[JOSEPHIDES, J.]

PHOTOS PHOTIADES & CO.,

Plaintiffs,

v.

GENERAL INSURANCE CO. "HELVETIA" LTD.,

Defendants.

(*Admiralty Action No.* 5/62)

Admiralty—Marine Insurance—Carriage of Goods by Sea—English Carriage of Goods by Sea Act, 1924, *Schedule, Article III, rule* 6 (*Brussels Convention of* 1924 : "*The Hague Rules*").

Insurance—Marine Insuramce—"Prompt notice"—"Reasonable despatch"—Question of fact—Giving of notice—Delay—Condition precedent—Waiver—Subrogation—English Marine Insurance Act, 1906, *section* 78 (4)—*The "5 per cent" and "3 per cent clauses"*.

Contract—Conditions precedent—Waiver.

This admiralty action was instituted by the plaintiff Company claiming the sum of £2.430 from the defendant Insurance Company under a policy of Marine Insurance for damage to their cargoes of sugar and rice on four ships, *viz.* s.s. "TEJO", s.s. "MONTROSE", s.s. "MILVIA" and s.s. "BRAMANTE".

The plaintiffs are a company with a registered office in Nicosia trading, *inter alia*, in sugar and rice. The defendants are a limited company registered in Switzerland carrying on business as insurers.

S.s. "TEJO" arrived in Cyprus on the 26th January, 1957, and discharged the plaintiff's cargo of British refined granulated sugar at Limassol and Famagusta on the 26th January, 1957, and 27th January, 1957, respectively.

It is the plaintiff's case that after delivery of the cargo they discovered loss and/or damage to the said cargo and that after a survey was carried out by the defendants' surveyor and/or the agent of the defendants in Cyprus, damage and loss amounting to £1.593.050 mils was ascertained and agreed.

The second claim of the plaintiffs is in respect of a cargo of refined granulated sugar on s.s. "MONTROSE" which arrived in Cyprus on the 29th December, 1956. The original

claim was for £175.494 but in the course of the hearing the damages were, by consent of the parties, agreed at £172 should it be found that the defendants are liable to pay any damages.

The third claim is in respect of a cargo of "*originario brillato*" rice from Milano/Trieste on the s.s. "BRAMANTE" which arrived in Cyprus on the 17th February, 1957. The sum originally claimed as damages was £527.205 but in the course of the hearing the damages, if payable, were agreed at £423.

The fourth and final claim of the plaintiffs is in respect of a cargo of rice from Milano/Trieste on the s.s. "MILVIA" which arrived in Cyprus on the 5th April, 1957. The amount originally claimed as damages was £135.150 mils but in the course of the hearing damages, if payable were agreed at £116

Held, (*I*) *as regards the contractual aspect of the case :*

(1) In the circumstances of this case I am satisfied and find as a fact that the plaintiffs complied with their obligations under the contract within a reasonable time having regard to all the circumstances of the case.

(2) The provisions as to the notice to the carrier are not a condition precedent to the payment of the plaintiff's claim.

(3) In any event, even if they were, I hold that (i) prompt notice was duly given to the carriers, and (ii) that such conditions were waived by the defendants ; and

(4) Even if notice was not duly given, such failure did not prejudice legitimate rights against the carriers in any way.

(*II*) *as regards liability with regard to the s.s.* "*TEJO*" *consignment :*

I hold that with regard to the consignment on the s.s. "TEJO" the defendants are liable to pay to the plaintiffs the damage and/or loss sustained under the policy.

(*III*) *as regards the amount of damage in respect of s.s.* "*TEJO*" *:*

(1) The amount of damage, particulars of which appear in paragraph 6 of the petition and in the plaintiff's claim to the defendant company, dated the 20th November, 1957, is £1,593.050 mils. This amount has been proved by the evidence of the plaintiff and his surveyor Rossos, which I have accepted having rejected the evidence of Lartides, the defendants' surveyor.

(2) The above sum includes a figure of £15.750 mils as surveyor's fees paid to Rossos. I have allowed this figure in favour of the plaintiff as an expense necessary to prove his claim against the defendants.

(3) In the circumstances of this case, as the loss exceeds 5 per cent, the defendants are liable to pay the *whole* of the loss, without deducting the 5 per cent.

(4) The plaintiffs are, therefore, entitled to JUDGMENT in respect of the "*TEJO*" consignment in the sum of £1,593.050 *mils.*

(*IV*) *as regards s.s.* "*BRAMANTE*" *consignment :*

(1) In the circumstances of this case the plaintiffs are entitled to judgment with respect to the "BRAMANTE" consignment. The damages have been agreed at £423 and I, accordingly, give JUDGMENT for that amount in plaintiff's favour.

(*V*) *as regards s.s.* "*MONTROSE*" *consignment :*

(1) I find that the plaintiffs have failed to act with "reasonable despatch" or to give "prompt notice" of their claim to the defendants in all the circumstances of the case. And, I, accordingly, DISMISS the plaintiff's claim with regard to the s.s. "MONTROSE" consignment.

(*VI*) *as regards s.s.* "*MILVIA*" *consignment :*

(1) The survey report of this consignment shows that the goods (rice) were discharged on the 5th and 6th April, 1957 and delivered to the plaintiffs on the 12th and 17th April, 1957, who applied for a survey on the 7th April, 1957. Consequently, there was no delay in applying for a survey. The agreed loss is £116. The survey report is dated 20th April, 1957. This date is not challenged by the plaintiffs and I accept that the report was delivered to the plaintiffs on or about that date. The claim was submitted on the 11th February, 1958, *i.e.* 9 3/4 months after the issue of the survey report, and this delay has not been explained or justified by the plaintiffs. In all the circumstances of this case I find that the delay was unreasonable and I, accordingly, DISMISS the plaintiffs' claim in respect of this consignment.

(*VII*) *In the result there will be JUDGMENT for the plaintiffs in the sum of* £2,016.050 *mils and costs.*

Judgment for the plaintiffs in the sum of £2,016.050 *mils and costs.*

Cases referred to :

Marine Insurance Company v. *China, etc. Steamship Company* (1888), 11 App. Cas., 573 ; Dictum of Lord Esher M.R., at p. 576, cited with approval.

Admiralty Action.

Admiralty Action for £2,430, under a policy of Marine Insurance for damage caused to plaintiffs cargoes of sugar and rice.

Chr. Mitsides, for the plaintiffs.

Char. Ioannides, for the defendants.

Cur. adv. vult.

The facts sufficiently appear in the judgment delivered by :

JOSEPHIDES, J.: The Plaintiff Company claims the sum of £2,430 from the Defendant Insurance Company under a policy of Marine Insurance for damage to their cargoes of sugar and rice on four ships, *viz.* s.s. "TEJO", s.s. "MONTROSE", s.s. "MILVIA" and s.s. "BRAMANTE".

The plaintiffs are a company with a registered office in Nicosia trading, *inter alia*, in sugar and rice. The defendants are a limited company registered in Switzerland carrying on business as insurers.

By virtue of an open policy No. OC.9/56, dated the 25th January, 1956, and supplemented on the 1st February, 1956, the defendants insured eight shipments of sugar and rice for the plaintiffs for the sum of £40,000, each shipment not exceeding £6,500, against the following risks :

> "Unless otherwise agreed, the insurance is with average according to Institute Cargo Clauses (W.A.), including theft, pilferage and non-delivery, damage by fresh, sea and/or rain water, ship's sweat damage by other cargo or by oil, mud or hooks, all irrespective of percentage, subject to Institute Cargo Clauses (Extended Cover), etc."

Supplementary certificates of insurance were issued in respect of each of the aforesaid four shipments.

