LMAA Arbitration: Hybrid Mock Arbitration Hearing

Thursday 16 September 2021

Event host: Ian Gaunt, LMAA Arbitrator and LMAA Past President

Tribunal:

Clive Aston, LMAA Arbitrator and Past President, Chairman

Daniella Horton, LMAA Arbitrator and Hon. Secretary

Nicholas Woo, Partner, Birketts LLP and LMAA Supporting Member

Counsel:

Nicholas Vineall QC & Anna Hoffmann, Barristers, 4 Pump Court

Julian Kenny QC & Michal Hain, Barristers, Twenty Essex

Witnesses:

Nicholas Kenny

Dr Minli Tang

With thanks to OPUS 2

Ian Gaunt, LMAA Arbitrator and Past President

Ian Gaunt is a full time Arbitrator in international maritime cases and Past President of the London Maritime Arbitrators Association.

Ian is a graduate of Cambridge University (Selwyn 1969) and a Barrister (although now not practising as counsel). He is a member of the Baltic Exchange, a member of the Board of Maritime London and a member of the panels of many foreign arbitration commissions, including CIETAC, CMAC, Shanghai International Arbitration Commission, Shanghai International Shipping Institute and Shenzhen Court of International Arbitration.

Since becoming a full time arbitrator in 2008 he has been actively engaged as sole or panel arbitrator in many maritime and international commercial arbitrations and has published over 300 awards.

Tribunal:

Clive Aston, LMAA Arbitrator and Past President, Chairman

Clive Aston studied law at Cambridge and was called to the Bar in 1979. He then spent 9 years at a leading P&I Club, including 5 years managing the FD&D class of cover and Greek P& I syndicate. In 1988 he started his own consultancy practice and began accepting appointments as an arbitrator, becoming a full member of the LMAA shortly afterwards. As an arbitrator he has dealt with a wide range of shipping and shipping related disputes in several thousand cases.

Clive was President of the LMAA from 2014-2017. He is also a trained mediator and arbitrating member of the China Maritime Arbitration Commission, Singapore Maritime Arbitration Commission, Hong Kong International Arbitration Centre and Shenzhen Court of International Arbitration.

Daniella Horton, LMAA Arbitrator and Hon. Secretary

Daniella has been involved in the maritime industry her entire career and became Honorary Secretary of the LMAA in 2015. Daniella began her career as an English qualified solicitor, specialising in shipping and international trade from qualification. After 9 years in private practice in London, predominantly advising the marine insurance market and P&I clubs, Daniella moved into an in-house counsel role for a further 8 years, before continuing to provide advice on a consultancy basis to owners, charterers and traders.

Nicholas Woo, Partner, Birketts LLP and LMAA Supporting Member

Nicholas is a Partner at Birketts LLP in the Shipping and International Trade Team and an accredited CEDR (Council of Effective Dispute Resolution) Mediator. He is a specialist in all areas of 'dry' shipping litigation with particular knowledge of shipping in Asia (Singapore, Korea, Japan, Taiwan, Hong Kong and China). He regularly delivers lectures and is able to take instructions in Mandarin.

Counsel:

Nicholas Vineall QC, Barrister, 4 Pump Court

Nick is a leading silk specialising in international arbitration and commercial litigation, with a focus on shipping and shipbuilding in addition to other areas. He regularly appears in the UK Courts and in a wide range of arbitral tribunals domestically and internationally, with a particular reputation for his work in the Far East. Nick accepts appointments as arbitrator and has sat as sole or panel arbitrator under a number of rules, including LCIA, LMAA, HKIAC and VIAC terms. He also sits as a Deputy High Court Judge in the Commercial Court and Technology and Construction Court.

Julian Kenny QC, Barrister, Twenty Essex

Julian specialises in commercial law, particularly banking, shipping and commodities, insurance and reinsurance, conflicts and jurisdiction, and arbitration. He is a leading specialist in chartering and international sale of goods disputes. In addition, Julian has extensive banking experience, particularly with disputes involving swaps and derivatives based on the ISDA Master Agreement.

Anna Hoffmann, Barrister, 4 Pump Court

Anna has experience in a range of commercial and regulatory matters with a particular focus on shipping and ship-building, financial services and international arbitration. She has a commercial practice and accepts instructions in all areas of Chambers' work as well as in the area of public law and judicial review. She was instructed together with Lord Garnier QC on the prorogation case: *R (on the application of Miller) v The Prime Minister*. Before coming to the Bar, Anna worked for a leading international commercial law firm in Switzerland, where she focused on international arbitration.

Michal Hain, Barrister, Twenty Essex

Michal has a broad practice spanning both general commercial work and specialised areas, such as shipping, insolvency and investor-state arbitrations. He acts in court proceedings, including in appeals where he draws on his experiences as a Judicial Assistant at the Supreme Court, as well as arbitral references held under various procedural rules, including LMAA, SCMA and UNCITRAL. Recently, Michal acted as sole counsel in a three-day trial in the High Court, which involved him cross-examining five witnesses remotely by reason of the COVID-19 pandemic.

Witnesses

Nicholas Kenny

Nicholas Kenny has worked in the container shipping industry for 15 years. He has worked for X-Press Feeders, Singapore who specialise in feeder operations and vessel ownership. He is currently employed as a Shipbroker with G.G.Lucas Asia Pte Ltd and handles both chartering and S&P for a variety of Asian based clients.

Dr. Minli Tang

Dual qualified in mainland China and in New York State, Minli has practiced in dispute resolution for years (especially in foreign-related matters, including litigation and arbitration). Minli is also a committee member of the BAIAC Singapore, and a supporting member of the LMAA.

Minli has frequently represented clients in Chinese domestic court litigations and participated in the handling of cases in the English High Court and Court of Appeal. Minli has also represented and advised clients in arbitration under the ICC, SIAC, HKIAC, AIAC, CIETAC and CMAC rules as well as under the Terms of the LMAA. In addition to her advocacy work, Minli has been involved in advising both domestic and foreign clients on Chinese law and conducted commercial negotiation.

IN THE MATTER OF THE ARBITRATION ACT 1996

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

GOOD SHIP LTD

Claimant / Owners

- and –

SEASTAR LINE SA

Respondent / Charterers

MV "BUONA VISTA"
C/P dd. 25 March 2021

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IN THE MATTER OF THE ARBITRATION ACT 1996

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MV "BUONA VISTA"
C/P dd. 25 March 2021

AGREED FACTS

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1 The m.v. *Buona Vista* ("**the Vessel**") is a container ship which belongs to Good Ship Ltd of the Marshall Islands ("**the Owners**"). The Vessel is managed by Duxton Hill Container Ships ("**Duxton**") of Singapore. The individual at Duxton in charge of managing the Vessel was Captain Nelson.

2 SeaStar Line SA ("**the Charterers**") run a number of container feeder lines around the world, including a service carrying container cargoes between ports in North and South America. SeaStar Line is based in Dubai. SeaStar's Americas line is run by Ms Chen.

3 In March 2021, the Charterers chartered the Vessel for a time trip charter of about 25 days, carrying cargo from ports on the US east coast to one or two ports to be nominated in Brazil. The charter was made on an amended NYPE1946 form dated 25 March 2021 ("**the Charterparty**").

4 On 1 April 2021, the Vessel was delivered into the Charter. The Vessel then loaded her cargo in the Port of New York and New Jersey and departed on 5 April 2021.

5 There was a telephone conversation on 10 April 2021 between Captain Nelson, the Vessel's commercial manager at Duxton, and Ms Chen of the Charterers, the terms of which are contested.

6 What is common ground is that Ms Chen gave orders for the Vessel to sail to and discharge at Porto Alegre. It is also common ground that this was outside of the permitted range, because it is 277 nautical miles south of the Port of Itajai.

7 However, Ms Chen says that Captain Nelson agreed that the Vessel could go to Port Alegre. The Charterers' position therefore is that the terms of the Charterparty were orally varied when Ms Chen spoke to Captain Nelson, so as to permit an order to go to Porto Alegre.

8 For his part, Captain Nelson says he only agreed to accept an order to go, even though he pointed out to Ms Chen that the order was unlawful because Port Alegre is outside the permitted range under the Charter. Captain Nelson insists he reserved all the Owners' rights.

9 The Vessel tendered her NOR at Porto Alegre at 07:00 on 15 April 2021.

10 On the same day at 19:00, the Mayor of the Municipality announced a 'circuit-breaker' lockdown following an outbreak of Covid-19 in the city, which, amongst other measures, prohibited any work in the port. The lockdown came into effect at 00:01 on 16 April 2021 and lasted until 23:59 on 30 April 2021.

11 The relevant part of the explanatory notes underlying the ordinance explained that:

> *Contact tracing has revealed that a cluster of the virus circulating in our community originally entered Porto Alegre because foreign crew members infected port employees in the process of cargo operations. To safeguard members of our community, stringent testing procedures will be introduced at the port. The prohibition against port operations for a period of 14 days is an interim measure before the testing process can be rolled out at scale. It should also prevent any such transmission in the meantime.*

12 By reason of the lockdown and the port congestion which resulted, discharge operations did not commence until 10 May 2021.

13 In the event, the Vessel was then only redelivered to Owners on 14 May 2021. This was 14 days late, because the contractual charterperiod was "*25 days =/- 5 days*".

14 The daily rate of hire under the Charterparty was $10,000, which was the market price for a ship of the Vessel's specification when the parties entered into it.

15 It is common ground that the Vessel was redelivered 14 days late and Charterers have given credit in their calculations for 14 days at the charter rate, i.e. for $140,000.

16 However, during April, there was a tremendous rise in the market. By 1 May, the market rate for the Vessel had reached US$30,000 and it remained at that level for the rest of the month. Owners say they are entitled to this rate for the period of the delay.

17 However, by 1 April 2021, Owners had also entered into a long-term time charter with Horizon Lines Inc ("**the New Charterers**") for a period of 3 years ("**the Follow-on Charter**"):

17.1 The Vessel was to be delivered into the Follow-on Charter between 1 and 20 May 2021. In the event, the Vessel was delivered on 18 May 2021. Had Charterers delivered the Vessel when they should have (i.e. by 30 April 2021 at the latest), the Vessel would have been delivered into the long-term charter on around 4 May 2021.

17.2 The Follow-on Charter hire rate was $20,000.

Relevant terms of the Charterparty / Recap

Time Charter

GOVERNMENT FORM

Approved by the New York Produce Exchange

November 6th, 1913 Amended October 20th, 1921; August 6th, 1931; October 3rd, 1946

1 **This Charterparty** made an concluded in **LODON** day **of 25 MARCH 2021**

2 Between GOOD SHIP LTD
3 Owners of the good **SHIP, MV BUONA VISTA**_____ of _____
4 of _____ tons gross register, and _____ tons net register, having engines of _____ indicated horse power
5 and with hull, machinery and equipment in a thoroughly efficient state, and classed _____
6 at _____ of about _____ cubic feet bale capacity, and about _____ tons of 2240 lbs.
7 deadweight capacity (cargo and bunkers, including fresh water and stores not exceeding one and one-half percent of ship's deadweight capacity,
8 allowing a minimum of fifty tons) on a draft of _____ feet _____ inches on _____ Summer freeboard, inclusive of permanent bunkers,

9 which are of the capacity of about _____ tons of fuel, and capable of steaming, fully laden, under good weather
10 conditions about _____ knots on a consumption of about _____ tons of best Welsh coal-best grade fuel oil-best grade Diesel oil,
11 now _____
12 _____ and **SEASTAR LINE SA**_____ Charterers of the City of _____
13 **Witnesseth,** That the said Owners agree to let, and the said Charterers agree to hire the said vessel, from the time of delivery, for
14 about **25DAYS +/- 5 DAYS**

...

26 (vessel is not to be employed in the carriage of Live Stock, but Charterers are to have the privilege of shipping a small number on deck at their risk,
27 all necessary fittings and other requirements to be for account of Charterers), in such lawful trades, between safe port and/or ports in ~~British North~~
28 ~~America, and/or United States of America, and/or West Indies, and/or Central America, and/or Caribbean Sea, and/or Gulf of Mexico, and/or~~
29 ~~Mexico, and/or South America _____ and/or Europe~~
30 ~~and/or Africa, and/or Asia, and/or Australia, and/or Tasmania, and/or New Zealand, but excluding Magdalena River, River St. Lawrence between~~
31 ~~October 31st and May 15th, Hudson Bay and all unsafe ports; also excluding, when out of season, White Sea, Black Sea and the Baltic,~~
32 _____
33 up to two ports in the Salvador-Itajai range
_____

...

97 15. That in the event of the loss of time from deficiency of men or stores, fire, breakdown or damages to hull, machinery or equipment,
98 grounding, detention by average accidents to ship or cargo, drydocking for the purpose of examination or painting bottom, or by any other cause
99 preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost; and if upon the voyage the speed be reduced by
100 defect in or breakdown of any part of her hull, machinery or equipment, the time so lost, and the cost of any extra fuel consumed in consequence
101 thereof, and all extra expenses shall be deducted from the hire.

START RECAP

VESSEL:	BUONA VISTA
CHARTERERS:	SEASTAR LINE SA
OWNERS:	GOOD SHIP LTD
CONTRACT:	NYPE 1946 (DATED 25 MARCH 2021)
PERIOD:	*25 days =/- 5 days*
DELIVERY:	PORT OF NEW YORK AND NEW JERSEY
RANGE:	*BETWEEN SAFE PORT AND/OR PORTS IN THE USA AND UP TO 2 PORTS IN SALVADOR – ITAJAI RANGE*
RATE:	USD 10,000 (p.d)
JURISDICTION:	LMAA Arbitration, Three Arbitrators

DELETE SECOND SENTENCE OF CLAUSE 16

IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN LMAA ARBITRATION

B E T W E E N

GOOD SHIP LTD

Claimant / Owner

and

SEASTAR LINE SA

Respondent / Charterer

m.v. "Buona Vista"

CLAIM SUBMISSIONS

CHARTERPARTY

1 Pursuant to the terms of a charterparty on an amended NYPE1946 form dated 25 March 2021 ("**the Charterparty**"), the Respondent ("**the Charterer**") agreed to charter the m.v. *Boana Vista* ("**the Vessel**") from the Claimant ("**the Owner**") for the purpose of carrying cargo from ports on the US east coast.

2 The following were express terms of the Charterparty:

2.1 The charter period was "*25 days +/- 5 days*".

2.2 The Charterer was entitled to nominate, for discharge, "*up to 2 ports in Salvador-Itajai range*".

2.3 The Charterer was obliged to pay daily hire at the rate of $10,000.

2.4 "[I]*n the event of loss of time from deficiency of men or stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, drydocking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost*".

2.5 The Charterparty is governed by English law. It is subject to arbitration on the basis of the current LMAA Terms. The current LMAA Terms are the 2021 Terms.

HIRE

3 The Charterer owes US$140,000[1] of hire or, alternatively, is liable for the same sum as damages for breach of its obligation to pay hire:

Particulars

3.1 The Charterer nominated Porto Alegre, Brazil as the port of discharge.

3.2 On 15 April 2021 at 07:00 (LT), the Vessel tendered NOR at the discharge port.

3.3 The Charterer deducted hire in the sum of $140,000 for the period from 00:01 on 16 April 2021 until 23:59 on 30 April 2021 during which any work had been prohibited in the port by reason of the 'circuit-breaker' lockdown enacted by municipal ordinance. In so doing, the Charterer relied on clause 15 of the Charterparty, i.e. the off-hire clause set out at paragraph 2.4 above.

3.4 The Charterer was wrong to deduct this hire, because the off-hire clause does not apply:

(a) The delay was caused by the municipal ordinance.

(b) The municipal ordinance is not a "*deficiency of men or stores, fire, breakdown*" or damage to "*hull, machinery or equipment*". It is also not a "*grounding, detention by average accidents to ship or cargo, drydocking for the purpose of examination or paining bottom*". It therefore does not fall within any of the offhire events expressly spelled out in clause 15.

(c) Further, the municipal ordinance is not "*any other cause preventing the full working of the vessel*" because it extraneous to the vessel or is an interference by the authorities that was unjustified by the reasonably suspected condition of ship or cargo.

PERMITTED RANGE

4 In the alternative to paragraph 3, if the Vessel was offhire during the 'circuit-breaker' lockdown, the Owner is entitled to the sum of $140,000 as damages for the Charterer's

[1] References to $ are to US$.

breach of the express term requiring it to nominate a port of discharge in the Salvador-Itajai range:

Particulars

4.1 Porto Alegre is South of Itajai and therefore outside the "*Salvador-Itajai range*".

4.2 Although the Owner (through Captain Nelson) agreed to discharge at Porto Alegre, it retained its right to claim damages from the Charterer for breach of contract.

4.3 No port in the Salvadaor-Itajai range became subject to any restriction on work in April 2021.

4.4 Had the Vessel not discharged at a port outside of the range, it would not have suffered the delay (and, ex hypothesi) been off-hire during the period.

REDELIVERY

5 Further, the Owner is entitled to damages in the sum of $140,000 for the Charterer's breach of its obligation to redeliver before the end of the charter period:

Particulars

5.1 The Vessel was delivered into the Charterparty on 1 April 2021.

5.2 The Charterer should therefore have redelivered the Vessel no later than on 30 April 2021.

5.3 In breach of contract, the Charterer redelivered the Vessel on 14 May 2021, i.e. 14 days late.

5.4 The Owner is entitled to damages in the amount of the difference between what the owners earned in hire under the charter during the period of overrun and what the market would have paid for the use of the ship during the same period.

5.5 The market daily rate was $30,000. The difference, per day, is therefore $20,000.

5.6 The Owner gives credit for the payment of $140,000 by Charterer representing the difference between the daily rate under the Charterparty and the daily rate under

the terms of the long-term time charter with Horizon Lines Inc ("**the New Charterers**") for a period of 3 years ("**the Follow-on Charter**"). The Follow-on Charter daily rate was $20,000.

6 The Owner is also entitled to interest pursuant to section 44 of the Arbitration Act 1993.

AND THE OWNER CLAIMS

A. $140,000 as hire or damages,

B. $140,000 as damages,

C. Compound interest at the rate of 4% with quarterly rests, and

D. Costs

NICHOLAS VINEALL QC
ANNA HOFFMANN

IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN LMAA ARBITRATION

B E T W E E N

GOOD SHIP LTD

Claimant / Owner

and

SEASTAR LINE SA

Respondent / Charterer

m.v. "Buona Vista"

DEFENCE SUBMISSIONS

CHARTERPARTY

1 Paragraph 1 is admitted.

2 As to paragraph 2:

2.1 Paragraphs 2.1, 2.3 and 2.4 are admitted.

2.2 Paragraph 2.2 is admitted as term of the Charterparty when it was an entered into. It was subsequently varied as set out below.

HIRE

3 Paragraph 3 is denied:

3.1 Paragraphs 3.1, 3.2 and 3.3 are admitted.

3.2 Paragraph 3.4 is denied. The 'circuit-breaker' lockdown constitutes "*any other cause preventing the full working of the vessel*" within the meaning of clause 15 of the Charterparty:

(a) Paragraphs 3.4(a) and 3.4(b) are admitted.

(b) Paragraph 3.4(c) is denied. Even if the correct test were that articulated by the Owner, which is denied, the municipal ordinance was neither extraneous to the vessel nor unjustified by the reasonably suspected condition of the

vessel. The infectiousness of the crew is a condition of the Vessel, and the ordinance was enacted because foreign crew members had infected port employees in the process of cargo operations.

PERMITTED RANGE

4 Paragraph 4 is denied, because Porto Alegre was not outside of the contractual range following the variation of the Charterparty:

4.1 Paragraph 4.1 is admitted.

4.2 Paragraph 4.2 is denied. On 10 April 2021, Ms Chen (for Charterer) and Capt Nelson (for Owner) agreed to vary the terms of the Charterparty, in particular the permitted range.

4.3 Paragraph 4.3 is admitted.

4.4 Paragraph 4.4 is not admitted.

REDELIVERY

5 Paragraph 5 is denied:

5.1 Paragraphs 5.1, 5.2 and 5.3 are admitted.

5.2 Paragraph 5.4 is admitted only as a summary of the normal measure of damages. This measure would overcompensate the Owner in circumstances where the only contractual right it lost was the ability to deliver the Vessel into the Follow-on Charter 14 days earlier than it did.

6 Paragraph 6 is denied, because the Owner is not entitled to any principal.

JULIAN KENNY QC
MICHAL HAIN

Richard Ramsay Nelson
1st Witness Statement
Served on behalf of Claimant Owners
RRN1
1 September 2021

IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN LMAA ARBITRATION

BETWEEN:-

GOOD SHIP LTD

Claimant Owners

-and-

SEASTAR LINE SA

Respondent Charterers

M/V "Buona Vista"

I, Richard Ramsay Nelson, of 80 Serangoon Rd, 217981 Singapore, will say as follows:

1. I am a qualified Master Mariner and have been employed by Duxton Hill Container Ships for 10 years.

2. I was the Master of the MV Buona Vista at the relevant time. I have been a Master engaged on similar vessels for over 20 years.

3. The facts and matters set out in this witness statement are known to me and are true to the best of my knowledge, information and belief.

4. On 1 April 2021, the Vessel was delivered and I oversaw the loading of cargo in the Port of New York and New Jersey.

5. On 5 April 2021, we left the Port of New York. We made good progress in the next few days.

6. I remember that very early on Sunday 10 April, I received a phone call from Ms Chen. I understand that Ms Chen is in charge of Charterers' operations in the Americas region. She seemed quite agitated and told me there were construction issues at our destination port. I tried to calm her down a bit. She said she had a potential solution and asked whether we could discharge instead at Porto Alegre.

7. I knew that Porto Alegre was outside the permitted range, as it is much further south. So, I told Ms Chen that I could agree to go to Porto Alegre but I also told her that this was not in line with the Charterparty and I most certainly reserved all of Owners' rights. This is something that I would routinely do given the many years I have been having these kinds of conversations.

8. The email correspondence from the time shows that there was no agreement to amend the Charterparty as I now understand Charterers to be alleging. I simply agreed to go to Porto Alegre all while pointing out that this was an unlawful order under the Charterparty.

9. I have confined my statement to the issue of the conversation on 10 April 2021 as I was asked to do so.

Statement of Truth

I believe that the facts stated in this witness statement are true.

Name: Richard Ramsay Nelson

Signed: *R.R. Nelson*

Date: 1st September 2021

Monica Chen
1st Witness Statement
Served on behalf of Respondent Charterers
MC1
1 September 2021

IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN LMAA ARBITRATION

BETWEEN:-

GOOD SHIP LTD

Claimant Owners

-and-

SEASTAR LINE SA

Respondent Charterers

M/V "Buona Vista"

I, Monica Chen, of Iolanthe Marine, Burj Khalifa, 1 Emaar Boulevard Dubai, United Arab Emirates, will say as follows:

1. I have been employed by SeaStar Line Ltd ("**SSL**") for the last 8 years and still work for SSL. I am in charge of SSL's Americas Line. I have held this position for the last 6 years. I have extensive experience in the running of such container feeder lines and have been working in this field for the last 15 years.

2. The facts and matters set out in this witness statement are known to me and are true to the best of my knowledge, information and belief.

3. We chartered the *Buona Vista* in March 2021 for a time trip charter of about 25 days.

4. On 1 April 2021, the Vessel was delivered and then loaded her cargo in the Port of New York and New Jersey and departed on 5 April 2021.

5. The original plan had been to sail to a port between Salvador and Itajai, Rio de Janeiro was a favoured option at the time.

6. However, after the departure of the Vessel, I received news that our local agents in Rio would not be able to deal with the cargo due to urgent maintenance works being carried out in the

port. I enquired with our other Brazilian operators and was told that the cargo could be safely handled at Porto Alegre.

7. I was pleased to have found a solution so quickly and called Captain Nelson on 10 April early in the morning to discuss the option of discharging the cargo at Porto Alegre. I distinctly recall that phone conversation because I was so elated at having found a solution. I had made many calls until late on 9 April and wanted to let Captain Nelson know as soon as possible the following day. That's why I called him early.

8. I remember that Captain Nelson agreed to sail to Porto Alegre. He may not have been best pleased about this change but he did agree and there was really no better solution than sailing to Porto Alegre and I think he understood that. We even confirmed this agreement by emails, which are in the correspondence clip attached to this witness statement.

9. The Vessel tendered her NOR at Porto Alegre at 07:00 on 15 April 2021.

10. I do not understand why Captain Nelson now says that there was no such agreement as we absolutely had this conversation on 10 April and there are the emails.

11. I know that there are also issues regarding redelivery but I was asked to limit my statement to the agreement to sail to Porto Alegre. This was reached in the phone call between myself and Captain Nelson as I have described.

12. As a result, I am of the view that Owners are wrong to say that the Charterparty was breached because the *Buona Vista* was not permitted to go to Porto Alegre. We agreed that she could discharge at Porto Alegre and that is what happened.

Statement of Truth

I believe that the facts stated in this witness statement are true.

Name: Monica Chen

Signed: *M Cheng*

Date: 1st September 2021

Richard R Nelson

From: Capt Richard R Nelson
To: Monica Chen
At: 10/04/2021 11:00
Subject: RE: MV Buona Vista to Porto Alegre

Dear Monica,

Thank you for your call. As said, I will discuss with Owns. I don't think discharging at Porto Alegre will be a problem. Will keep you posted.

Richard

From: Monica Chen
To: Capt Richard R Nelson
At: 10/04/2021 07:30
Subject: MV Buona Vista to Porto Alegre

Richard,

Thanks for good phone convo just now. Relieved that we have found a solution!

Best wishes

M

KING'S BENCH DIVISION.

June 13, 14, 15, 16, 1939.

COURT LINE, LTD. v. DANT & RUSSELL, INC.

Before Mr. Justice BRANSON.

Charter-party—Frustration—Time charter for nine or ten months, vessel entering upon service in March, 1937—Vessel to be redelivered at Australian port — Hire to be paid monthly in advance— "15. In the event of the loss of time from deficiency of men or stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, drydocking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost. . . . 16. Should the vessel be lost, money paid in advance and not earned . . . shall be returned to the charterers at once. The act of God, enemies, fire, restraint of princes, rulers and people, and all dangers and accidents of the seas . . . always mutually excepted"—Cargo loaded at Portland (Oregon) for Wuhu and Shanghai, vessel arriving at Wuhu on Aug. 7 — Outbreak of hostilities between China and Japan — Boom placed across River Yangtsze by Chinese to prevent Japanese fleet from ascending river — Discharge completed at Wuhu by Sept. 3.—Vessel prevented by boom from proceeding down river—Indication of indefinite delay—River in fact cleared before time for redelivery at Australian port—Claim by charterers that charter was frustrated on Sept. 3; and for repayment of subsequent payments of hire — Claim by owners for damages for wrongful repudiation — Arbitration — Award that charter was frustrated on Sept. 3, but that neither party could recover anything from the other party—Case stated—Doctrine of frustration of time charter considered.

———Held, that the question of frustration was one of law for the Court, and rested on a condition implied in the contract between the parties; that the inference to be drawn from the umpire's findings was that the probabilities at the time were that the vessel would be blocked in the Yangtsze for an indefinite period (the fact that the river was cleared before the redelivery date was immaterial); that substantially the whole contract thereby became impossible of performance or impracticable by a cause for which neither party was responsible; that frustration was proved; and that therefore the award must be upheld.

This was an award in the form of a special case stated by Mr. Patrick Arthur Devlin, as umpire, in an arbitration arising out of a dispute between the Court Line, Ltd., owners of the British steamship *Errington Court* (the claimants) and Messrs. Dant & Russell, Inc. (the charterers and respondents). The owners claimed damages for a breach by the charterers of a time charter dated Mar. 19, 1937. The charterers, however, alleged that the charter-party had been determined by frustration, and claimed repayment of hire paid by them to the owners and the price of coal left in the bunkers of the ship.

The charter-party provided that the vessel should be hired from the time of delivery until re-delivery between Dec. 15, 1937, and Jan. 31, 1938, at an Australian port, Newcastle (N.S.W.)/Port Pirie range. The charter-party further provided:—

(3) That the . . . owners shall, on expiration of this charter-party, pay for all coal left in the bunkers, at the current market price at the respective places where she is delivered to them.

(5) Payment of said hire to be made in London in cash monthly, in advance, and for the last month or part of same the approximate amount of hire, and should same not cover the actual time, hire is to be paid for the balance day by day, as it becomes due, if so required by owners, unless bank guarantee or deposit is made by the charterers, otherwise failing the punctual and regular payment of the hire, or bank guarantee, or any breach of the charter-party as herein specified, the owners shall be at liberty to withdraw the vessel from the service of the charterers, without prejudice to any claim they (the owners) may otherwise have on the charterers in pursuance of this charter. Delivery to count as arranged.

(15) That in the event of the loss of time from deficiency of men or stores, fire,

breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, drydocking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost. . . .

(16) That should the vessel be lost, money paid in advance and not earned (reckoning from the date of loss or being last heard of) shall be returned to the charterers at once. The act of God, enemies, fire, restraint of princes, rulers and people, and all dangers and accidents of the seas, rivers, machinery, boilers and steam navigation, and errors of navigation throughout this charter-party, always mutually excepted.

(20) Coals used by vessel while off hire . . . to be allowed by owners.

According to the case stated, the vessel entered upon her service on Mar. 18, 1937. On May 6 the charterers entered into a sub-charter with Messrs. Moore & Co., of San Francisco, whereunder "the sub-charterers agreed to hire the vessel from the time of delivery until re-delivery between Dec. 15, 1937, and Jan. 31, 1938, at an Australian port, Newcastle (N.S.W.)/Port Pirie range. The vessel was to be placed at the disposal of the sub-charterers at China or Japan at the charterers' option where and when discharge completed. It was further provided that if required by the sub-charterers, time was not to commence before Oct. 15, and that, should the vessel not be ready for delivery on or before Nov. 15, the sub-charterers were to have the option of cancelling the sub-charter-party.

In July, 1937, the vessel loaded at Portland (Oregon) with a cargo of lumber and scrap iron for Wuhu and Shanghai. On Aug. 7 she arrived at Wuhu and began discharging there on the following day. Wuhu is situated some distance up the River Yangtsze, and Shanghai is at the mouth of the river.

On Aug. 13, 1937, hostilities between Japanese and Chinese armed forces broke out in the neighbourhood of Shanghai. Severe fighting took place and the River Yangtsze was bombed by Japanese aeroplanes. On Aug. 14 the Chinese Government placed a boom or barrier across the River Yangtsze near Chinkiang (which is situated on the river between Wuhu and Shanghai) by sinking a number of junks and old gunboats. They mined the river below the barrier, and all aids to navigation were taken in. The Government's object in so doing was to prevent a Japanese fleet which was then conducting or threatening hostile operations against China in the vicinity of Shanghai from proceeding up the river. By Aug. 16 the river was completely blocked.

On Aug. 14 the master had been instructed by the charterers' Shanghai agents not to sail from Wuhu pending instructions. On Aug. 17 the vessel completed the discharging of her Wuhu cargo, and in the normal course of events she would have reached Shanghai on Aug. 19 and thereafter have returned to Portland. The charterers had intended that she should make another voyage from Portland to Shanghai before she was delivered to the sub-charterers. The sub-charterers intended her to make a voyage from Vancouver in British Columbia to an Australian port, where she would have been re-delivered to the owners as provided in the charter-party and sub-charter-party.

After Aug. 14 considerable difficulty was experienced by the charterers' Shanghai agents in communicating with the master, and it was not until Aug. 21 that he received a message instructing him to discharge the Shanghai cargo at Wuhu and telling him that his departure from there was left to his responsibility and discretion. He replied on the same day that on completion of discharging he intended to remain at Wuhu until the river was open to navigation.

On Aug. 24 the charterers notified the owners that they claimed the vessel was off hire from the time she was ready to leave Wuhu; and the owners replied on Aug. 15 that this claim was unjustified.

On Sept. 3 the vessel completed discharging at Wuhu. Thereafter the vessel remained at anchor off Wuhu until Nov. 24, keeping in close touch with the British naval authorities at or near Wuhu.

On Sept. 17 the charterers' London agents, Messrs. David Bruce & Co., wrote to Messrs. Haldin & Phillips, Ltd., the owners' managers, enclosing a cheque in payment of a month's hire in advance from Sept. 18 and stating that the charterers reserved any rights they had under the charter-party with regard to the payment of hire while the vessel was held up. On Oct. 14 the master, on the charterers' instructions, cabled the sub-charterers that

the vessel was at their disposal at Wuhu. On Oct. 16 the sub-charterers cabled the master that the sub-charter was at present frustrated and that they refused delivery; they added that if the boom was not lifted by Nov. 15 they considered the sub-charter cancelled.

On Oct. 18 the charterers' London agents sent a cheque for a further month's hire and received an acknowledgment from the owners' managers. The charterers then wrote a letter of Oct. 19 repeating that the charterers reserved their rights.

On Oct. 20 the charterers accepted some coal freights for the vessel between Wuhu and Hankow (Hankow being situated on the River Yangtsze above Wuhu), and they notified the owners that they were accepting them to minimise losses, and without prejudice to their claim that the vessel was off hire. On Oct. 27 they informed the owners that they had dropped the business, giving as their reasons the excessive delay in securing loading permits, and that pilots did not recommend it. No evidence was adduced by either side as to whether the business was in fact practicable or not. In the opinion of the master it would not have been prudent to run up to Hankow after the end of November at the latest, as the river would by then be very low.

On Nov. 16 the charterers' London agents sent to the owners a copy of a cable they had received from the charterers which read:—

> Moore refuse to take delivery within cancelling period ending to-day claiming frustration consider our charter with owners frustrated after completion discharge Wuhu September third and decline pay further hire request owners return all hire paid under protest as unearned.

The owners replied on the following day that the charter could not be regarded as frustrated or the vessel deemed to be off hire. Thereafter the charterers paid no further hire.

On Nov. 17 the British naval authorities in the River Yangtsze informed the master that there was a possibility that the Japanese would soon be trying to force the barrier, and advised him to proceed to Chinkiang. The crew of the vessel refused to move her without a war bonus, which about Nov. 24 the owners eventually promised to pay. On the same day the vessel proceeded to Chinkiang. On Dec. 9 a Japanese flotilla made a passage through the barrier.

On Dec. 15 the owners told the charterers that the vessel was still on charter and that they looked to them to carry out their obligation of re-delivery in Australia, to which the charterers replied on the same day that they claimed frustration and that they declined to issue orders to the master. Thereupon, on the same day the owners instructed the master to proceed to Miiki in Japan for bunkers.

Between Dec. 9 and Dec. 17 the owners' agents in Shanghai were negotiating with the Japanese authorities to allow the vessel to proceed down river, and on the latter day the vessel proceeded through the barrier and anchored at Woosung near Shanghai. She arrived at Miiki on Dec. 20, where she waited while the owners were trying to fix her with another charter, which they succeeded in doing on Jan. 4, 1938. She left Miiki on Jan. 6 to proceed to the port of loading under the new charter.

From the evidence placed before him, the umpire found that the following opinions were expressed at various times during the period from Aug. 14 to Nov. 17 by persons in or near Shanghai as to the extent of the delay to which the vessel was likely to be subjected.

(a) On Aug. 14 the charterers' Shanghai agents thought that the British Admiralty might be arranging for a convoy.

(b) On Aug. 16 the said agents cabled to the charterers:— "Consulate advised Yangtsze still mined exit hopeless yet."

(c) On Aug. 28 the owners' agents at Shanghai considered that there was no immediate prospect of the obstruction being removed.

(d) On Sept. 4 the charterers' agents at Shanghai thought that it would probably be a long time before the barrier was lifted.

(e) On Sept. 12 the master wrote to the owners:— "The general opinion is that the barrier will remain until all this trouble at Shanghai is over as it stops the Japanese fleet from proceeding up river to Nanking and Hankow."

(f) On Sept. 13 the owners' agents at Shanghai considered that the vessel was likely to remain indefinitely.

The umpire further found that from Aug. 16 to Dec. 17 it was impossible for the vessel to proceed down the River Yangtsze

beyond Chinkiang; and that in the events which happened it would have been possible for the charterers to have re-delivered the vessel at an Australian port on or before Jan. 31, 1938.

On Feb. 4, 1938, the owners claimed arbitration, and they claimed damages for the wrongful repudiation by the charterers of the charter-party, while the charterers claimed to be repaid the hire paid in respect of the period from Sept. 3 to Nov. 18 amounting to £5108 6s. 7d. and £233 2s 5d. as the price of coal in the vessel's bunkers on Sept. 3.

The owners contended that the charter-party was wrongfully repudiated by the charterers; that there was no frustration thereof; that the vessel was never off hire; that if there was frustration on Sept. 3 the payment of hire for the period thereafter by the charterers was made under a mistake of law and was not recoverable; that Clause 3 of the charter-party was inapplicable, inasmuch as the vessel had not been delivered thereunder, and that the owners were only obliged to pay to the charterers the value of the coal in the vessel's bunkers on her departure from Miiki, namely, 28 tons, for which they were willing to give credit against their claim for damages; and that if the owners were obliged to pay the charterers for some quantity of coal greater than 28 tons, then such payment was an item of damage recoverable by them from the charterers, in that the expense of taking the vessel to Miiki was an expense reasonably incurred by them as a result of the aforesaid wrongful repudiation.

