is any part of the sentence incorrect or [is] the whole of it incorrect, what's the position?*
>
> *A Your Honour, I had relied on the additional assurance but obviously I had not followed up - therefore I am saying **I didn't rely on it**." (Emphasis added)*

I should add that the answers given by Mr Cole in cross-examination were punctuated with long pauses and were given after considerable hesitation.

93 In re-examination, after a weekend adjournment, Mr Cole returned to the witness box and sought to explain away the above answers by specifying why he said the statements which he withdrew were incorrect. However, I do not accept these explanations. Furthermore, I do not accept that they diminish the force of the clear concessions made in cross-examination. I agree that the attempts to explain away the admissions of non-reliance were self-serving and made after reflection on the position of Mr Cole and Hi-Fert. Indeed, the attempt to explain away the answers reinforced the adverse view I formed as to the overall unreliability of Mr Cole's evidence. I agree with the submissions of Counsel for WBC that the evidence of Mr Cole was unsatisfactory in a number of important respects. These included, but are by no means limited to, his evidence as to there having been two incidents of karnal bunt in the last quarter of 1995 when he later conceded that he first heard of karnal bunt in April 1996. In relation to another incident he gave an explanation which he later conceded was *"just clutching at straws"*. There was also his unsatisfactory evidence as to the late discovery of documents. I find that the evidence of Mr Cole generally, and particularly with respect to reliance, should not be accepted. He demonstrated a preparedness to tailor his evidence to the exigencies of the cross-examination and the advancement of Hi-Fert's position, and he conceded several important matters in his original statement were false.

94 Two other independent factors lead me to the conclusion that there was no reliance by Hi-Fert. First, there were no complaints about the nature of the surveys carried out by P & L Marine. Second, Hi-Fert, through its agents, indirectly retained and bore the cost of the CTE survey which would not have been appropriate if reliance was placed on the expectation of a stringent P & L survey to serve the same purpose.

95 I do not accept that any reliance by Hi-Fert was established by the evidence of Mr Garbellini, the Supply Manager at Hi-Fert. He only joined the company in April 1995 and had no experience in relation to chartering vessels. He was involved in the areas of purchase and supply and not managing Hi-Fert's sea transport. He agreed that Mr Cole was the Hi-Fert officer responsible for dealing with WBC and port agents and that he left such matters to Mr Cole because he had more experience. Accordingly, Hi-Fert's position on reliance is to be measured by the conduct and discussions of Mr Cole. As I have already discussed Mr Cole did not rely on any the relevant representations from WBC.

96 This leads me to conclude that any misleading representation made by WBC ceased to have any operative effect by, at the latest, March 1995. By then WBC had become aware of the true position as regards the survey being provided by WBC and yet had failed to take any appropriate action. The misrepresentation case therefore fails on the ground of non-reliance on the above findings

Causation

97 It is not strictly necessary to decide this point, nevertheless, on the accepted principles set out in *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506, I am not satisfied that there was, as a matter of practical commonsense, any break in the chain of causation resulting from the alleged negligence of CTE in performing their inspection, or any other factor. See also *Mahony v J Krusesich*

(Demolitions) Pty Ltd (1985) 156 CLR 522 at 530. The possibility of the contamination not being detected on inspection in the present case was, in my view, a reasonably foreseeable result of the failure on the part of the ship to exercise due diligence.

Normal measure of damages

98 The authorities indicate that the normal measure of damages is the market value of the goods at the time and place at which they **should** have been delivered, less the amount it would have cost to get them to the place of delivery: see *McGregor on Damages* 16th ed. 1997 at [1161]; *Rodocanachi v Milburn* (1887) 18 QBD 67.

99 Hi-Fert contends that the market value of the goods at the place of delivery was $15.341 million, less the amount obtained on sale of the contaminated cargo, which was said by Mr Garbellini to be $6.814 million. This left a claimed net loss of $8.527 million.

100 Hi-Fert's evidence as to the market value of the goods was adduced from Mr Sloan. His assigned task was to establish the market value for each parcel of fertilizer product and to arrive at market value of the complete cargo of 40,196.81 metric tons. In carrying out this task he addressed a number of questions. First, whether there was a market in April though July 1996 in Australia for the cargo? Second, what was in tonnage terms, the size of the market in the period October 1995 through June 1996 season? Third, what was the market value of each parcel of product at each place and date of planned discharge and what was the total market value? Finally, whether the market value for the products was different at different ports of discharge? This calculation made on this basis produced a total market value of $15.341 million.

101 In order to check this figure Mr Sloan referred to two important "reality checks". The first is what he called a simplified valuation procedure, based to some extent on the primary method, which resulted in a simplified valuation figure of $16.329 million. He also used what he called a "CIF Valuation Model" which was said to be referable to data published by the Australian Customs Service. The results of the latter indicated that the figure of $15.341 million represented a 24% premium over the CIF Valuation which Mr Sloan said was a reasonable commercial mark-up.