S.s. "TEJO" arrived in Cyprus on the 26th January, 1957, and discharged the plaintiffs' cargo of British refined granulated sugar in single jute bags at Limassol and Famagusta on the 26th January, 1957 and 27th January, 1957,

respectively. It is the plaintiffs' case that after delivery of the cargo they discovered loss and/or damage to the said cargo and that after a survey was carried out by the defendants' surveyor and/or the agent of the defendants in Cyprus, the following damage and loss were ascertained and agreed (para. 6 of Petition) :—

"*Particulars of Damages :*

	£ *mils*
(*a*) 779 kgs. of sugar short	44.200
(*b*) 65% on the value of 359 bags of 100 kilos and on 217 bags of 50 kilos depreciation of sugar found to be wet and stained	1,528.100
(*c*) Fees paid to the surveyors ..	20.750
Total	1,593.050"

With regard to the shortage of 779 kgs. of sugar under(*a*) above, there is no dispute.

The plaintiffs submitted their claim to the defendants through their agents in Cyprus but the latter rejected the claim.

The second claim of the plaintiffs is in respect of a cargo of refined granulated sugar on s.s. "MONTROSE" which arrived in Cyprus on the 29th December, 1956. The original claim was for £175.494 but in the course of the hearing the damages were, by consent of the parties, agreed at £172 should it be found that the defendants are liable to pay any damages.

The third claim is in respect of a cargo of "*originario brillato*" rice from Milano/Trieste on the s.s. "BRAMANTE" which arrived in Cyprus on the 17th February, 1957. The sum originally claimed as damages was £527.205 but in the course of the hearing the damages, if payable, were agreed at £423.

The fourth and final claim of the plaintiffs is in respect of a cargo of rice from Milano/Trieste on the s.s. "MILVIA" which arrived in Cyprus on the 5th April, 1957. The amount originally claimed as damages was £135.150 mils but in the course of the hearing damages, if payable, were agreed at £116.

The defendant underwriters in their reply (paragraph 6) put forward the following defence in respect of the s.s. "TEJO" which was repeated also in respect of the cargoes discharged by the other three ships :

"6 (*a*).—The s.s. 'TEJO' arrived in Cyprus on the 26.1.1957 and the plaintiffs failed to ask immediately for a survey by the Average Agent and also notify by a registered letter the shipowners or their representative of any damage and invite them to be present at the survey. The plaintiffs failed to safeguard the rights against the shipowners for the damage caused to or the shortage of sugar.

(*b*) The damage to and shortage of sugar is not certified both by an official statement issued by both the carriers and by the Average Agent's survey report.

(*c*) The plaintiffs failed to lodge in time a claim accompanied by a Survey certificate from the Average Agent.

(*d*) The plaintiffs delayed in applying for survey and submit the matter to the defendants in time, or sue within the time allowed by law or usage, whereby legitimate claims against the shipowners and/or third persons were lost.

The defendants were released from any liability and in any case the plaintiffs' claim against the defendants is also time-barred."

The defence that the plaintiffs' claims were statute barred was abandoned by the defendants in the final address of their counsel.

s.s. "TEJO"

I shall first deal with the cargo on the s.s. "TEJO" : An agreed bundle of 40 documents (*exhibit* 1, blues 1 to 40) was put in evidence and the senior partner of the plaintiff firm and an insurance surveyor gave evidence on behalf of the plaintiffs ; while the defendants' appointed surveyor was the only witness called by the defendants.

The provisions of the agreement between the parties are contained in the two policies (blue 1 and 2) and the certificate of insuracne No. C. 18/57, dated 23rd January, 1957 (blue 5). The material provisions are the following : The insurance is agreed to be subject to English law and usage as to liability for and settlement of any claim. In the event of damage for which the defendant company may be liable,

any claim must be accompanied by a certificate from the defendant company's Average Agent ; and without this Certificate no claim will be paid. Notice must be given to the company's representative previous to survey. The risks insured against are as stated earlier in this judgment.

The material provisions of the Institute Cargo Clauses (W.A.), annexed to the policy (blue 1) are the following :

"8. Warranted free from liability for loss of or damage to the goods whilst in the custody or care of any carrier or other bailee who may be liable for such loss or damage but only to the extent of such carrier's or bailee's liability.

Warranted free of any claim in respect of goods shipped under a Bill of Lading or contract of carriage stipulating that the carrier or other bailee shall have the benefit of any insurance on such goods, but this warranty shall apply only to claims for which the carrier or other bailee is liable under the Bill of Lading or contract of carriage.

Notwithstanding the warranties contained in this clause it is agreed that in the event of loss of or damage to the goods by a peril or perils insured against by this policy for which the carrier or bailee denies or fails to meet his liability the Underwriters shall advance to the assured as a loan without interest a sum equal to the amount they would have been liable to pay under this policy but for the above warranties the repayment thereof to be conditional upon and only to the extent of any recovery which the assured may receive from the carrier or bailee.

It is further agreed that the assured shall with all diligence bring and prosecute under the direction and control of the Underwriters such suit or other proceedings to enforce the liability of the carrier or bailee as the Underwriters shall require and the Underwriters agree to pay such proportion of the costs and expenses of any such suit or proceedings as attached to the amount advanced under the policy.

Note.—It is necessary for the assured to give prompt notice to Underwriters when they become aware of an event for which they are 'held covered' under this policy and the right to such cover is dependent on compliance with this obligation."

The material provisions of the Institute Cargo Clauses (Extended Cover), annexed to the policy (blue 1) are the following :

"6. It is a condition of this insurance that the Assured shall act with reasonable despatch in all circumstances within their control.

Note.—It is necessary for the Assured when they become aware of an event which is 'held covered' under this policy to give prompt notice to Underwriters and the right to such cover is dependent upon compliance with this obligation."

The Certificate of Insurance No. C. 18/57, dated the 23rd January, 1957 (blue 5) certifies that the defendants insured for the account of the plaintiffs the amount of £7,694 on the cargo of refined granulated sugar specified therein, *i.e.* 1225 single jute bags of 100 kilos, and 610 single jute bags of 50 kilos refined granulated sugar, for the transport or voyage from "*London to Nicosia (Warehouse to Warehouse)*" by s.s. "TEJO". The insurance is stated to be subject to the conditions of the open policy No. OC. 9/56 (blue 1) *in respect of the risks stated earlier.* Mr. Ph. J. Lartides, of Nicosia, is nominated as the Average Agent of the defendant company ; and the following "*Important Notice*" appears in small print at the foot of the aforesaid Certificate :

"(a) *Please carefully examine the outward appearance of all the packages and have their weight checked before taking delivery.* If you notice any irregulatity (traces of damage or of packages having been tampered with, or difference of weight) please immediately ask for survey by the Average Agent ; and request in a registered letter to the carriers (shipowner, railway company post office, etc., as the case may be) the presence of their representative when packages are opened and survey held.

(b) If on opening packages you find any *loss or damage that had passed unnoticed* when taking delivery, please discontinue unpacking and immediately apply to the Average Agent for survey. In such cases, reservations must be made, stating the nature of the loss or damage ; by registered letter to the carriers within three days after delivery.

(c) The Insurance Company is entitled to reject any claim for loss or damage if same is not certified both by an *official statement* issued by the carriers and by the Average Agent's survey report.

(d) The Insurance Company is only liable for pilferage (if covered by the insurance) if outward traces or packages having been tampered with or differences in weight are duly certified and if the necessary steps have been taken to secure the claim against the carriers.

(e) The Average Agent is not the Underwriter's representative; his appointment does not imply the establishment of the recognition by the Underwriter of the jurisdiction of the Average Agent's place of residence.

(*f*) The Average Agent's expenses and fees are to be paid by the party who applied for his intervention. The Underwriter will refund these expenses and fees if and as far as the loss or damage concerned is covered by the insurance."

It should be noted that the paragraphs in the above notice are not numbered or lettered but for ease of reference I have lettered them (*a*) to (*f*).

The "Warehouse to Warehouse" clause mentioned in the certificate (blue 5) is defined in clause 1 of the Institute Cargo Clauses (Extended Cover), attached to the policy (blue 1), as follows :

> "This insurance attaches from the time the goods leave the warehouse at the place named in the policy for the commencement of the transit and continues until the goods are delivered to the Consignees' or other final warehouse at the destination named in the policy."