The charterers contended that the charter-party was frustrated on Sept. 3; that from Sept. 3 the obligation to pay hire was suspended because of the operation of one or more of the causes specified in Clause 15 of the charter-party; that from Sept. 3 the said obligation was suspended by reason of restraint of princes; that if any of the above contentions were right the charterers were entitled to be repaid hire paid by them in respect of the period from Sept. 3 to Nov. 18 as money paid under protest or paid and accepted subject to an implied condition that if the decision of an arbitration was in the charterers' favour it would be repayable; and that under Clause 3 and/or Clause 20 of the charter-party the charterers were entitled to be paid £233 2s. 5d., the price of coal in the bunkers on Sept. 3, or alternatively some other sum as the price of coal in the bunkers on Dec. 17.

The umpire found upon the evidence that the amount and price of the coal in the vessel's bunkers at the current market price: (a) at Wuhu on Sept. 3 was 275 tons, price £233 2s. 5d.; (b) at Shanghai on Dec. 17 was 144 tons, price £242; (c) at Miiki on Jan. 6 was 18 tons, price £25 18s.

The umpire said that if the charter-party was wrongfully repudiated by the charterers as claimed by the owners, then he assessed the sum payable by the charterers to the owners (as money due under the charter-party up to Dec. 15 and thereafter as damages) at £3405 1s. In assessing such sum he said that he had deducted the amount of £25 18s. for which the owners were willing to give credit as aforesaid; if the owners were obliged to pay to the charterers any sum greater than £25 18s. in respect of the price of such coal, then he accepted the contention of the owners that such excess should be added to their claim for damages; and he found as a fact that the expense of taking the vessel to Miiki was reasonably incurred by the owners as a result of the wrongful repudiation (if any).

So far as they were questions of fact he found and so far as they were questions of law he held: that on Sept. 3 the adventure provided for by the charter-party was frustrated and the charter-party thereby dissolved; that there was no loss of time from deficiency of men or stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, drydocking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel; that the detention of the vessel between Sept. 3 and Dec. 17 was caused by "restraint of princes"; and that if the charter-party was not dissolved before Dec. 15 then the vessel was withdrawn on that day by the owners from the service of the charterers.

Subject to the decision of the Court on the questions hereinafter set out, the umpire awarded that the owners were not entitled to recover damages or any other sum from the charterers, and that the charterers were not entitled to be repaid the hire paid by them to the owners but were entitled to £233 2s. 5d., being the price of coal as aforesaid; and he further awarded that the owners should pay the costs of the award and that the owners and the charterers should each bear their own costs of the reference.

The questions for the decision of the Court were:—

(1) Whether the charter-party was dissolved on Sept. 3, 1937.

(2) If the answer to the first question be in the negative, whether the charterers' obligation to pay hire was suspended from Sept. 3.

(3) If the answer to either the first or the second questions be in the affirmative, whether the charterers are entitled to be repaid the hire paid by them to the owners in respect of the period from Sept. 3 to Nov. 18.

(4) Whether the charterers are entitled to be paid £233 2s. 5d. as the price of coal as aforesaid.

(5) If the answer to the fourth question be in the negative, whether the charterers are entitled to be paid by the owners any other sum as the price of the coal.

If the Court answered the first question in the affirmative, the third in the negative and the fourth in the affirmative then his (the umpire's) award would stand. If the Court answered them otherwise the award would be set aside and an award made as the Court thought fit.

Sir Robert Aske, K.C., and Mr. A. A. Mocatta (instructed by Messrs. Holman, Fenwick & Willan) appeared for the shipowners; Mr. H. U. Willink, K.C., and Mr. Cyril A. Roberts (instructed by Messrs. Thomas Cooper & Co.) represented the charterers.

Sir Robert Aske said that the point raised by the case was whether a time charter-party was frustrated by the events which happened. The owners maintained it was not, and claimed damages for wrongful repudiation. The umpire, on the other hand, held that the charter-party was frustrated and decided against the claim of the owners. Counsel submitted that the doctrine of frustration was not to be so readily applicable to a time charter as to a voyage charter. In the case of the latter a ship went to a particular port and carried a particular cargo. Interference with her voyage might amount to frustration. In the case of a time charter there might be delays by the ship being detained by ice or being laid up for repairs or for other causes, but the charter-party would still remain in force. In his view the doctrine of frustration could not be applied to the present case.

Mr. Willink said that the conclusion the umpire had reached was that the charter-party was dissolved on Sept. 3, 1937. The question of frustration was covered by authority, but one had to keep away from the type of frustration which arose from requisition. To say that time-charters were in some peculiar class and to say they could not be frustrated except by requisition or loss tended to obscure the true problem they were examining. The charter-party was one in which the parties contemplated that the steamer would take from nine to ten and a half months, with a wide freedom of action given by the warranties. She would eventually sail for Australia and there be re-delivered. The basis of that contract, however, was destroyed. It was useless for the time-charterers to give any orders to the master; it was useless to arrange cargoes during the remainder of the time-charter; and it was impossible to proceed on any contemplated voyage.

Counsel argued that this was a commercial venture which it was impossible to perform. Consequently, the umpire found there was evidence upon which he could find that the charter-party was frustrated. That finding of fact could not be upset as being a finding the umpire was not entitled to make. If the Court took the view that the charter-party was not frustrated, then the ship was on hire, unless there was some clause to take her out. In those circumstances, what amount was due to the owners? Counsel submitted that the amount assessed as payable by the charterers to the owners, £3405 1s., was excessive. There should be deducted from that the time-charter hire from Nov. 18 to Dec. 15, 1937. The *Errington Court* was off hire during that period, as there was a cause which prevented the full working of the vessel.

Sir Robert Aske, in reply for the shipowners, contended that the position was that there was no authority as yet which decided that in the case of a time charter, where there had been some physical hindrance of the movement of the ship, that that was frustration. In all the immense number of circumstances in which vessels were held up under time charters, it was a little surprising that the point, if it were a relevant point, had not come before the Court before. The main feature of the case, as against others, where the circumstances were such that the ship was taken out of the control of both parties, was essentially and fundamentally different in principle. Where a chattel was hired by one

person, he might use it for such purpose as he thought fit. If the chattel were taken out of the disposition of the parties—taken away from the hirer, and the owner was also prevented from using it—there would be frustration of the agreement. If, on the other hand, the hirer had not the use of the chattel in the way he intended to use it, but still had possession and control of it, that, in Counsel's submission, would not be a case of frustration. The present case was of a most unfortunate type. One of two innocent parties had to suffer. Either the shipowner had to lose the gain he would have obtained by the use of his ship or the charterers would have to lose the sum paid for using the ship. The Court had to decide who took the risk. Counsel pointed out that it was the charterers alone who decided to what part of the world the vessel should go. To that extent they were the arbiters of the destinies of the vessel. The charterers had the ship for which they contracted, although in the circumstances it happened that her use was unprofitable.

JUDGMENT.

Mr. Justice BRANSON, in giving judgment, said: This is an appeal by way of case stated in an arbitration between the owners of the steamship *Errington Court* and the charterers of that ship. The ship was chartered on a time charter which contemplated a trading for nine to ten months between the limits defined by the Institute Warranties and in delivery unless lost at a safe port in Australia between Newcastle, New South Wales, and Port Pirie; payment of hire was to be monthly in advance; the captain was to prosecute his voyages with the utmost dispatch and to be under the orders and directions of charterers as regards employment and agency. There was an "off hire" clause (Clause 15) and an "exceptions" clause (Clause 16) excepting, amongst other things, restraint of princes.

The vessel entered upon her service on Mar. 18, 1937, and was variously employed until in July, 1937, she loaded a cargo of lumber and scrap iron at Portland (Oregon) for Wuhu and Shanghai. She arrived at Wuhu on Aug. 7, 1937. Wuhu is 750 miles up the River Yangtsze, and Shanghai is at the mouth of it. While the ship was discharging at Wuhu on Aug. 13, 1937 hostilities between Chinese and Japanese armed forces broke out in the neighbourhood of Shanghai, and on Aug. 14, 1937, the Chinese Government placed a boom across the river near Chinkiang, about 100 miles below Wuhu. This boom, while it existed, rendered it impossible for the *Errington Court* to go down the river to Shanghai. She completed the discharge of her Wuhu cargo on Aug. 17, and, in the normal course, would have reached Shanghai on Aug. 19. On Aug. 21 the master was ordered by the charterers' agents to discharge the Shanghai cargo at Wuhu. This was completed by Sept. 3. On Dec. 9 a Japanese flotilla made a passage through the boom and the ship was able to proceed down river on Dec. 17. The owners claimed that the ship was still on hire, but the charterers asserted that the contract had been frustrated on Sept. 3 and declined to issue further orders to the master. The matter went to arbitration and now comes before me upon an award stated by the umpire, Mr. Devlin, in the form of a special case.

The learned umpire found that the adventure provided for by the charter-party was frustrated on Sept. 3, 1937, and the charter-party thereby dissolved, and that neither party had any further claim against the other thereunder, except as to some bunker coals, with regard to which no question arises before me. He sets out in his award certain findings as to the opinions expressed by various persons as to the probable duration of the delay to which the vessel would be subjected, the net result of which is that it was likely to be indefinite. As the object of the Chinese in building the boom was to prevent the Japanese from getting up the river to such places as Hankow, it is obvious that they would maintain the boom for as long as they could, or until the Japanese gave up the attempt to ascend the river.

Upon this set of facts the first question which is raised for my decision is whether—the learned umpire having found that the contract was frustrated—the Court is bound by his decision, if there is any evidence upon which it was possible for him so to find, or whether the question whether there was frustration is one for the Court. This question is decided for me by the Court of Appeal in the case of Comptoir Commercial Anversois v. Power, Son & Co., [1920] 1 K.B. 868. Lord Justice Bankes, at p. 890, says:

> The question of whether the doctrine of frustrated adventure applies to any particular state of facts must, I consider, always be a question of law to be decided by the Court upon the facts.

Lord Justice Scrutton, at p. 898, states the same conclusion more at length.

The next matter in controversy is as to the true basis upon which the doctrine of frustration of contract rests. Does it depend upon a term to be implied into the contract or does it arise by operation of law as soon as it appears that the "basis of the contract has gone"—whatever that expression may mean? I am not sure myself that the distinction is more than academic. Indeed, the fact that in the case of F. A. Tamplin Steamship Company, Ltd. v. Anglo-Mexican Petroleum Products Company, Ltd., [1916] 2 A.C. 397, Lord Loreburn, at p. 403, and Lord Parker, at p. 422, expressly based the principle upon a term to be implied in the contract itself and not on something *dehors* the contract, while Lord Haldane, at p. 406, used language open to the construction that no implied term was involved—coupled with the further fact that Lord Finlay, in the case of the Bank Line, Ltd. v. Capel & Co., [1919] A.C. 435, at p. 442, said, referring to Tamplin's case: "It will be found that the principles of law enunciated by Lord Loreburn and by the two dissentients are identical; the difference between them being as to the application of these principles to the particular circumstances of the case," indicates plainly that his Lordship considered that there is no real distinction to be drawn. The Court will not regard the basis of a contract as gone unless circumstances have altered to such an extent that the Court will conclude that no reasonable men who contemplated such an alteration would be content to remain bound by the contract if it came about. But if there be any material difference between the two views the question is settled for me as a Judge of first instance by the express decision of the Court of Appeal in the Comptoir case to which I have already referred. Lord Justice Bankes, at p. 886, says:

> Having regard to the facts of the present case I do not think that the question of the frustration of the adventure and the question of whether the contracts contained an implied condition that they should in certain events be dissolved, need be considered separately. The present is a case in which it seems clear to me that the view taken by Lord Justice Lindley in Turner v. Goldsmith* and by Lord Sumner in Bank Line v. Capel & Co. applies, namely, that the so-called doctrine of the frustration of an adventure rests on an implied condition in the contract between the parties.

* [1891] 1 Q.B. 544, at p. 550.

This judgment does not appear to have been brought to the notice of Mr. Justice Goddard in the case of W. J. Tatem, Ltd. v. Gamboa, [1939] 1 K.B. 132; 61 Ll.L.Rep. 149. I cannot think that he would not have held himself bound by it if it had been.

Next, comes the question, What is the term to be implied? It is suggested on behalf of the charterers that it should be a term in general language such as that "if the adventure is frustrated the charter-party shall come to an end." I do not think that this suggestion is compatible with the language used in the decided cases. The condition suggested by Lord Loreburn at p. 406 in Tamplin's case was

> that they should be excused if substantially the whole contract became impossible of performance, or in other words impracticable, by some cause for which neither was responsible.

The difficulty created by the use of a diversity of terms to define the circumstances which lead to a dissolution of the contract has been pointed out by Lord Sumner in the Bank Line case, *sup.*, at p. 457. I do not propose to add another to the various attempts that have been made, but to apply to the case before me the condition suggested by Lord Loreburn. Here was a time charter for some nine to ten months contemplating that for that period the owners should keep the ship at the disposal of the charterers to carry goods for them to any port within the prescribed limits, as and when ordered by the charterers, with the utmost dispatch. For this service the charterers were to pay the prescribed hire. That is, in my opinion, a commercial adventure in the performance of which both parties were interested, and in respect of which both parties had continuing duties to perform. (See per Lord Sumner in the Bank Line case, at p. 453.) What was the effect upon this adventure of the closing of the Yangtsze by the boom on Aug. 15? It is true the charterers could go on paying hire and giving orders, if so minded, but the owners could not obey the orders or move the ship out of the river. It was urged, on behalf of the owners, that the doctrine of frustration cannot apply to a time charter unless the ship is physically removed from the control of both parties.

I cannot see why the adventure in question before me was any the less frustrated than was the adventure in the Bank Line case. All power in the ship's officers to continue the adventure was taken away, in the one case by requisition, and, in the other, by the construction of the boom.

The only question left on this part is whether the delay imposed was long enough to effect frustration. The authorities upon this point are again by no means unanimous. They agree, I think, in holding that the time as at which the question must be decided, is the time when the parties came to know of the cause and the probabilities of the delay and had to decide what to do; and that it was important to consider

> the probable length of the total deprivation of the use of the chartered ship compared with the unexpired duration of the charter-party (per Lord Sumner in the Bank Line case, *sup.*, at p. 454).

Indeed, this was the only distinction on the facts between Tamplin's case, where the charter-party was for 60 months, of which nearly three years remained to run when the ship was requisitioned, and was held not frustrated, and the Bank Line case, where the charter was for 12 months, all yet to run, and frustration was held to have taken place. The Court must, as the parties have to when the event arises which is alleged to cause frustration, estimate as best it can the probable duration of that event. The probability as to the length of the deprivation, and not the certainty arrived at after the event, is material. (See per Lord Sumner in the Bank Line case, *sup.*, at p. 454.)

According to Lord Shaw in the Bank Line case (p. 449), if stoppage or loss arise from a declaration of war, it must be considered to have been caused for a period of indefinite duration, and so to have effected an immediate solution of the contract arrangements for and dependent upon the completion or further continuance of the adventure. His Lordship thought the rule so stated would apply equally to a requisition, and I think that it must also apply to an act of hostilities which are being carried on without a formal declaration of war. Other authorities, for example Lord Sumner at p. 455 in the Bank Line case, indicate that the causes of frustration may have to be in operation for long enough to raise a presumption of inordinate delay before frustration takes place. The fair inference from the findings of the learned umpire as to what persons interested thought of the prospects of the ship getting down the river, is that he concluded that the probabilities were that the ship would be kept by the boom for an indefinite period. Once that conclusion is reached the contract is frustrated. The fact that the Japanese were able to break a passage through the boom in time to permit of the ship getting to Australia before the date fixed for re-delivery is immaterial.

For these reasons I have come to the conclusion that the award is correct and ought to be affirmed. I need not, therefore, deal in any detail with the other points which would have arisen if I had come to the opposite conclusion. If there was no frustration the contract stands and hire is payable unless there is anything in the contract to prevent it becoming payable. The charterers rely on Clause 15 for this. The argument depends upon the delay caused by the boom coming within the words " any other cause preventing the full working of the vessel." In my opinion it does not. I do not rely on the case of Hogarth and Others v. Miller, Brother & Co., [1891] A.C. 48, for this conclusion, but upon the words of this charter-party, which are materially different from those which the Court had to construe in that case. The words are not apt to cover a case where the ship is in every way sound and well found, but is prevented from continuing her voyage by such a cause as this. If there was no " off hire " period, the charterers could recover nothing in respect of coal consumed or hire paid, but they would, on the other hand, be liable for hire and damages as suggested in par. 25 of the award.

The umpire's award was accordingly upheld, with costs.

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

May 20, 21; Oct. 9, 1996

ANDRE & CIE S.A.
v.
ORIENT SHIPPING (ROTTERDAM) B.V.

(THE "LACONIAN CONFIDENCE")

Before Mr. Justice RIX

Charter-party (Time) — Off-hire — "Other causes" — Interference of authorities — Construction — Vessel delayed by port authority because of presence remaining on board of residue sweepings — Whether vessel "off-hire" by reason of "any other cause" — Whether authority's reaction was ejusdem generis to named cause of detention by average accident — Whether full working of vessel prevented.

By a charter-party dated Apr. 6, 1995 the disponent defendant owners let their vessel *Laconian Confidence* to the plaintiff charterers for one time charter trip from Yangon to Bangladesh. The charter was in the New York Produce Exchange form and provided inter alia:

> 15. That in the event of the loss of time from deficiency of and/or default men or stores, fire, breakdown or damages to hull machinery or equipment, grounding, detention by average accidents to ship or cargo, dry-docking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost . . .

The charterers shipped a cargo of 10,165 tonnes of bagged rice in new sound jute bags of 50 kgs. net weight. The vessel sailed to Chittagong and there discharged her cargo between May 5 and 26. Normal discharge ended at 23 25 hours on May 26 and a joint survey established the presence remaining on board of 15.75 tonnes of rejected residue sweepings.

The Bangladesh port authorities refused to allow *Laconian Confidence* to proceed to her next business because of the presence remaining on board of the residue sweepings. As a result the vessel was delayed for nearly 18 days until she was finally allowed to dump those residues and thereafter to sail.

The dispute as to whether the vessel was off hire was referred to arbitration. The arbitrators held that the vessel was not off hire. They stated in their award that the delay post May 26 did not inevitably arise from the nature of the cargo damage (assuming that there was damage and the owners were in breach) but from the remarkable reaction to it by the authorities. The arbitrators rejected the submission that the delay was caused by detention by average accidents on the basis that an average accident to cargo required a fortuity "probably of some magnitude" causing physical damage and they rejected the charterers' reliance on "any other cause", and in the absence of the addition of the word "whatsoever" rejected the charterers' submission on the basis of the ejusdem generis rule. The arbitrators said that "any other cause" must be construed ejusdem generis with the preceding list of incidents which consisted of only three kinds of item: (a) concerning the manning provisioning of the vessel; (b) serious incidents of breakdown or damage and (c) necessary dry docking. The arbitrators also rejected reliance on "any other cause" because of the qualifying phrase "preventing the full working of the vessel" stating that if the vessel was fully capable of performing the service required of it then hire should continue even though certain extraneous events prevented the charterers from using the vessel.

The charterers appealed, contending that the vessel was off hire by reason of "any other cause" viz. the port authorities' refusal to allow the vessel to work or leave. The charterers argued that the presence of the residues was the underlying cause and that the authorities' reaction was therefore ejusdem generis to the named cause of "detention by average accident". The charterers further argued that the full working of the vessel was prevented, by the extraneous cause of interference by authorities, that the vessel's incapacity to work was a legal incapacity and it did not matter that she was physically in herself efficient.

———*Held*, by Q.B. (Com. Ct.) (RIX, J.), that (1) the delay was due to the authorities; there was no average accident to cargo and the arbitrators were clearly right to say that an average "accident" had to involve a fortuitous occurrence and were entitled to form the view that there was no element of fortuity in the presence of residues; the charterers could not in the light of the arbitrators' findings assert detention by average accident to cargo; equally they could not assert the presence of residues to be itself "any other cause" either causing "loss of time" or causing the prevention of the full working of the vessel; in the arbitrators' view the cause of the detention was the interference of the authorities not the presence of the residues; and even on the assumption that an average accident to cargo had occurred, the charterers would have failed to bring themselves within the off-hire clause by reliance on the named cause of detention by average accident to cargo (*see* p. 144, col. 2; p. 145, col. 1);

(2) the qualifying phrase "preventing the full working of the vessel" did not require the vessel to be inefficient in herself; a vessel's working may be prevented by legal as well as physical means and by outside as well as internal causes; an otherwise totally efficient ship might be prevented from working; that was the natural meaning of those words (*see* p. 150, col. 2);

(3) it would generally be relevant to find whether the ship was efficient in herself either because even on the assumption of a named cause it might be relevant to point out that the vessel's working had not been prevented or because in considering whether an alleged cause of off-hire was a cause within the clause it might be very pertinent to point out that the vessel was otherwise efficient in herself (*see* p. 150, col. 2);

(4) it was well established that the words "any other cause", in the absence of "whatsoever", should be

construed either ejusdem generis or at any rate in some limited way reflecting the general context of the charter and the clause; a consideration of the named causes indicated that they all related to the physical condition or efficiency of either vessel or cargo; it was for the owners to provide an efficient ship and crew and it was therefore natural to conclude that the unamended words "any other cause" did not cover an entirely extraneous cause like the interference of authorities unjustified by the condition or reasonably suspected condition of ship or cargo (*see* p. 150, col. 2, p. 151, col. 1);

(5) it did not appear that it could be intended by a standard off-hire clause that an owner took the risk of delay due to the interference of authorities at any rate where the interference was something beyond the natural or reasonably foreseeable consequence of some named cause; where the clause was amended to include the word "whatsoever", there was no reason why the interference of authorities which prevented the vessel performing its intended service should not be regarded as falling within the clause (*see* p. 151, col. 1);

(6) although the full working of a vessel might be prevented for legal as well as physical reasons, the appeal failed; in the absence of the word "whatsoever" the unexpected and unforeseeable interference by the authorities at Chittagong at the conclusion of what was found to be a normal discharge was a totally extraneous cause; there was no accident to the cargo and there was nothing about the vessel herself, her condition or efficiency, nor even anything about the cargo which led naturally or in the normal course of events to any delay (*see* p. 151, col. 1);

(7) if the authorities had not prevented the vessel from working she would have been perfectly capable of discharging the residues or of sailing and dumping them without abnormal delay; the action of the authorities was not in any sense ejusdem generis any of the named causes within the clause (*see* p. 151, col. 1);

(8) if the clause had been amended to contain the word "whatsoever" the vessel would have been prevented from working albeit in unexpected circumstances; the cause would not have been ejusdem generis but with the addition of the word "whatsoever" would not have to be and it would not matter that the authorities' actions might be capricious (*see* p. 151, col. 2);

(9) the authorities suggested that where the port authorities acted properly or reasonably pursuant to the (suspected) inefficiency of the vessel, any time lost might well be off hire even in the absence of the word "whatsoever" (*see* p. 151, col. 2).

————*The Apollo*, [1978] 1 Lloyd's Rep. 200, *The Aquacharm*, [1980] 2 Lloyd's Rep. 237, *The Maestro Giorgis*, [1983] 2 Lloyd's Rep. 66 and *The Roachbank*, [1987] 2 Lloyd's Rep. 498 considered.

The following cases were referred to in the judgment:

Apollo, The [1978] 1 Lloyd's Rep. 200;

Aquacharm, The (C.A.) [1982] 1 Lloyd's Rep. 7; [1980] 2 Lloyd's Rep. 237;

Bridgestone Maru No. 3, The [1985] 2 Lloyd's Rep. 62;

Court Line Ltd. v. Dant & Russell Inc., (1939) 64 Ll.L.Rep. 212; (1939) 44 Com. Cas. 345;

Good Helmsman, The (C.A.) [1981] 1 Lloyd's Rep. 377;

Maestro Giorgis, The [1983] 2 Lloyd's Rep. 66;

Manhattan Prince, The [1985] 1 Lloyd's Rep. 140;

Mareva AS, The [1977] 1 Lloyd's Rep. 368;

Roachbank, The (C.A.) [1988] 2 Lloyd's Rep. 337; [1987] 2 Lloyd's Rep. 498.

This was an appeal by the charterers Andre & Cie S.A. against the arbitration award made in favour of the disponent owners Orient Shipping (Rotterdam) B.V. and holding in effect that the chartered vessel *Laconian Confidence* was not off hire and the vessel was fully capable of performing the service required of it, the Bangladesh port authorities having delayed the vessel because of the presence remaining on board of residue sweepings.

Mr. Peter Gross, Q.C. and Mr. Philip Edey (instructed by Messrs. Holman Fenwick & Willan) for the disponent owners; Mr. Dominic Kendrick (instructed by Messrs. Thomas Cooper & Stibbard) for the charterers.

The further facts are stated in the judgment of Mr. Justice Rix.

Judgment was reserved.

Wednesday Oct. 9, 1996

JUDGMENT

Mr. Justice RIX:

The problem

This is, for the present, the latest in a line of cases arising out of the New York Produce Exchange's off-hire clause and the problem created by the interference of authorities. As a result of such interference, the vessel, although entirely sound and efficient in herself, is prevented from working, that is to say from performing the next task required of her. Is the vessel off-hire, on the ground that she has been prevented from working by some "other cause", i.e. by some cause other than the named causes in the clause? Or does she remain on-hire,

because the vessel remains entirely efficient in herself, and/or because the ejusdem generis principle curtails "any other cause" to causes similar to the named causes?

My reader will recall that the NYPE's off-hire clause (cl. 15) provides as follows:

> That in the event of the loss of time from deficiency of [*and/or default*] men or stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, dry-docking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost . . .

The words in italics "and/or default" were added to the standard clause in the instant case, as they often are. (They were in error slightly misplaced: the obvious intent is that the clause should read "deficiency and/or default of men"; but nothing turns on that.) The word "whatsoever" is sometimes added to the phrase "or by any other cause", but not in the instant case. It is established that the phrase "preventing the full working of the vessel" qualifies not only the phrase "any other cause" but also all the named causes (*The Mareva AS*, [1977] 1 Lloyd's Rep. 368 at p. 382). It has therefore been said that the first question to be answered in any dispute under the clause is whether the full working of the vessel has been prevented; for if it has not, there is no need to go on to ask whether the vessel has suffered from the operation of any named cause or whether the phrase "any other cause [whatsoever]" is or is not limited in any way: *The Aquacharm*, [1982] 1 Lloyd's Rep. 7 at p. 9, *The Roachbank*, [1987] 2 Lloyd's Rep. 498 at p. 507.

The Mareva AS is also cited for the proposition that the qualifying condition "preventing the full working of the vessel" is not met if "the vessel in herself remains fully efficient in all respects" (at p. 382).

Ten years later, by the time of *The Roachbank*, this had become:

> . . . a judicial gloss . . . so that the question which has to be asked, according to the authorities, is whether the vessel is fully efficient and capable in herself of performing the service immediately required by the charterers . . .

Nevertheless, this judicial gloss has caused problems in cases where the cause of delay is the interference of authorities operating on a vessel which is in herself fully efficient. Four cases in particular illustrate this problem. In *The Apollo*, [1978] 1 Lloyd's Rep. 200 the vessel was denied free pratique and thus prevented from berthing and discharging while the suspicion of typhus in two of her crew members was investigated and, as it turned out, eliminated. In *The Aquacharm*, [1980] 2 Lloyd's Rep. 237 (Mr. Justice Lloyd); [1982] 1 Lloyd's Rep. 7 (C.A.) the vessel was delayed by the authorities at the entrance to the Panama Canal until she had lightened part of her cargo. In *The Maestro Giorgis*, [1983] 2 Lloyd's Rep. 66 the vessel was arrested by receivers as a result of alleged cargo damage on the voyage. In *The Roachbank* the vessel was delayed in being permitted to enter port because of the presence on board her of 293 Vietnamese refugees. In the first and third of those cases the vessel was held to be off hire, in the second and fourth on hire. The word "whatsoever" lies on both sides of that divide for, although it was absent in *The Aquacharm*, it was present in the other cases.

The award

The present case concerns the port authorities' bureaucratic refusal to allow *Laconian Confidence* (the "vessel") to proceed to her next business following discharge of her cargo because of the presence remaining on board of 15.75 tonnes of residue sweepings. As a result the vessel was delayed for nearly 18 days until she was finally allowed to dump these residues and thereafter to sail. The arbitrators, Messrs. Mabbs, Scott and Packard, held that the vessel was not off hire, even if, a question they left open or were even prepared to assume in charterers' favour, the owners had committed any breach of contract in relation to the care or discharge of the cargo. Their interim award is dated Jan. 3, 1996. Leave to appeal was granted by Mr. Justice Colman, limited to the off-hire issue. Other issues had been raised in the charterers' notice of motion. There is also a respondents' notice from the owners.

The dispute arose out of a time charter on the NYPE form dated Apr. 6, 1995 ("the charter"). This provided for one time charter trip from Yangon to Bangladesh. The charterers, Andre & Cie, respondents in the arbitration and appellants in this Court, shipped a cargo of 10,165 tonnes of bagged rice in new sound jute bags of 50 kgs. net weight. The (disponent) owners were Orient Shipping Rotterdam B.V., claimants in the arbitration and respondents on this appeal. The vessel sailed to Chittagong and there discharged her cargo between May 5 and 26. "Normal" discharge (the arbitrators' expression) ended at 23 25 hours on May 26. A joint survey established the presence remaining on board (on a visual estimate) of 15.75 tonnes of rejected sweepings. The report stated:

> The apparent cause of damage appeared to be the ingress of rain water between 15–18 of May, 1995 and the subsequent mixing of cargo from torn bags with water affected cargo, rust, dust, straws etc, of the holds of the vessel.

These residues must be distinguished from a shortage of 119 tonnes, based on a landed weight of 9961 tonnes (I am not sure how these various figures are to be reconciled).

The story thereafter can best be stated in the words of the award itself:

> The cargo situation at the end of 26th May was that there remained on board a small quantity of spoiled and adulterated/contaminated cargo sweepings. They were officially deemed to be damaged and unfit for the purpose for which imported — and they could not be landed ashore . . .
>
> In the event, and only after a lengthy and remarkable bureaucratic procedure insisted upon by the Bangladesh authorities, involving multiple certificates, this residual tonnage was permitted to be dumped on 13th June — and the vessel then sailed, re-delivering at 14:00 hours that day . . .
>
> The underlying cause of the delay was the presence on board the vessel of a 15.75 metric tons of cargo deemed unfit to be landed by the authorities (no doubt theirs was a proper view). It is not surprising after discharging a 10,000 cargo, including sound cargo swept up and rebagged (it seems at least 540 bags), that there should be a very small residue — mixed with foreign matter, wetted, or otherwise contaminated by extraneous materials — which is rejected. The owners' view of the proximate cause is stated later.
>
> In the charterers' view the dominant cause of the delay (i.e. the *causa causans* being the immediate cause, the last link in the chain of causation) was the highly bureaucratic attitude to the cargo residues taken by the various Bangladeshi authorities between 26th May and 13th June. They, predominately the Customs, demanded the performance of an extraordinary and exceedingly slow exercise involving multiple certificates as to the small quantity of cargo (one being for non radio-activity) and the vessel was not allowed to dispose of the 15.75 tons of rubbish and sweepings until 13th June. Eventually the authorities allowed the rejected residues to be dumped at a designated ocean position. We permit ourselves to comment that we do not see why — had the authorities acted realistically and efficiently — such permission/ruling could not have been given within a few hours of the end of discharge of all the sound cargo (so dumping might have taken place on, say, 27th May). It is clear to us that neither owners nor charterers were in any position to have induced the authorities to have acted more rationally and hence more quickly to permitting the dumping . . .
>
> In this case, at present it seems clear that the delay post 26th May did not inevitably arise from the nature of the cargo damage (assuming for the moment there was damage and the owners were in breach) but from the remarkable reaction to it by the authorities. In our opinion that distinguishes the present case from those upon which the charterers sought to rely.
>
> As a separate point, even if the owners were in breach then we think it plain (and it was common ground) that neither owners nor charterers contemplated (i.e. would have foreseen when entering the contract) that such a long delay would or could arise from the presence on board the vessel of a residue of a mere 15.75 tons of spoiled cargo at the end of what was otherwise a normal discharge . . .
>
> In the present case, if owners were in breach arising from the 15.75 tons of residues there would nevertheless be no damages of the kind here asserted by the charterers because it is common ground that at the time of contracting neither party could possibly foresee such an outcome from having a small quantity of rejected sweepings/rubbish on board the vessel at the end of normal discharge, namely a delay of 16+ days.

Turning specifically to the question of "Off-hire", the arbitrators first dealt with the charterers' submission that the delay was caused by "detention by average accidents to . . . cargo". They rejected that submission on the basis that an average accident to cargo required a fortuity "probably of some magnitude", causing physical damage. They said:

> The charterers relied upon " . . . average accident to . . . cargo". However, our understanding of "average accident" is that it is a fortuitous incident, probably of some magnitude, which has caused physical damage. For example, if the intruding bows of a colliding vessel also damaged containers on the other vessel then there would have been an average accident both to that ship and to her cargo. In our opinion, 15.75 tons of unacceptable sweepings on this vessel cannot be categorised as being the result of an average accident.

The arbitrators next considered the charterers' reliance on "any other cause" and in the absence of the addition of the word "whatsoever" rejected that on the basis of the ejusdem generis rule. They said:

> Here "any other cause" must be construed ejusdem generis with the preceding list of incidents. That list can be seen to consist of only three kinds of item: —
>
> (a) concerning the manning/provisioning of the vessel;

(b) serious incidents of breakdown or damage;

(c) necessary dry docking.

We readily find that 15.75 tons of rejected sweepings cannot be associated with the nature of any of those categories.

Finally the arbitrators appear to have rejected reliance on "any other cause" (the same would in logic be true of reliance on average accident to cargo) because of the qualifying phrase "preventing the full working of the vessel". They said, citing *The Mareva AS* and *The Roachbank*:

> ... if the vessel *itself* is fully capable of performing the service required of it then hire shall continue even though certain extraneous events prevent the charterers from using the vessel. That seems to be precisely the case here.

The submissions

On behalf of the charterers Mr. Kendrick submitted that the vessel was off hire by reason of "any other cause", viz. the port authorities' refusal to allow the vessel to work or leave. This was not a purely extraneous cause because it was linked to the authorities' suspicions about the residues. Those suspicions constituted an average accident to cargo, and the arbitrators applied the wrong test in concluding there was no such accident. Mr. Kendrick did not, I think, ultimately press a submission that there had been "detention by average accidents to ... cargo", presumably because he felt obliged to accept on the arbitrators' findings that the vessel's detention was not due so much to the presence of cargo residues as to the authorities' remarkable and unforeseeably bureaucratic reaction to them. He nevertheless submitted that the presence of those residues was the "underlying cause" (as found by the arbitrators) and that the authorities' reaction was therefore ejusdem generis to the named cause of "detention by average accidents". There was also an alternative submission that, even if there was not in fact an average accident to cargo, the authorities nevertheless suspected one, and therefore their reaction was equally a cause ejusdem generis with the named cause. Alternatively, the heterogeneous nature of the named causes made any application of the ejusdem generis rule inappropriate, and the question was simply whether the "other cause" bore a sufficiently close relationship to any named cause, which in this case it did.

As for average accident to cargo, the arbitrators were wrong to say that it required "a fortuitous incident, probably of some magnitude" or to find that there was no such accident. An average accident was merely damage and the extent of damage was irrelevant; in any event the arbitrators had assumed a breach by owners, which must amount to a fortuity; and there was a finding of damage. Therefore there was an average accident to cargo. Similarly, no account should be taken of the *extent* of damage for the purpose of any ejusdem generis rule (cf. the arbitrators' "serious incidents of breakdown or damage").

Although I have put Mr. Kendrick's submissions as to cause first, and have done so in order to give point and shape to those submissions, I acknowledge that Mr. Kendrick was prepared to recognize that on the authorities the first question for him to tackle was to show that the full working of the vessel had been prevented: and indeed most of his submissions were taken up with dealing with that issue. For this purpose he reviewed the authorities and submitted that they were all consistent with the thesis that the full working of a vessel can be prevented even by the apparently extraneous cause of interference by authorities, since a vessel's incapacity to work can be either physical or legal. In the present case the vessel's incapacity to work was a legal incapacity, and it did not matter that she was physically in herself efficient.

In this connection Mr. Kendrick relied in particular on three authorities. The first was *The Apollo* where the underlying cause of the delay in granting free pratique was suspected typhus: it did not matter that the typhus was not in fact present, and the vessel was therefore, as Counsel there argued, "perfectly sound and ready for service" (at p. 204). The second was *The Maestro Giorgis*, where the vessel was arrested, but again in herself physically efficient. The third was *The Bridgestone Maru (No. 3)*, [1985] 2 Lloyd's Rep. 62, where the vessel although found to be in every way fit for service was nevertheless prevented by the authorities from entering port because of her booster pump's failure to conform to local Italian regulations. Each of these three vessels was held to be off hire. In all three cases, Mr. Kendrick submitted, the vessel was physically efficient but legally incapacitated — the cause in question therefore did prevent the full working of the vessel. Even if this was not the express reasoning upon which those cases were decided, it was, if I may put it this way, the inherent, golden thread which linked their conclusions.