102 I do not accept the evidence of Mr Sloan as being of any real assistance in this matter. In cross-examination he agreed that he had no experience of, and was not engaged in, the fertilizer market. He was not personally aware of market prices nor of the figures from which he derived the market values used by him which were based on a mixture of imputs from his firm and other bodies. He agreed that there were, relevantly two types of market, an on-farm market and an importers' market. He based his valuations on the on-farm market but gave no satisfactory reason for the selection between the two.

103 Further, there are a number of unsubstantiated assumptions in the model used. For example it assumes that Hi-Fert would obtain stock from other domestic suppliers whereas in fact ninety per cent of the replacement stock came from overseas. In regard to what other domestic suppliers would charge Hi-Fert, the model assumed that variations in market prices would be immediately passed on. It also assumes that transport costs of the fertilizer would remain constant. Finally the model does not distinguish between sales of bagged and bulk fertilizer, or make an allowance for any form of discount for volume purchases.

104 Nor do I consider that the "reality checks" are of any assistance. The first check is based on the same input data as used in Mr Sloan's Model, and amounts to an attempt to verify the methodology only. The second check based on the CIF Valuation assumed that a 24% mark up was reasonable. This assumption was made without knowledge of, or reference to, any first hand information of mark ups in the industry, or in respect of these particular products.

105 It is true that when asked in cross-examination by Counsel for Hi-Fert whether 24% was a

reasonable commercial margin the expert called on behalf of KMC, Ms Lindsey, agreed that it was. However, in giving this evidence I am satisfied that Ms Lindsey was speaking generally and did not profess any direct knowledge of the particular operations of Hi-Fert or even of the fertilizer industry generally . Mr Garbellini's evidence supported a conclusion that Hi-Fert's overall figure was in the order of 10.6% in the fertilizer industry, but there is no satisfactory evidence as to the margin of profit which would have been likely to have been achieved by each of the three products which comprised the cargo. The evidence indicated generally that the fertilizer industry is a low margin business. The evidence of Mr Sloan in my view does not provide any reasonably determinate or useful range as to the market value of the products which comprised the cargo at the time and place they should have been delivered

106 Nor does Mr Garbellini's evidence assist the Court in ascertaining the market value. He was the Supply Manger and was not involved in marketing or sales. The documents he refers to in his first report are from his own supply department, not from the sales and marketing section of the operation. Further, he does not define the market he was referring to with any detail but simply refers to the "retail" market. I do not accept it nor do I accept the assertions of Mr Garbellini on this point, or the evidence of Mr Sloan.

First alternative measure

107 An alternative approach where the market price is not established is to take the Hi-Fert cost price and add to it the cost of carriage and a reasonable profit: see *McGregor* (supra) at [1166] and *O'Hanlan v G W Ry* (1865) 6 B & S 484.

108 Mr Garbellini asserted that the products were high demand products and that a reasonable mark-up in the peak season was about 22%. This margin has not been established. It will be recalled that Mr Garbellini's evidence, was that the average profit for the 1996 year was 10.6%. He said this was not appropriate for a high demand product, however there appears to be no breakdown or analysis of comparable actual figures for any of the three products in question. As noted above I am satisfied that the evidence of Ms Lindsey that 24% was reasonable does not, in the context of her evidence support Mr Garbellini's assertion.

109 Nor does Mr Garbellini gain assistance from the comparison of Mr Sloan's Report given the valid criticism which I have found have been made out based in relation to it.

110 I therefore do not accept this alternative measure advanced by Hi-Fert.

Second alternative measure

111 The calculation of loss on this third basis looks to the actual loss suffered by Hi-Fert as a consequence of the non-delivery. On this basis Hi-Fert says that its loss is $9.549 million.

112 The evidence of KMC in relation to the claim made on the second alternative basis was given by Ms Lindsey who is a Director of Horwarth Services, who are management consultants. Mr Garbellini gave evidence on behalf of Hi-Fert on this aspect.

113 The starting point of this calculation is a figure of $6.115 million which is the loss on the sale of contaminated cargo. To this is added an amount of $113,000 redirection costs involved in the resale of the cargo. These amounts are not in dispute.