It is also provided that deviation, delay and other eventualities stated therein are covered in the course of the transit of the goods.

In the course of the hearing the parties filed a statement of agreed facts. Those facts are that a cargo of sugar was shipped on s.s. "TEJO" consisting of 1225 bags of 100 kilos and 610 bags of 50 kilos from London to Cyprus where it arrived at Limassol on the 26th January, 1957, and Famagusta on the 27th January, 1957. 250 bags of 100 kilos were discharged at Limassol and the remaining cargo at Famagusta. The whole of this cargo was covered by the two policies and the certificate (blue 1, 2 and 5), the material parts of which have been summarised above. The 250 bags were discharged and cleared at Limassol from where they were transported to Nicosia on or about the 4th February, 1957. The Famagusta consignment was warehoused with the

Cyprus Bonded Warehouses Company Ltd., Famagusta, for clearance at subsequent dates, from where it arrived at Nicosia on or about the 15th February, 1957.

It is common ground that the plaintiffs applied to the defendants' average agent or surveyor Mr. Philippos Lartides for a survey of the goods on the 4th February, 1957. The average agents' surveyor's report, dated 30th May, 1957, has been put in evidence and is marked blue 10. It is the plaintiff's allegation that although this report is dated 30th May, 1957, it was not delivered to him by the defendant company's surveyor (Lartides) until the 20th November, 1957. The surveyor denied this and I shall deal with this point and make my finding at a later stage of my judgment.

Lartides' survey report (blue 10) shows that the cargo of sugar was cleared from the Limassol customs on the 29th Janurary, 1957, and from the Famagusta customs on different dates. It further states that the application for survey was made on the 4th February, 1957 and that the survey was held on the 4th February, 1957, on the Limassol consignment and the 15th February, 1957 on the Famagusta consignment at Nicosia in the consignee's (plaintiffs') store. The delay in issuing the report is stated to be " due to consignee's disagreement on the percentage recommended ".

In answer to question 15 of the report whether " due notice of loss or damage (has) been given to, and claim filed with, third parties responsible (S/S Co., rail, forwarding agents, and/or other carriers or bailees ", the surveyor states " Yes by letter ". The kind and cause of loss or damage is stated to be " tear of bags through the use of hooks. Damage by water through the presence of water in the ship's holds ". The damage is summarised under two headings, *viz.* (*a*) shortage and (*b*) damage by water.

The " shortage " is stated to be—

14 bags × 50 kgs.

52 bags × 100 kgs.

7 bags × 100 kgs (ex Limassol).

The total shortage (as weighed by the customs authorities) is given as 779 kilos, which is accepted by the plaintiffs and their surveyor (although in the report of the plaintiffs' surveyor there is a difference in the number of bags but not in the total number of kilos).

The " damage by water " is stated to be—

285 bags × 50 kgs.

109 bags × 100 kgs.

Opposite these figures it is stated by the defendants' surveyor that " these bags were wet by water. I have estimated the average percentage of the contents to amount to 65% and on this damaged quantity I recommend a depreciation of 15% (fifteen %) of Invoice value of sound sugar ". This is one of the main points of difference between the parties to which I shall revert later.

Finally, the defendants' surveyor states in his report—

" The bulk of this consignment has been warehoused with the CYPRUS BONDED WAREHOUSES CO., LTD., in Famagusta. On my instructions consignees had had all torn and damaged bags cleared and transferred to Nicosia for the purpose of this survey.

In view of the fact that the Master of the vessel has lodged a Protest, I believe that the damage has taken place while the cargo was in the custody of the Carriers.

Issued without prejudice to the rights of the Underwriters and subject to the terms and conditions of the Policy and/or Certificate of Insurance."

When Mr. Lartides made his survey on the 15th February, 1957, the senior partner of the plaintiff firm (to whom I shall hereafter refer as "the plaintiff") did not agree with the amount of damage and Mr. Andreas Rossos, Insurance Surveyor, agent of insurance companies and President of the Association of the Insurance Companies in Cyprus, was called in and he carried out a survey of the consignment. There is some dispute between the parties as to whether this was a joint survey with Lartides or not ; the plaintiff alleging that Lartides consented to such a survey while Lartides maintaining that he did not accept Rossos to carry out a joint survey with him saying that he would only accept the Lloyds' surveyor. The fact remains that Rossos was eventually called and, as Lartides put it in his evidence (p. 18J), plaintiff " called for another surveyor. He had a right to do it but whether the company accepts it or not it is another matter . " Lartides was present during the whole time that Rossos carried out the survey counting the damaged, wet and stained bags of sugar, etc. (see Lartides evidence at p. 20G to H).

I have been very favourably impressed with the way in which Rossos has given his evidence and on the whole I have formed the impression that he is more reliable than Lartides. On that basis, where the evidence of Rossos differs from that of Lartides, I have accepted the version of Rossos. Rossos stated that he was called on the 15th February, 1957, by the plaintiff to carry out a survey on the consignment of sugar brought to Cyprus by s.s. "TEJO". He further stated that Lartides attended the survey as the surveyor of the defendant company. After surveying the goods he prepared a report dated the 28th February, 1957, which is blue 8. His report gives particulars of the nature and extent of the damage. In that report he states—

> " It has been agreed by way of compromise between the consignees and the Insurance Company's surveyor that the following loss and/or damage has been sustained to the consignment. Summary of damage :—
>
> (*a*) *Shortage :*
>
> (1) 1 bag of 100 kgs. missing.
> (2) 14 bags of 50 kgs. found torn.
> (3) 59 bags of 100 kgs. found torn.
>
> } Out of these torn bags a total shortage of 779 kgs. (seven hundred and seventy nine kgs.) was verified after weighing.
>
> (*b*) *Damage by Water and/or oil :*
>
> 359 bags of 100 kgs.
> 217 bags of 50 kgs.
>
> } were found to be very wet and stained for which by way of compromise it has been allowed the 65% of the insured value as loss."

As to the shortage, although there is a difference in the number of bags, as already stated, both surveyors agree that the total shortage is 779 kgs.

Lartides strongly denied that he ever agreed by way of compromise that the loss should be allowed as 65% of the insured value. His version was that 65% of that consignment was wet, damaged by water, and that he recommended a depreciation of 15% on the Invoice value of the sugar, contending that the 65% wet sugar was not a total loss.

As against the version of Lartides the following " note " (blue 6), *initialled* both *by Lartides* and *Rossos* on the day of

the survey, *viz.* the 15th February, 1957, regarding the aforesaid damage, reads as follows :

"'TEJO' :

(1) One bag missing.

(2) 14×50 short of contents.
52×100 short of contents.

(3) 359×100 / 217×50 } 65% on insured value."

In considering this question of the alleged compromise as to the extent of the damage of the sugar I should make it clear that on the evidence it has not been proved that Lartides was the agent of the defendant company for the purpose of compromising or settling the claim, although I must say that even on his own evidence it appears that he was acting at times in more than one capacity. Nevertheless, on the strength of the Insurance Policies (blue 1 and 2) and the Certificate (blue 5), I am satisfied that he had no authority to negotiate any compromise or settlement. But, having said that, I must now proceed to make a finding as to whose estimate of the damage is the more reliable for the purposes of this case. The policy provides (blue 1 and 2) that, in the event of damage for which the defendant company may be liable, any claim must be accompanied by a certificate from the defendants' Average Agent ; and without this certificate no claim will be paid. The policy does not provide that the assured is bound by the survey or certificate of the defendant underwriters' Average Agent. Therefore, if this Court is satisfied, as it is, that the estimate of Rossos is more reliable, then it will act on that estimate and reject that of Lartides.