On behalf of the owners, on the other hand, Mr. Gross, Q.C. submitted, in the first place, that the charterers lacked the findings upon which any cause of off-hire could be based, indeed the arbitrators' findings were against them. There was no average accident to cargo, because the arbitrators were correct to say that there had to be fortuitous damage of a certain magnitude, whereas the findings were that the discharge was normal and the residues were "a mere 15.75 tonnes" of "sweepings/rubbish". A

fortiori, there was no "detention by average accidents to . . . cargo". In any event no average accident had caused the delay: the residues were merely part of the background as an "underlying [but for] cause". The award even lacked any finding that the port authorities had delayed the vessel. There was no finding that the vessel could not sail and dump her cargo, or that she was ever suspected of being incapable of doing so. The arbitrators had found that "the vessel *itself* is fully capable of performing the service required of it", and that all that happened was that "extraneous events", a new independent act of outside authorities, had prevented the charterers from using it.

Secondly, Mr. Gross submitted that in the absence of the word "whatsoever" (cf. *The Apollo* and *The Maestro Giorgis*), the ejusdem generis principle did apply. The arbitrators were right to say that the residues "cannot be associated with the nature of any" of the three categories of incidents identified by them in the clause, viz. those concerning the manning/provisioning of the vessel, serious incidents of breakdown or damage, and necessary dry docking. That was, at the lowest, a reasonable and unchallengeable mixed finding of fact and law.

Thirdly, Mr. Gross submitted that Mr. Kendrick's analysis of the authorities as permitting a finding of prevention of full working on legal as well as physical grounds was flawed. The true analysis was that an off-hire cause, whether named or unnamed, and whether or not the word "whatsoever" was inserted, had to bear on the vessel's *physical* condition as a vessel, albeit for these purposes her *suspected* physical condition was also relevant. All cases could be explained on that basis. Thus in *The Apollo*, the vessel was off hire because her crew were at any rate suspected of typhus: in her suspected condition therefore, the vessel was incapable of working. In *The Bridgestone Maru (No. 3)* the authorities' interference was due to the "suspected condition of the ship itself" in that the failure of the booster pump to comply with the regulation amounted at any rate to "a potential challenge to the efficiency of part of the ship's equipment" (at p. 83). As for *The Maestro Giorgis*, which on any view was the "high-water mark in the construction of the clause" (Wilford, Time Charters, 4th ed., at p. 372), that was distinguishable both on the ground that the clause there included the word "whatsoever", and/or on the ground that there at any rate the interference of authorities was "directly attributable to the history, if not the condition" of the vessel since the alleged cargo damage rendered her legally susceptible to arrest (at p. 69). Alternatively, *The Maestro Giorgis* was wrongly decided: it was not applied in *The Roachbank* (at p. 507) and was inconsistent with *The Manhattan Prince*, [1985] 1 Lloyd's Rep. 140 (where the Shelltime 3's phrase "efficient working of the vessel" was held to relate solely to the "physical" condition of the vessel, at p. 146).

Before turning to the authorities myself, I would observe that the nature of the argument seems to have altered since the matter was before the arbitrators. At the arbitration the cause relied on by the charterers as coming within the off-hire clause was obviously the presence of the 15.75 tonnes of residues themselves, in the form of average accident to cargo: see the passage headed "Off-hire" within the award. In an earlier part of the award, however, under the heading "Cause of the delay", it is stated that in the charterers' view the —

> . . .dominant cause of the delay . . . was the highly bureaucratic attitude . . . taken by the various Bangladeshi authorities.

Before me the cause relied upon was indeed the interference of the authorities. No objection was taken by Mr. Gross. Looking back at the leave to appeal stage, it may be noted, at any rate with hindsight, that the grounds drafted in the notice of motion were ambiguous. I deprecate the practice, which has become common, of drafting grounds of appeal (not in this case drafted by Counsel before me) without clearly identifying the "question of law" upon which an application for leave to appeal is based (cf. s. 1(2) of the Arbitration Act, 1979). Since, however, there has been no objection to this change of tack, if such it is, and the relevant facts are in my judgment found in the award, I shall proceed to deal with the arguments addressed before me. It is in any event clear from their respondents' notice that the owners came equipped to deal with the arguments in fact addressed by Mr. Kendrick: see in particular the last sentence of par. 2 and par. 4 of that notice.

The charterers' reliance on the interference of authorities was perhaps forced on Mr. Kendrick by the findings of the award. The delay was due to the authorities. There was no average accident to cargo. Even making allowance for an assumed breach by owners in the discharge, the arbitrators nevertheless went on to find that the discharge was normal and, by inevitable inference, it seems to me to follow that "a mere" 15.75 tonnes of residues was found to be normal too. It amounted, on my calculation, to no more than 0.16 per cent. of the cargo, and the arbitrators may well have viewed this tiny percentage as de minimis, hence their reference to an average accident as requiring "some magnitude". Be that as it may, the arbitrators were clearly right to say that an average "accident" must involve a fortuitous occurrence, and the arbitrators were entitled to form the view (whatever the position may have been so far as any rain or owners' breach were

concerned) that there was no element of fortuity in the presence of the residues. The assumption of breach of contract is then beside the point. If there was any breach connected with a shortage claim of 119 tonnes (which remains to be determined), or with the allegation that the crew had opened some 900 bags (45 tonnes) of cargo and bled them into the holds, or with the further allegation that rain water damage had occurred within May 15–18, the position remains that the arbitrators found the residues of 15.75 tonnes to be unexceptional. Above all the charterers cannot, in the light of the findings, assert *detention* by average accident to cargo. Equally they cannot assert the presence of residues to be itself "any other cause" either causing "loss of time" or causing the prevention of the full working of the vessel: in the arbitrators' view the cause of detention was the interference of the authorities, not the presence of the residues. Hence Mr. Kendrick had to reformulate the charterers' off-hire submissions. In the circumstances, even on the assumption that an average accident to cargo had occurred, the charterers would have failed to bring themselves within the off-hire clause by reliance on the named cause of detention by average accident to cargo.

The authorities

The off-hire authorities have been set out in extenso in several prior judgments such as *The Bridgestone Maru (No. 3)* (at pp. 81–83) and *The Roachbank* (at pp. 502–506), and I hesitate therefore to set them out afresh. I would, however, observe at the outset of my discussion of those authorities that there appear to be two interrelated concepts which run here and there through them. One is that the typical off-hire clause does not cover an "extraneous" cause, by which is, I think, meant a cause extraneous to the vessel itself. This concept I suppose relates to the meaning or possible width of meanings of "cause" in the expression "any other cause" or "any other cause whatsoever". The other concept is that a vessel cannot be off hire unless there is some defect or incapacity of or in the vessel herself which affects her working. This concept relates of course to the phrase "preventing the full working of the vessel".

Both concepts may be said to go back to what in a sense is for these purposes the leading case of *Court Line Ltd. v. Dant & Russell Inc.*, (1939) 64 Ll.L.Rep. 212; (1939) 44 Com. Cas. 345. That concerned a vessel, *Errington Court*, which got caught by a boom placed in the Yangtse river by Chinese forces. For a leading case the relevant part of the judgment is brief. At p. 219, col. 2; pp. 352–353 Mr. Justice Branson merely opined that the words "any other cause preventing the full working of the vessel":

> . . . are not apt to cover a case where the ship is in every way sound and well found, but is prevented from continuing her voyage by such a cause as this.

In *The Mareva AS* the *Court Line* case was not cited, and indeed the former case was not concerned at all with the problem of interference by authorities or by other third parties. The position was simply that the cargo had been damaged by reason of owners' breach (giving rise to what arbitrators held was an average accident to cargo) and as a result the vessel took longer to discharge than if the cargo had remained sound. The arbitrators found that despite this delay —

> . . . the vessel was fully capable of performing every service that was required of her. In particular . . . she was fully capable of discharging cargo from all her holds . . . " (at p. 381).

In the circumstances Mr. Justice Kerr could not realistically have concluded that the vessel was off hire, and he did not (at p. 382). The charterers' argument, however, had sought to sideline the off-hire clause's reference to "preventing the full working of the cargo" by relying on the named cause of "detention by average accidents to . . . cargo" and by submitting that named causes were not qualified by the phrase relating to the working of the vessel. Having rejected those submissions, Mr. Justice Kerr had no alternative to holding that the vessel remained on hire. It is not therefore his decision, but his reasoning, that has influenced subsequent cases, for he said (ibid.):

> The owners provide the ship and crew to work her. So long as these are fully efficient and able to render to the charterers the service then required, hire is payable continuously . . . But if, for instance, the cargo is damaged as the result of an accident, but the vessel's ability to work fully is not thereby prevented or impaired, because the vessel in herself remains fully efficient in all respects, then I do not think that the charterers bring themselves within the clause.

I can quite see that those words are capable of being applied to a case where the cause that prevents an otherwise efficient vessel from rendering the service immediately required of her operates from the outside, for instance because of the interference of authorities: but Mr. Justice Kerr was not thinking of such a case, such a question did not arise on the facts before him, and in particular it may be observed, as the facts of the instant case illustrate, that it does not follow from the fact that a ship is fully efficient in herself that she is able to render the services immediately required of her.

The concept of an extraneous cause was not therefore in issue in *The Mareva AS*, nor was that expression used in the *Court Line* case. But in *The*

Apollo Counsel for shipowners based a submission upon *Court Line* and *The Mareva AS* to the effect that:

> . . . the off-hire clause applied to matters internal to the ship and her crew and not to external interferences or delays [at p. 205].

However Mr. Justice Mocatta rejected that submission. He said (ibid.):

> I find it very difficult to lay down criteria of this kind. For example if a surveyor from a classification society required tests to be made to the machinery, would the delay consequent upon this bring the off-hire clause into play?

So far the concept of extraneous or external cause had not perhaps got very far: but in *The Aquacharm*, [1980] 2 Lloyd's Rep. 237 Mr. Justice Lloyd at p. 240 relied expressly on *Court Line* to eliminate "some external cause, such as the boom" as a possible off-hire cause at any rate when the vessel remained "fully efficient in herself". Those decisions were in turn relied on by the Court of Appeal in *The Good Helmsman*, [1981] 1 Lloyd's Rep. 377 at p. 422.

Then in *The Maestro Giorgis* Mr. Justice Lloyd held that a distinction should be made, in deciding whether a cause prevents the full working of a vessel —

> . . . between causes which are totally extraneous, such as the boom in *Court Line Ltd. v. Dant & Russell Inc.*, and causes which are attributable to the condition of the ship itself, such as engine breakdown (at p. 69).

Mr. Justice Lloyd then went on to decide that a vessel's susceptibility to arrest by reason of an allegation of cargo damage was sufficient to prevent the arrest itself being totally extraneous. He said (ibid.):

> In deciding whether the cause of prevention is totally extraneous, one must have regard not only to the physical condition of the vessel, but also, in the words of the arbitrators, to her qualities and characteristics, to which I would also add, her history and ownership. I can see no valid distinction between a vessel being arrested because of a claim by cargo against her owners, and a vessel being prevented from leaving port because, for example, her classification certificates are not in order. I agree with the arbitrators that it can make no difference whether she is arrested because of alleged damage to cargo carried on the particular voyage, or on some previous voyage, or indeed by reason of alleged damage to cargo carried on a sistership.

In such a situation a vessel is fully efficient in herself, but is susceptible to arrest. It follows that in *The Maestro Giorgis* Mr. Justice Lloyd was not giving to the words "preventing the full working of the vessel" a meaning that required the vessel to be inefficient in herself. Her full working was only prevented inasmuch as she was under arrest. His reasoning therefore amounted in effect to the validation of the arbitrators' reasons which he summarized in his own words (at p. 67) as follows:

> Where a vessel is fully efficient, and capable in herself of performing the service immediately required by charterers, she is on-hire, even if she is prevented from performing that service by an extraneous cause, such as the boom which prevented the vessel from sailing down the Yangtse in *Court Line Ltd. v. Dant & Russell Inc.*, (1939) 64 Ll.L.Rep. 212. But here the arrest was not an extraneous cause in that sense since it affected the legal status of the vessel. She was just as much incapable in herself of performing the service immediately required, that is to say, leaving port, by reason of the arrest as she would have been if she had suffered a breakdown in her engines. There is no distinction to be drawn between legal incapacity and physical incapacity.

The Maestro Georgis is therefore a decision to the effect that a vessel's inability to perform the service immediately required of her by reason of the interference of authorities fulfils the requirements of the words "preventing the full working of the vessel", at any rate if the authorities' interference is not totally extraneous. A vessel may of course be susceptible to the interference of authorities for a whole variety of reasons: the arrest jurisdiction is one such reason, but in truth any vessel visiting a port becomes immediately subject to the law of the country in which the port is situated and to the requirements and directives of the local authorities.

The off-hire clause in *The Maestro Giorgis* contained the word "whatsoever". That meant, said Mr. Justice Lloyd at p. 92, that any cause may suffice to put the vessel off hire, whether physical or legal. Mr. Justice Lloyd's reasoning thereafter appears to be concerned with the qualification of "preventing the full working of the vessel". The effect of his reasoning, however, appears to be that under a "whatsoever" clause outside interference which prevents the vessel performing her service, provided that it is not "totally extraneous", will put the vessel off hire.

I would comment that, if Mr. Justice Lloyd was wrong in his conclusion that an efficient vessel may be prevented from working by the action of the authorities, then it would be odd if the addition of the word "whatsoever" could make any difference. If a vessel efficient in herself cannot be within the words "preventing the full working of the vessel", then it does not seem to me that the nature of the

cause which operates on such a vessel can alter the fact that the vessel is efficient in herself. In such a case, widening the ambit of "cause" by adding the word "whatsoever" ought not in logic to affect the position.

In *The Roachbank*, however, Mr. Justice Lloyd's conclusion in *The Maestro Giorgis* was not applied. In that case the vessel was prevented for a while from entering port by the authorities because of the presence on board of Vietnamese refugees who had been rescued in pitiful condition at sea during the vessel's voyage. The off-hire clause contained the word "whatsoever". The arbitrators were divided on the result. They found that the working of the vessel was not prevented, in the sense that the vessel could have discharged her cargo without delay despite the presence on board of the 293 refugees, if the vessel had been permitted to enter port and discharge. Their finding was that:

> . . . the vessel was always capable, as a vessel, of performing the service immediately required [at p. 502].

They also found that the attitude of the authorities was an "extraneous cause", and that the presence of the refugees on board was too temporary to have become a "characteristic" of the vessel or part of the vessel's history.

On appeal from their award Mr. Justice Webster felt required by previous authorities to place upon the words "preventing the full working of the vessel" a judicial gloss:

> . . . so that the question which has to be asked, according to the authorities, is whether the vessel is fully efficient and capable in herself of performing the service immediately required by the charterers [at p. 507].

In the circumstances it was inevitable that he should uphold the award, for he was bound by the arbitrators' finding on that question. Equally, it would be irrelevant for him that the vessel could not work in the different sense that she was prevented from entering port and discharging by the action of the port authorities. In the circumstances, having been asked by Counsel (see at p. 502) to differ from the conclusions of Mr. Justice Lloyd in *The Maestro Giorgis*, he expressed his diffident disagreement with that decision in these terms (at p. 507):

> . . . for two reasons; first, because it seems to me to give undue emphasis to the cause of the prevention of the full working, as distinct from the fact that full working is prevented; and, secondly because, for the reasons that I have already expressed, in the case of an amended clause in my view it is probably unnecessary to consider the nature of the cause at all, something which Mr. Justice Lloyd himself acknowledged in the way in which he stated his second reason: "any cause may suffice". Moreover, for my own part, I do not think it either necessary or helpful to attempt to categorise causes with a view to distinguishing between totally extraneous and other causes.

I feel bound to say, however, with equal diffidence, that in my judgment the real point of difference between Mr. Justice Lloyd and Mr. Justice Webster (and perhaps both of them, reading this, would disagree with me) was that Mr. Justice Lloyd was willing to say that a vessel wholly efficient in herself might nevertheless, under certain circumstances, come within the words "preventing the full working of the vessel", whereas Mr. Justice Webster was of the view, based upon his reading of the authorities, that such a reading was not possible where the vessel was fully efficient and capable in herself. Even so, in the absence of authority, Mr. Justice Webster would perhaps have come to a different conclusion, for he had earlier remarked (at p. 502) that:

> If no gloss had been put upon the clause, other than that the reference to "the full working of the vessel" was to be construed as a reference to "the full working of the vessel for the service immediately required" (as to which there is no argument) I would have thought that the application of the clause prima facie involved only one matter of fact, namely whether the full working of the vessel, understood in that way, had been prevented.

So, as it seems to me, the critical question may well be whether Mr. Justice Webster was right to say that a judicial gloss had been put upon the phrase so as to require, for a vessel to be off hire, that she should not be efficient in herself to perform the next service required. The authorities considered by Mr. Justice Webster were *Court Line*, *The Mareva AS*, *The Apollo* and *The Aquacharm*.

I have already considered *Court Line* and *The Mareva AS*. In my opinion there is nothing in those cases to *require* the judicial gloss which Mr. Justice Webster found to exist. *Court Line* differed perhaps from all other cases in that the boom there was a totally extraneous matter — I know of no other way in which to point up that idiosyncrasy. Although it was man-made, it was akin to a geographical impediment. A vessel is not off hire just because she cannot proceed upon her voyage because of some physical impediment, like a sand bar, or insufficiency of water, blocking her path. While remarking that the vessel was "in every way sound and well found" Mr. Justice Branson ultimately founded his reasoning, it seems to me, on the fact that "such a cause as this" was not within the clause. As for *The Mareva AS*, I have already made the point that that case was not concerned at all with

the interference of authorities. The language of a vessel's inherent efficiency is there found, but in circumstances where there was no interference with the vessel's service, and the distinction that had to be made was between the efficiency of the vessel herself and the increased time involved in the discharge of a damaged cargo. In such circumstances it comes as no surprise that Mr. Justice Kerr used the language which he did, nor that he found that the cargo damage had not prevented the full working of the vessel. The vessel, after all, was working fully.

Similarly I do not think that *The Apollo* supports the judicial gloss determined by Mr. Justice Webster, nor did he found any reliance on it. On the contrary, Mr. Justice Mocatta said (at p. 205):

> In my judgment the action taken by the port health authorities did prevent the full working of the vessel and did bring the off-hire clause into play.

It seems to me that in saying this Mr. Justice Mocatta was recognizing that a vessel could be prevented from working by an outside bar on her working. That is not consistent with glossing the critical phrase as requiring some failure of the vessel's efficiency in herself. Of course I bear in mind that in that case there was suspected typhus of the crew.

The last case considered by Mr. Justice Webster was *The Aquacharm*. It was Mr. Justice Lloyd himself who, at first instance, introduced the judicial test of whether:

> . . . the vessel is fully efficient in herself, that is to say, whether she is fully capable of performing the service immediately required of her (at p. 240).

I would comment in passing first that the test of "fully efficient in herself" is not necessarily the same as the test of "fully capable of performing the service immediately required of her" as Mr. Justice Lloyd was himself to recognize in *The Maestro Giorgis*; and secondly, that on the facts of that case, since the vessel had to be lightened to transit the Panama Canal, there could have been no difference between the service required by the charterers and that required by the canal authorities, viz. the lightening of the vessel.

In the Court of Appeal in *The Aquacharm*, Lord Denning, M.R. did not adopt the gloss of "fully efficient in herself". He merely said (at p. 9):

> I do not think the lightening of the vessel does "prevent the full working of the vessel". Often enough cargo has to be unloaded into a lighter — for one reason or another — to get her off a sandbank — or into a basin. The vessel is still working fully, but she is delayed by the need to unload part of the cargo.

Lord Justice Griffiths did, however, adopt the judicial gloss. For instance he said (at p. 11):

> *Aquacharm* remained at all times in herself fully efficient in all respects. She could not pass through the canal because the canal authorities decided she was carrying too much cargo, but that decision [in] no way reflected upon *Aquacharm's* efficiency as a ship.
>
> By contrast, in *The Apollo*, . . . A ship suspected of carrying typhus is prevented from working fully until it is cleared, for no responsible person would use it in such a condition. The incapacity of the ship to work in such a case is directly attributable to the suspected condition of the ship itself . . .

Lord Justice Shaw said that he agreed entirely with the judgments of Lord Denning and of Mr. Justice Lloyd and would dismiss the appeal for the reasons stated in the judgment of Lord Denning (at p. 12).

The judgment of Lord Justice Griffiths and his explanation of *The Apollo* have been influential; but the reasoning of the majority in the Court of Appeal is that contained in the judgment of Lord Denning, and that in my view does not support, and a fortiori does not require, the judicial gloss found by Mr. Justice Webster. Of course, *Aquacharm* was fully efficient in herself, that was one of the facts of the case. Equally, it was a fact of the case that the vessel was fully working when she was waiting to lighten and actually lightening. That, however, may be contrasted with the situation in *The Apollo*, where the vessel was not working at all during the period when free pratique was refused; and could also be contrasted perhaps with a hypothetical situation where the Panama Canal authorities perversely refused entrance to the canal on grounds of draught, even though the vessel plainly was not overladen, a problem with which the Court of Appeal did not have to contend.

The Good Helmsman was cited to Mr. Justice Webster, but he did not find it of assistance, in particular because of some doubt as to whether the judgment of Lord Justice Ackner is accurately reported (see *The Roachbank* at p. 505). For my part I would be prepared to assume, as did Mr. Justice Lloyd in *The Maestro Giorgis* (at p. 68) that a "not" had fallen out of the report so that Lord Justice Ackner's judgment should read (at p. 422): ". . . the full working of the vessel was [not] prevented for the short period alleged". Even so, I agree with Mr. Justice Webster that *The Good Helmsman* does not take the matter any further. Certainly Mr. Justice Lloyd in *The Maestro Giorgis* did not think that Lord Justice Ackner's judgment prevented him from reaching the conclusion to which he came. In my judgment the reason why *The Good Helmsman* does not take the matter any

further is that there the Court of Appeal were dealing only with an implied off-hire clause limited to "deficiency of men preventing the full working of the vessel" and without any "sweeping up clause" (at p. 421). Lord Justice Ackner held first, that there was no evidence that the vessel was detained through the absence of a crew member (at p. 421), making it unnecessary to decide any further point (at p. 422). What followed was therefore obiter. Lord Justice Ackner then said that if there had been delay, it would have been caused by "the action of the authorities in refusing to allow the vessel to sail and not to the deficiency of the men". It followed, therefore, that in the absence of any sweeping up provision (e.g. "any other cause"), the interference of authorities could not possibly be a cause of off-hire in that case. The decision was therefore a factual one as to cause, under a limited implied term, not as to the construction of the NYPE clause.

In these circumstances I would for my part respectfully differ from Mr. Justice Webster's conclusion that he was bound by authority to impose the judicial gloss he adopted upon the phrase "preventing the full working of the vessel". I would prefer myself to accept that it could be legitimate to find the full working of a vessel had been prevented by the action of authorities in preventing her working.

The Roachbank itself went to the Court of Appeal [1988] 2 Lloyd's Rep. 337 on an application for leave to appeal from the judgment of Mr. Justice Webster. In dismissing that application Lord Justice Neill said (at pp. 342–343):

> In order to succeed in her application for leave to appeal, it would be necessary for her to show that the conclusion on the law reached by Mr. Justice Webster in the instant case was either plainly wrong, or at any rate that there was a strong prima facie case for saying that he was in error.
>
> I am not satisfied that is so. In all the cases to which we have been referred it has been recognized by the Courts that the words in cl. 15 involve some limitation on the causes. The way it was put by Mr. Justice Webster in the present case was that the question which the arbitrators had to determine was —
>
> > . . . whether the vessel was efficient in herself and fully capable of performing the service immediately required.
>
> With the utmost respect to Miss Heilbron it seems to me that there is no prima facie case, let alone a strong prima facie case, for saying that that interpretation of the words in cl. 15 "preventing the full working of the vessel" is plainly wrong.

On the present appeal, however, the matter has been fully, and, if I may say, ably argued. While drawing the decision of the Court of Appeal to my attention, Mr. Gross did not submit that it amounted to a binding confirmation of Mr. Justice Webster's judgment. In any event I am far from suggesting that Mr. Justice Webster should have allowed the appeal before him. The arbitrators had directed themselves by reference to *The Maestro Giorgis*, and had found the vessel to be on hire. The majority had not only found that the full working of the vessel had not been prevented (as to which on my view of the matter, they had applied the wrong test), but had also found that the action of the authorities had been totally extraneous and that the presence of the refugees on board had not been a characteristic of the vessel. The arbitrators were the tribunal of fact and perfectly entitled to reach such findings of fact or mixed fact and law. It would perhaps have been a harsh reward for the owners that their master's humanity should have led to their vessel being off hire.

Two further decisions cited to me but not mentioned by Mr. Justice Webster are *The Manhattan Prince*, [1985] 1 Lloyd's Rep. 140 and *The Bridgestone Maru No. 3*, [1985] 2 Lloyd's Rep. 62. It may be that they were not cited to Mr. Justice Webster, or if cited not mentioned in his judgment, because they are both decisions on the Shelltime 3 clause with its slightly different language "preventing the *efficient* working of the vessel" (emphasis added). The efficiency of the vessel is mentioned twice in the clause, thus —

> In the event of loss of time . . . due to deficiency of . . . or any other cause preventing the efficient working of the vessel . . . hire shall cease to be payable from the commencement of such loss of time until the vessel is again ready and in an efficient state to resume her service . . .

In *The Manhattan Prince* the vessel was arrested by the ITF on the ground that her owners were in breach of their agreement with the ITF to employ crew in accordance with ITF rates for worldwide trading. Mr. Justice Leggatt considered the authorities down to *The Maestro Giorgis* and held that the vessel remained on hire. He said (at p. 146):

> It is plain that what the charterers have to show is that the efficient working of the vessel was indeed prevented by the I.T.F. One starts then by asking: What is the natural meaning of the words in that context? One may take account of the ejusdem generis principle in the sense that the causes of loss of time which are specified may indeed throw light upon the proper meaning to be ascribed to the phrase "efficient working of the vessel".

It seems to me that the true interpretation of the phrase in its context demands that it should apply, and apply only, to the physical condition of the vessel, with the result that, as Mr. Phillips contends, the phrase "efficient working" must enjoy the connotation of efficient physical working. In my judgment the vessel worked, even though she was prevented from working in the way the charterers would have wished by the action of the I.T.F. She was indeed fully operational and as such was not within the scope of the off-hire clause.

In *The Bridgestone Maru No. 3* it will be recalled that the vessel was unable to remain and discharge at Livorno because her booster pump was not a fixed installation as required by local RINA regulations. She was nevertheless in every way an efficient vessel. Mr. Justice Hirst considered the same authorities and held that the vessel was off hire on the ground that the delay was attributable to the suspected condition of the ship. He said (at p. 83):

This is by no means an easy problem, and on any view the case is very near the borderline.

In the *Court Line* case the cause (the boom) was entirely extraneous to the ship and had nothing whatsoever to do with the efficiency of the vessel. In *The Aquacharm* the cause was the overloading, and although this was in a sense intrinsic to the ship, it had, as Lord Denning, M.R., clearly pointed out, nothing to do with its actual efficiency as a working vessel. In *The Good Helmsman*, where the case was on any view extremely weak on the facts, the absence of one single crew member could not possibly affect the overall efficiency of the crew.

On the other hand, in *The Apollo* the cause was the alleged health risk which, if made good, would undoubtedly affect the efficiency of the crew. In *The Maestro Giorgis* the case was the alleged defects revealed by the cargo claim, which again, if made good, would affect the efficiency of the vessel.

In my judgment, this case falls within the latter of the above two categories. The cause of refusal to allow the vessel to discharge was the failure of the pump to comply with the RINA regulations in that it was unfixed. This allegation was a potential challenge to the efficiency of part of the ship's equipment, namely, the portable pump. To adapt the words of Lord Justice Griffiths in *The Aquacharm*, the incapacity of the ship to discharge was attributable to the suspected condition of the ship itself, and as a result the crew could not use the relevant part of the machinery, namely, the pump. Consequently I hold that the charterers have clearly established as a matter of principle the occurrence of an off-hire event at Livorno.

I find nothing in these two cases, or in their examination of the NYPE authorities, to alter the view I have formed of those authorities. On the contrary, it seems to me that the Shelltime 3's emphasis upon the efficiency of the vessel is a real difference from the language of the NYPE, fully justifying Mr. Justice Leggatt's conclusion that the former's off-hire clause applies only to the physical condition of the vessel or at any rate to her efficiency as a vessel (including, I would readily accept, her suspected efficiency). It seems to me that Mr. Justice Leggatt pointed up the difference in the language of the two forms when he said:

... the vessel worked, even though she was prevented from working in the way the charterers would have wished ...

In my judgment therefore, the qualifying phrase "preventing the full working of the vessel" does not *require* the vessel to be inefficient in herself. A vessel's working may be prevented by legal as well as physical means, and by outside as well as internal causes. An otherwise totally efficient ship may be prevented from working. That is the natural meaning of those words, and I do not think that there is any authority binding on me that prevents me from saying so. The question remains, of course, whether a ship has been prevented from working by a cause within the clause. Moreover, it will generally be relevant to find whether the ship is efficient in herself: either, as in *The Mareva AS*, because, even on the assumption of the operation of a named cause, it may be relevant to point out that the vessel's working had not been prevented; or, as in *Court Line*, because, in considering whether an alleged cause of off-hire is a cause within the clause, it may be very pertinent to point out that the vessel was otherwise efficient in herself.

Those comments bring me back to consider the phrase "any other cause" in the light of the authorities. In my judgment it is well established that those words, in the absence of "whatsoever", should be construed either ejusdem generis or at any rate in some limited way reflecting the general context of the charter and clause: see *The Apollo* at p. 205, *The Aquacharm* at p. 239 (Mr. Justice Lloyd), *The Maestro Giorgis* at p. 68, *The Manhattan Prince* at p. 146, *The Roachbank* at p. 507. A consideration of the named causes indicates that they all relate to the physical condition or efficiency of either vessel (including its crew) or, in one instance, cargo. There is, moreover, the general

context, emphasized for instance by Mr. Justice Kerr in *The Mareva AS* (at p. 382), that it is for the owners to provide an efficient ship and crew. In such circumstances it is to my mind natural to conclude that the unamended words "any other cause" do not cover an entirely extraneous cause, like the boom in *Court Line*, or the interference of authorities unjustified by the condition (or reasonably suspected condition) of ship or cargo. Prima facie it does not seem to me that it can be intended by a standard off-hire clause that an owner takes the risk of delay due to the interference of authorities, at any rate where that interference is something beyond the natural or reasonably foreseeable consequence of some named cause. Where, however, the clause is amended to include the word "whatsoever", I do not see why the interference of authorities which prevents the vessel performing its intended service should not be regarded as falling within the clause, and I would be inclined to say that that remains so whether or not that interference can be related to some underlying cause internal to the ship, or is merely capricious. That last thought may be controversial, but it seems to me that if an owner wishes to limit the scope of causes of off-hire under a clause which is deliberately amended to include the word "whatsoever", then he should be cautious to do so.

The decision

It follows in my judgment that, although I would for my part accept Mr. Kendrick's submission that the full working of a vessel may be prevented for legal as well as physical reasons, this appeal must nevertheless fail. In the absence of the word "whatsoever", the unexpected and unforeseeable interference by the authorities at Chittagong at the conclusion of what was found to be a normal discharge was a totally extraneous cause, (save in a "but for" sense) unconnected with, because too remote from, the merely background circumstance of the cargo residues of 15.75 tonnes. There was no accident to cargo, and there was nothing about the vessel herself, her condition or efficiency, nor even anything about the cargo, which led naturally or in the normal course of events to any delay. If the authorities had not prevented the vessel from working, she would have been perfectly capable of discharging the residues or of sailing and dumping them without any abnormal delay. In such circumstances I reject Mr. Kendrick's submission that the action of the authorities was in any sense ejusdem generis any of the named causes within the clause. There is no finding that they suspected an average accident to cargo, or, to pick up the award's reference to a certificate for non radio-activity, that there was any suspected problem in regard to radio-active contamination. I would be extremely doubtful in any event that a capricious suspicion could bring their action within the clause. As it is we do not know why on this occasion the authorities delayed the vessel for so long, other than the arbitrators' finding that their procedures were remarkably bureaucratic.

Having decided the issue before me, I should perhaps go no further. But out of deference to the submissions made to me, I would venture the following thoughts, but emphasizing their obiter nature.

I would suggest that if the clause had been amended to contain the word "whatsoever", then the position would probably have been otherwise. The vessel would have been prevented from working, albeit in unexpected circumstances. The cause would not have been ejusdem generis, but with the addition of the word "whatsoever" would not have to be. It would not seem to me to matter that the authorities' actions may have been capricious.

The authorities suggest, moreover, that where the authorities act properly or reasonably pursuant to the (suspected) inefficiency or incapacity of the vessel, any time lost may well be off hire even in the absence of the word "whatsoever". Thus in *The Apollo* (albeit the presence of "whatsoever" may have facilitated the decision) Mr. Justice Mocatta stressed that there was good cause for the careful testing and disinfection that was carried out before free pratique was granted (at p. 205); and Lord Justice Griffiths pointed out (in *The Aquacharm* at p. 11) that no responsible person would use a ship suspected of carrying typhus. Moreover in *The Bridgestone Maru No. 3* Mr. Justice Hirst held that the vessel was off hire even in the absence of the word "whatsoever" on the basis that the regulations had been properly applied and that the failure of the pump to comply with the regulations was a potential (sc and reasonable) challenge to the efficiency of the ship herself.

Finally, suppose time lost due to the detention of a vessel by the authorities arising out of the discovery of contraband on board her, an example debated before me. In such a case the position may well depend on who was responsible for the presence of the contraband. If the owners (or their crew) were responsible, the vessel might well be off hire, particularly under an amended clause, but even perhaps in the absence of amendment. If, however, the charterers were responsible, it would seem to be absurd to hold the vessel off hire: how would that square under an amended clause with my construction, seeing that the detention by the authorities under my construction would be "any other cause whatsoever preventing the full working of the

vessel"? It seems to me that there would be an implicit exclusion of causes for which the charterers were responsible.

Considerations such as these indicate that there will always be difficult decisions to make in borderline cases or unusual combinations of circumstances. In many if not most cases the ultimate decision will depend on findings of fact or mixed fact and law made by the arbitrators, which could not be easily, if at all, faulted. So in the present case, even upon the construction of the words "preventing the full working of the vessel" which I have preferred, and even after taking into account the charterers' shift of position, it seems to me that ultimately my decision is concluded for me by the arbitrators' findings.

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

5 February; 11 June 2010

COSCO BULK CARRIER CO LTD
v
TEAM-UP OWNING CO LTD
(THE "SALDANHA")

[2010] EWHC 1340 (Comm)

Before Mr Justice GROSS

Charterparty (time) — Off-hire — Vessel seized by Somali pirates — Whether off-hire event — NYPE form, clause 15.

The vessel *Saldanha* was chartered on the NYPE form as amended for a period of 47 to 50 months. On 22 February 2009 the vessel was seized by Somali pirates whilst sailing through the transit corridor in the Gulf of Aden. The pirates compelled the master to sail the vessel to waters off the Somali town of Eyl, where the vessel remained until 25 April when she was released by the pirates. She reached an equivalent position to the location at which she was seized on 2 May.

The charterers refused to pay hire for the period between 22 February and 2 May, contending *inter alia* that the vessel was off-hire under clause 15 of the charterparty. The owners claimed the hire plus the cost of bunkers, additional war risk premium and crew war risk bonuses. The claim was made under the terms of the charter alternatively as a claim for an indemnity against the consequences of following orders to take the Suez route. The charterers counterclaimed for damages alleging unseaworthiness because the vessel and her crew had not been properly prepared to deal with an attack by pirates.

Clause 15 of the charter provided:

> "That in the event of the loss of time from default and/or deficiency of men including strike of Officers and/or crew or deficiency of . . . stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, dry-docking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost . . . "

The arbitrators determined a number of preliminary issues arising under clause 15 and under other clauses of the charterparty. As to clause 15, the tribunal held that the detention by pirates did not have the effect of putting the vessel off-hire under that clause. The tribunal also held that the vessel was not off-hire under clause 39 and that the war risk and insurance provisions of the charterparty did not preclude the owners from claiming hire in respect of periods during which the vessel was under the control of pirates.

The charterers appealed to the High Court in relation to the tribunal's determination that the vessel was not off-hire under clause 15. There was no appeal in relation to the tribunal's other determinations.

The charterers submitted that they had succeeded in bringing themselves within one or more of the following three causes contained in clause 15 of the charterparty, namely: (1) "detention by average accidents to ship or cargo"; (2) "default and/or deficiency of men"; and (3) "any other cause".

————*Held* by QBD (Comm Ct) (GROSS J) that the appeal would be dismissed.

(1) There was no "detention by average accidents to ship or cargo". The piracy incident did not result in damage to the vessel, and the incident could not properly be described as an "accident". Furthermore, "average" in the present context was not simply to be equated with a peril ordinarily covered by marine insurance. Damage to the ship was an essential ingredient for the wording "average accidents to ship" to apply (*see* paras 10 to 15);

————*Mareva Navigation Co Ltd v Canaria Armadora SA (The Mareva AS)* [1977] 1 Lloyd's Rep 368 followed.