114 There are three areas in dispute between the parties as to the calculation of actual loss. These concern:

* Replacement stock costs

* Loss profit on unreplaced stock

* Administration costs

Replacement stock costs

115 After the cargo was quarantined Hi-Fert was able to buy in some replacement fertilizer leaving only 6,374 metric tons unreplaced. In the course of buying-in Hi-Fert was able to secure an advantageous price in relation to the fertilizer products shipped on a vessel, "The Lausanne", of approximately $359,000. Hi-Fert contends that this advantageous purchase should not be taken into account when estimating the loss suffered by it because when calculating the **normal** measure of damages the market value must be calculated independently of the particular circumstances of the plaintiffs and regardless of whether they were able to buy at an advantageous price. In the present case however, the **normal** measure gives no useful guidance as the third basis is concerned with Hi-Fert's **actual** losses. In my view these actual losses cannot properly be assessed unless the benefits obtained by Hi-Fert buying in at a lower price are taken into account. The principle enunciated by Viscount Haldane LC in *British Westinghouse v Underground Electric Railways* [1912] AC 673 is applicable. There his Lordship said at 689:

> *"... this second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. But when in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act."*

116 I prefer the approach taken by Ms Lindsey on this aspect and I note that in the cross-examination of Mr Garbellini the following exchange took place:

> *"Q ... Mr Garbellini, you don't suggest, do you that if you bought the new stock and made a saving that the defendants should not be entitled to the benefit of that saving, do you?*
>
> *A No, and in the way I approach this the first time that's the sort of thing I included. **I figured if there's a savings that it should naturally go back to the defendants.***
>
> ...
>
> *Q That would be the reasonable thing to do, wouldn't it, Mr Garbellini?*
>
> *A That's certainly the way I tackled it initially, yes **without advice**." (Emphasis added)*

117 Of course that concession does not determine the legal position but it does reflect in my view a reasonable commercial approach and understanding of the claims. Damages based on actual losses are compulsory. In my view, the advantage gained on the buy-in of replacement stock attributable to *The Lausanne* shipment must be taken into account.

118 I do not accept the submission of Hi-Fert on this matter.

Loss of profit on unreplaced stock

119 As to the 6,374 metric tons of unreplaced stock, Ms Lindsey did not accept the loss of profit claimed by Hi-Fert because she believed that this stock was likely to have been resold by Hi-Fert at the market price prevailing in May-June 1996. It is by no means clear on the evidence that if the cargo had been replaced it would have been sold immediately having regard to the stock pile position of Hi-

Fert over that and subsequent periods. However, my conclusion is that given that it was the peak season, and having regard to the relatively small quantities of each of the three types of fertilizer, the total 6374 metric tons of cargo could have been sold in the market then prevailing at a profit. I also consider that it was reasonably foreseeable that if the fertilizer was not supplied there might be some loss of profit on sale into the market.

120 As to the amount of lost profits which can be recovered I accept Ms Lindsey's evidence that the evidence indicates the appropriate margin to apply is 10.6% which is in accordance with the gross margin for Hi-Fert during the year to 30 June 1996. Although it was asserted by Mr Garbellini that the profit margin for the three products was greater than 10.6% no specific material was given to substantiate this assertion. I do not accept his statements on this point. If the margin of 10.6% is applied to the sales value of the replaced stock of $2,779,660 referred to in Ms Lindsey's report, the resultant figure is $294,642 which I accept as an appropriate award for loss of profits. I am not persuaded on the material before me that any higher profit figure has been made out or is appropriate.

121 I note that a similar figure was arrived at by Ms Lindsey on the last page of her report on the basis of three adjustments to the gross profit figure in respect of the unreplaced stock.

Administration costs

122 Hi-Fert also claims a loss of $1.724 milion arising from fixed administration costs which it says were rendered futile as a consequence of the breach of duty to properly clean the holds of the vessel. As a matter of first impression this figure seems disproportionate when regard is had to the fact that the claim is made in respect of only two months for a small number of staff members. It far exceeds the amount claimed by Mr Garbellini for administration costs in his first supplementary statement. Indeed, he agreed in cross-examination that it would be absurd to suggest that the cost of running a department of four persons in relation to the purchase of the cargo and in administering its import would be in the order of $2 million. Mr Garbellini also conceded in cross-examination that no additional staff were employed and that additional monies paid out were at best a few thousand dollars. He accepted the description of the amount of the additional costs as being "rats and mice" money whatever that means.

123 The quarantine and prevention of delivery of the cargo has not been shown to give rise any significant additional administrative cost and no attempt was made to give a specific costing in allocation to the cargo.

124 The figure of $1.724 million administrative costs in respect of this one cargo was costed on the basis that the work was done in a quiet period when the administration costs per ton of fertilizer imported or handled were at their highest level, said to be $92 and $83 per ton respectively in January and February. This figure is then discounted by reference to unit cost per ton in peak season of May and June when the replacement took place. Because of the high volume handled in those months these figures were said to be $23 and $24 per metric ton. On an arbitrary basis Mr Garbellini selects a figure of $51 per ton as appropriate and then multiplies this by the 33,823 metric tons which were in fact replaced. This whole exercise of administration costs per unit ton per month is in my view a meaningless exercise and I do not accept the resultant figure.