I go back now to the "note" (blue 6) initialled by both surveyors on the 15th February, 1957. According to the evidence of Rossos "there had been a compromise between the consignees" (plaintiffs) and the insurers (defendants) for an allowance of 65% of the insured value as a loss. "*Q.* This note it was prepared and initialled by both of you after the compromise? *A.* Yes." (page 7G–H). Irrespective of whether this was a compromise or not the fact remains that the allowance of 65% on the insured value as a loss was a fair estimate of the damage sustained by the consignment ; and, in fact, Rossos stated in his evidence that he stands by his survey report.

Lartides, on the other hand, while admitting having initialled the note (blue 6) gave two explanations for doing so. The following are the relevant extracts from his evidence (pages 20, 21 and 22) :

"*Q.* Why did you initial that document? *A.* I initialled the document because Mr. Photos (plaintiff) told me that he was sending Rossos' report to the company together with mine and he wanted me to initial it so that I would not come back and tell him that he has altered Rossos' figures.

Q. He did not want any report from you to send with Rossos' report? *A.* He wanted also my report to send together with Rossos.

Q. He knew that without your report he could not send a claim. That is part of the policy? *A.* Yes. (Pages 20K to 21B).

Court : Look at that note Blue 6, item 3, '359 bags of 100 kilos and 217 bags of 50 kilos' '65% on the insured value' and you initialled it. Did you agree to that? *A.* Mr. Photos put these figures on the paper and he told me that that was the finding of Rossos and he told me to initial it so that Rossos would not alter the figures. XXIN conts.

Q. Why did you not tell him 'why should I initial somebody else's report'? *A.* From the very beginning I did not accept Rossos' report.

Court : I am referring to Blue 6. If this was his finding why did you initial it? *A.* Because Photos asked me to initial the paper. It was immaterial for me.

Q. Are you a man who knows nothing about this business and if Photos asks you to sign a paper for £100,000 you will sign it? *A.* It is not the same. I initialled it because he wanted to make sure that Rossos should make the same report. My figures were my finding. I did not alter them and I do not want to alter them." (Page 22A to E).

I must confess that these are very extraordinary statements to be made by a man of Mr. Lartides' experience in insurance business and I am not prepared to accept his explanations.

Relying on the evidence of Rossos I find as a fact that the damage by water and/or oil was 65% of the insured

value of the sugar and not 15% on the invoice value of the 65% of the bags so damaged, as stated in Lartides' report.

The next question which I have to consider is the date of delivery of Lartides' report, dated the 30th May, 1957 (blue 10), to the plaintiff. According to Lartides he offered to deliver his report on the 31st May, 1957, but the plaintiff did not accept it and he (Lartides) tendered it again on several occasions subsequently, even during the plaintiff's absence to his brother who did not accept it. The reason why Lartides did not leave the report on the plaintiff's desk was, as he stated in his examination-in-chief (page 19K), because he wanted to receive his surveyor's fees amounting to £5. The reason why the plaintiff did not accept the report of Lartides was, according to the latter, that the plaintiff insisted that Lartides should change his report as to the estimate of damage payable, that is to say, raise it to 65% of the insured value, and that Lartides refused to do so.

Subsequent to the first refusal of the plaintiff to accept the report (as alleged by Lartides), a meeting was arranged in the office of the Managing Director of the defendants' agents in Cyprus, Mr. Joakim, who is a relative of Lartides, and they are both shareholders in several other associated companies. There, Rossos was also called in and an attempt was made to come to some agreement, but no agreement was reached. Lartides refused to produce his notes of the survey; Joakim did not express any opinion and reserved his views having promised to look into the matter after discussing it with Lartides. It is significant that, apart from Lartides, neither Joakim, Managing Director of the defendants' agents in Cyprus, nor any other witness was called by the defendants to support the version of Lartides and, generally, the defendants' version in this case. The fact remains that even Lartides himself admits that he does not remember the date when he delivered his report to the plaintiff. He simply stated that it was after the plaintiff's return from abroad (page 24A). The same statement is repeated in his letter to the plaintiff dated 23rd November, 1957 (blue 15, paragraph 2). From the plaintiff's evidence it appears that plaintiff was away for 52 days between the 2nd August and the 22nd September, 1957. But even this date (September, 1957) is not accepted by the plaintiff who stated categorically that it was not until the 20th of November, 1957, that Lartides delivered his report to him. When

it was put to Lartides in cross-examination why did he not deliver his report to the plaintiff, irrespective of whether the plaintiff accepted its contents or not, he replied "I had to be paid for it". And his evidence continues :

"*Q*. And you say the ridiculous suggestion that because he did not pay you your fees as surveyor, that is why you did not leave the report? *A*. Yes, I took it back.

Q. What was your fee? *A*. In this particular case it was £5.

Q. Did you ask him to pay you and he refused? *A*. "No." (Lartides' evidence, page 23E to F).

It is significant, however, that to a very strong letter of protest, regarding Lartides' delay in issuing his report, addressed by the plaintiff to Lartides on the 24th July, 1957 (blue 11), the latter did not give a written reply but he says that he went and spoke with the plaintiff. This is how the plaintiff's letter (blue 11) begins :

"Your long, long delay in issuing the relative survey report for the above consignment despite of our repeated reminders directly to you and through Mr. Joakim, Managing Director of the Lion's Products Co. Ltd., has started annoying us.

Your attitude in this matter has been very peculiar and as we can wait no longer without our interests being affected in this case we have to inform you that if you fail to issue the relative survey report within four days we shall have no alternative but to refer the matter to the Insurance Company concerned."

And the plaintiff then puts forward his version as to the survey and the agreed damage to the goods. When this letter was put to Lartides in cross-examination this is what he had to say :

"*Q*. Now, Mr. Lartides, on the 24th July he writes to you a very strong letter ? *A*. Yes.

Q. And you did not reply ? *A*. Because I went personally there. Until the end I was going several times.

Q. Why did you not reply and say 'here is the reply' take a witness ? *A*. I did not know we would come to this point. Photos was a personal friend of mine and we cooperated before.

Q. And you say to the Court this man was losing without your report £1,593? *A.* I did not say so.

Q. But if he did not have your report to send to your company he would lose £1,593 and you were afraid about your own fee? *A.* That is my business.

Q. Why did you not ask him to pay for it? *A.* If he did not accept the report why should I get money.

Q. Did you ask him and he refused? *A.* It was not a question of asking him.

Q. In his claim to the company which he sent I think on the 20th November, he says £5 fees of surveyors did he pay you? *A.* Yes, he paid me £5 survey fees.

Q. When did he pay you? *A.* When he accepted the report. I do not remember the date when he took the report from me and paid me my fee. It was after his return from abroad. (23F to 24A).

According to the evidence of the plaintiff, Lartides sent to him his survey report, dated 30th May, 1957 (blue 10) on the 20th November, 1957, and on the same day plaintiff sent to him telegram (blue 12) which reads as follows:

"Your survey reports 57/3/12 and 57/5/37 dated 16th March and 30th May respectively just received but contents both unacceptable and rejected letters follow."

It should be noted that survey report 57/3/12 (dated 16th March, 1957) referred to in the above telegram refers to s.s. "BRAMANTE"; and survey report No. 57/5/37 (dated 30th May, 1957) refers to s.s. "TEJO".

Following that telegram the plaintiff on the same day (20th November, 1957), addressed a letter to Lartides (blue 13) protesting against Lartides's report and repeating his (plaintiff's) version of the agreed damage of 65% on the insured value of the damaged goods.

I should, I think, interpose here an observation with regard to the survey report on the s.s. "BRAMANTE". Although in his telegram to Lartides, dated 20th November, 1957 (blue 12), the plaintiff referred to the "BRAMANTE" survey report and he ended up his telegram by saying "letters follow" only his letter with regard to the "TEJO" report was produced; but, it seems that he also sent to Lartides a letter of protest with regard to the "BRA-

MANTE" report because Lartides in his letter dated 23rd November, 1957 (blue 15) acknowledges the receipt of the plaintiff's telegram (blue 12) and quotes it verbatim and then goes on to say "and have today received your *letters* of the 20th instant". The rest of Lartides's letter refers to his version with regard to the survey of the "TEJO" consignment. The plaintiff replied to Lartides's letter of the 23rd November, 1957 (blue 15) by his letter dated 5th December, 1957 (blue 16), reiterating his version in still stronger terms.