(2) There was no "default and/or deficiency of men". The tribunal had been asked to determine whether, on the (disputed) assumption that the officers and crew had failed to take recognised anti-piracy precautions before and during the attack, those failures would fall within the exception "default of men". The tribunal had further been asked to assume that that failure on the part of the officers and crew was a significant cause of the loss of time resulting from the pirates taking over the vessel and consequent loss of full working of the vessel. The charterers had submitted that the natural meaning of "*default* of men" included a failure to perform or a breach by the master and crew of their duties. However, the context presented an insuperable obstacle to adopting the charterers' construction of "default of men". In context, "default of men" in clause 15 had a narrower construction, and meant a refusal by officers or crew to perform all or part of their duties as owed to the shipowner and not the negligent or inadvertent performance of those duties (*see* paras 19 to 28).

(3) The incident did not fall within the words "any other cause". The wording was not "any other cause *whatsoever*". The difference in wording was significant. The act of piracy was not *ejusdem generis*. It did not arise out of the condition or efficiency of the vessel, or the crew, or the cargo, or the trading history, or any reasonable perception of such matters by outside bodies. It was a truly extraneous cause. The effect of the bargain contained within clause 15, construed in its general context, was that the owners did not take the risk of the full working of the vessel being prevented by an extraneous cause such as piracy. The charterers assumed that risk (*see* paras 30 and 34);

————*Andre & Cie SA v Orient Shipping (Rotterdam) BV (The Laconian Confidence)* [1997] 1 Lloyd's Rep 139 considered.

The following cases were referred to in the judgment:

Andre & Cie SA v Orient Shipping (Rotterdam) BV (The Laconian Confidence) [1997] 1 Lloyd's Rep 139;

Chandris v Isbrandtsen-Moller Co Inc (CA) [1951] 1 KB 240;

Kelman v Livanos [1955] 1 Lloyd's Rep 120;

Kidston v Empire Insurance Co (1866) LR 1 CP 535;

Mareva Navigation Co Ltd v Canaria Armadora SA (The Mareva AS) [1977] 1 Lloyd's Rep 368;

Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua) [2010] EWHC 280 (Comm); [2010] 1 Lloyd's Rep 509;

Piccinini v Partrederiet Trigon II (The Alfred Trigon) [1981] 2 Lloyd's Rep 333;

Royal Greek Government v Minister of Transport (CA) (1949) 82 Ll L Rep 196;

Thomas Wilson Sons & Co v Owners of Cargo per the "Xantho" (The Xantho) (HL) (1887) 12 App Cas 503.

This was an appeal by Cosco Bulk Carrier Ltd, charterers of the vessel *Saldanha*, from an arbitration award determining, in favour of the owners, Team-Up Owning Co Ltd, that the vessel was not off-hire when seized by Somali pirates in February 2009.

Luke Parsons QC and David Lewis, instructed by Holman Fenwick Willan, for the charterers; Andrew Baker QC and Sean O'Sullivan, instructed by Ince & Co, for the owners.

The further facts are stated in the judgment of Gross J.

Judgment was reserved.

Friday, 11 June 2010

JUDGMENT

Mr Justice GROSS:

Introduction

1. The subject matter of this case is unfortunately topical: namely, Somali pirates. In *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2010] 1 Lloyd's Rep 509, the context was marine insurance; here the issue concerns off-hire under a time charterparty.

2. The question is whether detention by pirates, piracy or perhaps the effects of piracy entitled charterers to put the vessel off-hire in reliance upon that version of clause 15 of the NYPE form of charterparty agreed by the parties in the charterparty of 25 June 2008 ("the charterparty").

3. Clause 15 of the charterparty provided as follows:

> "That in the event of the loss of time from *default and/or deficiency of men* including strike of Officers and/or crew or deficiency of ... stores, fire, breakdown or damages to hull, machinery or equipment, grounding, *detention by average accidents to ship or cargo*, dry-docking for the purpose of examination or painting bottom, *or by any other cause* preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost ... " (Italics added.)

4. By its Award on Preliminary Issues dated 8 September, 2009 ("the award"), an eminent arbitration tribunal ("the tribunal") held unanimously that the answer to the question was "no". From that decision the applicants ("charterers") appeal.

5. For completeness, the tribunal also considered preliminary issues arising under other clauses of the charterparty. In summary, the tribunal held that the vessel was not off-hire under clause 39 of the charterparty and that the war risk and insurance provisions of the charterparty did not preclude the respondents ("owners") from claiming hire in respect of periods during which the vessel was under the control of pirates. There is no appeal from these determinations of the tribunal and no more need be said of them. This appeal is accordingly solely focused on the question of off-hire under clause 15 of the charterparty.

6. Reverting to the award, loss of time resulting from the seizure by pirates was not in dispute. The tribunal held that the "full working" of the vessel had been prevented by the actions of the pirates. Owners do not appeal from that decision of the tribunal. The only issue on this appeal is therefore still further narrowed: namely, whether, contrary to the decision of the tribunal, charterers succeed in bringing themselves within one or more of the following three (italicised) causes contained in clause 15 of the charterparty on which they seek to rely:

> (i) "Detention by average accidents to ship or cargo" ("Issue (I)");
>
> (ii) "Default and/or deficiency of men" ("Issue (II)");
>
> (iii) "Any other cause" ("Issue (III)").

7. The facts, so far as relevant to this appeal, are within a short compass and may conveniently be taken from the award:

> "5. The vessel is a Panamax size bulk carrier ...

6. The charter was contained in a recap which provided for a charter period of 47 to 50 months at US$52,500 per day and 'otherwise as per' an earlier charter of a similar vessel 'logically amended' with certain exceptions. The earlier charter was on the NYPE form with additional clauses . . . The clauses we have to construe come from this earlier charter.

7. The vessel was delivered into the charter on about 5 July 2008. On 30 January 2009 Charterers gave orders to load a cargo of bulk coal in Indonesia for carriage to Koper in Slovenia. Owners responded by saying they supposed this voyage was to be via the Cape of Good Hope. When Charterers said it was to be via the Suez Canal Owners reserved their right to refuse to comply with the orders unless Charterers confirmed that they would reimburse Owners for the additional war risk premium which they would have to pay. Charterers confirmed that they would do so 'as per Charter'.

8. On 22 February 2009 the vessel was seized by Somali pirates whilst sailing through the transit corridor in the Gulf of Aden. The pirates compelled the Master to sail the vessel to the waters off the Somali town of Eyl where the vessel remained until 25 April when she was released by the pirates. She reached an equivalent position to the location at which she was seized on 2 May.

9. Charterers have refused to pay hire for the period between 22 February and 2 May. Owners claim the hire plus the cost of bunkers, additional war risk premium and crew war risk bonuses. The claim is made under the terms of the charter alternatively as a claim for an indemnity against the consequences of following orders to take the Suez route. Charterers counterclaim for damages alleging unseaworthiness because the vessel and its crew had not been properly prepared to deal with an attack by pirates. The preliminary issues are not concerned with the claim for indemnity or the counterclaim."

8. Pausing here, it is worth underlining that the applicable principles are beyond argument. As is hornbook law and was clearly expressed in the award, under a time charterparty, hire is payable continuously unless charterers can bring themselves within any exceptions, the onus being on charterers to do so. Doubt as to the meaning of exceptions is to be resolved in favour of owners. Unless within the ambit of the exceptions, the risk of delay is borne by charterers. The justice of the matter is to be found in the bargain struck by the parties. Mr Baker QC, for owners, put it well in his skeleton argument:

> "There is no relevant concept of fairness other than the contractual balance struck by the off-hire clause, construed in accordance with well-known orthodoxy."

9. I turn without more ado to the three issues, already identified.

Issue (I): "Detention by average accidents to ship or cargo"

10. For charterers, the essence of the argument carefully developed by Mr Parsons QC was as follows:

> " . . . in the context of clause 15, the reference to an 'average accident' is not intended to require that there be damage to the Vessel, ie, physical loss (that is covered elsewhere in clause 15), nor to require that there be an 'accident' as that term would be understood in an everyday sense, but to enumerate that the Vessel will be off-hire in the event of 'detention' (itself a limiting requirement . . .) due to fortuities which are marine perils. Piracy is a marine peril: see section 3 of the 1906 Act . . . "

The tribunal rejected Mr Parsons' submissions under this heading. With respect and notwithstanding Mr Parsons' advocacy, I have no hesitation in agreeing with the tribunal. My reasons follow.

11. First, in commercial law, certainty is of great importance. In *Mareva Navigation Co Ltd v Canaria Armadora SA (The Mareva AS)* [1977] 1 Lloyd's Rep 368, at page 381, Kerr J (as he then was) said of this very wording that "average accident":

> " . . . merely means an accident which causes damage."

On any view, this incident did not result in damage to the vessel. It follows that if this *dictum* is correct, then the wording in question affords no assistance to charterers. It is right that Kerr J's observation was *obiter.* But, as the tribunal remarked and over and above the respect due to observations of Kerr J:

> "Our own experience is that in the period of almost 30 years since it was given, it has been accepted as correct, and as settling the issue of the meaning of 'average accident' in the NYPE form, both in textbooks and in arbitration. We imagine that innumerable charterparties have been made on this basis."

I respectfully share the tribunal's understanding. In the circumstances, I agree entirely with the tribunal that it would only be right to differ from the view expressed by Kerr J if persuaded that it was clearly wrong. To the contrary, that view seems right to me as it did to the tribunal.

12. Secondly, I am unable to accept that, however approached, the incident can properly be described as an "accident". Mr Parsons submitted that although the capture of the vessel was planned in advance and deliberate, it was a fortuity so far as the crew and the vessel were concerned. In telling wording, the tribunal rejected this submission:

> "We disagree that 'accident to the ship' is a natural way to describe a seizure by pirates. We cannot imagine a master telephoning or emailing his Owners after the seizure and saying 'there has been an accident to the ship'. He would naturally say 'the ship has been seized by pirates' or 'we have been captured by pirates'. Accident requires lack of intent by all protagonists. An obviously deliberate and violent attack is not described as an accident, no matter how unexpected it may have been to the victim. A much more specific word or phrase is put to the incident, to reflect its deliberate and violent nature."

The tribunal recorded that other examples had been canvassed at the hearing, including hijacking and the assassination of President Kennedy. As to the latter:

> " . . . nobody would naturally say that President Kennedy had an accident in Dallas in 1963."

To my mind, this reasoning of the tribunal is unanswerable.

13. Mr Parsons valiantly contended that, as the wording "average accident" was esoteric and not in everyday use, the tribunal's point was neutral; a master would never contact owners to say that the vessel had had an "average accident". This submission misses its mark. I shall come to the question of "average" accident very shortly; but, on no view and for the reasons given by the tribunal, could this incident properly be termed an "accident".

14. For completeness:

(i) I did not think that anything in *Thomas Wilson Sons & Co v Owners of Cargo per the "Xantho" (The Xantho)* (1887) 12 App Cas 503, relied upon by Mr Parsons, assisted the argument either way; apart from all other considerations, a collision at sea is far removed from a seizure by pirates.

(ii) Nor for that matter is there anything in the war risk clauses of the charterparty which can properly be prayed in aid in support of Mr Parsons' construction of "accident".

(iii) All the objections canvassed so far to describing the incident as an "accident" apply, if anything, *a fortiori*, when it is remembered that the wording is "accident to" the ship. As the tribunal observed, the preposition suggests "an accident physically affecting (and probably causing damage to) the structure or machinery of the ship . . . ". Collision, grounding or an explosion on board, furnish ready examples of when this wording in the clause may be invoked; seizure and detention by pirates is a very different matter.

15. Thirdly, I have already foreshadowed the thrust of Mr Parsons' submission as to the meaning of "average accident". I agree with charterers thus far, that much depends on context and that the wording "average accident" points towards an insurance context. But it does not at all follow (even putting Kerr J's authoritative *dictum* to one side) that "average", in this context, is simply to be equated with a peril ordinarily covered by marine insurance. At the least, as it seems to me, in this context, damage to the ship is an essential ingredient for the wording "average accidents . . . to ship" to apply. The tribunal said this:

> " . . . in the insurance context, 'average' tends to be used to mean damage which is less than a constructive total loss: for example 'free of average' or 'particular average'. The word does not mean a maritime peril . . . Accordingly, if the issue were free from authority, our view would be that the word, in context, was intended to refer to damage rather than to a peril, so that in clause 15 an average accident to ship or cargo was an accident which caused damage to ship or cargo, but not total loss."

Suffice to say, I respectfully agree.

16. The tribunal ventured the further consideration that this approach to the wording in question in clause 15 of the charterparty might have formed part of a consistent scheme, when regard is had to clause 16 of the charterparty. Clause 16 provided as follows:

> "That should the Vessel be lost, money paid in advance and not earned . . . shall be returned to the Charterers at once . . . "

As the tribunal put it:

> "It seems plausible that the draftsman intended clause 15 to deal, *inter alia*, with the effect upon hire of damage short of total loss, and clause 16 to deal, *inter alia*, with the effect upon hire of a total loss."

Though I respectfully see force in this linkage between clauses 15 and 16, I would not wish to — and do not — rest my decision upon it. My concern is that this may be putting more weight on the overall coherence of the drafting of the charterparty than it will safely bear — a consideration emphasised when regard is had to the question of "surplusage" (dealt with below).

17. In all this, I have not lost sight of Mr Parsons' references to other authority, viz, *Kidston v Empire Insurance Co* (1866) LR 1 CP 535, at page 546;

Kelman v Livanos [1955] 1 Lloyd's Rep 120, especially at page 134; and *Piccinini v Partrederiet Trigon II (The Alfred Trigon)* [1981] 2 Lloyd's Rep 333, at pages 336 to 338. Over-elaboration is unnecessary. First, no help is to be obtained from the very different case of *Kidston*, determined on facts far removed from those with which the present dispute is concerned. Secondly, these authorities undoubtedly underline the importance of context but that, by itself, does not advance the argument. In *The Alfred Trigon*, for instance, the wording in question — in the context of the second-hand ship sale and purchase market — was "average damage". As the tribunal observed, "average" there could not have meant "damage" *simpliciter* and was understandably construed to mean a particular kind of damage — namely, damage occasioned by a peril ordinarily covered by insurance as opposed to defects through wear and tear or general old age. Thirdly, in both *Kelman v Livanos* and *The Alfred Trigon* there had been damage. The most, as it seems to me, charterers could extract from these authorities is that an "average accident" in clause 15 meant an accident causing damage to ship or cargo resulting from a peril ordinarily covered by marine insurance. But even if that be right, it does not go nearly far enough to assist charterers' case; on any view, these two authorities cannot be read as removing the requirement of damage.

18. Fourthly, Mr Parsons understandably pointed to the wording "damages to hull, machinery or equipment" as a separate cause in clause 15. On the tribunal's construction of "average accident" — and that adopted by Kerr J — there was a significant overlap between these two causes. The tribunal accepted that its construction would lead to surplusage, pointing out that Kerr J had himself acknowledged the problem: *The Mareva AS* (*supra*), at pages 381 and 382. The tribunal said this:

> "In truth, the clause is riddled with potential overlap in many of its causes. Indeed it may have been put together long ago as a patchwork of exceptions to hire then in vogue, rather than the draftsman starting from a blank piece of paper. In any event, bearing in mind that the presumption against surplusage is weak in charterparties, we were not impressed by the point."

Again, I agree. The presumption against surplusage does not at all dissuade me from the construction I otherwise favour.

Issue (II): "Default and/or deficiency of men"

19. The issue under this heading was dealt with by the tribunal on assumed facts. The tribunal was asked to determine whether, on the factual assumption (very much disputed) that the officers and crew had failed to take recognised anti-piracy precautions, before and during the attack, these failures would fall within the exception "default of men". The tribunal was further asked to assume that this failure on the part of the officers and crew was a significant cause of the loss of time resulting from the pirates taking over the vessel and consequent loss of full working of the vessel.

20. Mr Parsons submitted that the natural meaning of "*default* of men" included a failure to perform or a breach by the master and crew of their duties. If so, then, on the assumed facts, charterers would bring themselves within clause 15 of the charterparty.

21. In essence, the tribunal held that the context presented an insuperable obstacle to adopting charterers' construction of "default of men". Instead, in context, "default of men" in clause 15 had the limited meaning:

> "... of a refusal by Officers or crew to perform all or part of their duties as owed to the shipowner and not the negligent or inadvertent performance of those duties ..."

It followed that, even on the assumed facts, charterers' case failed. I agree with the tribunal.

22. First, it must be accepted, as the tribunal rightly did accept, that the natural meaning of "default" is capable of including the negligent or inadvertent performance of the duties of master and crew. Thus far, charterers' argument is soundly based. Thereafter, however, the submission encounters ever-increasing difficulties.

23. Secondly and immediately, the history of the clause must be considered. In the wartime case of *Royal Greek Government v Minister of Transport* (1949) 82 Ll L Rep 196, charterers ordered the vessel to sail but her crew refused to do so, except in convoy. A dispute arose as to whether, charterers' order to sail having been disobeyed, the vessel was off-hire. Upholding the decision of Sellers J, as he then was, the Court of Appeal held that charterers could not bring themselves within the off-hire clause, which contained (so far as relevant) only the printed words "deficiency of men". That wording meant "numerical insufficiency" and resulted in the vessel being off-hire when an adequate complement of officers and crew for working the ship was not available. However, the vessel had a full complement of crew, so that, on the facts, the wording did not assist charterers. "Deficiency of men" did not extend to cover a wilful refusal to work.

24. As the tribunal observed:

> "In consequence of this decision, the printed clause has for many years frequently been amended, as here, by the addition of 'default and/or'. The insertion of that phrase with the additional words '... including strike of Officers

and/or crew . . . ' showed, at least, that the parties unmistakeably intended that a refusal to perform duties would be an off-hire cause."

25. Mr Parsons sought to meet this point by submitting that although the decision in *Royal Greek Government v Minister of Transport* may have "provoked" the amendment to the clause, it did not follow that the wording was confined to meeting the facts and the result of that case. That is a submission not without force, especially when allied to the natural meaning of the wording in question. On the other hand, it is to be acknowledged that the mischief which the amended clause was designed to address must be a powerful factor in its construction — and offers no assistance to charterers. In any event, matters do not end there.

26. Thirdly, clause 15 in the present case contains the additional wording " . . . including strike of Officers and/or crew". This additional wording may be seen as suggesting that the clause is focused on a refusal to perform duties, whether or not amounting to a full-scale strike. Mr Parsons countered by submitting that this was no more than a single example. That is right as far as it goes but it is also fair to observe, as Mr Baker retorted, that it was the only example given. For my part, I think this additional wording is of limited weight — and certainly not decisive in itself — but is a pointer towards a narrow construction of "default of men", consistent with the history of the clause and the mischief at which it is aimed.

27. Fourthly and to my mind decisively, I have regard to the allocation of the risk of delay under a typical time charterparty — emphasised above. If, however, charterers' case is well-founded, it must follow that on almost every occasion when officers or crew negligently or inadvertently fail to perform their duties causing some loss of time, then a vessel would be off-hire under this wording. That would be so whether or not owners were liable in damages for breach of contract. For example, even if (as here) owners enjoyed the benefit of familiar exemptions in respect of errors of navigation (clause 16) or negligent navigation (clause 76), charterers could claim off-hire. Consider, for instance, delay attributable to bad weather or port congestion which would have been avoided but for an error in navigation. Ordinarily under a time charterparty, such risks are to be borne by charterers; but, on the face of it, charterers' submission results in the shifting of these risks to owners. Moreover, off-hire could be asserted regardless of whether an equitable set-off could be made good on the facts. Granted that it is commonplace for charterers to enjoy the benefit of an off-hire clause without the need to make good a breach of contract on the part of owners; even so, this submission of charterers would, if soundly based, result in a startling alteration in the bargain typically struck in time charterparties as to the risk of delay. In my judgment, the wording "default of men" is not so clear as to compel the surprising conclusion (and consequences) to which I have referred.

28. Although I share the tribunal's reluctance to depart from the natural meaning of the word "default" without good reason, in agreement with the tribunal I too conclude that charterers fail to satisfy the burden of bringing themselves clearly within the wording of clause 15 in question. In the event, the tribunal, with respect, correctly summarised the sense of the relevant wording as follows:

> "If the Owners do not provide a workforce in the numbers necessary to perform the chartered services as owed by the Owners to the time-charterers, when required, there is a 'deficiency of men'; if the Owners do provide the numbers necessary, but the workforce refuses to perform the services, there is a 'default'. This is distinct and separate from an individual transient act of negligence by a crew member or officer in the carrying out of the Owners' chartered services."

In this manner, proper effect can be given to the wording "default of men" by way of the narrower construction preferred by the tribunal — a construction consistent with the history of the clause and the mischief at which it was aimed.

29. I am fortified in reaching this conclusion by the further consideration that if Mr Parsons' submission was right, then it is remarkable that he can point to no authority in support. As the tribunal observed:

> " . . . there does not seem to have been a single case where a default by the crew or a crew member (in the sense of simple negligence) has triggered off-hire under clause 15 as amended."

Issue (III): "Any other cause"

30. The starting point here is to underline that clause 15 in the charterparty contains the wording "any other cause" rather than the wording "any other cause *whatsoever*". This difference in wording is significant, a matter best encapsulated, with respect, in a passage from the judgment of Rix J (as he then was) in *Andre & Cie SA v Orient Shipping (Rotterdam) BV (The Laconian Confidence)* [1997] 1 Lloyd's Rep 139, at pages 150 and 151:

> "In my judgment it is well established that those words [ie, 'any other cause'], in the absence of 'whatsoever', should be construed either *ejusdem generis* or at any rate in some limited way reflecting the general context of the charter and clause . . . A consideration of the

named causes indicates that they all relate to the physical condition or efficiency of either vessel (including its crew) or, in one instance, cargo. There is, moreover, the general context . . . that it is for the owners to provide an efficient ship and crew. In such circumstances it is to my mind natural to conclude that the unamended words 'any other cause' do not cover an entirely extraneous cause, like the boom in *Court Line*, or the interference of authorities unjustified by the condition (or reasonably suspected condition) of ship or cargo. *Prima facie* it does not seem to me that it can be intended by a standard off-hire clause that an owner takes the risk of delay due to the interference of authorities, at any rate where that interference is something beyond the natural or reasonably foreseeable consequence of some named cause. Where, however, the clause is amended to include the word 'whatsoever', I do not see why the interference of authorities which prevents the vessel performing its intended service should not be regarded as falling within the clause, and I would be inclined to say that that remains so whether or not that interference can be related to some underlying cause internal to the ship, or is merely capricious. That last thought may be controversial, but it seems to me that if an owner wishes to limit the scope of causes of off-hire under a clause which is deliberately amended to include the word 'whatsoever', then he should be cautious to do so."

31. The decision of Rix J was that charterers' appeal failed. The arbitrators in that case had been right to decide that the vessel was not off-hire. In the absence of the word "whatsoever", the unexpected and unforeseeable interference by the Chittagong authorities at the conclusion of a normal discharge was, Rix J said (at page 151):

"... a totally extraneous cause ... unconnected with, because too remote from, the merely background circumstance of the cargo residues of 15.75 tonnes. There was no accident to cargo, and there was nothing about the vessel herself, her condition or efficiency, nor even anything about the cargo, which led naturally or in the normal cause of events to any delay. If the authorities had not prevented the vessel from working, she would have been perfectly capable of discharging the residues or of sailing and dumping them without any abnormal delay."

32. Against this somewhat unpromising background, Mr Parsons' carefully constructed argument proceeded as follows. First, even without the additional word "whatsoever", the wording "any other cause" was a sweeping-up provision. That wording was there to prevent "disputes founded on nice distinctions": see, *Chandris v Isbrandtsen-Moller Co Inc* [1951] 1 KB 240, at pages 246 and 247. Secondly and accepting that the sweeping-up provision was to be construed in some limited way reflecting the general context of clause 15, it was nonetheless not easy to identify any "genus" which included all of the named causes in clause 15. The most that could be said was that they all related to the physical condition or efficiency of the vessel (including its crew) or, in one instance, cargo and did not include truly extraneous causes. Thirdly, if contrary to charterers' primary case (see above), "average accident" did "technically" (Mr Parsons' word) require there to be damage, nevertheless a fortuitous occurrence normally covered by marine insurance but which happened not to have caused damage, would be within "the spirit" of the clause and caught by the wording "any other cause". Fourthly, even if "default of men" did not cover negligent errors, given the sweeping-up wording, such a "fine distinction" should not determine whether or not the vessel was off-hire. Fifthly, there had here been a "refusal to perform" their duties on the part of officers and crew and no less so because the officers and crew were under duress from pirates. Sixthly, it was necessary to consider the *effect* of piracy as much as piracy itself. The acts of piracy could result in an off-hire event such as grounding; so too, here, they resulted in off-hire by preventing the crew acting as a crew. Thus:

"Seizure by pirates is far from being a totally extraneous cause. It operates by disabling the officers and crew, who are just as much unable to work as if struck down with typhus, and by immobilising the ship, just as much as if it were aground or if there were not enough crew to work it. Owners are entitled to hire if they provide a functioning ship and a crew able to work the ship to provide the service required — neither ship nor crew can function if seized by pirates ... and the basis for the payment of hire is in such circumstances wholly undermined."

The Laconian Confidence was accordingly distinguishable.

33. With respect, I am unable to accept these submissions. Intuitively, as a matter of indelible impression and in agreement with the tribunal, I think that seizure by pirates is a "classic example" of a totally extraneous cause. Suffice to say with regard to "average accident" that charterers' submissions gain no force from the wording "any other cause"; for the reasons already canvassed there was here neither an "accident" nor an "average accident" and charterers' case cannot be rescued by the sweep-up wording (or "spirit") of the clause. I do not think there is only a "fine distinction" between the narrower and wider constructions of "default of men", still less a distinction that would bring charterers within the sweep-up wording. I confess I regard as unreal the notion that the officers' and

crew's failure to carry out their duties under duress of pirates was equivalent to a refusal to perform those duties. For completeness, I have not overlooked a further submission advanced by Mr Parsons that the tribunal erred in requiring charterers to demonstrate that for a cause to fall within the sweeping-up provision it had to "arise out of" the condition or efficiency of the vessel or crew, rather than merely "relate to" the relevant condition or efficiency — the words used by Rix J, in the passage already cited from *The Laconian Confidence*. No more need be said than that, in this context at least, the difference is purely semantic; there is nothing in this point. All in all and whether regard is had to piracy, the effects of piracy or both, to my mind, the incident remains a totally extraneous cause, falling outside the scope of the sweep-up wording.

34. Here too, with respect, the tribunal put the matter well:

> "We cannot accept any of these permutations [ie, those contained in charterers' argument]. They all seemed to us to be attempts to avoid the well known consequences of the wording in the form agreed by the parties. This act of piracy was not *ejusdem generis*. It did not arise out of the condition or efficiency of the vessel, or the crew, or the cargo, or the trading history, or any reasonable perception of such matters by outside bodies. Unlike a trading history which gave rise to typhus or a well-grounded suspicion of typhus, it was a truly extraneous cause. The effect of the bargain contained within clause 15, construed in its general context, was that Owners did not take the risk of the full working of the vessel being prevented by an extraneous cause such as piracy. The Charterers . . . did assume that risk."

I agree.

Overall conclusion

35. As Mr Baker submitted, the seizure of a ship by external actors is a recognised peril; but no such peril was covered by clause 15 of the charterparty. Moreover and, to my mind significantly, there was in the charterparty a "bespoke" clause dealing *inter alia* with seizures; clause 40 of the charterparty provided as follows:

> "Clause 40 — Seizure/Arrest/Requisition/Detention
>
> Should the Vessel be seized, arrested, requisitioned or detained during the currency of this Charter Party by any authority or at the suit of any person having or purporting to have a claim against or any interest in the Vessel, the Charterers' liability to pay hire shall cease immediately from the time of her seizure, arrest, requisition or detention and all time so lost shall be treated as off-hire until the time of her release . . . "

Plainly, however, clause 40 did not extend to cover seizure by pirates. Perhaps that is charterers' misfortune but, be that as it may, it does not furnish justification for distorting the meaning of clause 15 of this charterparty.

36. Should parties be minded to treat seizures by pirates as an off-hire event under a time charterparty, they can do so straightforwardly and most obviously by way of an express provision in a "seizures" or "detention" clause. Alternatively and at the very least, they can add the word "whatsoever" to the wording "any other cause", although this route will not give quite the same certainty as it presently hinges on *obiter dicta*, albeit of a most persuasive kind.

37. At all events in this case, the various submissions advanced by charterers fail, individually and cumulatively, to satisfy the burden of proof resting on them to come clearly within the wording of the off-hire provisions contained in clause 15 of the charterparty. The appeal must therefore be dismissed.

38. I add only this. The issue of piracy is topical and, I suspect, of interest to the industry, so making this a suitable case for crossing the threshold from the private realm of arbitration into a public judgment at first instance. Accordingly, I have set the matter out at a little length, even though, effectively, I have dismissed the appeal for the reasons given by the tribunal.

39. I shall be grateful for the assistance of counsel in drawing up an appropriate order and in respect of all matters relating to costs.

HOUSE OF LORDS

Nov. 6, 7, 8, 9, 13, 14, 15 and 16, 1989

MOTOR OIL HELLAS (CORINTH) REFINERIES S.A.
v.
SHIPPING CORPORATION OF INDIA

(THE "KANCHENJUNGA")

Before Lord KEITH OF KINKEL, Lord BRANDON OF OAKBROOK, Lord TEMPLEMAN, Lord GRIFFITHS and Lord GOFF OF CHIEVELEY

Charter-party (Consecutive Voyage) — Nomination of unsafe port — Charterers ordered vessel to load at Kharg Island — Iran-Iraq war — Whether owners elected not to treat Kharg Island as improper nomination — Whether owners waived right — Whether charterers in repudiatory breach.

Under a charter-party dated Aug. 8, 1978 the owners let their vessel *Kanchenjunga* to the charterers for four consecutive voyages with an option (which was exercised) to extend the period to cover four further consecutive voyages. The charter was in the Exxonvoy form and the trading option defined the loading ports as 1/2 safe ports Arabian Gulf excluding Fao and Abadan.

On Aug. 8, 1978 the charterers sub-let the vessel on a back to back basis to Varnima Chartering Compania Naviera S.A. On Nov. 19, 1980 Varnima sub-sub-chartered the vessel to Refineria de Petroleos del Norte S.A. (Petronor) for a single voyage from loading ports defined as 1/2 safe ports Arabian Gulf excluding Iran and Iraq but including Kharg, Lavan and Sirri Islands. The Petronor charter was in the Asbatankvoy form.

Following the making of the Petronor charter the charterers ordered the vessel to load a cargo of crude oil at Kharg Island. The order was given on Nov. 20 and repeated on Nov. 21.

On Nov. 21 the owners instructed the master to proceed to Kharg Island. The vessel arrived on Nov. 23 and gave notice of readiness. By Dec. 1 the vessel had still not berthed and on that day there was an Iraqi raid upon Kharg Island during which bombs were dropped. The master of the vessel promptly weighed anchor and proceeded away from Kharg Island to a point of safety.

On Dec. 2 the owners informed the charterers that Kharg Island had been bombed and that the master had proceeded 25 miles out to sea for safety, and called on the charterers to nominate a safe port. The charterers replied repeating their request that the master proceed to Kharg Island.

There then ensued exchanges between the owners and the charterers under which the owners called upon the charterers to nominate another port which would be safe and the charterers refused to do so insisting that the vessel should load at Kharg Island.

The owners wanted the master to go to Kharg Island and told him to comply with the voyage instructions but the master rejected these instructions.

The dispute was referred to arbitration. The charterers submitted that the owners' conduct between Nov. 21 and Dec. 2 showed that they had elected not to treat Kharg Island as an improper nomination of a loading port under the charter; alternatively if there was not an election there was at least a promissory estoppel which precluded owners from contending that Kharg Island was an unsafe port.

Owners sought to rely on cl. 20(vi)(b) of the charter contending that they were entitled after Dec. 1 to refuse to load at Kharg Island. Clause 20(vi)(b) provided inter alia:

> (b) if owing to any war, hostilities warlike operations . . . entry into any such port of loading . . . or the loading . . . of cargo at any such port considered by the master or owners in his or their discretion dangerous or prohibited . . . the charterers shall have the right to order the cargo . . . to be loaded . . . at any other safe port . . .

Since the charterers had not exercised their right, Kharg Island remained the only nominated port and as there was no material change of circumstance the master continued to be entitled to refuse to load at that port and was not at fault in exercising his right to do so.

By their interim award the arbitrators held that it was the charterers who were in repudiatory breach and that the owners were entitled to treat the charter as at an end and recover damages from the charterers. There was an appeal against that award.

———*Held*, by Q.B. (Com. Ct.) (HOBHOUSE, J.), that (1) under a charter it could not be contended that a shipowner when he received an order was under an obligation to check whether it was a proper order to a safe port and to reject it if it was not; proceeding to a nominated port did not deprive shipowners of any of their rights but the duty to mitigate or avoid loss did require that the master should in order to safeguard the vessel refuse to enter the port or if already within it, leave it; the order did not give rise to any obligation upon the owners to elect and mere compliance did not amount to any election;

(2) in the context of what had passed between the parties previously owners' communication to charterers on Nov. 21 was correctly characterized as an acceptance of the order not a mere compliance with the order; the fact that the owners served a notice of readiness indicated that the owners were saying that they were ready and willing to load at Kharg Island; on Nov. 25 the owners were still saying that the vessel was available to load and called upon charterers to arrange priority berthing; there was nothing equivocal about the owners' conduct and they were dealing with the charterers on the basis that the loading port nomi-

nation had been made and that Kharg Island was that port;

(3) on the facts and evidence the owners did waive their right to say that Kharg Island was not the nominated loading port under the charter;

(4) on the promissory estoppel argument the conduct found by the arbitrators did represent that the owners were willing that the vessel should proceed to Kharg Island and load there under the charter;

(5) on the facts found by the arbitrators the master did have the right to refuse to load the cargo at Kharg Island; this gave rise to an option to charterers to nominate another loading port; they chose not to exercise that option and in circumstances where the master was still bona fide entitled to refuse to load at Kharg Island, the charterers terminated the charter; they could not now complain of any breach on the part of the owners; and the submission that the owners had waived their rights to rely on cl. 20(vi)(b) had not been made out.

The owners appealed and the charterers cross-appealed.

———*Held*, by C.A. (Fox, Lloyd and Glidewell, L.JJ.), that (1) nowhere in the owners' telex of Nov. 20 or in their two telexes of Nov. 21 did they reserve the right to treat the nomination as non-contractual; and the owners gave notice of readiness after proceeding north of latitute 24 deg. without obtaining the charterers' agreement to pay the additional war risk premium; these two factors showed that the owners' conduct was unequivocal and that the owners were dealing with the charterers on the basis that the loading port nomination had been made and Kharg Island was that port;

(2) it was clear from the arbitrators' findings that the owners knew the facts; if those facts meant that Kharg Island was unsafe then the owners must have known that they were entitled to refuse to accept the nomination; the right to refuse to load at Kharg Island was not specifically stated in the charter but it was implicit as a matter of legal analysis; by accepting the charterers' nomination the owners lost their right to refuse to load at Kharg Island;

(3) the charterers were entitled to insist on the vessel loading at Kharg Island; the owners had by their conduct waived their right to refuse to load at Kharg Island and their claim for damages for repudiation failed;

(4) under cl. 20(vi) the only right expressly given to the owners was the right to discharge cargo at any safe port if the charterers failed to nominate an alternative port of discharge when requested; although the clause gave the owners no express right to sail away in the event of the loading port being considered dangerous or impossible such a right existed by necessary implication;

(5) cl. 20 (vi) conferred a separate and independent discretion on the master of the vessel and nothing the owners did could be construed as a waiver of the master's discretion; the appeal and cross appeal would be dismissed.

The charterers appealed as to the effect of cl. 20(vi) and the owners cross-appealed on the issue of waiver.

———*Held*, by H.L. (Lord Keith of Kinkel, Lord Brandon of Oakbrook, Lord Templeman, Lord Griffiths and Lord Goff of Chieveley), that (A) as to the cross-appeal: (1) the situation in which the owners found themselves was one in which they could either have rejected the charterers' nomination of Kharg Island as uncontractual or they could have, nevertheless, elected to accept the order and load at Kharg Island thereby waiving or abandoning their rights to reject nomination but retaining their right to claim damages from the charterers for breach of contract (*see* p. 400, col. 1);

(2) the master gave notice of readiness on arrival at Kharg Island; thereafter the owners were asserting that the vessel was available to load and they called on the charterers to arrange priority berthing and referred to the fact that laytime was running; in these circumstances the owners were asserting a right inconsistent with their right to reject the charterers' orders; the owners must be taken in law to have elected not to reject the charterers' nomination and the owners' cross-appeal would be dismissed (*see* p. 393, cols. 1 and 2; p. 400, cols. 1 and 2).

(B) As to the charterers' appeal: the clause expressly referred to the discretion which the owners and master were entitled to exercise in a situation of danger and must impliedly recognize that in the exercise of that discretion they might decline to load or discharge at the relevant port; the clause did not only apply to named ports or ports properly nominated under the charter because in the event of an improper nomination being made by the charterers the owners' acceptance of the nomination would have the effect that all the relevant contractual provisions applied including cl. 20 (vi); and the owners, presented by the charterers with an uncontractual nomination, had to decide whether or not to reject it; they elected not to do so and this election could not have had any effect on cl. 20 (vi); the appeal would be dismissed (*see* p. 393, cols. 1 and 2; p. 401, col. 1).