125 The figure of $1.724 million is more than three and a half times the additional costs referred to in the May 1996 Executive Summary for the fertilizer division of Hi-Fert. That document states:

> *" Operating costs for May were above budget* ***by $0.5M dollars reflecting the additional costs incurred as a result of the loss of the April phosphate vessel and increased plant storage lease costs and hire expenses****." (Emphasis added)*

126 The above quote asserts that the loss of the cargo taken **together with** unspecified increased storage lease costs and hire expenses only amounted to $500,000. The loss attributable to the cargo

loss alone could be expected to be substantially less than that. In the June 1996 Executive Summary for the fertilizer division there is **no reference to any additional operating costs** as a result of the contamination of the fertilizer cargo. No details were given in evidence as to the nature and extent of the administrative costs as to time, rates of pay, number of staff, work done, additional time spent or any other information to substantiate any such claim.

127 In support of its position that administration costs rendered futile are recoverable Hi-Fert referred to the decision of Carruthers J in *"The Iron Gippsland"* (1994) 34 NSWLR 29. In that case a cargo of diesel oil was contaminated by gas and it had to be **reprocessed** in the refinery to remove the contamination. Claims were made for the variable and fixed costs of using plant in the decontamination reprocessing. The variable costs were agreed to be recoverable but the fixed costs were in issue. Justice Carruthers considered that the oil reprocessed should bear its proportion of the fixed refinery costs. However that case is distinguishable from the present because during the reprocessing period of two months the refinery had no spare additional capacity to reprocess the oil and the decontamination reprocessing displaced the processing of a similar volume of crude oil. In the present case there was no suggestion of any need to divert resources or to displace the ordinary course of business in response to the loss of the cargo. The administration costs would have been incurred in any event and absorbed into the existing structure. Nor was it suggested that the personnel involved could have been employed on other profit-making work or in other ventures. Counsel could not direct me to any other authority in which administrative costs have been recovered in similar circumstances.

128 For the above reasons I am not satisfied that Hi-Fert has made out a case for recovery of administration costs thrown away either for the amount claimed or at all. This item should not be allowed.

Mitigation

129 Counsel for the defendants submits that Hi-Fert did not negotiate with or investigate potential purchasers of the damaged fertilizer with sufficient thoroughness or vigour before entering into a contract for sale to dispose of the cargo. There was a possibility of another purchaser in addition to the purchaser ultimately selected by Hi-Fert. Hi-Fert submitted that it was concerned about the credit worthiness of the second buyer. The defendant objected that the credit worthiness of this other buyer was not an issue because there would inevitably be a requirement of a confirmed letter of credit.

130 It is well settled that the courts will not readily substitute their evaluations as to what is commercially achievable in a negotiating context for the often delicately balanced evaluations of what is achievable by experienced commercial negotiators. In the present case there is no reason to doubt that Hi-Fert was attempting to achieve the best and most certain arrangements available to it rather than lose a likely purchaser: see *Dredge "WH Goomai" v Australian Oil Refining Pty Ltd* (1989) 94 FLR 298 at 307 per McHugh JA.

131 Given the exigencies forced on Hi-Fert by the quarantine process, the time of the year and the possibility of losing a prospective contract which was under negotiation, I am satisfied that there is no substance in the assertion that Hi-Fert failed to take proper steps to mitigate its loss

Conclusion

132 My conclusions in this matter are:

1. That there should be judgment for Hi-Fert against KMC and that Hi-Fert is entitled to recover damages from KMC for the loss sustained as a consequence of the contamination of the hods, caused by KMC's failure to ensure that the holds were properly cleaned and fit to receive and carry the fertilizer cargo.

2. KMC should pay Hi-Fert's costs in relation to the claim against it.

3. Hi-Fert's claim against WBC should be dismissed with costs.

4. Damages should be awarded to Hi-Fert against KMC in accordance with these reasons.

133 I direct Hi-Fert to bring in draft Short Minutes to give effect to these reasons and, in the event of disagreement, I will hear the parties at a suitable time to be arranged with my Associate. It will also, of course, be necessary to calculate the interest to judgment at the appropriate rates on the damages as finally calculated in accordance with these reasons.

I certify that the preceding one hundred and thirty-three (133) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Tamberlin.

Associate:

Dated: 18 May 2000

Counsel for the Applicant:	Mr R B S McFarlane QC and Mr P King
Solicitor for the Applicant:	Withnell Hetherington
Counsel for the First Respondent:	Mr S D Rares SC and Mr G Nell
Solicitor for the First Respondent:	James Neill
Counsel for the Second Respondent:	Dr A Bell
Solicitor for the Second Respondent:	Ebsworth and Ebsworth
Date of Hearing:	6-10, 13-17, and 20 March 2000
Date of Judgment:	18 May 2000