On the evidence before me and weighing the two opposing versions, having watched the demeanour of the witnesses in the witness box, I have no hesitation in finding as a fact that Lartides delivered his survey report to the plaintiff on the 20th November, 1957. On the same day the plaintiff submitted his claim to the defendant company with regard to the "TEJO" consignment (blue 14) and his claim with regard to the "BRAMANTE" consignment (blue 28). I shall revert to the "BRAMANTE" consignment later.

It seems that the defendant company did not reply to the plaintiff's claim dated the 20th November, 1957, until some 5 months later and this appears from the plaintiff's letter dated the 18th April, 1958 (blue 17), in which he refers to a conversation he had on the same day with the defendants' agents' Managing Director, Joakim, during which it is stated that Joakim pointed out to the plaintiff that the defendants rejected the plaintiff's claim, but no reasons appear in that letter for such rejection. There is no oral or documentary evidence before the Court of what happened between the 18th April, 1958, when blue 17 was written by the plaintiff, and the middle of August, 1958, when the plaintiff again reverted to his claims regarding the "TEJO" consignment, as well as the consignments on the other three ships, *i.e.* s.s. "MONTROSE", s.s. "BRAMANTE" and s.s. "MILVIA', by his letter dated the 16th August, 1958 (blue 33); but before referring further to that letter I must, I think, refer now to the facts concerning the consignments on the three other ships because the correspondence after May, 1958, covers generally all four consignments.

s.s. "BRAMANTE":

The facts with regard to "BRAMANTE" as appearing in the survey report of Lartides, dated 16th March, 1957 (blue 26), are as follows: the ship arrived in Limassol from Trieste on the 17th February, 1957, and discharged the cargo of rice on the same day. The consignment was deli-

vered to the plaintiff on the 6th and 7th March, 1957, having been cleared from the customs on the 6th March. The plaintiff applied to the surveyor (Lartides) for a survey on the 18th February, 1957, and the survey was held by him on the 18th February, 1957 at Limassol and the 8th March, 1957, in Nicosia. The plaintiff notified the carriers by letter "in the usual way" (plaintiff's evidence, p. 17 I, and survey report (blue 26) reply to question 15 (*a*)).

Lartides's survey report on the "BRAMANTE" No. 57/3/12 is dated 16th March, 1957 (blue 26), but, according to the plaintiff's telegram to Lartides dated the 20th November, 1957 (blue 12), that report was not received until the 20th November, 1957, although in his letter dated the 23rd November, 1957 (blue 15) Lartides alleges that the survey reports on "TEJO" and "BRAMANTE" were delivered to the plaintiff "the day following your return to Cyprus after your four months trip abroad". As stated earlier in this judgment, I find as a fact that both reports were delivered by Lartides to plaintiff on the 20th November, 1957, and not earlier.

As the amount of damages payable has been agreed at £423 in the case of "BRAMANTE" it is unnecessary for me to deal with the contents of the survey report. The plaintiff submitted his claim to the defendant insurance company on the 20th November, 1957 (blue 28). There is no other oral or documentary evidence with regard to the consignment on the "BRAMANTE" except the letter dated the 26th November, 1958 (blue 34) which covers all four claims and to which I shall revert later.

s.s "MONTROSE".

With regard to the consignment of sugar transported from London on the s.s. "MONTROSE", both parties state in their pleadings that the ship arrived on the 27th December, 1956, but the survey report (blue 22A) shows that it arrived on the 29th December, 1956. However, nothing really turns on the difference of these two days. As the survey report shows, the cargo was discharged at Famagusta on the 30th December, 1956, and the goods were cleared on different dates. Two applications were made to the surveyor for a survey report; one of the 21st January, 1957, and the other on the 8th May, 1957. The survey was held by Lartides on the 21st January, 1957, 8th May, 1957, and the 19th and 20th June, 1957. Lartides issued two survey reports: one dated the 2nd August, 1957 (blue 22A) in respect of 283 bags of sugar, and the other dated the 2nd December, 1957 (blue 22B) in respect of 946 bags. The reason

for the delay in issuing these reports is stated by Lartides in his first report dated 2nd August, 1957 (blue 22A) as follows : " The delivery of this certificate has been delayed to this date pending submission of the necessary documents"; and in his second report, dated 2nd December, 1957 (blue 22B), the reason for the delay is given as the " lack of the relative documents ". No oral evidence was given by either party on this point, and I find as a fact that the plaintiff could not submit his claim to the defendant company in respect of the s.s. " MONTROSE " before the 2nd December, 1957. In fact, he submitted his claim to the defendant company on the 17th April, 1958 (blue 23). The amount of damage has been agreed at £172 and it is, therefore, unnecessary for me to consider further the survey reports.

The Cyprus agents of the defendant company replied to the plaintiff on the 26th May, 1958 (blue 24) rejecting his claim in the following terms :

> " With reference to your above claim we quote hereunder text from a letter addressed to us by our Head Office :—
>
> > ' We refer to our previous correspondence regarding this matter. As your letter of the 21st April, contains no reply whatever about the question raised, and especially the question regarding the extraordinary delay in applying for survey and in submitting the matter to us, we regret that this claim cannot be entertained, and we have to reject it definitely. As a consequence of this extraordinary delay, the claim against the shipowners responsible for the loss has become time-barred '.
>
> We are accordingly returning to you herewith the complete file of documents."

s.s. "MILVIA" :

The consignment of rice from Milano/Trieste arrived at Famagusta on the s.s. "MILVIA " on the 5th April, 1957, according to the survey report (blue 30). The cargo was discharged on the 5th and 6th April. Delivery to the plaintiff was on the 12th and 17th April, 1957. The application for survey was made by the plaintiff on the 7th April, 1957, and the survey was held on the 13th and 17th April, 1957. The survey report is dated 20th April, 1957. There is no evidence at all on behalf of either party as to what happened between that date and the 11th February, 1958, when the plaintiff submitted his claim to the defendant company (blue 31). The damages have been agreed at

£116. On the 30th May, 1958, the Cyprus agents of the defendant company replied to the plaintiffs as follows (blue 32) :—

> "We have now received authority from our Head Office that we can make an *ex-gratia* payment of £50, subject to your accepting our offer up to the 15th June, 1958. Unfortunately our Head Office is not prepared to arrange any other settlement for reasons previously explained to you. Recourse against the shipowners has not been dealt with while the claim has become time-barred on the 5th April."

I have now dealt with the oral and documentary evidence in respect of all four consignments separately and I shall now deal with two material letters exchanged between the parties concerning all four consignments.

GENERAL

Apparently nothing happened until the 16th August, 1958, when the plaintiff wrote a letter (blue 33) to the defendant company referring to a meeting which he had with the Cyprus agent (Joakim) of the defendant company on that day in connection with the outstanding claims in respect of the four consignments. In that letter he protested for the defendants' refusal to pay his claims which was alleged to be based on the plaintiff's delay in submitting his claims and he alleged that this very delay was the direct result of the failure of the defendants' surveyor to issue the survey reports in time despite his (plaintiff's) repeated protests and reminders in this connection ; and the plaintiff gave final warning that if his claims were not satisfied he would institute legal proceedings against the defendants. The defendants replied to that letter some three months later by their Cyprus agents' letter of the 26th November, 1958 (blue 34). The letter begins as follows :—

> "This is to confirm the verbal conversation between your Mr. Photiades and our Mr. Joakim in connection with your four outstanding claims.
>
> As explained to you, in view of the unwarranted delays and the loss of legitimate claims against shipowners our principals find themselves fully justified in turning down all your claims altogether. Therefore, on the merits of the facts our principals have refused to make any settlement whatever in respect of your four claims."