The following cases were referred to in the judgment of Lord Goff:

Borrowman Phillips & Co. v. Free & Hollis, (1878) 4 Q.B.D. 500;

China National Foreign Trade Transportation Corporation v. Evlogia Shipping Co. S.A. of Panama (The *Mihalios Xilas*), (H.L.) [1979] 2 Lloyd's Rep. 303; [1979] W.L.R. 1018;

Compania Naviera Maropan S/A v. Bowater's Lloyd Pulp and Paper Mills Ltd. (The *Stork*), (C.A.) [1955] 1 Lloyd's Rep. 349; [1955] 2 Q.B. 68; [1954] 2 Lloyd's Rep. 397, [1955] 2 Q.B. 68;

Hughes v. Metropolitan Railway Co., (1877) 2 App.Cas. 439;

Kammins Ballrooms Co. Ltd. v. Zenith Investments (Torquay) Ltd., (H.L.) [1971] A.C. 850;

Kodros Shipping Corporation of Monrovia v. Empresa Cubana de Fletes (The *Evia*), (No. 2), (H.L.) [1982] 2 Lloyd's Rep. 307; [1983] 1 A.C. 736;

Reardon Smith Line Ltd. v. Australian Wheat Board (The *Houston City*), (P.C.) [1956] 1 Lloyd's Rep. 1; [1956] A.C. 266;

Scarf v. Jardine, (H.L.) (1882) 7 App.Cas. 345.

This was an appeal by the charterers Motor Oil (Hellas) Corinth Refineries S.A. and a cross-appeal by the owners, Shipping Corporation of India from the decision of the Court of Appeal ([1989] 1 Lloyd's Rep. 354) dismissing the owners' appeal and the charterers' cross-appeal from the decision of Mr. Justice Hobhouse ([1987] 2 Lloyd's Rep. 509) holding inter alia that the owners had waived their right to treat Kharg Island as non-contractual but that the owners were entitled to the protection of cl. 20(vi) of the charter-party.

Mr. Anthony Clarke, Q.C. and Mr. Charles Haddon-Cave (instructed by Horrocks & Co.) for the charterers; Mr. Michael Collins, Q.C. and Mr. David Mildon (instructed by Messrs. Ince & Co.) for the owners.

The further facts are stated in the judgment of Lord Goff of Chieveley.

Judgment was reserved.

Thursday Feb. 15, 1990

JUDGMENT

Lord KEITH OF KINKEL: My Lords, I agree that this appeal and the cross-appeal should be dismissed for the reasons set out in the speech to be delivered by my noble and learned friend Lord Goff of Chieveley. I also agree with the supplementary observations of my noble and learned friend Lord Brandon of Oakbrook.

Lord BRANDON OF OAKBROOK: My Lords, I have had the advantage of considering in draft the speech prepared by my noble and learned friend, Lord Goff of Chieveley. I agree with it and for the reasons which he gives I would dismiss both the appeal and the cross-appeal.

I think it important to observe that, on my noble and learned friend's analysis of the case, the only right which the owners waived was the right to reject the nomination of Kharg Island as uncontractual; and that, if the ship had loaded there and been lost or damaged in a further air raid, the charterers would, despite that waiver, have been liable to the owners for such loss or damage on the ground of their breach of contract in ordering the ship to load at an unsafe port.

It seems to me to follow from this that the owners might have been able to succeed in their claim against the charterers for loss of freight if they had pleaded and proved that the ship's master, in refusing to load at Kharg Island, had acted reasonably so as to mitigate the damage for which the charterers would have been liable in the eventuality to which I have referred. For what may well have been good reasons, however, no contention of this kind was put forward for the owners at any stage of the proceedings. That being so, your Lordships are not required to deal with such a point in this case.

Lord TEMPLEMAN: My Lords, I agree that the appeal and cross-appeal be dismissed.

Lord GRIFFITHS: My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Goff of Chieveley. I agree with it and would dismiss both the appeal and the cross-appeal.

Lord GOFF OF CHIEVELEY: My Lords, this case is concerned with *Kanchenjunga*, a very large crude carrier of 272,372 tons dead weight. Her owners at all material times were the Shipping Corporation of India of Bombay (whom I shall refer to as "the owners") and she flew the Indian flag. The owners (the shares in which are owned by the Government of India) are a large shipping company, owning a number of other tankers as well as *Kanchenjunga*. The vessel was chartered to Motor Oil (Hellas) Corinth Refineries S.A. of Athens (whom I shall refer to as "the charterers") under a consecutive voyage charter-party dated Aug. 8, 1978, on the Exxonvoy form, for four consecutive voyages with an option for the charterers to extend the period for a further four consecutive voyages. That option was exercised by the charterers, and the present case is concerned with the eighth and last voyage under the charter as so exended. The Exxonvoy standard form of charter contains no safe port warranty in the printed form; however, in completing the form, the loading ports in part I of the charter were agreed to be "1/2 (one/two) safe ports Arabian Gulf excluding Fao and Abadan" in charterers' option. There was a wide range of discharging

ports; these are not material. I shall have later to refer to cl. 20, a substantial printed clause contained in part II of the charter, and in particular to cl. 20 (vi) which is expressed to be concerned with war risks.

On the same date as the above charter, the charterers sub-chartered the vessel on a back-to-back basis to an associated company called Varnima Chartering Compania Naviera S.A. ("Varnima"). Throughout this matter, the charterers and Varnima have been treated as having an identical interest. On Nov. 19, 1980, Varnima sub-sub-chartered the vessel to Refineria de Petroleos del Norte S.A. ("Petronor"). I shall refer to this charter as "the sub-charter", and to the charter between the owners and the charterers as "the head charter". The sub-charter was not on back-to-back terms. It was for a single voyage, on the Asbatankvoy form (for all practical purposes identical to the Exxonvoy form), the loading ports being expressed to be —

> . . . one/two safe [ports] Arabian Gulf excluding Iran and Iraq but including Kharg, Lavan and Sirri Islands.

The rate of freight under the sub-charter was substantially higher than that under the head charter.

The vessel had been waiting at Mina al Fahal in the Arabian Gulf since Oct. 8, 1980 for loading port orders for the final voyage under the head charter. It was following the making of the Petronor fixture, on Nov. 19, that the charterers ordered the vessel to proceed to Kharg Island. The order was given on Nov. 20, and repeated on Nov. 21, on which day the owners instructed the master of the vessel to proceed to Kharg Island. He did so, arriving at Kharg Island on Nov. 23, when notice of readiness was given. On Dec. 1 there occurred an air raid by Iraqi aircraft upon Kharg Island, which caused the master of the vessel to weigh anchor and proceed away from Kharg Island to a place where she could wait in safety. There then followed an exchange of telex messages between the parties which led first to impasse and ultimately to the termination of the charter in early January, 1981.

When the head charter was entered into, in August 1978, Iraq and Iran were not at war. It was not until Sept. 22, 1980 that border hostilities between Iran and Iraq, which had been simmering for some months, erupted into full-scale war. The general position in the vicinity of Kharg Island, and the owners' reaction to it, are described in detail in pars. 7 to 10 of the arbitrators' reasons for their award. It appears that, following the outbreak of war, among the targets for Iraqi air attack were the oil installations at Kharg Island. The natural reaction of shipowners on the eruption of fighting was to keep their vessels out of areas where they might suffer damage. However, at this time India was very short of crude oil and pressure was put on the owners by the Indian authorities (the Oil Co-ordination Committee — "O.C.C.") to load from Iranian ports, including Kharg Island, in spite of the risks which would be incurred. Paragraphs 9 and 10 of the arbitrators' reasons (in which the owners are referred to as "S.C.I.") read as follows:

> 9. Up to 19 November, Iran admitted that there had been air raids on Kharg Island on the following dates: 24, 27 September, 5, 10, 13, 14, 15 October. These air raids were not of the concentrated type so familiar in the 1939–45 war; indeed, Iraq did not have the bombers to operate such attacks. Rather they appear to have been of a hit and run type operated by one, two or three fighter-bombers. It is possible that air raids in addition to those admitted by Iran took place. In spite of the risks involved, five tankers belonging to S.C.I. loaded at Kharg in the first half of October. To minimise the risks, the vessels anchored about five miles off until they were called in to berth; a strict black-out was enforced by the Iranian authorities and there were restrictions on the use of radio and V.H.F. The S.C.I. vessels observed that oil tanks had been damaged and were on fire; frequent anti-aircraft firing was observed. The raids would appear to have been directed at the oil storage tanks, rather than at the actual loading installations or at ships. However, on 10 October, two bombs fell in the water in close proximity to S.C.I.'s vessel *B. R. Ambedkar* which was waiting to load (this vessel was diverted to Lavan Island to load). Their *Lok Manya Tilak* also reported heavy attacks on 14 and 15 October; as a result of these reports, S.C.I. decided not to send further tankers to Kharg Island until such time as "reasonably safe conditions for loading" were restored.
>
> 10. Towards the end of October and the beginning of November, the Iranian Oil suppliers National Iranian Oil Co. ("N.I.O.C.") were pressing O.C.C. to take up cargo from Kharg and on or about 5 November the Government of India agreed to S.C.I. sending the *C. P. Shivaji* to Kharg "subject to ship's captain local assessment of the situation". At the same time, S.C.I. went into the market with a view to chartering a v.l.c.c.

to load at Kharg which it could put in under its contract(s) of affreightment with O.C.C. S.C.I. ordered the *C. P. Shivaji* to Kharg on 6 November and the *Barauni* on 8 November. The *C. P. Shivaji* reported that the situation was dangerous with attempted air raids, although she encountered no difficulties in loading. As a result on 9 November the *Barauni* was ordered to stay at Mina al Ahmadi pending further orders. In the meantime, the negotiations for charting in a v.l.c.c. had apparently been proceeding and on or about 15 November the *Venus* was fixed to load some 210,000 metric tons. That vessel was expected to berth on 15 or 16 November and on 17 November S.C.I. decided to order the *Barauni* to sail from Mina al Ahmadi at daybreak on 18 November for Kharg so that she could load immediately after the *Venus*. At or shortly after this time, S.C.I. also ordered the *N. S. Bose* and the *Satyamurti* to Kharg to load.

Meanwhile, in September, October and the first half of November telex exchanges took place between the owners and the charterers about the employment of the vessel on her last voyage under the charter. She completed discharge on her seventh voyage at Brunsbuttel in West Germany, and was ordered by the charterers to proceed at slow speed to the Arabian Gulf for orders. Ultimately, following the fixture with Petronor on Nov. 19, the charterers telexed the owners on Nov. 20 informing them of the fixture and requesting them to instruct the master to proceed to Kharg Island for loading. On Nov. 21, the charterers telexed the owners with detailed voyage instruction, which the owners passed on to the master on the same day, advising him that they were arranging bunkers at Damman on the loaded passage and that, in view of the current situation prevailing in the area, he should proceed with due caution. On the same day the owners consulted with the Government of India as to whether the vessel should go to Kharg Island, pointing out that:

> . . . since we have been loading our own as well as inchartered vessels at Kharg Island in recent past and also at this very time our non-compliance [with] the charterers' instructions will lead to breach of charterparty with serious implications.

The response was that the owners should take a commercial view of the situation. The arbitrators understood that to mean that:

> . . . the national interest was not concerned and that S.C.I. should weigh against the possible risks of damage to the ship and injury to the crew the possibility of being liable for heavy damages if it were later held that they were not entitled to refuse to order the ship to Kharg Island.

The master was, however, concerned about the order to proceed to Kharg Island, and when he cabled to the owners with his e.t.a. at Kharg Island, he added a protest against ordering the vessel to Kharg Island which "[we] consider dangerous". The owners did not, however, respond to this protest; and when, on the same day, they telexed the charterers confirming that they had instructed the master to comply with the charterers' instructions to proceed to load at Kharg Island, they stated that they had done so without prejudice to their rights in respect of the very substantial delay by the charterers in giving orders for the loading port (a claim which was later to be upheld by the arbitrators), but made no protest about the orders to proceed to Kharg Island.

The vessel anchored off Kharg Island at 18 06 G.M.T. on Nov. 23, and served notice of readiness. Under the charter-party, laytime began to count six hours thereafter, with a total laytime of 72 running hours. Thereafter the owners, referring to the fact that the laytime was running, repeatedly pressed for priority berthing. When the vessel arrived, there were seven other vessels anchored, presumably waiting to load, including the owners' vessel *Barauni*; shortly afterwards *Satyamurti*, also belonging to the owners, arrived for loading. On Nov. 25, the master of *Satyamurti* radioed to the owners reporting "situation generally satisfactory, no cause for alarm", but that a black-out was being strictly observed and that A.A. firing had been observed on the island during the early hours. Because of the reported A.A. fire, the owners instructed their vessels to proceed 25 miles west of Kharg Island and, on Nov. 25, informed the charterers of this, holding the charterers responsible for sending the vessel to Kharg Island. The arbitrators observed that this was the first occasion on which the owners had raised the possible unsafety of Kharg Island with the charterers since receiving orders to proceed there to load. On Nov. 26, the master of *Satyamurti* informed the owners that he had stayed where he was, thinking the anchorage better there than 25 miles west; he reported further sporadic A.A. fire, but thought this was only routine/practice. However, because of the continued delay in berthing, the vessel left Kharg Island on Nov. 26, and proceeded to Mina al Ahmadi for bunkering, returning to Kharg Island early in the morning of Nov. 28. She did not miss her turn by leaving the port for

this short time, and resumed her position as second in turn. On Nov. 28, the owners kept the charterers informed of the vessel's movements. On Nov. 30, the loading berth became free for the vessel; but she was unable to berth because of bad weather, and before she could berth there was an air raid on Kharg Island at 23 15 hours on Dec. 1. The master promptly weighed anchor and proceeded away from Kharg Island until about 03 00 hours on Dec. 2 when the vessel was stopped pending instructions from the owners.

On Dec. 2 the owners telexed the charterers reporting the air raid and the movement of the vessel to the south, and stating that they considered it self-evident that the port was unsafe. They claimed (incorrectly, as the arbitrators held) that they had expressed reservations about the safety of Kharg Island, and that they had agreed to proceed to Kharg Island without prejudice to their right to claim damages. They asked the charterers to nominate soonest a safe port where they proposed to load cargo. There followed an exchange of telex messages, in which the charterers pressed the owners to instruct the vessel to return to Kharg Island for loading, and the owners protested that the port was unsafe. However, on Dec. 3, the owners cabled the master as follows:

> Charterers want vessel to proceed immediately to Kharg. Please comply with our voyage instructions. Acknowledge forthwith.

But the master was unwilling to return to Kharg Island and replied on Dec. 4 to the charterers:

> Received your voyage instructions through owners to proceed to Kharg. As situation in Kharg is dangerous and as we witnessed heavy bombing regret unable to comply with your instructions.

Petronor continued to press upon Varnima that the vessel should return to Kharg Island for loading, pointing out that other vessels were doing so. Attempts by them to obtain alternative cargo elsewhere in the area failed. The owners, on the other hand, continued to press the charterers to nominate an alternative safe port, and Varnima pressed Petronor to do likewise. By mid-December, solicitors had been instructed. No alternative port having been nominated, the owners' solicitors informed the charterers' solicitors on Nov. 5 that the owners treated the charterers as having repudiated the contract; and the charterers' solicitors maintained that it was the owners who had repudiated the charter, and that the charterers had treated the owners as being in repudiation. So the battle lines were drawn.

In the arbitration, where jurisdiction was conferred on the arbitrators to deal with both the dispute as between the owners and the charterers and the dispute as between Varnima and Petronor, the arbitrators first held that, when the vessel was ordered to Kharg Island on Nov. 21, Kharg Island was not a prospectively safe port. They stated in their reasons for their award (par. 29):

> A full-scale war involving Iran and Iraq had been waging for some two months, air attacks had been made on Kharg and it was but a short flying distance from Iraqi bases. On the other hand, ships as such had not been attacked, there had been a pause in the air attacks, war risk insurance was obtainable and ships were loading. However, the risk of further air attacks still obtained as was realised by all concerned and we find that in the context of the head charter Kharg was not a prospectively safe port when nominated on 21 November.

However, they went on to hold that the safety or unsafety of Kharg Island was not changed in any way by the attack on Dec. 1. They stated (par. 31):

> The possibility of such an air raid was the very fact that made Kharg prospectively unsafe under the charter but was one of the matters which would have been in the contemplation of the parties when the sub-charter was made. The raid was of like character to the earlier ones; the only real change since the date of the sub-charter was that instead of the date of the next attack being uncertain it was ascertained. Thereafter, the date of the succeeding attack became equally uncertain.

Faced with the clear safe port warranty in the head charter, the charterers argued before the arbitrators that the owners had waived their right not to comply with the charterers' orders to proceed to Kharg Island. This argument the arbitrators rejected. They considered that waiver only applied where there were just two alternative courses of action available; here there were at least three courses of action open to the owners, and so they held that the defence must fail. This reasoning was, as is now accepted, erroneous in law. The arbitrators also rejected an alternative argument founded on promissory estoppel, stating that the mere acceptance of orders without protest does not amount to the required clear and unequivocal promise required by the doctrine.

Having rejected both waiver and promissory estoppel, they held that the charterers were in

breach of contract in ordering the vessel to an unsafe port. On the other hand, Varnima was held liable to Petronor under the sub-charter, having expressly agreed that the vessel would proceed to Kharg Island; and the arbitrators held that Varnima could not derive any protection from cl. 20 (vi) in the sub-charter.

The charterers appealed from the award of the arbitrators with leave of the Court. Mr. Justice Hobhouse [1987] 2 Lloyd's Rep. 509 allowed the appeal on the issue of waiver. He held that the owners had accepted the charterers' orders to proceed to Kharg Island; and that by so doing, and by serving notice of readiness at Kharg Island and thereafter continuing to assert that the vessel was available to load, asking the charterers to arrange priority berthing and referring to the running of laytime, the owners' conduct could not be described as equivocal. He said, at p. 516:

> There is nothing unequivocal about owners' conduct. They were dealing with charterers on the basis that the loading port nomination had been made and that Kharg Island was that port.

Furthermore, they knew of their right to choose. They knew the facts; they knew what the provisions of the contract were, and what their legal effect was. Therefore both the requirements of waiver, unequivocal conduct and the requisite knowledge, were made out. The Judge did not therefore find it necessary to deal with the alternative argument on promissory estoppel. However he then held that, on a true construction of cl. 20 (vi), the owners were protected from liability to the charterers in damages. The Court of Appeal affirmed the decision of the Judge on both points (see [1981] 1 Lloyd's Rep. 354).

The charterers then obtained leave to appeal to your Lordships' House, and the owners cross-appealed. It was in fact the owners' cross-appeal on the issue of waiver which raised the most substantial issue in the appeal before your Lordships' House, as it had done in the Courts below. To that issue I will first turn.

There is no dispute between the parties as to the nature of their respective rights and obligations under the contract with regard to the charterers' orders to proceed to Kharg Island to load (I put on one side, of course, the effect of cl. 20 (vi), which I will consider later). Since these matters are not in dispute, I can state the position very briefly. The arbitrators' finding that Kharg Island was, at the time of its nomination by the charterers, prospectively an unsafe port was not, and indeed could not be, challenged. Kharg Island was not therefore a port which, under the terms of the charter, the charterers were entitled to nominate. It followed that the nomination was a tender of performance which did not conform to the terms of the contract; as such, the owners were entitled to reject it. Even so, by their nomination of Kharg Island the charterers impliedly promised that that port was prospectively safe for the vessel to get to, stay at, so far as necessary, and in due course, leave (see *Kodros Shipping Corporation of Monrovia v. Embresa Cubana de Fletes (The Evia)* (No. 2), [1982] 2 Lloyd's Rep. 307 at p. 315; [1983] A.C. 736 at p. 757, per Lord Roskill). Accordingly if the owners, notwithstanding their right to reject the nomination, complied with it and their ship suffered loss or damage in consequence, they would be entitled to recover damages from the charterers for breach of contract, though the ordinary principles of remoteness of damage and causation would apply to any such claim: see *Compania Naviera Maropan S/A v. Bowaters Lloyd Pulp and Paper Mills Ltd. (The Stork)*, [1955] 1 Lloyd's Rep. 349; [1955] 2 Q.B. 68, and *Reardon Smith Line Ltd. v. Australian Wheat Board (The Houston City)*, [1956] 1 Lloyd's Rep. 1; [1956] A.C. 266.

This is not, however, a case in which the owners have complied with an order to proceed to an unsafe port, and their ship has proceeded there and suffered damage in consequence. This is a case in which the owners have complied with the charterers' orders to the extent that the vessel has proceeded to the unsafe port and given notice of readiness there, but then the master, having tasted at first hand the danger inherent in the port's unsafety, has persuaded them not to persist in loading there but to sail away. Here the crucial question is whether, before the vessel sailed away, the owners had, by their words or conduct, precluded themselves from rejecting the charterers' nomination as not complying with the contract. Hence the reliance by the charterers on the principles of waiver and estoppel, unsuccessful before the arbitrators, but successful, so far as waiver is concerned, before the Judge and the Court of Appeal. The question whether the Courts below were correct in their conclusion depends, in my opinion, upon an analysis of these principles, and their proper application to the facts of the present case.

It is a commonplace that the expression "waiver" is one which may, in law, bear different meanings. In particular, it may refer to a forbearance from exercising a right or to an abandonment of a right. Here we are concerned

with waiver in the sense of abandonment of a right which arises by virtue of a party making an election. Election itself is a concept which may be relevant in more that one context. In the present case, we are concerned with an election which may arise in the context of a binding contract, when a state of affairs comes into existence in which one party becomes entitled, either under the terms of the contract or by the general law, to exercise a right, and he has to decide whether or not to do so. His decision, being a matter of choice for him, is called in law an election. Characteristically, this state of affairs arises where the other party has repudiated the contract or has otherwise committed a breach of the contract which entitles the innocent party to bring it to an end, or has made a tender of performance which does not conform to the terms of the contract. But this is not necessarily so. An analogous situation arises where the innocent party becomes entitled to rescind the contract, i.e. to wipe it out altogether, for example because the contract has been induced by a misrepresentation; and one or both parties may become entitled to determine a contract in the event of a wholly extraneous event occurring, as under a war clause in a charter-party. Characteristically, the effect of the new situation is that a party becomes entitled to determine or to rescind the contract, or to reject an uncontractual tender of performance; but, in theory at least, a less drastic course of action might become available to him under the terms of the contract. In all cases, he has in the end to make his election, not as a matter of obligation, but in the sense that, if he does not do so, the time may come when the law takes the decision out of his hands, either by holding him to have elected not to exercise the right which has become available to him, or sometimes by holding him to have elected to exercise it. Instances of this phenomenon are to be found in s. 35 of the Sale of Goods Act, 1979. In particular, where with knowledge of the relevant facts a party has acted in a manner which is consistent only with his having chosen one of the two alternative and inconsistent courses of action then open to him — for example, to determine a contract or alternatively to affirm it — he is held to have made his election accordingly, just as a buyer may be deemed to have accepted uncontractual goods in the circumstances specified in s. 35 of the 1979 Act. This is the aspect of election referred to by Lord Diplock in *Kammins Ballrooms Co. Ltd. v. Zenith Investments (Torquay) Ltd.*, [1971] A.C. 850 at p. 883. But of course an election need not be made in this way. It can be communicated to the other party by words or conduct; though, perhaps because a party who elects not to exercise a right which has become available to him is abandoning that right, he will only be held to have done so if he has so communicated his election to the other party in clear and unequivocal terms (see *Scarf v. Jardine*, (1882) 7 App.Cas. 345 at p. 361, per Lod Blackburn, and *China National Foreign Trade Transportation Corporation v. Evlogia Shipping Co. S.A. of Panama (The Mihalios Xilas)*, [1979] 2 Lloyd's Rep. 303 at p. 307; [1979] 1 W.L.R. 1018 at p. 1024, per Lord Diplock). Once an election is made, however, it is final and binding (see *Scarf v. Jardine*, per Lord Blackburn, at p. 360). Moreover it does not require consideration to support it, and so it is to be distinguished from an express or implied agreement, such as a variation of the relevant contract, which traditionally requires consideration to render it binding in English law.

Generally, however, it is a prerequisite of election that the party making the election must be aware of the facts which have given rise to the existence of his new right. This may not always be so. For example, in the law of sale of goods, where goods have been tendered to the buyer which are not in conformity with the contract, he may, if he has had a reasonable opportunity to examine them, be deemed in certain circumstances to have accepted them, thereby electing not to exercise his right to reject them, even though he has not actually examined the goods and discovered the defect (see s. 34 and 35 of the 1979 Act). This may flow from the fact that he has waived his right to examine them — yet another example of waiver. I add in parenthesis that, for present purposes, it is not necessary for me to consider certain cases in which it has been held that, as a prerequisite of election, the party must be aware not only of the facts giving rise to his rights but also of the rights themselves, because it is not in dispute here that the owners were aware both of the relevant facts and of their relevant rights.

There are numerous examples of the application of this principle of election in English law. Perhaps the most familiar situation is that which arises when one contracting party repudiates the contract. The effect is that the other contracting party then has a choice whether to accept the repudiation (as it is called) and bring the contract to an end; or to affirm the contract, thereby waiving or abandoning his right to terminate it. If, with knowledge of the facts giving rise to the repudiation, the other party to the contract acts (for example) in a manner consistent only with treating that contract as still alive,

he is taken in law to have exercised his election to affirm the contract.

The present case is concerned not so much with repudiation as with an uncontractual tender of performance. Even so, the same principles apply. The other party is entitled to reject the tender of performance as uncontractual; and, subject to the terms of the contract, he can then, if he wishes, call for a fresh tender of performance in its place. But if, with knowledge of the facts giving rise to his right to reject, he nevertheless unequivocally elects not to do so, his election will be final and binding upon him and he will have waived his right to reject the tender as uncontractual.

We can see these principles at work in the law of sale of goods. If goods are tendered which are not in conformity with the contract, the buyer is entitled to reject them. However, as is recognized by s. 11(2) of the 1979 Act, where a contract of sale is subject to a condition to be fulfilled by the seller, the buyer may —

> . . . *elect* to treat the breach of the condition as a breach of warranty . . .

Of course, if the buyer rejects the goods as not conforming with the contract, and the time for delivery has expired, the buyer can without more sue the seller for damages for non-delivery. If the time for delivery has not yet expired, the seller is still entitled to make a fresh tender which conforms with the contract, in which event the buyer is bound to accept the goods so tendered: see *Borrowman Phillips & Co. v. Free & Hollis*, (1878) 4 Q.B.D. 500. If the buyer elects to accept non-contractual goods, he is bound by his election and is limited to his right of action for damages for breach of warranty, the exercise of that right being consistent with his having waived his right to reject the goods: see s. 11(4) of the 1979 Act. However, as Mr. Justice Devlin pointed out in *The Stork*, [1954] 2 Lloyd's Rep. 397 at p. 414, col. 1;[1955] 2 Q.B. 68 at pp. 76–77, the principle of election is applicable in every class of contract. He said:

> . . . There *is* a difference between a contractor who does not discharge his obligation at all and one who does so imperfectly. In the latter case, the contract gives the other party the right to elect to treat the imperfect performance as if it were a fulfilment of the contract (even if he knows that in fact it is not), and to claim damages if any result from the imperfection. This is a right which is, I think, common to every class of contract. The general principle is that the other party is entitled to proceed just as he would have done if the contract had been properly fulfilled, and the risk of any damage that flows from that must be borne by the wrongdoer.

Mr. Justice Devlin was there speaking in the context of the nomination of an unsafe port under a charter-party, and there can be no doubt that the principle of election applies in such circumstances, as it does in other cases.

Election is to be contrasted with equitable estoppel, a principle associated with the leading case of *Hughes v. Metropolitan Railway Co.*, (1877) 2 App.Cas. 439. Equitable estoppel occurs where a person, having legal rights against another, unequivocally represents (by words or conduct) that he does not intend to enforce those legal rights; if in such circumstances the other party acts, or desists from acting, in reliance upon that representation, with the effect that it would be inequitable for the representor thereafter to enforce his legal rights inconsistently with his representation, he will to that extent be precluded from doing so.

There is an important similarity between the two principles, election and equitable estoppel, in that each requires an unequivocal representation, perhaps because each may involve a loss, permanent or temporary, of the relevant party's rights. But there are important differences as well. In the context of a contract, the principle of election applies when a state of affairs comes into existence in which one party becomes entitled to exercise a right, and has to choose whether to exercise the right or not. His election has generally to be an informed choice, made with knowledge of the facts giving rise to the right. His election once made is final; it is not dependent upon reliance on it by the other party. On the other hand, equitable estoppel requires an unequivocal representation by one party that he will not insist upon his legal rights against the other party, and such reliance by the representee as will render it inequitable for the representor to go back upon his representation. No question arises of any particular knowledge on the part of the representor, and the estoppel may be suspensory only. Furthermore, the representation itself is different in character in the two cases. The party making his election is communicating his choice whether or not to exercise a right which has become available to him. The party to an equitable estoppel is representing that he will not in future enforce his legal rights. His representation is therefore in the nature of a promise which, though unsupported by consideration, can have legal consequences; hence it is sometimes referred to as promissory estoppel.

These are the principles which fall to be con-

sidered in the present case. Here, as I have already indicated, the situation in which the owners found themselves was one in which they could either reject the charterers' nomination of Kharg Island as uncontractual, or could nevertheless elect to accept the order and load at Kharg Island, thereby waiving or abandoning their right to reject the nomination but retaining their right to claim damages from the charterers for breach of contract. Since the owners were in this situation, it is logical first to consider the question of election before considering (if necessary) equitable estoppel.

The arbitrators addressed themselves to the possibility of election, but unfortunately their rejection of it was founded upon a mistaken appreciation of the law. The Judge and the Court of Appeal, however, both held that the owners had elected to waive their right to reject the nomination. In my opinion they were right to reach this conclusion.

Because the arbitrators did not approach the issue of election correctly, they failed to consider the correct questions. In particular, they did not ask themselves whether there had been the necessary unequivocal representation by the owners. It is true that they did ask themselve whether there had been the necessary "clear and unequivocal promise" when considering the alternative principle of equitable estoppel; they held that there was not, on the basis that the mere acceptance of orders without protest does not amount to such a promise. As a general proposition, this is no doubt correct; and it would equally be true if made with reference to the question whether there had been an unequivocal representation by the owners that they were waiving their right to reject the nomination as uncontractual. Moreover, if the relevant evidence had related only to the communications passing between the parties before the vessel arrived at Kharg Island, the question would have arisen whether, on these communications (set of course in their factual context), there had been such an unequivocal representation. But the matter does not stop there, because on arrival at Kharg Island the master proceeded to serve notice of readiness. Thereafter, as the Judge pointed out, the owners were asserting that the vessel was available to load; they were also calling upon the charterers to arrange priority berthing, and referring to the fact that laytime was running. In these circumstances, the owners were asserting a right inconsistent with their right to reject the charterers' orders. The right which they were asserting was that laytime had started to run against the charterers at Kharg Island, with the effect that the charterers had become bound to load the cargo there within the laytime fixed by the charter and, if they failed to do so, to pay demurrage to the owners at the contractual rate. In these circumstances, on the principle stated by Lord Diplock in the *Kammins Ballrooms* case [1971] A.C. 850, at pp. 882–883, the owners must be taken in law to have thereby elected not to reject the charterers' nomination, and so to have waived their right to do so or to call for another nomination. Accordingly, in my opinion, Mr. Justice Hobhouse and the Court of Appeal were fully entitled in these circumstances to substitute their view of the case on this point for that of the arbitrators. There was no question of their reversing the arbitrators on an issue of fact; they were deciding, and in my opinion rightly deciding, that the arbitrators had failed to draw an inference of law which on their findings of fact they were bound to draw.

No doubt the master was entitled to refuse to endanger his ship and crew in the circumstances in which he found himself; but that did not excuse the owners from their breach of contract, after they had elected not to reject the charterers' nomination of Kharg Island in the knowledge of the facts rendering it prospectively unsafe. Furthermore this is not a case in which a new situation had developed at Kharg Island, or some other danger already existed there. If the known danger had become significantly different; or if a new and different danger had developed; or if some other danger, hitherto unknown, already existed at the port — in such circumstances as these, other questions might have arisen. But your Lordships are not troubled with any such questions in the present case. The arbitrators found as a fact that the safety or unsafety of Kharg Island was not changed in any way by the attack on Dec. 1. This was a finding which they were fully entitled to make, and which cannot be challenged.

For these reasons, I would dismiss the owners' cross-appeal on this issue. It follows that it is unnecessary for the purposes of the cross-appeal to consider the alternative question of equitable estoppel.

I turn then to the charterers' appeal which related to the effect of cl. 20 (vi) of the charter. Clause 20 (vi) reads, so far as relevant, as follows:

> WAR RISKS (a) If any port of loading or of discharge named in this charterparty or to which the vessel may properly be ordered pursuant to the terms of the bills of lading be blockaded, or (b) if owing to any war, hostilities, warlike operations . . . entry to any such port of loading or of discharge or the loading

or discharge of cargo at any such port be considered by the master or owners in his or their discretion dangerous or prohibited . . . the charterers shall have the right to order the cargo or such part of it as may be affected to be loaded or discharged at any other safe port of loading or of discharge within the range of loading or discharging ports respectively established under the provisions of the charterparty (provided such other port is not blockaded or that entry thereto or loading or discharge of cargo thereat is not in the master's or owner's discretion dangerous or prohibited) . . .

Both the Judge and the Court of Appeal held that this clause was effective to protect the owners from liability in damages, though it did not render the charterers liable in damages in the events which had happend. With this conclusion I agree; I shall therefore deal with the point briefly.

Three arguments were advanced on behalf of the charterers. The first was that, on its true construction, all that the clause did was to confer an option on them. It was simply a charterers' option clause, which conferred no rights or protection on the owners in the events specified in the clause. This argument was rejected both by the Judge and by the Court of Appeal, on the basis that it would deprive the clause of all meaning and effect if it were held that it did not protect the owners in the event of their deciding, in their discretion, that the port was dangerous or prohibited and that they would not therefore load or discharge cargo there, as the case might be. With this conclusion I agree. The clause expressly refers to the discretion which the owners and master are entitled to exercise in a situation of danger and must, in my opinion, impliedly recognize that in the exercise of that discretion they may decline to load or discharge at the relevant port. This is precisely what happened in the present case. It was next argued that, on its true construction, the clause only applied to named ports or ports properly nominated under the charter-party. This cannot be right because, in the event of an improper nomination being made by the charterers, owners' acceptance of the nomination would have the effect that all the relevant contractual provisions applied, including cl. 20 (vi). Finally, it was suggested that the owners, by waiving their right to reject the charterers' nomination as uncontractual, thereby also waived their right to rely upon cl. 20 (vi). Again, I cannot agree. The owners, presented by the charterers with an uncontractual nomination, had in the end to decide whether or not to reject it, and they elected not to do so. I cannot see that this election had any effect upon cl. 20 (vi), and indeed in the course of argument the charterers virtually abandoned the point.

For these reasons, which are substantially the same reasons as those given by the Judge and by the Court of Appeal, I would dismiss both the appeal and the cross-appeal.

Finally, I find it necessary to refer to the fact that my noble and learned friend, Lord Brandon of Oakbrook, has suggested that the owners might have been able to succeed in their claim against the charterers for loss of freight if they had pleaded and proved that the master, in refusing to load at Kharg Island, had acted reasonably so as to mitigate the damage for which the charterers would have been liable if the ship had entered the port and been lost or damaged in a further air raid. This point was not raised in argument, either by Counsel for the owners or indeed by the tribunal, before any of the four tribunals (including your Lordship's House) before which the case has been argued. Having heard no argument on the point, I can express no concluded opinion upon it. Even so, out of fairness to Counsel for the owners, I feel compelled to make the following observations:

(1) The owners, with knowledge of the relevant facts, waived their right to reject the charterers' nomination of Kharg Island as uncontractual, and the arbitrators have found as a fact that there was no material change in the nature of the danger at Kharg Island between the date of the nomination and the date when the owners ultimately refused to load there. In these circumstances, although no doubt the mster was entitled to act as he did for the safety of his ship and crew, I find it difficult to see how the owners could, in the absence of any change of circumstances or any hitherto unknown circumstances coming to light which significantly increased the danger of loading at Kharg Island, escape from their contractual obligation to load there by invoking the principle of mitigation of damage.

(2) If it were right that the owners' refusal to load at Kharg Island constituted a reasonable step taken in mitigation of damage, it would follow that, had the ship instead entered Kharg Island and suffered bomb damage while loading there, the charterers could have escaped all liability for such damage on the ground that the owners had failed to mitigate their damage by refusing to enter the port. I have great difficulty in seeing how any tribunal could reach such a conclusion.

(3) In any event, since the owners, while waiving their right not to treat the charterers' nomination as uncontractual, did not waive their rights under cl. 20 (vi), that clause legislated for the circumstances which arose.

For these reasons, quite apart from others which might have been advanced if the point had been argued, as at present advised it seems to me very understandable that Counsel for the owners should not have raised the point.