The defendants went on to repeat an offer (which, apparently, they had made earlier) of a round figure of £1,000 in

final settlement and full discharge of all four claims. After some correspondence no settlement materialised and the present action was instituted.

This disposes of all the facts concerning the arrival, survey and submission of claims in respect of the four consignments except the question of the notice stated to have been given to the carriers (the shipping company) by the plaintiff in respect of the s.s. "TEJO".

It is the plaintiff's case (see page 13H of his evidence) that he sent a letter to the Cyprus Shipping Co., in Famagusta, representing the s.s. "TEJO" in Cyprus, on the 4th February, 1957, informing them that of the goods deliverable to plaintiffs ex s.s. "TEJO" a great number of bags were found to be damaged, notifying the carriers that the plaintiffs held them responsible as such for this damage/loss. The plaintiffs further informed the carriers that the goods were then lying at the Cyprus Bonded Warehouses at Famagusta where they would be surveyed by the defendants' surveyor (but the date of survey was left blank); and they invited the Cyprus agents of the carriers to attend the survey. The date of the survey was not specified because, as the plaintiff stated, "perhaps we did not know the date when Lartides would have surveyed them".

By the 10th April, 1957, the plaintiffs did not receive a reply to their notice of the 4th February, 1957, to the carriers' agents, and they accordingly sent another letter to them on that date (attaching copy of their notice of 4.2.1957), to which the carriers' agents (the Cyprus Shipping Co. Ltd.) replied by their letter dated the 11th April, 1957 (blue 9), acknowledging receipt of the plaintiffs notice of damage (without stating the date of such notice) and informing them that "according to the clauses and conditions of the bills of lading neither the ship nor her owners/charterers, ourselves as agents are liable for damage to goods coverable by insurance or otherwise". They further informed the plaintiffs that the Master of the ship lodged his Note of Protest in Liverpool against boisterous weather and rough sea encountered during the voyage and that they would let the plaintiffs have a copy of it in due course. They further stated that according to their tally at ship's tackle the remarks were as follows:

"18 bags by 100 kilos torn and short of contents,
6 bags by 100 kilos wet, 97 bags by 50 kilos wet,
2 bags by 50 kilos torn and short of contents."

The carriers' agents further stated that the wet bags were inspected by the "P & I Club" surveyor whose report read as follows :

> "This is to confirm that according to your request we have inspected the cargo of sugar discharged at Famagusta ex above vessel. We have only to say that a representative number of bags of sugar marked PHOTOS/NICOSIA were found to be wet by sweat."

The carriers' agents also alleged that further damage, if any, must have taken place after the cargo left the ship's tackle and they, therefore, *declined liability*. They also stated that they desired to place it on record that the plaintiffs failed to notify them in due course of any damage and invite them to be represented at the survey which was held in a private bonded store in Famagusta. Finally, they concluded their letter by asking the plaintiffs to refer their claim to the insurance company.

To that letter the plaintiffs replied by their letter of the 16th May, 1957 (blue 9A), stating that their claim referred to "the whole consignment due both for Famagusta and Limassol ports" which was stated to be 1255 bags of 100 kgs. and 610 bags of 50 kgs., and *not* as stated by the Cyprus agents of the carriers. Particulars are then given in the letter of the wet bags and of the torn and short of contents bags, and the plaintiffs conclude their letter by stating "we are compelled to state the above for good order's sake and to reiterate our claim against the carriers whom *we hold responsible for the damages*".

The Cyprus agents of the carriers by their letter dated the 20th May, 1957 (blue 9B), for the first time denied having received the plaintiffs' notice of damage, dated the 4th February, 1957, although the plaintiffs had attached a copy of that notice to their letter dated the 10th April, 1957 (as it appears from this letter of the Cyprus agents of the carriers). It is significant that in their letter of the 11th April, 1957, (blue 9) the Cyprus agents of the carriers did not deny the receipt of that notice and it is also significant that they were not called by the defendants to give evidence in this case substantiating their allegation.

On the plaintiff's evidence I find as a fact that plaintiff duly notified the carriers on the 4th February, 1957, of the damage to the goods on s.s. "TEJO" and held them responsible for such damage ; but the actual date of the survey was left blank in the notice, although the

carriers were invited to attend the survey. It should also be noted that by their letter dated the 11th April, 1957 (blue 9), the carriers declined liability for any damage to the goods insured by the defendants.

At a later stage of this judgment I shall consider—

(*a*) whether the provision for notice to the carriers was of the essence of the contract (considering also the provisions of the English Carriage of Goods by Sea Act, 1924, Schedule, Article III rule 6) ; and

(*b*) if such provision is of the essence of the contract, whether it has been complied with by the plaintiff in the case of the "TEJO" consignment ; and

(*c*) whether this or any other conditions have been waived by the defendants.

s.s. "TEJO" consignment :

The defendants opposed the plaintiff's claim as regards the "TEJO" consignment on the grounds appearing in paragraph 6 of their defence which has already been quoted.

I shall first deal with paragraphs 6 (*a*) and (*d*) together, and then with paragraphs 6 (*b*) and 6 (*c*) separately. Paragraphs 6 (*a*) and (*d*) of the defence are :

"(*a*) The s.s. "TEJO" arrived in Cyprus on the 26.1.1957 and the plaintiffs failed to ask immediately for a survey by the Average Agent and also notify by a registered letter the Shipowners or their representative of any damage and invite them to be present at the survey. The plaintiffs failed to safeguard the rights against the shipowners for the damage caused to or the shortage of sugar.

(*d*) The plaintiffs delayed in applying for survey and submit the matter to the defendants in time, or sue within the time allowed by law or usage, whereby legitimate claims against the shipowners and/or third persons were lost."

Now, what are the contractual provisions on the points raised by the defendants and what is the law applicable? The parties are agreed that under the policy English Law is applicable in this case.

The first complaint of the defendants is that although s.s. "TEJO" arrived in Cyprus on the 26th January, 1957, the plaintiffs failed to ask "immediately" for a survey by the average agent; and that they delayed in submitting the matter to the defendants in time. The second complaint is that the plaintiffs failed to notify by a registered letter the shipowners or their representative of any damage and invite them to be present at the survey; that the plaintiffs failed to safeguard the rights against the shipowners for the damage caused to or the shortage of sugar; that they failed to sue within the time allowed by the law or usage, whereby legitimate claims against the shipowners and/or third persons were lost And that, consequently, the defendants were released from any liability.

As to the first complaint, the contractual provisions are contained in the "Note" to the Institute Cargo Clauses (W.A.) annexed to the policy (blue 1), whereby it is provided that "prompt notice" must be given to the underwriters when the assured become aware of an event for which they are "held covered" under the policy, and the right to such cover is dependent on compliance with this obligation. Paragraph 6 of the Institute Cargo Clauses (extended Cover), annexed to the policy (blue 1), also provides that "it is a condition of this insurance that the Assured shall act with reasonable despatch in all circumstances within their control". The defendants also rely on the "Important Notice" in small print at the foot of the Insurance Certificate (blue 5), quoted earlier; but the question is, does this "Important Notice" add anything to the previous conditions of the policy?

I entertain considerable doubts whether it does. In fact, whether the conditions referred to above and the "Important Notice" are to be construed as conditions precedent is a question of construction of the policy taken as a whole. It seems to me that in the "Important Notice" side by side with the conditions which are expressed as involving forfeiture are other conditions to which no such sanction is attached. I think that paragraphs (*a*) and (*b*) of the "Important Notice" do not, in fact add anything more to the provisions for "prompt notice" or "reasonable despatch" in the policy (Institute Cargo Clauses) (blue 1). Paragraph (*a*) states:

> "*Please* carefully examine the outward appearance of all the packages before taking delivery . . *Please* immediately ask for sur-

vey by the average agent, and request in a registered letter to the carriers..... .the presence of their representative..... . ..."

Paragraph (*b*), which refers to the position after delivery of the goods states : " ....*Please* discontinue unpacking and immediately apply to the average agent for survey. In such cases, reservations must be made stating the nature of the loss or damage, by a registered letter to the carriers within three days after delivery ".

The repeated use of the word " please " is to be noted. Obviously, if these two paragraphs stood by themselves they could hardly be described as conditions precedent for the payment of a claim. But when read together with Clause 6 of the Institute Cargo Clauses (extended Cover) and the " Note " to the Institute Cargo Clauses (already quoted) they place an obligation on the assured to notify the average agent with " reasonable despatch " or by giving " prompt notice ". What is " reasonable despatch " or " prompt notice " is a question of fact in each case ; this means within a reasonable time under all the circumstances of the case.

No doubt these provisions are not inserted for the purpose of enabling the insurers to escape liability, but rather to give them a reasonable opportunity of investigating the claim under the most favourable circumstances, and thereby of detecting and rejecting fraudulent or exaggerated demands. Such conditions ought to be construed fairly to give effect to this object, but at the same time so as to protect the assured against being trapped by obscure or ambiguous phraseology (see *MacGillivray* on Insurance Law, 4th edition, paragraph 1559).

Reverting to the " TEJO " consignment, the insurance was a cover from " *London to Nicosia* (*Warehouse to Warehouse*) ". 250 bags of sugar were discharged at Limassol and cleared on the 29th January, 1957, from where they were transported to the plaintiff's warehouse at Nicosia on the 4th February, 1957. And on the same day, notice was given to the defendants' average agent to carry out a survey, which was held on the same day. The Famagusta consignment was warehoused in a bonded warehouse at Famagusta and it arrived at Nicosia at the plaintiff's warehouse on or about the 15th February, 1957, on which day the survey was held by the average agent. In these circumstances can it be said that the assured failed to give " prompt notice " to the underwriters or

that they failed to act with "reasonable despatch" in applying to the average agent for a survey? In the circumstances of this case I am satisfied and find as a fact that the plaintiffs complied with their obligations under the contract within a reasonable time having regard to all the circumstances of the case.

The second complaint of the defendants is about the failure of the plaintiffs to notify the shipowners (carriers) etc. On the facts of this case I have already found as a fact that the plaintiffs notified the carriers on the 4th February, 1957, of the damage and about a proposed survey, without specifying the exact date. But even if it were held that the carriers were not duly notified by the plaintiffs, I am of the view that paragraphs (*a*) and (*b*) of the "Important Notice" (blue 5) are not conditions precedent and even if they were conditions precedent, they were waived by the conduct of the defendants who did not take this particular objection in any of their letters to the plaintiffs. Furthermore, under the provisions of the Schedule to the English Carriage of Goods by Sea Act, 1924 (incorporating the Brussels Convention of 1924, known as "The Hague Rules"), the giving of notice to the carriers is not a condition precedent for the enforcement of a claim against them (Article III, rule 6, in the Schedule to the Act). In any event the burden of proving loss or damage is on the consignee (see *Carver* on Carriage of Goods by Sea, 10th edition page 191). Article III, rule 6, reads as follows:

> "6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading.
>
> The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.
>
> In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods."

It will thus be seen that only the third paragraph must be complied with, and that the goods-owner will lose any remedy he has against the carrier unless he issues a writ against him within one year, or the carrier waives that requirement (see *Carver, ubi Supra*, at p. 191). This matter will be examined later in connection with the question whether the plaintiffs were bound under the terms of the policy to bring such an action against the carriers as a condition precedent to the paymnet of their claim by the defendants.

To sum up : (*a*) The provisions as to the notice to the carrier are not a condition precedent to the payment of the plaintiff's claim :

(*b*) in any event, even if they were, I have already held that (i) prompt notice was duly given to the carriers, and (ii) that such conditions were waived by the defendants ; and

(*c*) even if notice was not duly given, such failure did not prejudice legitimate rights against the carriers in any way.

The last complaint of the defendants under paragraphs 6 (*a*) and (*d*) of the defence is that (i) the plaintiffs delayed in submitting the matter to the defendants in time ; (ii) they failed to sue the carriers within the time allowed by law or usage, that is within a year ; and (iii) they failed to safeguard their rights against the shipowners for the damage caused to or the shortage of the sugar ; whereby legitimate claims against the shipowners and/or third-persons were lost.

These complaints of the defendants were based on the paragraph (*d*) of the " Important Notice " (blue 5) concerning loss by pilferage, the principles of subrogation, the alleged duty of the plaintiff to institute proceedings against the carrier within a year, under the provisions of the Carriage by Sea Act, 1924, Article III, rule 6, of the Schedule, and on section 78 (4) of the Marine Insurance Act, 1906, which provides that it is the duty of the assured *vis-a-vis* the carrier to minimise loss.

From a perusal of paragraph (*d*) of the " Important Notice " it becomes abundantly clear that that paragraph refers to losses by *pilferage only* and not to any other risks. In the present case the loss as stated in Lartides's survey report

is shortage due to tear of bags through the use of hooks and damage by water. Consequently, there is no question of pilferage and paragraph (*d*) is inapplicable.

With regard to the duty of the assured to minimise loss *vis-a-vis* the carrier, under the provisions of section 78 (4) of the Marine Insurance Act, 1906, I do not think that the provisions of that section are applicable to this case, but even if they were the assured (plaintiffs) have done everything within their power to minimise loss.

As to (i), on the findings of fact in this case it is obvious that the plaintiffs did not delay in submitting the matter to the defendants in time ; they applied for a survey on the 4th February, 1957, and as soon as they received the survey report on the 20th November, 1957, they submitted their claim to the defendants, and this date was more than two months before the close of the year after delivery of the goods ; and if the defendants wanted to avail themselves of the provisions of the fourth paragraph of clause 8 of the Institute Cargo Clauses (W.A.), annexed to the policy (blue 1), there was still time for them to pay the plaintiffs and then require them to bring and prosecute under their direction and control such suit or other proceedings to enforce the liability of the carriers, if any. But, in fact, the defendants concede that they neither paid the plaintiffs nor did they require them to bring an action against the carriers.

As to (ii) and (iii), to the effect that the plaintiffs failed to sue the carriers within a year, under the 1924 Act aforesaid, the same observations apply which have already been made in the preceding paragraph.

There is no express provision in the policy or any other agreement between the parties making it a condition precedent to the satisfaction of the plaintiffs' claim that they should first enforce their claim against the carriers. On the contrary, the third and fourth paragraphs of clause 8 of the aforesaid Institute Cargo Clauses (W.A.) make it abundantly clear that (*a*) the underwriters should first pay the assured's claim ; and (*b*) then require him to bring an action against the carriers after giving him an indemnity for costs. And this appears to be in accordance with the general law and statutory provisions with regard to subrogation. Section 79 of the English Marine Insurance Act, 1906, reads as follows:

> "79.—(1) Where the insurer pays for a total loss either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, he thereupon

becomes entitled to take over the interest of the insured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter, as from the time of the casualty causing the loss."

(2) Subject to the foregoing provisions, where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the assured in and in respect of the subject-matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified, according to this Act, by such payment for the loss."

A useful exposition of the doctrine of subrogation can be found in *Arnould* on Marine Insurance (1961), edited by Lord Chorley and C. T. Bailhache, volume II, chapter 30, paragraphs 1214 and 1215. The concluding sentence of that paragraph reads as follows :

" In practice, the commonest way in which the principle of subrogation is applied to insurance, is for the insurer to pay the claim of the assured, and then to institute proceedings in the name of the latter, but for his own benefit, against the party ultimately liable."

It should be borne in mind that the only objection raised by the defendants in correspondence prior to the action was " the unwarranted delays and the loss of legitimate claims against shipowners " (blue 34), and it would seem that they waived all other conditions even if applicable.