QUEEN'S BENCH DIVISION (ADMIRALTY COURT)

Dec. 13, 14, 15, 18 and 19, 1989

THE "MONTANA"

Before Mr. Justice SHEEN

Carriage by sea — Short delivery — Title to sue — Bulk cargo of barley discharged at Singapore bagged and reloaded for shipment to Jeddah — Plaintiff consignee alleged short delivery — Whether defendants liable in damages for failing to deliver all cargo loaded in Singapore — Whether plaintiff had title to sue.

Bunge (Australia) Pty. Ltd. of Melbourne chartered *Montana* from the disponent owners by a charter-party dated Dec. 14, 1983 at Melbourne. Under the terms of the charter the receivers' stevedores were to be employed at the port of discharge.

A cargo of barley in bulk was carried in *Montana* from the port of shipment, Geelong, to Singapore. At Singapore the cargo was discharged. It was then bagged and reloaded. It was agreed that *Montana* sailed from Singapore laden with 27,500 tonnes of barley in 550,000 bags. Each bag and its contents weighed 50 kgs.

The bill of lading stated that the cargo was to be delivered in the like apparent good order and condition at Jeddah unto the order of the Saudi Cairo Bank or their assigns. The bills of lading incorporated the provisions of the charter-party.

The letter of credit was opened by the Saudi Cairo Bank on Dec. 20, 1983 for the account of Mr. S.H.A. Sharbatly of Jeddah. The beneficiaries were named as Bunge (Austraila) Pty. Ltd. of Melbourne and was for about U.S.$10,200,000 (10 per cent. more or less). There was no evidence that that letter of credit referred to the shipment of barley.

Montana arrived in Jeddah on Feb. 28, 1984. Discharging commenced at 07 00 hours on Feb. 29 and was completed on Mar. 13. The master sent a telex message to the owners' London agents stating inter alia that 27,464 tonnes had been discharged and only a quantity of about 15 tonnes remained in the holds in bulk from bags torn by the stevedores in the course of discharging. The stevedores refused to discharge this cargo.

On Apr. 28, 1984 a document headed summary of vessel's outturn was issued indicating a shortage of 1108 bags. On Apr. 20, 1984 the Jeddah customs issued a shortage certificate which stated that 550,000 bags were loaded in Montana but only 548,892 bags were discharged.

The plaintiff claimed damages on the ground that 1108 bags of barley were not delivered to him and that 4000 bags were delivered partly empty. After the contents of those 4000 bags were rebagged it was found that they filled only 3442 bags and that there was a further shortage of 558 bags. The total

HOUSE OF LORDS

14–15 February; 28 March 2007

GOLDEN STRAIT CORPORATION
v
NIPPON YUSEN KUBISHKA KAISHA
(THE "GOLDEN VICTORY")

[2007] UKHL 12

Before Lord BINGHAM of CORNHILL,
Lord SCOTT of FOSCOTE,
Lord WALKER of GESTINGTHORPE,
Lord CARSWELL and
Lord BROWN of EATON-UNDER-HEYWOOD

Charterparty (Time) — Damages — Each party having right to cancel charter in event of war between UK and Iraq — Charterparty to terminate in 2005 — Repudiation of charterparty by charterers in 2001 — War breaking out in 2003 — Owner's measure of damages — Whether damages ran from date of repudiation to outbreak of war in 2003 or from date of repudiation to later date on which charterparty due to terminate — Arbitration Act 1996, section 69.

Golden Strait Corporation (owners) chartered their vessel *Golden Victory* to Nippon Yusen Kubishika Kaisha (charterers) for a period of seven years with one month more or less in NYKK's option. The earliest date on which the vessel could be redelivered was 6 December 2005.

Clause 33 of the charterparty provided that both owners and charterers should have the right to cancel the charter if war or hostilities were to break out between any two or more of a number of countries including the United States, the United Kingdom and Iraq.

In repudiatory breach of the charterparty the charterers redelivered the vessel on 14 December 2001 and the owners accepted that breach as terminating the charter in a letter dated 17 December 2001.

As at 17 December 2001 the charter had a period of just less than four years to run. The second Gulf War began on 20 March 2003, some 14 months after the repudiation and some 32 months before the period of the charterparty would have expired. There was, at the time of repudiation, an available market for the chartering in of vessels such as *Golden Victory.*

Disputes arose in relation to the quantum of damages recoverable by the owners. The owners contended that the second Gulf War was irrelevant to their claim, which was to be assessed at the difference between the charter rate and the (lower) market rate for the whole of the remaining four-year period of the charterparty. The charterers contended that since clause 33 would have entitled them to cancel the charter on the outbreak of the second Gulf War, two years after the repudiation, the owners' claim for damages only ran for those two years.

The arbitrator found that the second Gulf War was a "war" within clause 33 of the charterparty such as to give either party the right to cancel it; that at 17 December 2001, a reasonably well-informed person would have considered war between the United States/United Kingdom and Iraq "merely a possibility" but not "inevitable or even probable"; and that the charterers would have cancelled the charterparty relying on clause 33 had the vessel remained on charter to them at the outbreak of the second Gulf War on 20 March 2003. He accepted the owners' submission that the second Gulf War was irrelevant to their claim, but regarded himself as constrained by *BS&N Ltd v Micado Shipping Ltd (The Seaflower)* [2000] 2 Lloyd's Rep 37 to decide otherwise.

The owners' appealed to the High Court on a point of law under section 69 of the Arbitration Act 1996.

The owners submitted that in a case of an accepted repudiation of a long-term charterparty where there was an available market at the date of repudiation, the rule was that damages should be assessed at the date of repudiation as the difference between the contract rate and the market rate for chartering a substitute ship for the balance of the charter period. Events subsequent to that date were irrelevant in the assessment of the damages since the loss was crystallised at the date of repudiation, and the only exception was where the subsequent event could be seen at the crystallisation date to be inevitable or "predestined".

The charterers contended that although damages were normally assessed as at the date of the breach, that was not an absolute rule. The available market provided the test for what was required of the innocent party by way of reasonable mitigation of his loss. It fixed the maximum claim unless there was a claim to special damages. Where there was a suspensive condition such as a war clause, the duration of the charter was always uncertain The issue was one of causation and should be approached on normal principles of proof.

At first instance Langley J held that there was no such rule as was contended for by the owners, and that the damages had to reflect the fact that, had there been no repudiatory breach, the charterparty would not have run its full term because the charterers would have cancelled the charter on the outbreak of the second Gulf War. He accordingly upheld the arbitrator's award. The owners' appeal to the Court of Appeal was dismissed.

The owners appealed to the House of Lords.

————*Held*, by HL (Lord SCOTT OF FOSCOTE, Lord CARSWELL and Lord BROWN OF EATON-UNDER-HEYWOOD; Lord BINGHAM OF CORNHILL and Lord WALKER OF GESTINGTHORPE dissenting), that the appeal would be dismissed.

(1) The fundamental principle governing the quantum of damages for breach of contract was that damages should compensate the victim of the breach for the loss of his contractual bargain. If the contract was a contract for performance over a period, such as a time charter, the assessment of damages for breach had to proceed on the same principle, namely, that the victim of the breach should be placed, so far as damages could do it, in the position he would have been in had the contract been performed. If the contract would have terminated early on the occurrence of a particular event,

the chance of that event happening had to be taken into account in the assessment of the damages. If it was certain that the event would happen, the damages had to be assessed on that footing (*see* paras 29, 30, 36, 63, 64, 66, 76, and 78);

————*Robinson v Harman* (1848) 1 Ex 850 and *Wertheim v Chicoutimi Pulp Co* [1911] AC 301 applied; *The Mihalis Angelos* [1970] 2 Lloyd's Rep 43 and *Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co* [1903] AC 426 considered.

(2) Whilst the general rule was that damages for breach of contract were to be assessed as at the date of breach, that rule was subject to many exceptions and qualifications, and was not to be mechanistically applied in circumstances where assessment at another date might more accurately reflect the overriding compensatory rule (*see* paras 32, 33, 80, 81 and 83);

————*Miliangos v Frank (Textiles) Ltd* [1976] 1 Lloyd's Rep 201, *Dodd Properties v Canterbury City Council* [1980] 1 WLR 433, *County Personnel Ltd v Alan R Pulver & Co* [1987] 1 WLR 916, *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278, and *North Sea Energy Holdings NV v Petroleum Authority of Thailand* [1999] 1 Lloyd's Rep 483 considered.

(3) Whilst certainty was desirable, particularly in commercial contracts, it was not a principle and had to give way to principle. The achievement of certainty in relation to commercial contracts depended on firm and settled principles of the law of contract (*see* para 38).

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The following cases were referred to in the judgment:

Aitchison v Gordon Durham & Co Ltd (CA) 30 June 1995, unreported;

Baker v Willoughby (HL) [1970] AC 467;

Bradberry, In re [1943] Ch 35;

BS & N Ltd (BVI) v Micado Shipping Ltd (Malta) (The Seaflower) [2000] 2 Lloyd's Rep 37;

Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co (HL) [1903] AC 426;

Carslogie Steamship Co v Royal Norwegian Government (HL) [1951] 2 Lloyd's Rep 441 (*sub nom The "Carslogie"*); [1952] AC 292;

County Personnel (Employment Agency) Ltd v Alan Pulver & Co (CA) [1987] 1 WLR 916;

Curwen v James (CA) [1963] 1 WLR 748;

Dampskibsselskabet "Norden" A/S v Andre & Cie SA [2003] 1 Lloyd's Rep 287;

Dodd Properties (Kent) Ltd v Canterbury City Council (CA) [1980] 1 WLR 433;

Dudarec v Andrews (CA) [2006] 1 WLR 3002;

Homburg Houtimport BV v Agrosin Private Ltd (The Starsin) (HL) [2003] 1 Lloyd's Rep 571; [2004] 1 AC 715;

Jamal v Moolla Dawood Sons & Co (PC) [1916] AC 175;

Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc (The Jordan II) (HL) [2005] 1 Lloyd's Rep 57, [2005] 1 WLR 1363;

Jobling v Associated Dairies Ltd (HL) [1982] AC 794;

Johnson v Agnew (HL) [1980] AC 367;

Kaines (UK) Ltd v Osterreichische Warrenhandelsgesellschaft Austrowaren GmbH (CA) [1993] 2 Lloyd's Rep 1;

Kitchen v Royal Air Force Association (CA) [1958] 1 WLR 563;

Koch Marine Inc v D'Amica Società di Navigazione ARL (The Elena D'Amico) [1980] 1 Lloyd's Rep 75;

Maredelanto Compania Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos) (CA) [1970] 2 Lloyd's Rep 43;

McKinnon v E Survey Ltd [2003] EWHC 475 (Ch);

Miliangos v George Frank (Textiles) Ltd (HL) [1976] 1 Lloyd's Rep 201; [1976] AC 443;

Murphy v Stone-Wallwork (Charlton) Ltd (HL) [1969] 1 WLR 1023;

North Sea Energy Holdings NV v Petroleum Authority of Thailand (CA) [1999] 1 Lloyd's Rep 483;

Radford v De Froberville [1977] 1 WLR 1262;

Re-Source America International Ltd v Platt Site Services Ltd (CA) [2005] 2 Lloyd's Rep 50;

Robinson v Harman (1848) 1 Ex 850;

Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade) (HL) [1983] 2 Lloyd's Rep 253; [1983] 2 AC 694; (CA) [1983] 1 Lloyd's Rep 146; [1983] QB 529;

SIB International Srl v Metallgesellschaft Corporation (The Noel Bay) (CA) [1989] 1 Lloyd's Rep 361;

Thoars Deceased, In Re [2002] EWHC 2416 (Ch);

Vallejo v Wheeler (1774) 1 Cowp 143;

Wertheim v Chicoutimi Pulp Co (PC) [1911] AC 301;

Woodstock Shipping Co v Kyma Compania Naviera SA (The Wave) [1981] 1 Lloyd's Rep 521.

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This was an appeal by Golden Strait Corporation owners of the vessel *Golden Strait* from the decision of the Court of Appeal (Auld and Tuckey LJJ and Lord Mance) ([2005] 2 Lloyd's Rep 747) affirming the decision of Langley J ([2005] 1 Lloyd's Rep 443) who dismissed the owners'

appeal from an arbitration award made in favour of the charterers Nippon Yusen Kubishika Kaisha in relation to the quantum of damages payable in respect of the charterers' repudiatory breach of charter.

Nicholas Hamblen QC and David Allen, instructed by Reed Smith Richards Butler, for the owners; Timothy Young QC and Henry Byam-Cook, instructed by More Fisher Brown, for the charterers.

The further facts are stated in the opinions of Lord Bingham of Cornhill and Lord Carswell.

Judgment was reserved.

Wednesday, 28 March 2007

JUDGMENT

Lord BINGHAM of CORNHILL:

My Lords,

1. The issue in this appeal concerns the assessment of damages for loss of charter hire recoverable by a shipowner where a charterer repudiates a time charter of a vessel during its currency and he accepts that repudiation, there being an available market in which the shipowner can, at or shortly after the date of acceptance of repudiation, charter out the vessel for the balance of the charter term. The dispute between the parties turns on the date at which the quantification of damages is to be made. The shipowners contend that the quantification should be made when, the repudiation having been made and accepted, they charter out (or may reasonably be expected to charter out) the vessel. Events occurring later, not affecting the value of the contractual right which the owner has lost at that time, are irrelevant. The charterers contend that the quantification should be made as of the date on which the damages actually fall to be assessed, taking account of any event which has by then occurred which affects the value of what the owners lost as a result of his repudiation. The maritime arbitrator who was the original decision-maker in this case (Mr Robert Gaisford) would have preferred to accept the owners' contention, but felt constrained by first instance authority to accept the charterers'. His decision was upheld by Langley J in the Commercial Court ([2005] 1 Lloyd's Rep 443) and by Auld and Tuckey LJJ and Lord Mance in the Court of Appeal ([2005] 2 Lloyd's Rep 747). A majority of my noble and learned friends also agree with that decision. I have the misfortune to differ. I give my reasons for doing so, unauthoritative though they must be, since in my respectful opinion the existing decision undermines the quality of certainty which is a traditional strength and major selling point of English commercial law, and involves an unfortunate departure from principle.

The facts

2. By a time charterparty on an amended Shelltime 4 form dated 10 July 1998 Golden Strait Corporation, a Liberian company, as owners chartered their tanker *Golden Victory* to Nippon Yusen Kubishika Kaisha of Tokyo as charterers for a period of seven years with one month more or less in charterers' option. The charterparty provided for payment of a minimum guaranteed base charter hire rate per day, increasing over the seven years of the charter, but subject to a specified reduction if market rates should fall to a certain level. The owners were also to receive a share of operating profits earned by the charterers during the term of the charter above the base charter rate. The charterparty provided (in clause 33) that both owners and charterers should have the right to cancel the charter if war or hostilities were to break out between any two or more of a number of countries including the United States, the United Kingdom and Iraq. The charter was subject to English law and jurisdiction and there was an arbitration clause.

3. On 14 December 2001 the charterers repudiated the charter by redelivering the vessel to the owners. The owners accepted the repudiation three days later, on 17 December, when the charter had nearly four years to run. The owners claimed damages. The charterers did not accept the claim. The matter was referred to arbitration and the arbitrator was asked to decide whether (and if so when) the charterers had repudiated the charter, whether (and if so when) the owners had accepted the repudiation, and what was the earliest date on which the vessel could be redelivered under the charter. By an interim declaratory award dated 16 September 2002 the arbitrator resolved the first two issues in the owners' favour, as summarised above. He found 6 December 2005 to be the earliest date for contractual redelivery of the vessel. This date was significant as the terminal date of the owners' claim for damages.

4. The charterers sought unsuccessfully to challenge this award on appeal, and negotiations then followed for redelivery of the vessel to the charterers on the same terms (so far as material) as before, with settlement of damages for the period between the accepted repudiation and the redelivery. The charterers made an offer to that effect on 7 February 2003. At that stage the owners, according to evidence recited by the arbitrator in the reasons for his second declaratory arbitration award (para 8), had received legal advice that if they proceeded to

arbitration of their damages claim the arbitrator would ignore a later event of war and the charterers' option to cancel and would award the owners damages for the entire four-year period between 17 December 2001 and 6 December 2005. The owners' consultant considered that an event 15 months after the repudiation was irrelevant and that (para 10) "it would be sheer stupidity and not mitigation for us to enter into a charter well below the current market with a clause which entitled the charterer to cancel if there was a war, which seemed to be about to happen". The owners rejected the charterers' offer.

5. The matter then returned to the arbitrator, who was asked to decide three further questions. The first was whether the owners had failed to mitigate their loss by not accepting the charterers' offer of 7 February 2003 to take the vessel back on charter on the same terms as before. In his second declaratory arbitration award dated 27 October 2004 he held that they had not. There is no appeal against this ruling. The second issue was that which gives rise to this appeal. It was whether the events (described as the outbreak of the second Gulf War) in March 2003 placed a temporal limit on the damages recoverable by the owners for the charterers' repudiation of the charterparty such that no damages were recoverable for the period from 21 March 2003 onwards. This issue the arbitrator reluctantly decided in the charterers' favour. The owners say that he was wrong to do so. The third issue was not explored in the reference and is irrelevant for present purposes.

6. In his reasons for deciding the first of these issues as he did, the arbitrator correctly summarised the law on mitigation of damage where there is an available market, as it was agreed, and the arbitrator found, was the case here.

7. In his reasons for deciding the second issue as he did, the arbitrator concluded that the second Gulf War, which effectively began on 20 March 2003, fell within clause 33, as it plainly did. He then considered the likelihood of the second Gulf War occurring when judged from mid-December 2001 by a reasonably well-informed person. This was an issue on which both sides called expert evidence. He judged (para 59) that at 17 December 2001 such a person would have considered war or large-scale hostilities between the United States or the United Kingdom and Iraq to be not inevitable or even probable but merely a possibility. But by the date of the award, the war had occurred and the arbitrator accepted the charterers' evidence that if the charterparty had still been in force on 20 March 2003 they would have exercised their right to cancel under clause 33. He had to decide whether that conclusion put a limit on the period of the owners' recoverable loss or whether, as he put it, "the question is what was the value of the contract that the Owners lost on the date it was lost". He observed (para 55) that:

> if the second Gulf War was no more than a possibility on 17 December 2001, it cannot be doubted that what the Owners lost at that date was a charterparty with slightly less than four years to run. For example, had the Charterers not repudiated the Charterparty but the Owners had sold the vessel with her charter on that day, the value they would have received would surely have been calculated on that basis.

He favoured the owners' position (para 56)

> since it seems to me to be the more orthodox approach and supported by cogent reasons for maintaining it. In essence, it does not seem to me that it can be right that the value of that which the Owners have lost (and which is calculable on the date of breach in the then prevailing circumstances) should thereafter vary according to when a determination is made in proceedings to enforce their rights and in perhaps quite different circumstances.

But (para 56) he felt constrained to follow Timothy Walker J's decision in *BS & N Ltd (BVI) v Micado Shipping Ltd (Malta) (The Seaflower)* [2000] 2 Lloyd's Rep 37 which he found to be in point and indistinguishable.

Principle

8. The repudiation of a contract by one party ("the repudiator"), if accepted by the other ("the injured party"), brings the contract to an end and releases both parties from their primary obligations under the contract. The injured party is thereupon entitled to recover damages against the repudiator to compensate him for such financial loss as the repudiator's breach has caused him to suffer. This is elementary law.

9. The damages recoverable by the injured party are such sum as will put him in the same financial position as if the contract had been performed. This is the compensatory principle which has long been recognised as the governing principle in contract. Counsel for the charterers cited certain classical authorities to make good this proposition, but it has been enunciated and applied times without number and is not in doubt. It does not, however, resolve the question whether the injured party's loss is to be assessed as of the date when he suffers the loss, or shortly thereafter, in the light of what is then known, or at a later date when the assessment happens to be made, in the light of such later events as may then be known.

10. An injured party such as the owners may not, generally speaking, recover damages against a repudiator such as the charterers for loss which he

could reasonably have avoided by taking reasonable commercial steps to mitigate his loss. Thus where, as here, there is an available market for the chartering of vessels, the injured party's loss will be calculated on the assumption that he has, on or within a reasonable time of accepting the repudiation, taken reasonable commercial steps to obtain alternative employment for the vessel for the best consideration reasonably obtainable. This is the ordinary rule whether in fact the injured party acts in that way or, for whatever reason, does not. The actual facts are ordinarily irrelevant. The rationale of the rule is one of simple commercial fairness. The injured party owes no duty to the repudiator, but fairness requires that he should not ordinarily be permitted to rely on his own unreasonable and uncommercial conduct to increase the loss falling on the repudiator. I take this summary to reflect the ruling of Robert Goff J in *Koch Marine Inc v D'Amica Società di Navigazione ARL (The Elena D'Amico)* [1980] 1 Lloyd's Rep 75. That case concerned the measure of damages recoverable by a charterer for breach of a time charter during its currency by an owner. While taking care to avoid laying down an inflexible or invariable rule, the judge held (page 89, col 2) that if, at the date of breach, there is an available market, the normal measure of damages will be the difference between the contract rate and the market rate for chartering in a substitute ship for the balance of the charter period. An analogy was drawn with section 51(3) of the Sale of Goods Act 1893. Neither party challenged this decision, which has always been regarded as authoritative. It does however assume that the injured party knows, or can ascertain, what the balance of the charter period is.

11. It is a general, but not an invariable, rule of English law that damages for breach of contract are assessed as at the date of breach. Authority for this familiar proposition may be found in *Jamal v Moolla Dawood Sons & Co* [1916] AC 175 at page 179: *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 at page 468; *Johnson v Agnew* [1980] AC 367 at pages 400 and 401; *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 WLR 433 at pages 450 and 451, 454 and 455, and 457; *County Personnel (Employment Agency) Ltd v Alan R Pulver & Co* [1987] 1 WLR 916 at pages 925 and 926; *Chitty on Contracts,* 29th edition, 2004, volume 1, para 26-057; Professor S M Waddams, *The Date for the Assessment of Damages*, 1981, 97 LQR 445 at page 446. The Sale of Goods Acts of 1893 and 1979 both give effect to this *prima facie* rule in section 51(3) of the respective Acts in the case of refusal or neglect by a seller to deliver goods to a buyer where there is an available market.

The argument

12. While not, I think, challenging the general correctness of the principles last stated, the charterers dispute their applicability to the present case. Their first ground for doing so is in reliance on what, from the name of the case in which this principle has been most clearly articulated, has sometimes been called "the *Bwllfa* principle". It is that where the court making an assessment of damages has knowledge of what actually happened it need not speculate about what might have happened but should base itself on the known facts. In non-judicial discourse the point has been made that you need not gaze into the crystal ball when you can read the book. I have, for my part, no doubt that this is in many contexts a sound approach in law as in life, and it is true that the principle has been judicially invoked in a number of cases. But these cases bear little, if any, resemblance to the present. In *Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co* [1903] AC 426 a coalowner claimed statutory compensation against a water undertaking which had, pursuant to statutory authority, prevented him mining his coal over a period during which the price of coal had risen. The question was whether the coal should be valued as at the beginning of the period or at its value during the currency of the period. The coalowner was entitled to "full compensation" and the House upheld the latter measure. In doing so, it was at pains to distinguish the case from one of sale or property transfer: see Lord Halsbury LC, pages 428 and 429; Lord Macnaghten, page 431; Lord Robertson, page 432. *In re Bradberry* [1943] Ch 35, where the principle was invoked, concerned the valuation of an annuity in the course of administering an estate. The claim in *Carslogie Steamship Co v Royal Norwegian Government* [1951] 2 Lloyd's Rep 441 (*sub nom The "Carslogie"*); [1952] AC 292 was a claim by shipowners for loss of time during repairs of damage caused by a collision. After the collision the ship had suffered heavy weather damage, which required the ship to be detained for repair of that damage. It was common ground that the ship would have been detained for the same period if the collision had never occurred (page 313). In *In Re Thoars Deceased* [2002] EWHC 2416 (Ch) the principle was invoked in the course of deciding whether a policy of life insurance had been transferred at an undervalue within the meaning of section 339 of the Insolvency Act 1986. The principle was again invoked in *McKinnon v E Survey Ltd* [2003] EWHC 475 (Ch) a claim against negligent surveyors in which the court was asked to assume, for purposes of a preliminary issue, that the property had not been the subject of movement at the date of valuation and had not been subject to movement since, but that it would not

have been possible to establish these facts until after the purchase of the property. In *Aitchison v Gordon Durham & Co Ltd* (30 June 1995, unreported) the Court of Appeal applied the principle where a joint venture agreement to develop land had been broken and the court took account of what actually happened to decide what the claimant's profit would have been. I do not think it necessary to discuss these cases, since it is clear that in some contexts the court may properly take account of later events. None of these cases involved repudiation of a commercial contract where there was an available market.

13. The charterers further submit that even if, as a general rule, damages for breach of contract (or tort, often treated as falling within the same rule) are assessed as at the date of the breach or the tort, the court has shown itself willing to depart from this rule where it judges it necessary or just to do so in order to give effect to the compensatory principle. I accept that this is so. But it is necessary to consider the cases in which the court departs from the general rule. Some are personal injury claims, of which *Curwen v James* [1963] 1 WLR 748 and *Murphy v Stone-Wallwork (Charlton) Ltd* [1969] 1 WLR 1023 may serve as examples. *Dudarec v Andrews* [2006] 1 WLR 3002 was in form a negligence claim against solicitors, but damages were sought for the loss of a chance of success in a personal injuries action struck out for want of prosecution seven years earlier, and the issue was similar to that in a personal injuries action. It is unnecessary to consider the extent to which, in the light of *Baker v Willoughby* [1970] AC 467 and *Jobling v Associated Dairies Ltd* [1982] AC 794, the breach date principle applies to the assessment of personal injury damages in tort. The court has also departed from the general rule in cases where, on particular facts, it was held to be reasonable for the injured party to defer taking steps to mitigate his loss and so reasonable to defer the assessment of damage. *Radford v De Froberville* [1977] 1 WLR 1262 and *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 WLR 433 are examples. In both cases the general rule was acknowledged and reasons given for departing from it. *County Personnel (Employment Agency) Ltd v Alan Pulver & Co* [1987] 1 WLR 916 was a claim against solicitors whose negligent advice had saddled the plaintiffs with a ruinous underlease, from which the plaintiffs had had to buy themselves out. The ordinary diminution in value measure of damage was held to be wholly inapt on the particular facts. Again, reasons were given for departing from the normal rule. In *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 the effect of inflation led the House to sanction a departure from the rule that losses sustained in a foreign currency must be converted into sterling at the date of breach. The plaintiff in *Re-Source America International Ltd v Platt Site Services Ltd* [2005] 2 Lloyd's Rep 50 was bailee of spools used to carry optic fibre cables which it was to refurbish. The spools were destroyed by fire. It was held to be entitled to recover the cost of replacing the spools, subject to a deduction based on the saved cost of refurbishment. The Court of Appeal took account of what happened after the fire. It was expressly found (para 5) that there was no available market in used spools, so the plaintiff could not have mitigated its loss by replacing them. *Wertheim v Chicoutimi Pulp Co* [1911] AC 301, cited by the charterers, was not a case of non-delivery or refusal to deliver, but of delayed delivery. The goods, although delivered late, were received and there was no accepted repudiation. The case would not have fallen under section 51(3) of the 1893 Act. The buyer made a claim for damages, based on the difference between the market price at the place of delivery when the goods should have been delivered and the market price there when the goods were in fact delivered. It was apparent on the figures that this claim, if successful, would have yielded the plaintiff a much larger profit than if the contract had not been broken, and he was compensated for his actual loss. None of these cases, as is evident, involves the accepted repudiation of a commercial contract such as a charterparty. It is necessary to consider some cases more similar to the present case to which the House was referred.

14. Considerable attention has been paid to the decision of the Court of Appeal (Lord Denning MR, Edmund Davies and Megaw LJJ) in *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos)* [1970] 2 Lloyd's Rep 43. The case concerned a voyage charterparty by which the ship was fixed to sail to Haiphong and there load a cargo for delivery in Europe. In the charterparty dated 25 May 1965 the owners stated that the ship was "expected ready to load under this charter about July 1, 1965". The charterparty also provided, in the first sentence of the cancelling clause, "Should the vessel not be ready to load (whether in berth or not) on or before July 20, 1965, charterers have the option of cancelling this contract, such option to be declared, if demanded, at least 48 hours before vessel's expected arrival at port of loading". On 17 July 1965 the ship was at Hong Kong still discharging cargo from her previous voyage. It was physically impossible for her to finish discharging and reach Haiphong by 20 July. The charterers gave notice cancelling the charter. The owners treated this as a repudiation and claimed damages, which were the subject of arbitration and of an appeal to Mocatta J. On further appeal, there were three issues. The first was

whether the "expected readiness" clause was a condition of which the owners were in breach, entitling the charterers to terminate the charter contract. All three members of the court decided this issue in favour of the charterers and against the owners. The second issue was whether (if the answer to the first issue was wrong) the charterers had repudiated the contract by cancelling on 17 July, three days before the specified 20 July deadline. Lord Denning held that they had not, but Edmund Davies and Megaw LJJ held that they had. The third issue was as to the damage suffered by the owners, on the assumption that the charterers' premature cancellation had been a repudiation. Lord Denning, in agreement with the arbitrators, who were themselves agreed, held that they had suffered no damage (page 49 col 1):

> Seeing that the charterers would, beyond doubt, have cancelled, I am clearly of opinion that the shipowners suffered no loss: and would be entitled at most to nominal damages.

Edmund Davies LJ agreed (page 53 col 1):

> One must look at the contract as a whole, and if it is clear that the innocent party has lost nothing, he should recover no more than nominal damages for the loss of his right to have the whole contract completed.

Megaw LJ (at page 58 col 1) stated:

> In my view, where there is an anticipatory breach of contract, the breach is the repudiation once it has been accepted, and the other party is entitled to recover by way of damages the true value of the contractual rights which he has thereby lost; subject to his duty to mitigate. If the contractual rights which he has lost were capable by the terms of the contract of being rendered either less valuable or valueless in certain events, and if it can be shown that those events were, at the date of acceptance of the repudiation, predestined to happen, then in my view the damages which he can recover are not more than the true value, if any, of the rights which he has lost, having regard to those predestined events.

It is evident that all members of the court were viewing the case as from the date of acceptance of the repudiation (although only Megaw LJ said so in terms). They were not taking account of later events. They were recognising, as was obvious on the facts as found, that the value of the contractual right which the owners had lost, as of the date of acceptance of the repudiation, was nil because the charter was bound to be lawfully cancelled three days later.

15. If, as I think, the Court of Appeal's decision on the third issue in the *Mihalis Angelos* was entirely orthodox, so was the decision of Mustill J in *Woodstock Shipping Co v Kyma Compania Naviera SA (The Wave)* [1981] 1 Lloyd's Rep 521. This concerned a time charter for 24 months, three months more or less at charterers' option. The owners repudiated the charter and the charterers accepted their repudiation on 2 August 1979. In assessing the charterers' loss, and allowing for their ability to obtain a substitute fixture in the available market shortly after the date of the accepted repudiation, in accordance with the ruling in the *Elena D'Amico,* above, the judge compared the charterparty rate with the market rate in the early days of September 1979, declining to speculate whether market rates in September 1981 would induce the charterers to exercise their three month option one way or the other.

16. *SIB International Srl v Metallgesellschaft Corporation (The Noel Bay)* [1989] 1 Lloyd's Rep 361 concerned a voyage charterparty. The charterers repudiated the charterparty and the owners accepted the repudiation on 3 June 1987. On appeal to the Court of Appeal, Staughton LJ accepted (page 364, col 2) the submission of counsel that the value of the contract which the owners lost "must be assessed as at June 3, the date when repudiation was accepted". He went on to quote, with approval, the passage from the judgment of Megaw LJ in the *Mihalis Angelos* which I have set out in para 14 above.

17. *Kaines (UK) Ltd v Osterreichische Warrenhandelsgesellschaft Austrowaren GmbH* [1993] 2 Lloyd's Rep 1 concerned not a charterparty but a contract for the sale and purchase of crude oil. The sellers repudiated and at 1728 on 18 June 1987 the buyers accepted the repudiation. Steyn J held that the buyers should have replaced the oil in the market by, at latest, 19 June, and their damages were assessed accordingly. It was an anticipatory repudiation. Both the judge and the Court of Appeal in dismissing the appeal cited with approval (pages 7 and 10) a passage in Treitel, *The Law of Contract*, 7th edition, 1987, page 742:

> Under this [mitigation] rule, the injured party may, and if there is a market generally will, be required to make a substitute contract; and his damages will be assessed by reference to the time when the contract should have been made. This will usually be the time of acceptance of the breach (or such reasonable time thereafter as may be allowed under the rules stated above) . . .

The Court of Appeal observed (page 11) that the judge's finding on the date when the buyers should have bought in a substitute cargo "fixes the level of the plaintiffs' damages on the facts of this case irrespective of what the plaintiffs did or failed to do at the time" and (page 13) "crystallises the position so far as the basis of a capital award of damages is concerned".

18. The buyers in *North Sea Energy Holdings NV v Petroleum Authority of Thailand* [1999] 1 Lloyd's Rep 483 repudiated an oil purchase agreement and the sellers accepted their repudiation. The sellers could not, however, show that they would have been able to obtain the oil to sell, and the Court of Appeal accordingly held that they were not entitled to substantial damages. In reaching this conclusion the court cited and applied part of Megaw LJ's statement in the *Mihalis Angelos* which I have quoted in para 14 above.

19. *BS & N Ltd (BVI) v Micado Shipping Ltd (Malta) (The Seaflower)* [2000] 2 Lloyd's Rep 37 concerned a time charterparty dated 20 October 1997 for a period of 11 months, maximum 12 months at charterers' option. The charterparty referred to various major oil company approvals including that of Mobil all on the point of expiring and provided that if during the charter term the owners lost one of these approvals they should reinstate the same within 30 days failing which the charterers would be at liberty to cancel the charterparty. It also contained a guarantee by the owners to obtain an approval from Exxon within 60 days of the charter date. The vessel was duly delivered but the owners had not obtained an approval from Exxon and did not do so within 60 days from the charter date. On 30 December 1997 the charterers fixed the vessel to load a cargo of Exxon products. On the same date the charterers asked the owners if they had obtained the Exxon approval and gave notice requiring the owners to obtain it by 5 January 1998. The owners replied that the vessel would be ready for Exxon inspection by late January or early February. The charterers responded by terminating the charter and redelivering the vessel. At an initial hearing Aikens J held that the 60-day guarantee was an innominate term, not a condition. Thus the charterers were not entitled to terminate, and had repudiated the charterparty, which the owners had accepted. In proceedings initiated by the charterers, the owners counterclaimed for damages for wrongful termination of the charter, quantified as the difference between the daily hire rates in the charter and the alternative employment found for the vessel for the rest of the charter period. The charterers met this claim by contending that the owners would have lost their Mobil approval on 27 January 1998 and would not have been able to regain it within 30 days, namely 26 February: therefore the charterers would be contractually entitled to cancel, and the owners' damages should end then. Timothy Walker J discerned a difference between the three judgments in the *Mihalis Angelos*, discounting Megaw LJ's formulation as that of a minority, but found on the facts, as established at 30 December 1997, that the owners would have lost the Mobil approval on 27 January 1998. This conclusion he found to be supported by evidence of what actually happened after 30 December. He concluded that it was inevitable that the charter would have come to an end on 26 February, and limited the owners' damages accordingly. This was, as I read the judgment, a conclusion he regarded as inevitable on 30 December. It does not appear that there was argument about the permissibility of relying on evidence of what happened later, and the judge cannot have supposed that he was deciding any issue of principle. The result of this case was perhaps less obvious than that on the third issue in the *Mihalis Angelos*, but it was a judgment, on different facts, to very much the same effect. It was quite unlike the present case, because early termination was very clearly predictable on the date when the repudiation was accepted, and the judge only relied on evidence of later events to fortify his conclusion on that point. I do not think he would have reached a different conclusion had he not received that evidence.

20. *Dampskibsselskabet "Norden" A/S v Andre & Cie SA* [2003] 1 Lloyd's Rep 287 is a recent example of the application of the general rule. A forward freight swap agreement was treated as terminated because of the defendants' breach of solvency guarantees. It was common ground by the end of the trial that the injured party's loss was to be measured by the difference between the contract rate and the market rate after the date of termination. Toulson J recorded this agreement, observing (page 292, col 2) that "The availability of a substitute market enables a market valuation to be made of what the innocent party has lost, and a line thereby to be drawn under the transaction". This is what the general rule is intended to achieve.

21. In support of their argument that damages should be assessed as of the date of actual assessment, the charterers contend that their claim attributable to loss of profit share would in any event have to be deferred. Neither the arbitrator nor the judge mentioned this point, from which it seems safe to infer that the point was not at that stage relied on. But Lord Mance, giving the leading judgment in the Court of Appeal, did refer to it (para 25), and counsel for the owners accepted in argument that the assessment of the profit share loss would have had to be deferred. I am far from convinced that counsel was right to accept this. It would of course be very difficult to calculate loss of profit prospectively over a four-year period, but an injured party can recover damages for the loss of a chance of obtaining a benefit (see Treitel, 11th edition, 2003, pages 955 to 957) and the difficulty of accurate calculation is not a bar to recovery. Even if counsel is right on this point and I am wrong, this would not in my view be sufficient to displace the general rule in this context.

Conclusion

22. The thrust of the charterers' argument was that the owners would be unfairly over-compensated if they were to recover as damages sums which, with the benefit of hindsight, it is now known that they would not have received had there been no accepted repudiation by the charterers. There are, in my opinion, several answers to this. The first is that contracts are made to be performed, not broken. It may prove disadvantageous to break a contract instead of performing it. The second is that if, on their repudiation being accepted, the charterers had promptly honoured their secondary obligation to pay damages, the transaction would have been settled well before the second Gulf War became a reality. The third is that the owners were, as the arbitrator held (see para 7 above), entitled to be compensated for the value of what they had lost on the date it was lost, and it could not be doubted that what the owners lost at that date was a charterparty with slightly less than four years to run. This was a clear and, in my opinion, crucial finding, but it was not mentioned in either of the judgments below, nor is it mentioned by any of my noble and learned friends in the majority. On the arbitrator's finding, it was marketable on that basis. I can readily accept that the value of a contract in the market may be reduced if terminable on an event which the market judges to be likely but not certain, but that was not what the arbitrator found to be the fact in this case. There is, with respect to those who think otherwise, nothing artificial in this approach. If a party is compensated for the value of what he has lost at the time when he loses it, and its value is at that time for any reason depressed, he is fairly compensated. That does not cease to be so because adventitious later events reveal that the market at that time was depressed by the apprehension of risks that did not eventuate. A party is not, after all, obliged to accept a repudiation: he can, if he chooses, keep the contract alive, for better or worse. By describing the prospect of war in December 2001 as "merely a possibility", the expression twice used by the arbitrator in para 59 of his reasons, the arbitrator can only have meant that it was seen as an outside chance, not affecting the marketable value of the charter at that time.

23. There is, however, a further answer which I, in common with the arbitrator, consider to be of great importance. He acknowledged the force of arguments advanced by the owners based on certainty ("generally important in commercial affairs"), finality ("the alternative being a running assessment of the state of play so far as the likelihood of some interruption to the contract is concerned"), settlement ("otherwise the position will remain fluid"), consistency ("the idea that a party's accrued rights can be changed by subsequent events is objectionable in principle") and coherence ("the date of repudiation is the date on which rights and damages are assessed"). The judge was not greatly impressed by the charterers' argument along these lines, observing (paras 13 and 35) that although certainty is a real and beneficial target, it is not easily achieved, and the charterparty contained within it the commercial uncertainty of the war clause. Lord Mance similarly said (para 24):

> Certainty, finality and ease of settlement are all of course important general considerations. But the element of uncertainty, resulting from the war clause, meant that the owners were never entitled to absolute confidence that the charter would run for its full seven-year period. They never had an asset which they could bank or sell on that basis. There is no reason why the transmutation of their claims to performance of the charter into claims for damages for non-performance of the charter should improve their position in this respect.

I cannot, with respect, accept this reasoning. The importance of certainty and predictability in commercial transactions has been a constant theme of English commercial law at any rate since the judgment of Lord Mansfield CJ in *Vallejo v Wheeler* (1774) 1 Cowp 143 at page 153), and has been strongly asserted in recent years in cases such as *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 1 Lloyd's Rep 146 at page 153 col 2; [1983] 2 Lloyd's Rep 253 at page 259 col 1; [1983] QB 529 at pages 540 and 541, [1983] 2 AC 694 at pages 703 and 704; *Homburg Houtimport BV v Agrosin Private Ltd* [2003] 1 Lloyd's Rep 571; [2004] 1 AC 715 at page 738; *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc (The Jordan II)* [2005] 1 Lloyd's Rep 57; [2005] 1 WLR 1363 at page 1370. Professor Sir Guenter Treitel QC read the Court of Appeal's judgment as appearing to impair this quality of certainty (*Assessment of Damages for Wrongful Repudiation*, 2007, 123 LQR 9–18) and I respectfully share his concern.

24. On my reading of *The Seaflower* (see para 19 above), I do not think the arbitrator was bound by that decision to reach the conclusion he did. If he was, I respectfully think the judge was wrong to analyse the *Mihalis Angelos* as he did in that case. But on the facts Timothy Walker J was entitled to value the owners' charter in that case at two months' purchase as of the repudiation acceptance date. In the present case, by contrast, the arbitrator found four years' purchase (less a few days) as the true market value of the charterparty on the repudiation acceptance date.

25. For these reasons and those given by my noble and learned friend Lord Walker of Gestingthorpe, with which I wholly agree, I would, for my part, have allowed the owners' appeal.

Lord SCOTT of FOSCOTE:

My Lords,

26. The facts of this case have been fully and clearly set out in the opinions of my noble and learned friends Lord Bingham of Cornhill and Lord Carswell, both of which I have had the advantage of reading in advance. It will suffice for me to state in summary form what I take to be the salient features of the facts that have led to this litigation and to the appeal to your Lordships.

27. The charterparty of 10 July 1998 whereby the appellants (the owners) and the respondents (the charterers) agreed on a charter of the vessel, *Golden Victory*, for a period ending on 6 December 2005 contained a provision (clause 33) enabling either party to cancel the charter if war or hostilities should break out between any two or more of a number of named countries. The named countries included the USA, the UK and Iraq. The charterers in breach of contract repudiated the charter on 14 December 2001 when the charter had nearly four years still to run (but subject, of course, to the clause 33 possibilities of cancellation). The owners accepted the repudiation on 17 December 2001 and claimed damages for the charterers' breach of contract. The owners' claim went to arbitration and, after various issues had been determined by the arbitrator, all in the owners' favour, but before the arbitrator had assessed the quantum of the damages payable by the charterers, the outbreak, in March 2003, of the second Gulf War occurred. The charterers said that if the charterparty had still been on foot when the second Gulf War began they would have exercised their clause 33 right to bring the charter to an end. They submitted, therefore, that the owners' damages for their (the charterers') breach of contract should be assessed by reference to the period from 17 December 2001, when the contract came to an end on the owners' acceptance of their repudiation, to March 2003, when the contract would have come to an end if it had still been on foot. The owners disagreed. They said the damages should be assessed by reference to the value of their rights under the charterparty as at 17 December 2001. That assessment could properly take account of the chance, assessed as at 17 December 2001, that a clause 33 event enabling one or other party to terminate the contract might occur, but should not take account of the actual occurrence of any event subsequent to 17 December 2001. The question was put to the arbitrator for decision. As your Lordships know, the arbitrator decided the question in favour of the charterers. Langley J did likewise and the Court of Appeal agreed. The question is now before your Lordships for a final decision.

28. Two important matters that have, or may have, a bearing on the answer to the question are now common ground. First, it is common ground that, if the charterparty had still been on foot when, in March 2003, hostilities between the USA and the UK on one side and Iraq on the other side began, the charterers would have exercised their clause 33 right to terminate the charterparty. Second, it is common ground that as at 17 December 2001 the chance that any hostilities triggering the clause 33 right of termination would break out was no more than a possibility and certainly not a probability.

29. My Lords, the answer to the question at issue must depend on principles of the law of contract. It is true that the context in this case is a charterparty, a commercial contract. But the contractual principles of the common law relating to the assessment of damages are no different for charterparties, or for commercial contracts in general, than for contracts which do not bear that description. The fundamental principle governing the quantum of damages for breach of contract is long established and not in dispute. The damages should compensate the victim of the breach for the loss of his contractual bargain. The principle was succinctly stated by Parke B in *Robinson v Harman* (1848) 1 Ex 850 at page 855 and remains as valid now as it was then:

> The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

If the contract is a contract for performance over a period, whether for the performance of personal services, or for supply of goods, or, as here, a time charter, the assessment of damages for breach must proceed on the same principle, namely, the victim of the breach should be placed, so far as damages can do it, in the position he would have been in had the contract been performed.

30. If a contract for performance over a period has come to an end by reason of a repudiatory breach but might, if it had remained on foot, have terminated early on the occurrence of a particular event, the chance of that event happening must, it is agreed, be taken into account in an assessment of the damages payable for the breach. And if it is certain that the event will happen, the damages must be assessed on that footing. In *The Mihalis Angelos* [1970] 2 Lloyd's Rep 43, Megaw LJ referred to events "predestined to happen". He said, at page 58 col 2, that:

> . . . if it can be shown that those events were, at the date of acceptance of the repudiation, predestined to happen, then . . . the damages which [the claimant] can recover are not more than the true value, if any, of the rights which he has lost, having regard to those predestined events.

Another way of putting the point being made by Megaw LJ is that the claimant is entitled to the benefit, expressed in money, of the contractual rights he has lost, but not to the benefit of more valuable contractual rights than those he has lost. In *Wertheim v Chicoutimi Pulp Co* [1911] AC 301, Lord Atkinson referred, at page 307, to:

> . . . the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed

and, in relation to a claim by a purchaser for damages for late delivery of goods where the purchaser had, after the late delivery, sold the goods for a higher price than that prevailing in the market on the date of delivery, observed, at page 308, that:

> . . . the loss he sustains must be measured by that price, unless he is, against all justice, to be permitted to make a profit by the breach of contract, be compensated for a loss he never suffered, and be put, as far as money can do it, not in the same position in which he would have been if the contract had been performed, but in a much better position.

31. The result contended for by the appellant in the present case is, to my mind, similar to that contemplated by Lord Atkinson in the passage last cited. If the charterparty had not been repudiated and had remained on foot, it would have been terminated by the charterers in or shortly after March 2003 when the second Gulf War triggered the clause 33 termination option. But the owners are claiming damages up to 6 December 2005 on the footing, now known to be false, that the charterparty would have continued until then. It is contended that because the charterers' repudiation and its acceptance by the owners preceded the March 2003 event, the rule requiring damages for breach of contract to be assessed at the date of breach requires that event to be ignored.

32. That contention, in my opinion, attributes to the assessment of damages at the date of breach rule an inflexibility which is inconsistent both with principle and with the authorities. The underlying principle is that the victim of a breach of contract is entitled to damages representing the value of the contractual benefit to which he was entitled but of which he has been deprived. He is entitled to be put in the same position, so far as money can do it, as if the contract had been performed. The assessment at the date of breach rule can usually achieve that result. But not always. In *Miliangos v Frank (Textiles) Ltd* [1976] 1 Lloyd's Rep 201 at page 210 col 1; [1976] AC 443 Lord Wilberforce at page 468 referred to "the general rule" that damages for breach of contract are assessed as at the date of breach but went on to observe that:

> . . . It is for the courts, or for arbitrators, to work out a solution in each case best adapted to giving the injured plaintiff that amount in damages which will most fairly compensate him for the wrong which he has suffered . . .

and, when considering the date at which a foreign money obligation should be converted into sterling, chose the date that "gets nearest to securing to the creditor exactly what he bargained for". If a money award of damages for breach of contract provides to the creditor a lesser or a greater benefit than the creditor bargained for, the award fails, in either case, to provide a just result.

33. In *Dodd Properties v Canterbury City Council* [1980] 1 WLR 433, Megaw LJ, commenting on the "general rule" to which Lord Wilberforce had referred in the *Miliangos* case, said, at page 451, that it was "clear" that the general rule was "subject to many exceptions and qualifications". In *County Personnel Ltd v Alan R Pulver & Co* [1987] 1 WLR 916, Bingham LJ, as my noble and learned friend then was, said at page 926 that the general rule that damages were assessed at the date of the breach "should not be mechanistically applied in circumstances where assessment at another date may more accurately reflect the overriding compensatory rule". In *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278, the Court of Appeal held that damages for wrongful dismissal could not confer on an employee extra benefits that the contract did not oblige the employer to confer and Diplock LJ (as he then was) said at page 294 that:

> . . . the first task of the assessor of damages is to estimate as best he can what the plaintiff would have gained in money or money's worth if the defendant had fulfilled his legal obligations and had done no more. Where there is an anticipatory breach by wrongful repudiation, this can at best be an estimate, whatever the date of the hearing. It involves assuming that what has not occurred and never will occur has occurred or will occur, ie that the defendant has since the breach performed his legal obligations under the contract and, if the estimate is made before the contract would otherwise have come to an end, that he will continue to perform his legal obligations thereunder until the due date of its termination. But the assumption to be made is that the

> defendant has performed or will perform his legal obligations under his contract with the plaintiff and nothing more.

This passage was cited and applied by Waller LJ in giving his judgment, concurred in by Roch and Ward LJJ, in *North Sea Energy Holdings NV v Petroleum Authority of Thailand* [1999] 1 Lloyd's Rep 483 at pages 494 and 495.

34. The assessment at the date of breach rule is particularly apt to cater for cases where a contract for the sale of goods in respect of which there is a market has been repudiated. The loss caused by the breach to the seller or the buyer, as the case may be, can be measured by the difference between the contract price and the market price at the time of the breach. The seller can re-sell his goods in the market. The buyer can buy substitute goods in the market. Thereby the loss caused by the breach can be fixed. But even here some period must usually be allowed to enable the necessary arrangements for the substitute sale or purchase to be made (see eg *Kaines v Österreichische* [1993] 2 Lloyd's Rep 1). The relevant market price for the purpose of assessing the quantum of the recoverable loss will be the market price at the expiration of that period.

35. In cases, however, where the contract for sale of goods is not simply a contract for a one-off sale, but is a contract for the supply of goods over some specified period, the application of the general rule may not be in the least apt. Take the case of a three-year contract for the supply of goods and a repudiatory breach of the contract at the end of the first year. The breach is accepted and damages are claimed but before the assessment of the damages an event occurs that, if it had occurred while the contract was still on foot, would have been a frustrating event terminating the contract, eg legislation prohibiting any sale of the goods. The contractual benefit of which the victim of the breach of contract had been deprived by the breach would not have extended beyond the date of the frustrating event. So on what principled basis could the victim claim compensation attributable to a loss of contractual benefit after that date? Any rule that required damages attributable to that period to be paid would be inconsistent with the overriding compensatory principle on which awards of contractual damages ought to be based.

36. The same would, in my opinion, be true of any anticipatory breach the acceptance of which had terminated an executory contract. The contractual benefit for the loss of which the victim of the breach can seek compensation cannot escape the uncertainties of the future. If, at the time the assessment of damages takes place, there were nothing to suggest that the expected benefit of the executory contract would not, if the contract had remained on foot, have duly accrued, then the quantum of damages would be unaffected by uncertainties that would be no more than conceptual. If there were a real possibility that an event would happen terminating the contract, or in some way reducing the contractual benefit to which the damages claimant would, if the contract had remained on foot, have become entitled, then the quantum of damages might need, in order to reflect the extent of the chance that that possibility might materialise, to be reduced proportionately. The lodestar is that the damages should represent the value of the contractual benefits of which the claimant had been deprived by the breach of contract, no less but also no more. But if a terminating event had happened, speculation would not be needed, an estimate of the extent of the chance of such a happening would no longer be necessary and, in relation to the period during which the contract would have remained executory had it not been for the terminating event, it would be apparent that the earlier anticipatory breach of contract had deprived the victim of the breach of nothing. In the *Bwllfa* case [1903] AC 426, Lord Halsbury at page 429 rejected the proposition that "because you could not arrive at the true sum when the notice was given, you should shut your eyes to the true sum now you do know it, because you could not have guessed it then" and Lord Robertson said at 432, that "estimate and conjecture are superseded by facts as the proper *media concludendi*" and, at 433, that "as in this instance facts are available, they are not to be shut out". Their Lordships were not dealing with a contractual, or tortious, damages issue but with the quantum of compensation to be paid under the Waterworks Clauses Act 1847. Their approach, however, is to my mind as apt for our purposes on this appeal as to theirs on that appeal.

37. My noble and learned friend Lord Bingham, in what has been rightly described as a strong dissent, has referred (in para 9) to the overriding compensatory principle that the injured party is entitled to such damages as will put him in the same financial position as if the contract had been performed. On the facts of the present case, however, the contract contained clause 33 and would not have required any performance by the charterers after March 2003. It should follow that, in principle, the owners, the injured party, are not entitled to any damages in respect of the period thereafter. As at the date of the owners' acceptance of the charterers' repudiation of the charterparty, the proposition that what at that date the owners had lost was a charterparty with slightly less than four years to run requires qualification. The charterparty contained clause 33. The owners had lost a charterparty which

contained a provision that would enable the charterers to terminate the charterparty if a certain event happened. The event did happen. It happened before the damages had been assessed. It was accepted in argument before your Lordships that the owners' charterparty rights would not, in practice, have been marketable for a capital sum. The contractual benefit of the charterparty to the owners, the benefit of which they were deprived by the repudiatory breach, was the right to receive the hire rate during the currency of the charterparty. The termination of the charterparty under clause 33 would necessarily have brought to an end that right.

38. The arguments of the owners offend the compensatory principle. They are seeking compensation exceeding the value of the contractual benefits of which they were deprived. Their case requires the assessor to speculate about what might happen over the period 17 December 2001 to 6 December 2005 regarding the occurrence of a clause 33 event and to shut his eyes to the actual happening of a clause 33 event in March 2003. The argued justification for thus offending the compensatory principle is that priority should be given to the so-called principle of certainty. My Lords there is, in my opinion, no such principle. Certainty is a desideratum and a very important one, particularly in commercial contracts. But it is not a principle and must give way to principle. Otherwise incoherence of principle is the likely result. The achievement of certainty in relation to commercial contracts depends, I would suggest, on firm and settled principles of the law of contract rather than on the tailoring of principle in order to frustrate tactics of delay to which many litigants in many areas of litigation are wont to resort. Be that as it may, the compensatory principle that must underlie awards of contractual damages is, in my opinion, clear and requires the appeal in the case to be dismissed. I wish also to express my agreement with the reasons given by my noble and learned friends Lord Carswell and Lord Brown of Eaton-under-Heywood for coming to the same conclusion.

Lord WALKER of GESTINGTHORPE:

My Lords,

39. I have had the privilege of reading in draft the opinion of my noble and learned friend Lord Bingham of Cornhill. His opinion clearly sets out the principles of law applicable in this area, including the importance of certainty in commercial transactions. His survey of the authorities demonstrates, to my mind conclusively, the essential uniformity of reported decisions on charterparties and similar commercial contracts. In particular, none of the judgments in *The Mihalis Angelos* [1970] 2 Lloyd's Rep 43 supports the respondents' case (Megaw LJ was not expressing a minority view, although he expressed his view more plainly than Lord Denning MR and Edmund-Davies LJ). The decision of Mustill J in *The Wave* [1981] 1 Lloyd's Rep 521 was entirely orthodox.

40. The decision of Timothy Walker J in *The Seaflower* [2000] 2 Lloyd's Rep 37 was rather less clear, but (in agreement with Lord Bingham) I consider that the judge took a view of the facts as they were at 30 December 1997 (the date of the charterers' notice of termination which was held to be unjustified) although he did (at page 44) refer to later events as a confirmation of what was inevitable on 30 December 1997. In that case, at page 44, Timothy Walker J seems to have drawn a distinction between what was "inevitable" and what was "predestined" (the expression used by Megaw LJ in *The Mihalis Angelos* at page 58 col 2). The word "predestined" carries theological implications (a point made by the arbitrator in para 52 of his second declaratory award) but I agree with the arbitrator that Megaw LJ must have been using the word metaphorically. He cannot possibly have meant anything other than "inevitable", in the sense of an event which is predictable with total confidence. In that case the vessel was still unloading in Hong Kong on 17 July 1965 and on that date it was simply impossible that she should be in Haiphong, ready to load, three days later. Timothy Walker J instructed himself (following Lord Denning MR in *The Mihalis Angelos* at page 49 col 1) that he should "take into account all contingencies which might have reduced or extinguished the loss," but he then correctly concluded that there was, at 30 December 1997, only one possible outcome.

41. Cases concerned with the assessment of damages in tort for personal injuries are in a quite different category. They are not concerned with economic loss as between traders operating in the marketplace, but with assessing monetary compensation (so far as money can ever provide compensation) for bodily injuries whose long-term effects may be very difficult to predict. In those cases (and especially in cases of very serious injury) it is well understood that the final assessment of damages should be made only on the basis of full and up to date medical evidence. That does not bear on the assessment of damages for breach of a commercial contract in cases where there is an available market.

42. For all the reasons given by Lord Bingham I would allow the appeal, and I am not sure that I can usefully say more. I would simply add that this seems to me to be a case in which a new point, not in either party's mind at (or soon after) the date of breach, has taken on a life of its own as the litigation has been prolonged, both at first instance

and on appeal. This appears from the full and clear findings of fact made by the arbitrator (Mr Robert Gaisford), including his findings about later negotiations which the charterers relied on in alleging that the owners had failed to mitigate their loss.

43. These matters are covered in the early paragraphs of Lord Bingham's opinion but I draw attention to some salient dates. The repudiation by redelivery occurred on 14 December 2001. The original dispute between the parties was as to the effect of a memorandum of agreement dated 17 July 1998 (a few days after the charterparty) which provided for the charterers to have an option for a charter back to the owners' parent company. This dispute (arising out of subsequent changes in the structure of the owners' corporate group) went to arbitration, resulting in a first declaratory award dated 16 September 2002. This declared that the earliest date on which the vessel could have been redelivered under the charterparty was 6 December 2005. The charterers appealed from that award to the Commercial Court, in which Morison J dismissed the appeal on 17 January 2003 ([2003] 2 Lloyd's Rep 592). There were then negotiations between the parties (described in detail in paras 7 to 16 of the second declaratory award) as to the charterers accepting redelivery of the vessel on the same terms (with an amendment not relating to the war clause). But on 9 January 2003 (when Morison J was still considering his judgment) Mr Martin Benny, acting on behalf of the owners, realised the significance of the war clause (clause 33 of the charterparty), if included (in its amended form) in the proposed new charterparty. The arbitrator described this as follows (para 8):

> However, when the negotiations were close to fruition, Mr Martin Benny . . . was going through the Charterparty line-by-line when he came across clause 33. His evidence was that as soon as he saw it he thought that the Charterers might try to use the clause in the new Charterparty to throw it up virtually as soon as it was agreed. He felt at that time that war between Iraq and the United States was looking increasingly likely.

44. The outcome was that the owners rejected an offer which the charterers made on 7 February 2003 (after Morison J had delivered judgment) and the negotiations broke down (but that did not, as the arbitrator held, amount to a failure on the part of the owners to mitigate their loss). So the possible significance of the war clause was first raised by the owners, in the context of the proposed new charter, more than a year after the original repudiation, and at a time when the prospect of war in the Gulf was emerging as a real threat (hostilities began on 20 March 2003).

45. The arbitrator made a finding of fact (para 59) that at 17 December 2001 a reasonably well-informed person would have considered war or large-scale hostilities between the United States (and/or the United Kingdom) and Iraq as "merely a possibility". I do not read that as meaning "less than a 50% prospect". The whole thrust of the arbitrator's findings, after hearing a good deal of evidence, is that it was at the date of repudiation the sort of outside possibility which would, in the commercial world, be severely discounted (or even entirely disregarded). That is strikingly confirmed, I think, by the fact that the war clause does not seem to have received even a passing mention in the first part of the arbitration and the consequent appeal to the Commercial Court. The issue in those proceedings was of course different; but if the charterers had seen the war clause as even a potentially live issue, their lawyers could have been expected to put down a marker as to the need to qualify the arbitrator's unequivocal declaration, upheld in the Commercial Court, that the earliest date for redelivery would have been 6 December 2005.

46. In my opinion the arbitrator erred only in not following his own instinct (para 56) towards the owners' "more orthodox" approach. He concluded, wrongly in my view, that *The Seaflower* required him to look at later events as a guide to what was inevitable, rather than looking at the position (and weighing contingencies in an appropriate case) as at the date of breach. In this case an objective and well-informed observer, looking at the matter in December 2001, would have thought, not only that the prospect of the war clause option becoming exercisable was not inevitable (in the sense of being predictable with confidence equal, or closely approximating, to 100 per cent) but that it was a mere possibility carrying little or no weight in commercial terms.

47. I would therefore allow this appeal.

Lord CARSWELL:

My Lords,

48. The appellants chartered a ship to the respondents by a period time charterparty dated 10 July 1998, by whose terms the earliest contractual date for termination would have been 6 December 2005. The respondents repudiated the charter, however, by purporting on 14 December 2001 to redeliver the vessel to the appellants, who on 17 December 2001 accepted the repudiation. An arbitration was held in which, following some earlier skirmishes, damages for breach fell to be measured. By the time they came to be considered by the arbitrator the second Gulf War had broken out, which would have entitled the charterers to cancel the charter, if it had still been current. The question, which was decided by the arbitrator as a preliminary issue, was

whether the damages sustained by the appellants should be measured by reference to the full term of the charter or only up to the date on which such cancellation would have taken place. This issue, on which there is no definitive previous authority, has come before the House as an appeal on the question of law involved.

49. By the charterparty, which was on an amended Shelltime 4 form and was subject to two memoranda dated 17 July 1998, the appellant shipowners, Golden Strait Corporation of Monrovia, Liberia, chartered the vessel *Golden Victory* to the respondents Nippon Yusen Kubishika Kaisha of Tokyo, Japan, for a period of seven years "with one month more or less in Charterers' option". The rate of hire, contained in an agreed memorandum, consisted of, first, a minimum guaranteed base charter rate starting at US$31,500 per day and increasing from year to year, and, secondly, a share in operating profit over and above the base charter rate.

50. The war clause contained in the printed Shelltime 4 form was amended by the addition of several countries and a rider, and as amended read:

> 33. If war or hostilities break out between any two or more of the following countries: USA, former USSR, PRC, UK, Netherlands, Liberia, Japan, Iran, Kuwait, Saudi Arabia, Qatar, Iraq, both Owners and Charterers shall have the right to cancel this charter. Either party, however, shall not be entitled to terminate this charter on account of minor and/or local military operation or economic warfare anywhere which will not interfere with the vessel's trade.

51. Following the redelivery of the vessel to the appellants and their acceptance of the repudiation of the charter, they made a claim for damages against the respondents, who denied liability. The parties referred the dispute to the arbitration in London of a sole arbitrator Mr Robert Gaisford. He found against the charterers on the issue of liability by an interim declaratory award given on 16 September 2002, an appeal from which was dismissed by Morison J, sitting in the Queen's Bench Division (Commercial Court), on 17 January 2003.

52. The parties then entered into the issue of damages and asked the arbitrator to determine three further preliminary issues, of which the question before the House was one. Following the dismissal of their appeal on liability, the respondents had made an offer to take the vessel back on charter and entered into negotiations on the measure of damages. When the appellants appreciated that it was apparent that the charter would be terminated under clause 33 of the charterparty on the outbreak of war, which was then increasingly likely to happen, they declined to accept the offer except on terms that excluded clause 33. The arbitrator held that the appellants did not by their refusal to accept the offer made by the respondents fail to mitigate their loss.

53. The arbitrator then focused on the issue which is now before the House, whether the outbreak of the second Gulf War on 20 March 2003 placed a temporal limit on the period in respect of which damages fell to be awarded for the breach of the terms of the charterparty. It was not in dispute, and was so found by the arbitrator, that there was an available market for the chartering of such vessels as the *Golden Victory,* though the appellants claimed that a new fixture could only have commenced earning, following negotiation, on 1 April 2002. The appellants' contention, which they have maintained throughout the sequence of appeals, was that the proper measure of damages was the basic hire which they would have received until the earliest contractual date of termination on 6 December 2005, plus the profit share to which they would, but for the breach, have become entitled in that period, less the amounts which the vessel could have earned in the available market. The respondents claimed, on the other hand, that the damages should run only until the outbreak of the war, when they would, as the arbitrator found, have cancelled the charter.

54. The arbitrator received evidence from experts of opposing views as to the likelihood, seen in December 2001, of the occurrence of war between the United States and Iraq. He concluded in para 59 of the reasons given for his second declaratory award made on 27 October 2004:

> On the evidence, I have concluded that at 17 December 2001, a reasonably well-informed person would have considered war (or large-scale hostilities) between the United States/United Kingdom and Iraq merely a possibility. I do not consider that such a person would have considered it inevitable or even probable but merely a possibility, although I do accept that the degree of probability would have been higher had that person known as much about the prevailing circumstances then as we do today.

He considered the parties' contentions about the period for calculation of the damages and his conclusion, following, not without some reluctance, the decision in *BS & N Ltd (BVI) v Micado Shipping Ltd (Malta) (The Seaflower)* [2000] 2 Lloyd's Rep 37, was that the respondents' contention was correct and that the outbreak of war in March 2003 placed a temporal limit on the damages, none being recoverable for the period from 20 March 2003 onwards.

55. The appellants appealed on a point of law to the High Court and in a written judgment given on 15 February 2005 Langley J dismissed their appeal ([2005] 1 Lloyd's Rep 443). He examined a number of cases, but was unable to derive direct authority from them on the issue the subject of the parties' contentions. He rejected the appellants' submission founded on statements contained in the judgments in *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos)* [1970] 2 Lloyd's Rep 43, and expressed his conclusions in para 35 of his judgment:

> In my judgment the arbitrator was right in his conclusion despite his reluctance to reach it. Essentially and in summary I think: (i) the conclusion accords with the basic compensatory rule for the assessment of damages in that had the charterparty not been repudiated but been performed it would have come to an end upon the outbreak of the second Gulf War; (ii) I can see no sound reason why the ordinary principles requiring a claimant to prove his loss and that it was caused by the impugned conduct of the defendant should not apply in this case nor why the "normal" approach to assessment of loss derived from the normal approach to mitigation should dictate another result; (iii) I also see no sound reason why there should be an "exception" to the rule for which Mr Hamblen contends limited only to a case where at the time of repudiation the loss is predestined to end at a date earlier than the expiry of the charter period; (iv) the desirability of certainty and crystallisation is accepted but, I think, no more obviously achievable with than without Mr Hamblen's rule and its supposed exception. The fact is that the charterparty itself contained the uncertainty of the war clause. That was what GSC lost. If Mr Hamblen were right GSC would recover more than the charterparty was worth to it and do so without in fact incurring any greater loss.

56. The appellants appealed to the Court of Appeal (Auld and Tuckey LJJ and Lord Mance), which on 18 October 2005 dismissed their appeal ([2005] 2 Lloyd's Rep 747). Lord Mance, with whose judgment the other members of the court agreed, also declined to accept the appellants' argument based on *The Mihalis Angelos* and the emphasis placed by their counsel on the paramountcy of certainty and finality in charter transactions. He expressed the view, first, that it was correct in principle to take into account the subsequent event of the second Gulf War and, secondly, that considerations of certainty and finality

> would have, so far as necessary, to yield to the greater importance of achieving an assessment of damages and compensation which more accurately reflects the actual loss which the owners can, at whatever is the date of assessment, now be seen to have suffered as a result of the charterers' repudiation.

57. Damages for breach of contract are a compensation to the claimant for the loss of his bargain: *McGregor on Damages,* 17th edition, 2003, para 2-002. He is entitled to be placed, as far as money can do it, in the position which he would have occupied if the contract had been performed: *Wertheim v Chicoutini Pulp Co* [1911] AC 301, at page 307, per Lord Atkinson. They should ordinarily be assessed as at the date when the cause of action arose, that is to say, the date of breach: see *Chitty on Contracts,* 29th edition, 2004, volume 1, para 26-057; and *cf Johnson v Agnew* [1980] AC 367, at pages 400 and 401, *per* Lord Wilberforce and the other cases cited by my noble and learned friend Lord Bingham of Cornhill in para 11 of his opinion. The basic rule in the case of repudiation of a charterparty, where there is an available market, is that the loss is measured as at the date of acceptance of the repudiation. The calculation is made on the basis that the injured party can mitigate his loss by going into the market and obtaining a replacement charter as soon as reasonably possible on the best terms available for the balance of the charter period: see *Koch Marine Inc v D'Amica Società di Navigazione ARL (The Elena D'Amico), per* Robert Goff J. His loss will then be calculated by reference to the extent to which he is worse off in consequence. This will normally be the extra cost of chartering a substitute vessel, if the owner has repudiated the original charter, and any reduction in charter rates if the repudiation was by the charterer. In either case the loss is ordinarily assessed over the remainder of the duration of the original charter.

58. At the centre of the appellants' printed case and the persuasive oral argument presented to the House by their counsel Mr Hamblen QC was the proposition that in commercial transactions such as shipping charters the pre-eminent requirement is for certainty, finality and ease of settlement of disputes. There are many judicial statements, going back to Lord Mansfield CJ in *Vallejo v Wheeler* (1774) 1 Cowp 143, underlining the high importance of certainty in commercial transactions, a number of which have been cited by Lord Bingham in para 23 of his opinion. I do not propose to set these out again, since the principle is so well known and established. Mr Hamblen took as his starting point the rule that where there is an available market the loss is measured at (or close to) the date of acceptance of the repudiation. Applying to that the requirement of certainty, he reasoned that events subsequent to that date are irrelevant in the assessment of the damages, since the loss is crystallised at the date of repudiation and an arbitrator or court should not look at such events in making the

assessment. The only exception to this rule was where the subsequent event could be seen at the crystallisation date to be inevitable or "predestined" (the term used by Megaw LJ in *The Mihalos Angelos,* to which I shall return). In such a case, but not otherwise, it could be shown that at that date the effect of the events which were inevitably going to take place had rendered less valuable the contractual rights lost by the injured party.

59. Mr Young QC for the respondents submitted that whereas the appellants' proposition might be regarded as sound in respect of the rate at which the loss is to be calculated, it was incorrect in respect of the duration of that loss. He drew that distinction because on the occurrence of the repudiation the injured party has the opportunity to mitigate his loss by going into the market and making new arrangements as soon as reasonably possible, so that at that point the loss becomes crystallised and one can calculate it over the remainder of the charter period. Where there is a suspensive condition such as a war clause, however, the duration of the charter was always uncertain, depending on a contingency of the occurrence of an event which was by definition within the contemplation of the parties. As Lord Mance said in the Court of Appeal (para 23), the charter always had inherent in it the uncertainty involved in the war clause.

60. The cases cited by Lord Bingham in paras 15 to 17 of his opinion are in complete accord with the principle of measuring the loss at a date as near as practicable to the acceptance of the repudiation. In none of these cases was there any suspensive condition which might come into operation, and they each reaffirm the standard rule of crystallisation, which is undoubtedly correct. The issue before the House arises where such a condition may affect the duration of the charter but it cannot be forecast with any certainty whether or when it will operate. Mr Hamblen recognised that an exception may be allowed to permit the occurrence of certain subsequent events to affect the calculation of the injured party's loss, but he argued that the ambit of the exception is limited in the manner which I have set out. In so submitting he relied strongly on a statement by Megaw LJ in *The Mihalos Angelos,* a decision to which I must now turn.

61. Lord Bingham has set out the facts and issues in that case in some detail in para 14 of his opinion and I gratefully adopt his account to avoid unnecessary repetition. The passage from Megaw LJ's judgment on which Mr Hamblen relies is at page 210:

> If the contractual rights which he [the injured party] has lost were capable by the terms of the contract of being rendered either less valuable or valueless in certain events, and if it can be shown that those events were, at the date of acceptance of the repudiation, predestined to happen, then in my view the damages which he can recover are not more than the true value, if any, of the rights which he has lost, having regard to those predestined events.

It is in my opinion important to read this statement in the context of the case which the Court of Appeal was deciding. It was completely certain, or predestined, that the contingency on which the charterers were entitled to cancel the contract would occur, since it was physically impossible for the ship to reach Haiphong by 20 July, the date on which she was to be ready to load at that port and the date on which the charterers could cancel if she was not so ready. Megaw LJ's statement was entirely correct, for the event was predestined to happen and the consequence which he set out in the passage which I have quoted had to be regarded as following. It might be doubted whether Megaw LJ intended to enunciate a general rule limiting consideration of subsequent events to those predestined to happen, seen from the date of acceptance of repudiation, and it may be observed that neither Lord Denning MR nor Edmund Davies LJ went so far as to tie the consideration of subsequent events to those which could be seen at the date of repudiation as certain to happen. If, however, the meaning to be taken from Megaw LJ's statement is that only events predestined to happen will qualify to bring the exception into operation, then I must decline to accept that as correct, for the reasons which I shall set out.

62. The decision in *The Seaflower* has some similarity to that in *The Mihalos Angelos.* Lord Bingham has set out the facts of this case in para 19, and again I would adopt them and need not repeat them. Timothy Walker J found that it was inevitable that the charter would have come to an end on 26 February 1998, since the Mobil approval could not have been regained by that date and the charterers would have been entitled to cancel. He said specifically at page 44 of the report that he must follow the view expressed by the majority of the court in *The Mihalos Angelos* and that he could see no reason why in the case before him "the approach should be constrained in the way suggested by Lord Justice Megaw". He went on in the next sentence:

> If the contract would inevitably have come to an end earlier than its due date anyway, it is right that the damages should be limited accordingly, regardless of whether or not the event was predestined at the date of repudiation.

It appears accordingly that the judge did not hold that it could be said at the date of repudiation that it was inevitable or predestined that the owners would

be unable to regain the Mobil approval, which was necessary if the charterers were not to have the right to cancel on that date. It became inevitable at some later date, but it was not so found at the date of repudiation (although no doubt it was highly likely). If it had been, one would have expected the judge to hold that on either test the damages were limited to the period up to 27 February 1998. The arbitrator considered, I think rightly, that Timothy Walker J in *The Seaflower* took the view which I have attributed to him and that the supervening event was capable of limiting the measure of damages.