With regard to *paragraph* 6 (*b*) of the defence, the defendants' complaint is that the damage to and shortage of sugar is not certified both by an " official statement " issued by the carriers and by the average agent's survey report. In fact, the plaintiffs' claim is accompanied by the average agent's survey report. This complaint is based on paragraph (*c*) of the " Important Notice " (blue 5). It has not been explained what is an " official statement " issued by the carriers, and what is significant is that in the policy itself (blue 1) the only provision with regard to claims is that without the average agent's certificate no claim will be paid. In the first place, this objection with regard to the " official statement " of the carriers was never raised by the defendants prior to the action, even if it were considered to be a condition precedent to the payment of the claim, and it would appear that this has been waived. But, in any

event, the letter dated the 11th April, 1957 (blue 9) from the Cyprus Agents of the carriage, declining liability and particularising the damage to the goods, which letter accompanied the plaintiffs' claim to the defendants (see plaintiffs' letter dated the 20th November, 1957 (blue 14), may, in the circumstances of this case, be deemed to be such an "official statement" issued by the carriers.

With regard to *paragraph* 6 (*c*) of the defence, from what has already been stated it is abundantly clear that the plaintiffs lodged their claim on the 20th November, 1957, on the very day on which the defendants' average agent delivered his report to the plaintiffs. And, consequently, I find as a fact that they lodged their claim in time.

For these reasons I hold that with regard to the consignment on the s.s. "TEJO" the defendants are liable to pay to the plaintiffs the damage and/or loss sustained under the policy.

Amount of damage in respect of s.s. "TEJO" :

The amount of damage, particulars of which appear in paragraph 6 of the petition and in the plaintiffs' claim to the defendant company, dated the 20th November, 1957, (blue 14) is £1,593.050 mils. This amount has been proved by the evidence of the plaintiff and his surveyor Rossos, which I have accepted having rejected the evidence of Lartides, the defendants' surveyor.

The above sum includes a figure of £15.750 mils as surveyor's fees paid to Rossos. I have allowed this figure in favour of the plaintiff as an expense necessary to prove his claim against the defendants.

The 5 per cent clause

The defendants submitted that they were entitled to a reduction of 5 per cent of the amount of damage to the sugar, on the strength of the following provision in the policy (blue 1) :

> "*N.B.* Sugar, tobacco, hemp are warranted free from average under Five Pounds per cent ; and all other goods are warranted free from average under Three Pounds per cent .... ,unless general, or the ship be stranded, sunk or burnt."

These are what are known in the Marine Insurance Law as the "5 per cent" and "3 per cent" clauses. The object of both these clauses is the same, namely, to protect the underwriter against trifling claims. Marine policies

of insurance usually contain a memorandum at the end in similar terms as the above, protecting the underwriter from liability to small particular averages, under a certain percentage, which might otherwise be claimed in respect of certain perishable commodities. The clause with regard to the 5 per cent stipulates that with respect to such goods the underwriter shall not be liable unless the loss amounts to 5 per cent. As Lord Esher M.R. said in *Marine Insurance Company* v. *China, etc. Steamship Company* (1888), 11 App. Cas. at p. 576, " The way to find out whether the loss amounts to 3 per cent or not within the condition, is to find out what the loss is, irrespective of any consideration of the 3 per cent clause. If you find that the loss to the assured would have been less than 3 per cent, as compared with the value in the policy, the underwriter is not liable at all. If you find that the loss exceeds 3 per cent, then the condition is fulfilled, and the underwriter has to pay *the whole of the average loss* ".

In the circumstances of this case, as the loss exceeds 5 per cent, the defendants are liable to pay the *whole* of the loss, without deducting the 5 per cent.

The plaintiffs are, therefore, entitled to JUDGMENT in respect of the " *TEJO* " consignment in the sum of £1,593.050 *mils.*

The main issues with regard to the remaining three consignments (on the s.s. " BRAMANTE ", s.s. " MONTTROSE " and s.s. " MILVIA ") are—

(*a*) did the plaintiffs delay in applying for survey ? and

(*b*) did the plaintiffs delay in submitting their claim to the defendants ?

As regards all the other conditions, for the reasons stated earlier, I am of the view that they were not conditions precedent and, even if they were, they were waived by the defendants' conduct, as the only objections raised by them in their correspondence (and there is no other evidence on the point) refer to the aforesaid delays and nothing else. The only evidence with regard to the three consignments is that appearing in the survey reports of the defendants' surveyor and the correspondence which has not been challenged by the plaintiff in his evidence. Apart from this, there is only a brief reference in the plaintiff's evidence regarding the giving of notice to the carriers (p. 17H–I of the evidence).

I shall now deal with each of the three consignments separately :

S.s "BRAMANTE" :

I have already given the facts with regard to the arrival, survey and submission of claim as regards this consignment. The cargo of rice was discharged on the 17th February, 1957, at Limassol, and delivered to the plaintiffs on the 6th and 7th March, 1957. They applied for a survey of the loss on the 18th February, 1957. Consequently, there was no delay in applying for a survey.

I have already found as a fact that the defendants' surveyor (Lartides) delivered his report dated 16th March, 1957 (blue 26), to the plaintiffs on the 20th November, 1957. The plaintiffs submitted their claims on the same day that is, on the 20th November, 1957. Consequently, there was no delay in the submission of the claim to the defendant company. In any event, if the defendant company were so minded and had paid the loss to the plaintiffs and required them to bring an action against the carriers, if necessary, there was time for this to be done within the statutory period of 12 months, as the ship delivered the goods on the 17th February, 1957, and the claim was in the hands of the defendants on the 20th November, 1957 ; that is to say, they had a period of about 3 months within which to act in order to safeguard their rights.

In the circumstances of this case the plaintiffs are entiltled to judgment with respect to the "BRAMANTE" consignment. The damages have been agreed at £423 and I, accordingly, give JUDGMENT for that amount in plaintiffs' favour.

S.s. "MONTROSE" :

According to the survey reports the ship arrived on the 29th December, 1956, and the customs clearances was "on different dates". There is no other evidence before the Court as to the exact date of customs clearance or delivery to the consignee. There are two survey reports in the case of this consignment. Two applications for survey were made, *viz.* on the 21st January, 1957, and the 8th May, 1957. The survey reports are dated 2nd August, 1957 (blue 22A) and 2nd December, 1957 (blue 22B). As I have no evidence as to the exact date of delivery of the goods to the plaintiffs I am not prepared to find that there was unreasonable delay in applying for a survey. The agreed loss is £172.

Blue 23 shows that the plaintiffs submitted their claim to the defendants on the 17th April, 1958, that is to say—about 4 1/2 months after the date of the last survey report, and 15 1/2 months after the discharge of the goods from the ship.

As the dates of issue of the two survey reports have not been challenged by the plaintiffs, I find that the reports were delivered to them on or about the dates shown therein, and as the aforesaid delay of 4 1/2 months in submitting the claim has not been explained or justified by the plaintiffs and the claim (if any) against the carriers was lost owing to the delay (15 1/2 months), I find that the plaintiffs have failed to act with " reasonable despatch " or to give " prompt notice " of their claim to the defendants in all the circumstances of the case. And, I, accordingly, DISMISS the plaintiffs' claim with regard to the s.s. " MONTROSE " consingment.

S.s. " MILVIA " :

The survey report of this consignment shows that the goods (rice) were discharged on the 5th and 6th April, 1957, and delivered to the plaintiffs on the 12th and 17th April, 1957, who applied for a survey on the 7th April, 1957. Consequently, there was no delay in applying for a survey. The agreed loss is £116.

The survey report is dated 20th April, 1957 (blue 30). This date is not challenged by the plaintiffs and I accept that the report was delivered to the plaintiffs on or about that date. The claim was submitted on the 11th February, 1958 (blue 31), *i.e.* 9 3/4 months after the issue of the survey report, and this delay has not been explained or justified by the plaintiffs. In all the circumstances of this case I find that the delay was unreasonable and I, accordingly, DISMISS the plaintiffs' claim in respect of this consignment.

In the result there will be JUDGMENT for the plaintiffs in the sum of £2,016.050 mils and costs.

Judgment accordingly.