63. The point at issue in this appeal has never been considered by your Lordships' House and remains open for decision. Lord Bingham has placed strong emphasis in para 23 of his opinion on the importance of certainty in commercial transactions. I do not wish to cast any doubt upon that, but I have come to the conclusion that Langley J and the Court of Appeal were right in holding that the contingency of the outbreak of war, which had occurred before the damages fell to be considered in the arbitration, could be taken into account. I find myself in agreement with Lord Mance when he said that considerations of certainty and finality have in this case to yield to the greater importance of achieving an accurate assessment of the damages based on the loss actually incurred.

64. The duration of the charter may in a case such as the present be affected by the contingency of the occurrence of an event which is in the contemplation of the parties and catered for in the terms of the charterparty. While the rate at which the hypothetical new charter is arranged on repudiation of the original one is for good reasons taken to be fixed at the time when the injured party could go into the market to negotiate a replacement, the same considerations do not apply to determination of the duration. The damages can be assessed at the date of repudiation by valuing the chance that the contingency would occur and that the charter would be cancelled, an approach accepted by Lord Mance at para 23 of his judgment. That value might lie anywhere on the scale between extreme unlikelihood, which would give the deduction a minimal value, to virtual certainty, which would mean that it would be assessed at a figure very close to that which would be reached if one made the definite assumption that the contingency would occur. This approach is well known and recognised in other areas of the law. It is commonplace in the assessment of damages for personal injuries to award a sum which reflects the chance that a condition such as osteoarthritis may set in. A clear example of the technique may be found in *Kitchen v Royal Air Force Association* [1958] 1 WLR 563, where in a claim against solicitors for damages for professional negligence in failing to bring an action on for trial the court awarded the plaintiff a sum representing her prospects of success in the action, being a proportion of the damages which she would have received if one could have been certain that it would have been successful: see also the abundant examples discussed in *McGregor on Damages,* 17th edition, 2003, paras 8-024 *et seq.*

65. This is where the principle exemplified by *Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co* [1903] AC 426 operates. The respondent waterworks company in that case exercised its statutory power by notice dated 15 October 1898 to prevent the appellant colliery company from proceeding with its intention to work a seam of coal, notified by the appellant in September 1898 under section 22 of the Waterworks Clauses Act 1847. The coal in the protected area would have been reached in or about June 1900 and would have been worked out in about two years from that date. The appellant sought statutory compensation for this loss and the matter went to an arbitration, which concluded in February 1901, the arbitrator giving his award on 26 April 1901 in the form of a special case. The issue between the parties was whether the compensation was to be assessed, not on the basis of the value of coalfield or the coal in question in October 1898, but on the basis of the amount which the appellant could have made from mining the coal. The House rejected the respondent's contention that the coal should have been valued as if on a sale at the date of the appellant's notice in October 1898 and accepted that the proper basis was the profit which the appellant could have made from mining the coal. That being so, if the arbitration had been held soon after October 1898, the arbitrator could have calculated that by estimating the possible rise or fall in the price of coal over the period in which it would have been mined. As it was not held until a later date, he had available up-to-date evidence of the rise in price over the period. It was held that it was wrong to require him to disregard this, for, as Lord Macnaghten said in characteristic style at page 431:

> Why should he listen to conjecture on a matter which has become an accomplished fact? Why should he guess when he can calculate? With the light before him, why should he shut his eyes and grope in the dark?

66. If the second Gulf War had not broken out by the time the arbitration was held, the arbitrator would have had to estimate the prospect that it might do so and factor into his calculation of the appellants' loss the chance that the charter would be cancelled at some future date under clause 33. The loss which would have been sustained over the full

period of the charter would then have been discounted to an extent which would have reflected the chance, estimated at the time of the assessment, that it would be so terminated. As events happened, however, the arbitrator did not come to assess damages until after the outbreak of war, when, as he found, the respondents would have cancelled the charter. The outbreak of the second Gulf War was then an accomplished fact, which was highly relevant to the amount of damages, and in my opinion the arbitrator was correct to take it into account in assessing the appellants' loss. As Lord Robertson put it in the *Bwllfa* case at page 432, "estimate and conjecture are superseded by facts". A striking example of the artificiality of failing to have regard to this principle may be seen in para 84 of the opinion of my noble and learned friend Lord Brown of Eaton-under-Heywood.

67. Two features relating to this conclusion are worthy of mention. First, it is a necessary assumption in estimating the damages that the hypothetical new charterparty taken to have been negotiated by the appellants in early 2002 would have contained terms which corresponded as closely as possible to those of the original charterparty, including the cancellation provision in clause 33. Mr Hamblen accepted in argument that one should regard it as containing such a clause and Lord Mance recorded in para 27 of his judgment that the court was told that bilateral war clauses were invariable in time charters for tankers likely to visit the Gulf. Secondly, Mr Hamblen expressed concern that repudiating parties in future cases might attempt to delay the assessment of damages in order to see if such a suspensive condition might come into operation. I recognise that a risk of that nature may exist, but courts and arbitrators have the ability to prevent such abuse if application is made to them to proceed with dispatch.

68. For these reasons and also for those contained in the opinions of my noble and learned friends Lord Scott of Foscote and Lord Brown, I agree with the conclusion reached by Langley J and the Court of Appeal and would dismiss the appeal.

Lord BROWN of EATON-UNDER-HEYWOOD:

My Lords,

69. The basic facts of this case could hardly be simpler. On 17 December 2001 the appellant owners accepted the respondent charterers' repudiation of a charterparty which nominally still had nearly four years to run — to 6 December 2005. I say "nominally" because by clause 33 of the charterparty the charterers were entitled to cancel it in the event of war or hostilities breaking out between any two or more of a number of countries including the USA, the UK and Iraq. On 20 March 2003 such a war (the second Gulf War, hereafter "the War") did indeed break out and the arbitrator has found as a fact that the charterers would in any event then have cancelled the charterparty.

70. Indisputably the owners are entitled to damages for having been deprived of the value of this charterparty for the 15 months or so up to the outbreak of the War. Are they, however, entitled, as they claim, to be compensated on the basis that the charterparty would have continued for the whole length of its nominal term?

71. The owners advance their argument by reference to the familiar principle that damages for breach of contract ordinarily fall to be assessed as at the date of the breach (the breach date rule as it was called in argument). They submit that that principle is applicable here and that the assessment of damages must accordingly ignore the outbreak of the War. That, it is argued, is a subsequent event of no relevance to the proper assessment of the owner's loss in December 2001. Indeed, even had there existed in December 2001 a very substantial risk of imminent war in the Gulf, the owner's principal argument would require it to be ignored: only if it could be shown that by that date war was inevitable — "pre-destined to happen" in the words of Megaw LJ in *The Mihalis Angelos* [1970] 2 Lloyd's Rep 43 (in the passage cited by my noble and learned friend Lord Bingham of Cornhill at para 14) — could it be brought into account to ensure that "the damages which [the owners] can recover are not more than the true value, if any, of the rights which [they have] lost, having regard to those predestined events" (again the words of Megaw LJ in the same passage). The charterers submit to the contrary that, whilst certainly (given the availability of a market for the vessel's period chartering) the breach date rule would operate in this case to fix the daily net differential base charter rate, it should not determine either the period for which that loss was suffered or the date for assessing that period.

72. A single issue has been formulated by the parties for your Lordships' determination on the appeal:

> Where damages for an accepted repudiation of a contract are claimed, in what circumstances can the party in breach rely on subsequent events to show that the contractual rights which have been lost would have been rendered either less valuable or valueless?

73. It is convenient at this point to notice the way this issue was dealt with by the arbitrator in his second declaratory arbitration award. His main conclusion — to which he felt reluctantly driven by Timothy Walker J's decision in *The Seaflower* [2000] 2 Lloyd's Rep 37 — was that the outbreak

of war "did place a temporal limit on the recoverability of damages . . . and that no damages are recoverable for the period from 21 March 2003 onwards". But his award considered also what the position would have been if (contrary to his main conclusion) damages had had to be assessed as at December 2001. The owners (relying on *The Mihalis Angelos*) argued that in that event the charterers would have had to show that as at that date war was inevitable; the charterers submitted to the contrary that all they would have needed to establish was that war was probable. Expert evidence on this issue was adduced respectively from a professor of peace studies and a professor of war studies, one saying that war had been inevitable, the other (as recorded in para 35 of the award) that "its level of probability was not above 50 per cent, as of mid-December 2001". The arbitrator expressed his conclusion at para 59:

> On the evidence, I have concluded that at 17 December 2001, a reasonably well-informed person would have considered war (or large-scale hostilities) between the United States/United Kingdom and Iraq merely a possibility. I do not consider that such a person would have considered it inevitable or even probable but merely a possibility, although I do accept that the degree of probability would have been higher had that person known as much about the prevailing circumstances then as we do today. In view of this finding it is unnecessary for me to consider whether the relevant degree of likelihood is that war was inevitable or that it was likely to occur on the balance of probabilities, although it appears that I am bound by the decision in *The Seaflower* and that the relevant degree of likelihood required is "inevitable".

74. Having regard to his main conclusion, of course, this secondary issue was not in any event capable of influencing the result: that was to be determined by the known outcome of events, not some notional earlier forecast. It seems to me, however, important to consider its implications. There was in this charterparty (as my noble and learned friend Lord Carswell points out at para 59 of his opinion) a suspensive condition, clause 33, recognised by the parties to be capable of bringing this contract to a premature end. Could it really be the position that only were cancellation under clause 33 inevitable could it properly be brought into account in calculating the value of this repudiated contract? What, indeed, in this context does inevitability connote? At what point in the remaining four years of the nominal term of this charterparty did its premature cancellation have to be inevitable? It would be one thing if war were adjudged likely to have broken out within a month, quite another if that was not to be for a further three years — and so forth. For my part, I have found *The Mihalis Angelos* of little assistance on this appeal. The position that arose there could hardly have been more different. It concerned a single voyage charterparty. Once it was recognised that the charterers would have been bound in any event to have cancelled the charterparty before ever it took effect, the owners could establish no loss. It was an all or nothing case. The voyage either would or would not have taken place. Not so here: the question rather was whether and if so when the charterparty would have been ended under clause 33 before the completion of its nominal term. Even had war not broken out by the time damages came to be assessed I can see no reason why that question should not have been addressed in the conventional way, ie by making the best possible assessment of the likely course of future events as at the date of assessment. As Lord Denning MR said in *The Mihalis Angelos*, at page 49 col 1: "You must take into account all contingencies which might have reduced or extinguished the loss." It was hardly a novel proposition.

75. I realise, of course, that I have yet to address the central question arising for your Lordships' decision: the date by reference to which the overall damages assessment falls to be made. It seems to me, however, essential first to appreciate just what is the exercise the tribunal assessing damages would be embarking upon.

76. Not only do I reject the owners' contention that the tribunal would be concerned with contingencies only if, at the relevant date, they were *inevitable*, but I reject too the charterers' concession, apparently implicit in their competing submission to the arbitrator, that only contingencies which are *probable* need be brought into account. It seems to me that before the arbitrator everyone was mesmerised by *The Mihalis Angelos*, a case which, as I have already suggested, affords very little assistance in the very different circumstances arising here. And, indeed, despite their apparent approval of Megaw LJ's formulation of the test in *The Mihalis Angelos,* I understand both Lord Bingham and my noble and learned friend Lord Walker of Gestingthorpe to accept that account should properly be taken of a contingency which would reduce the value of the contract lost even were the chance of it happening less than 50 per cent (provided always that it was of some real and not just minimal significance) — see particularly para 22 of Lord Bingham's opinion and para 46 of Lord Walker's.

77. In this connection I respectfully disagree with Lord Walker's interpretation (in para 45 of his opinion) of the arbitrator's findings. Unlike him, I understand the arbitrator's characterisation (in para 59 of his award) of the prospect of war as at 17

December 2001 as "merely a possibility" to mean precisely "less than a 50% prospect". On the arguments addressed to him, the only issue was whether the correct test was one of probability or inevitability. Once he decided on the facts that neither of those tests was satisfied here, it was unnecessary for him to say more. The expression "merely a possibility" was used simply in contradistinction to both the rival situations being contended for, probability and inevitability. Paragraph 59 was, indeed, an acceptance of Professor Freedman's view, expressed at para 35, "that war was clearly neither pre-destined nor inevitable and, indeed, its level of probability was not above 50%, as of mid-December 2001". Not even Professor Freedman was suggesting that the prospect of war was only an outside possibility, of no real significance whatever. His evidence was no more extreme than that the prospect "was not above 50%". Assuming this were so, whether the prospect was 5 per cent or 45 per cent was, on the arguments addressed to the arbitrator, immaterial.

78. In the end, I should add, nothing to my mind turns on this difference between Lord Walker and myself. My more fundamental conclusion, as I shall shortly explain, is that the breach date rule does not require contingencies — such as the likely effect of a suspensive condition — to be judged prior to the date when damages finally come to be assessed. All I am presently concerned to demonstrate is that, whatever the appropriate date by reference to which the assessment must be made, the taking into account of a contingency is likely to be an altogether more complex exercise than it was in *The Mihalis Angelos* and that it will not generally be possible, as it was there, simply to decide one way or the other (in that case it mattered not whether at the point of breach or later) whether or not the whole contract was inevitably doomed to fail. The point is sufficiently made if the arbitrator here *might* have found, say, a 30 per cent or 40 per cent prospect of war as at December 2001. The next question would have been: war when? Could it really be thought in the interests of certainty to address these questions as of some date prior to that on which damages are in fact being assessed? To my mind, not. Must the judge really shut his eyes to the known facts and speculate how matters might have looked at some earlier date? Again, not without compelling reason and none appears to me. Lord Bingham (at para 12) and Lord Carswell (at para 65) have already explained the "*Bwllfa* principle": *Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co* [1903] AC 426. There is no need to repeat it. Suffice it to say that I see no good reason to depart from it here.

79. It is time finally to address the breach date rule directly. Its most obvious manifestation is to be found in section 51(3) of the Sale of Goods Act 1893:

> Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

But the rule is by no means confined to the sale of goods context and, as Lord Bingham explains, has been applied by analogy to a variety of other situations. Essentially it applies whenever there is an available market for whatever has been lost and its explanation is that the injured party should ordinarily go out into that market to make a substitute contract to mitigate (and generally thereby crystallise) his loss. Market prices move, both up and down. If the injured party delays unjustifiably in re-entering the market, he does so at his own risk: future speculation is to his account — "the buyer's decision is (in the vernacular) down to him" (Bingham LJ, as he then was, in *Kaines (UK) Ltd v Osterreichische* [1993] 2 Lloyd's Rep 1, at page 11).

80. The rule is easy to apply where, for example, goods or shares are traded: if it is the seller who is injured by non-acceptance, he must as soon as possible re-sell the goods or shares at the then available market price; if the buyer, he must similarly buy in substitute goods or shares. But undoubtedly the rule can be applied in more complex situations, for example, to building or repairing contracts and, most relevantly for present purposes, to breached charterparties — see particularly *The Mihalis Angelos, The Elena d'Amico* [1980] 1 Lloyd's Rep 75, *The Wave* [1981] 1 Lloyd's Rep 521, *The Noel Bay* [1989] 1 Lloyd's Rep 361 and *The Seaflower* [2000] 2 Lloyd's Rep 37. Where goods or shares are sold, the breach date rule is at its strictest. In other cases, however, time may well be needed before the injured party can reasonably be required to re-enter the market. *Radford v De Froberville* [1977] 1 WLR 1262 concerned a defendant's contractual failure to build a wall on the plaintiff's land. In a much quoted judgment Oliver J at page 60 said this:

> It is sometimes said that the ordinary rule is that damages for breach of contract fall to be assessed at the date of the breach. That, however, is not a universal principle and the rationale behind it appears to me to lie in the inquiry — at what date could the plaintiff reasonably have been expected to mitigate the damages by seeking an alternative to performance of the contractual obligation?

Or take *Dodd Properties (Kent) Ltd v Canterbury City Council* [1981] 1 WLR 433, a case of contractual liability for serious structural damage, where Megaw LJ (at page 451) said this:

> The true rule is that, where there is a material difference between the cost of repair at the date of the wrongful act and the cost of repair when the repairs can, having regard to all relevant circumstances, first reasonably be undertaken, it is the latter time by reference to which the cost of repair is to be taken in assessing damages. That rule conforms with the broad and fundamental principle as to damages, as stated in Lord Blackburn's speech in *Livingston v Rawyards Coal Co* (1880) 5 App Cas 25, 39, where he said that the measure of damages is:
>
> > " . . . that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."
>
> In any case of doubt, it is desirable that the judge, having decided provisionally as to the amount of damages, should, before finally deciding, consider whether the amount conforms with the requirement of Lord Blackburn's fundamental principle.

A little later, Megaw LJ (at page 453) added:

> I agree with the observations of Oliver J in *Radford v De Froberville* . . . as to the relationship between the duty to mitigate and the measure, or amount, of damages in relation to a question such as the question with which we are here concerned.

81. Take, indeed, this very case. Whilst it was not disputed before the arbitrator that an available market existed for the chartering of this vessel, the owners contend that a new fixture could only have commenced earning on 1 April 2002 and in the result claim for loss on the spot (rather than the period charter) market for the three and a half months between 17 December 2001 and 1 April 2002. In this case, as in *Dodd Properties*, therefore, account must necessarily be taken of post-breach events. Why then ignore the outbreak of the War? Say that this had started a year earlier, on 20 March 2002, before a substitute charterparty could have commenced earning? Would the damages assessment really have had to ignore it? Nor, indeed, is the lapse of some three and a half months before a substitute charterparty could have commenced earning the only, or even the main, post-breach event necessarily to be taken into account here. As my Lords have observed, the rate of hire of *Golden Victory* consisted only partly of the base charter rate; it consisted also of a share in the charterers' operating profit over and above that rate and this latter element of the claimed loss, as Lord Mance pointed out, would require any court or arbitrator to take account of actual market rates during the relevant period over which the loss is claimed. Yet on the owners' argument that part of the claim too would continue throughout the remaining four years of this charterparty, the intervention of the War notwithstanding.

82. None of the earlier charterparty cases to my mind addresses or determines the particular problem arising here. In none of them, as Lord Carswell has observed, was there a suspensive condition which could (and which we know in the event would) have operated to bring the contract to an early end. Any substitute contract here — albeit, as the arbitrator found, for the four-year balance of the original seven-year term — would have been subject to the self-same conditions as the repudiated contract. And it can be assumed that the hypothetical substitute charterers would similarly have cancelled their contract on the outbreak of the War. The arbitrator surmised that had the owners in December 2001 sold the vessel with a substitute four-year charter "the value they would have received would surely have been calculated on that basis", ie the basis of a four-year charterparty with war "no more than a possibility". Even were that so, however, no one has ever suggested that the breach date rule operated here so as to require the owners to go out into the market not only to obtain a substitute charter but also then to sell the vessel. The measure of loss did not fall to be crystallised on this basis.

83. In my opinion the owners' argument here seeks to extend the effect of the available market rule well beyond its proper scope and to do so, moreover, at the plain expense of Lord Blackburn's fundamental principle: to restore the injured party to the same position he would have been in but for the breach, not substantially to improve upon it. It is one thing to say that the injured party, mitigating his loss as the breach date rule requires him to do, thereby takes any future market movement out of the equation and to that extent crystallises the measure of his loss; it is quite another to say, as the owners do here, that it requires the arbitrator or court when finally determining the damages to ignore subsequent events (save where the defendants can demonstrate that at the date of breach some suspensive condition would inevitably — and immediately — have operated to cancel the contract). There is no warrant for giving the rule so extended an application.

84. There is a final point to be made. Shift the facts here and assume that the arbitrator had found, as at December 2001, a probability (or even merely a significant possibility) of (perhaps imminent) war breaking out in the Gulf, but that in fact, by the time

damages finally came to be assessed, not only had war not broken out but all risk of it had disappeared — or, indeed, the assessment might not have taken place until the whole nominal term of the charterparty had expired. On the view taken by the minority of your Lordships, the damages award would have had to reflect a risk which never in fact eventuated a conclusion in the circumstances, greatly to the owner's disadvantage, yet that inescapably is the logic of the minority's approach. Is such a result compelled in the interests of "certainty" or "finality" or "consistency" or "predictability" (the interests identified by Lord Bingham at para 23 of his opinion), or so that the charterers could have "promptly honoured their secondary obligation to pay damages" (Lord Bingham at para 22)? In my judgment it is not. When market movement can be eliminated from the assessment of damages (as here with regard to the charterparty rate) it should be (by the breach date rule). But not history; the court need not shut its mind to that.

85. In short, I find myself in full agreement with the judgments of Langley J at first instance in the Commercial Court and Lord Mance in the Court of Appeal, and the opinions of Lord Scott of Foscote and Lord Carswell in your Lordships' House. I too would dismiss this third appeal from the arbitrator's decision.

A House of Lords

Transfield Shipping Inc *v* Mercator Shipping Inc

[2008] UKHL 48

2008 May 1; July 9

Lord Hoffmann, Lord Hope of Craighead, Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe, Baroness Hale of Richmond

Damages — Contract — Breach — Time charter — Late redelivery — Charterers giving notice of redelivery for last possible date under charterparty — Owners fixing new charter of vessel — Vessel redelivered late after expiry of laycan period under new charter — Owners negotiating extension of cancellation date with new charterers on basis of reduction of daily rate under new charter — Whether charterers liable for owners' loss of profit under new charter — Whether loss arising naturally from breach of contract

Ships' names — Achilleas

The owners chartered their vessel to the charterers with redelivery due on 2 May 2004. In April 2004, market hire rates having risen, the owners fixed a follow-on time charter with another company at the new market rate of $39,500 per day, the company having the right to cancel if the vessel were not available on 8 May. The charterers' voyage was delayed and by 5 May the owners realised that the vessel was not going to be returned by 8 May. By that time the market hire rate had fallen sharply and in order to secure the company's agreement that the cancellation date be extended until 11 May, the revised date when the vessel would be returned and available for the follow-on charter, the owners had to agree to a reduced rate of $31,500 per day. The charterers had not been put on notice of the existence of the follow-on charter at any time prior to redelivery. The owners claimed damages for breach of contract for $1,364,584, based on the $8,000 loss per day they suffered over the 191-day duration of the follow-on charter. The charterers claimed that the owners were only entitled to the difference between the market and charter rates of hire for the overrun period, namely $158,301, and that loss of profits on a subsequent fixture were only recovereable where the risk of such loss had been expressly brought to the attention of the party which had broken the contract. The arbitrators, by a majority, though accepting that the general understanding in the shipping market was that a charterer who returned a vessel late was liable in damages only for the period of late delivery, held that the loss on the follow-on charter was recoverable as arising naturally from the breach of contract, in that it was damage which the charterers, at the time when the contract had been made, ought to have realised was not unlikely to result from the breach of contract caused by returning the vessel late. Dismissing the charterers' appeals, the judge and the Court of Appeal upheld that decision.

On further appeal by the charterers—

Held, allowing the appeal (Baroness Hale of Richmond dubitante), that since all contractual activity was voluntarily undertaken, liability for damages for breach of contract was founded upon the presumed intention of the parties and required the court to determine objectively what was the common basis on which the parties had contracted; that, in so far as recovery was allowable for loss which was reasonably foreseeable, the required probability was that which would generally happen in the ordinary course of things, since a party entering into a contract could only be supposed to contemplate losses which were likely to result from the breach in question; that regard was to be had to the nature and object of the business transaction, including the commercial context in which it had been made; that reasonable parties to a charterparty would have understood that late redelivery by

charterers could result in owners losing a subsequent follow-on fixture with damages recoverable for the difference between the charter rate and any higher market rate during the period of overrun; that the owners' loss of profits in excess of that amount had been caused by volatile market conditions which amounted to an unusual occurrence outside the parties' contemplation; and that, accordingly, the charterers were not liable in damages for the owners' loss of profit (post, paras 11, 12, 15, 16, 24–25, 26, 27, 30, 36, 52, 60, 63, 69, 73, 78, 79, 84, 87, 91, 93).

Hadley v Baxendale (1854) 9 Exch 341 and *C Czarnikow Ltd v Koufos (The Heron II)* [1969] 1 AC 350, HL(E) applied.

Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd [1997] AC 191, HL(E) considered.

Per Lord Hoffmann and Lord Hope of Craighead. The party in breach may not be liable for foreseeable losses which are not of the type or kind for which he can be treated as having assumed responsibility (post, paras 21, 32).

Decision of the Court of Appeal [2007] EWCA Civ 901; [2008] 1 All ER (Comm) 685; [2007] 2 Lloyd's Rep 555 reversed.

The following cases are referred to in the opinions of the Committee:

Alma Shipping Corpn of Monrovia v Mantovani (The Dione) [1975] 1 Lloyd's Rep 115, CA

Aneco Reinsurance Underwriting Ltd v Johnson & Higgins Ltd [2001] UKHL 51; [2001] 2 All ER (Comm) 929; [2002] 1 Lloyd's Rep 157, HL(E)

Arta Shipping Co Ltd v Thai Europe Tapioca Service Ltd (The Johnny) [1977] 2 Lloyd's Rep 1, CA

Aruna Mills Ltd v Dhanrajmal Gobindram [1968] 1 QB 655; [1968] 2 WLR 101; [1968] 1 All ER 113; [1968] 1 Lloyd's Rep 304

Bain v Fothergill (1874) LR 7 HL 158, HL(E)

Banco de Portugal v Waterlow & Sons Ltd [1932] AC 452, HL(E)

Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd [1997] AC 191; [1996] 3 WLR 87; [1996] 3 All ER 365, HL(E)

British Columbia and Vancouver's Island Spar, Lumber and Saw-Mill Co Ltd v Nettleship (1868) LR 3 CP 499

Cory v Thames Ironworks and Shipbuilding Co Ltd (1868) LR 3 QB 181

Czarnikow (C) Ltd v Koufos (The Heron II) [1966] 2 QB 695; [1966] 2 WLR 1397; [1966] 2 All ER 593; [1966] 1 Lloyd's Rep 595, CA; [1969] 1 AC 350; [1967] 3 WLR 1491; [1967] 3 All ER 686; [1967] 2 Lloyd's Rep 457, HL(E)

Davies v Taylor [1974] AC 207; [1972] 3 WLR 801; [1972] 3 All ER 836, HL(E)

Finlay (James) & Co Ltd v NV Kwik Hoo Tong Handel Maatschappij [1929] 1 KB 400, CA

Hadley v Baxendale (1854) 9 Exch 341

Hall (R & H) Ltd v WH Pim (Junior) & Co's Arbitration (1928) 33 Com Cas 324; 30 LL L Rep 159; 139 LT 30, HL(E)

Hill (Christopher) Ltd v Ashington Piggeries Ltd [1969] 3 All ER 1496; [1969] 2 Lloyd's Rep 425, CA

Horne v Midland Railway Co (1872) LR 7 CP 583

Hyundai Merchant Marine Co Ltd v Gesuri Chartering Co Ltd (The Peonia) [1991] 1 Lloyd's Rep 100, CA

Jackson v Royal Bank of Scotland plc [2005] UKHL 3; [2005] 1 WLR 377; [2005] 2 All ER 71; [2005] 1 All ER (Comm) 337; [2005] 1 Lloyd's Rep 366, HL(E)

Koch Marine Inc v D'Amica Societa Di Navigazione ARL (The Elena D'Amico) [1980] 1 Lloyd's Rep 75

Liverpool City Council v Irwin [1977] AC 239; [1976] 2 WLR 562; [1976] 2 All ER 39, HL(E)

Monarch Steamship Co Ltd v Karlshamns Oljefabriker (A/B) [1949] AC 196; [1949] 1 All ER 1, HL(Sc)

Mulvenna v Royal Bank of Scotland plc [2003] EWCA Civ 1112, CA
Parana, The (1877) 2 PD 118, CA
Robinson v Harman (1848) 1 Exch 850
Robophone Facilities Ltd v Blank [1966] 1 WLR 1428; [1966] 3 All ER 128, CA
Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA (The Pegase) [1981] 1 Lloyd's Rep 175
Torvald Klaveness A/S v Arni Maritime Corpn (The Gregos) [1993] 2 Lloyd's Rep 335, CA; [1994] 1 WLR 1465; [1994] 4 All ER 998; [1995] 1 Lloyd's Rep 1, HL(E)
Transworld Oil Ltd v North Bay Shipping Corpn (The Rio Claro) [1987] 2 Lloyd's Rep 173
Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 KB 528; [1949] 1 All ER 997, CA

The following additional cases were cited in argument:

Biggin & Co Ltd v Permanite Ltd [1951] 1 KB 422; [1950] 2 All ER 859
Dampskibs A/S Avenir v Munson Steamship Line (The Thorgerd) [1926] AMC 160
GKN Centrax Gears Ltd v Matbro Ltd [1976] 2 Lloyd's Rep 555, CA
Grébert-Borgnis v J & W Nugent (1885) 15 QBD 85, CA
Hammond & Co v Bussey (1887) 20 QBD 79, CA
Kwei Tek Chao v British Traders and Shippers Ltd [1954] 2 QB 459; [1954] 2 WLR 365; [1954] 1 All ER 779
Mehmet Dogan Bey v GG Abdeni & Co Ltd [1951] 2 KB 405; [1951] 2 All ER 162
Pagnan (R) & Flli v Corbisa Industrial Agropacuaria Ltda [1970] 1 WLR 1306; [1971] 1 All ER 165; [1970] 2 Lloyd's Rep 14, CA
Patrick v Russo-British Grain Export Co Ltd [1927] 2 KB 535
Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Comrs [2007] UKHL 34; [2008] 1 AC 561; [2007] 3 WLR 354; [2007] 4 All ER 657, HL(E)
Williams v Reynolds (1865) 6 B & S 495

APPEAL from the Court of Appeal

This was an appeal, by leave of the House of Lords (Lord Hoffmann, Lord Mance and Lord Neuberger of Abbotsbury), by the charterers, Transfield Shipping Inc, from the order of the Court of Appeal (Ward, Tuckey and Rix LJJ) upholding the decision of Christopher Clarke J [2006] EWHC 3030 (Comm); [2007] 1 All ER (Comm) 379; [2007] 1 Lloyd's Rep 19 to dismiss the charterers' appeal under section 69 of the Arbitration Act 1996 seeking to set aside an arbitrators' award made on 17 May 2006 (Mr David Farrington and Mr Bruce Buchan; Mr Christopher Moss dissenting) which had determined that the owners, Mercator Shipping Inc of Monrovia, were entitled to recover from the charterers US$1,364,584·37 by way of damages for the late redelivery of the vessel *Achilleas* under a charterparty.

The facts are stated in the opinions of Lord Hoffmann and Lord Rodger of Earlsferry.

Dominic Kendrick QC and *Benjamin Parker* (instructed by *Swinnerton Moore LLP*) for the charterers.

Loss of earnings caused by late delivery under a charterparty is the difference between the market rate and the charter rate for the period between the due date of redelivery and the actual date of redelivery: see *Hadley v Baxendale* (1854) 9 Exch 341.

What a tribunal may reasonably suppose to have been in the contemplation of the parties as the ordinary and natural result of a breach of contract is a question of law, not fact: see *Williams v Reynolds* (1865) 6 B & S 495; *Hammond & Co v Bussey* (1887) 20 QBD 79; *Patrick v Russo-British Grain Export Co Ltd* [1927] 2 KB 535; *R & H Hall Ltd v WH Pim (Junior) & Co's Arbitration* (1928) 33 Com Cas 324 and *Mehmet Dogan Bey v GG Abdeni & Co Ltd* [1951] 2 KB 405. As a matter of law, the market measure of damages is established in commercial cases as the ordinary and natural result of a breach of contract: see *Koch Marine Inc v D'Amica Societa Di Navigazione ARL (The Elena D'Amico)* [1980] 1 Lloyd's Rep 75; *C Czarnikow Ltd v Koufos (The Heron II)* [1966] 2 QB 695; [1969] 1 AC 350 and *Goode, Commercial Law*, 3rd ed (2004) pp 386–388. As to delayed redelivery under a charterparty, see *Arta Shipping Co Ltd v Thai Europe Tapioca Service Ltd (The Johnny)* [1977] 2 Lloyd's Rep 1; *Torvald Klaveness A/S v Arni Maritime Corpn (The Gregos)* [1994] 1 WLR 1465 and *Hyundai Merchant Marine Co Ltd v Gesuri Chartering Co Ltd (The Peonia)* [1991] 1 Lloyd's Rep 100.

To escape from the natural and ordinary measure of damages the claimant has to show that it has brought particular matters to the attention of the defendant at the time of contracting so that it can be said that the defendant has assumed the risk of paying damages by reference to those matters. Equally, the claimant has to accept the risk that reference to those matters could work contrary to his interest and reduce his damages. Mere allusion, notification, or background knowledge on the defendant's part is not sufficient: see *Biggin & Co Ltd v Permanite Ltd* [1951] 1 KB 422; *Mulvenna v Royal Bank of Scotland plc* [2003] EWCA Civ 1112 and *Dampskibs A/S Avenir v Munson Steamship Line (The Thorgerd)* [1926] AMC 160.

Simon Croall QC and *Ruth Hosking* (instructed by *Bentleys Stokes & Lowless*) for the owners.

A charterparty is a contract and the usual contractual principles apply. Those principles include the rule that where a party sustains a loss by reason of breach of contract he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract has been performed. Whether damages are too remote to be recovered is to be determined by the application of well-established principles set out in *Hadley v Baxendale* 9 Exch 341 the result of which is that parties should only be liable for damages which were when they contracted within their contemplation in the event of a breach: see *Sempra Metals Ltd (formerley Metallgesellschaft Ltd) v Inland Revenue Comrs* [2008] 1 AC 561; *Jackson v Royal Bank of Scotland plc* [2005] 1 WLR 377 and *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA (The Pegase)* [1981] 1 Lloyd's Rep 175.

The precise nature of the loss does not have to be in the contract-breaker's contemplation, the requirement being merely that he should have contemplated loss of the same type or kind as that which in fact occurred: see *Transworld Oil Ltd v North Bay Shipping Corpn (The Rio Claro)* [1987] 2 Lloyd's Rep 173, 175 and *GKN Centrax Gears Ltd v Matbro Ltd* [1976] 2 Lloyd's Rep 555, 579–580. When determining the shared knowledge of the parties and hence the matters within their reasonable contemplation in the event of a breach, the court or tribunal proceeds on the basis that

A reasonable businessmen understand the ordinary practices and exigencies of each other's business, and those need not be the subject of special discussion or communication. The knowledge is essentially a question of fact: see *Monarch Steamship Co Ltd v Karlshamns Oljefabriker (A/B)* [1949] AC 196, 224, 232. The majority arbitrators found as a fact that at the relevant time the parties would have had in mind loss of a follow-on fixture by the owners in the event of late delivery. A finding by a tribunal or court as B to what was in the contemplation of the parties as to the not unlikely consequences of the breach are findings of fact not law and cannot be interfered with on appeal: see the *Monarch Steamship* case [1949] AC 196, 232 and *Mehmet Dogan Bey v GG Abdeni & Co Ltd* [1951] 2 KB 405, 410–412.

The market measure is the prima facie measure applied in sale of goods C cases involving the supply of defective goods or the late delivery of goods because the law assumes that commercial men will, in the event that they are not provided with goods meeting the contractual standard, enter an available market and buy replacement goods: see *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 QB 459 and *Grebert-Borgnis v J & W Nugent* (1885) 15 QBD 85. But this is only a prima facie measure: see *R Pagnan & Flli v Corbisa Industrial Agropacuaria Ltda* [1970] 1 WLR D 1306. It does not apply where the parties know or ought to know that the innocent party cannot avert his loss by buying substitute goods in an available market. It cannot apply to late redelivery cases where, by definition, the owners cannot enter into a substitute transaction because they do not have their ship to deliver to a prospective substitute charterer.

Kendrick QC replied. E

The Committee took time for consideration.

9 July 2008. **LORD HOFFMANN**

1 My Lords, the *Achilleas* is a single-decker bulk carrier of some 69,000 dwt built in 1994. By a time charter dated 22 January 2003 the owners let her to the charterers for about five to seven months at a daily hire rate of F US$13,500. By an addendum dated 12 September 2003 the parties fixed the vessel for a further five to seven months at a daily rate of US$16,750. The latest date for redelivery was 2 May 2004.

2 By April 2004, market rates had more than doubled compared with the previous September. On 20 April 2004 the charterers gave notice of redelivery between 30 April and 2 May 2004. On the following day, the G owners fixed the vessel for a new four to six month hire to another charterer, following on from the current charter, at a daily rate of US$39,500. The latest date for delivery to the new charterers, after which they were entitled to cancel, was 8 May 2004.

3 With less than a fortnight of the charter to run, the charterers fixed the vessel under a subcharter to carry coals from Quingdao in China across the Yellow Sea to discharge at two Japanese ports, Tobata and Oita. If this H voyage could not reasonably have been expected to allow redelivery by 2 May 2004, the owners could probably have refused to perform it: see *Torvald Klaveness A/S v Arni Maritime Corpn (The Gregos)* [1994] 1 WLR 1465. But they made no objection. The vessel completed loading at Quingdao on 24 April. It discharged at Tobata, went on to Oita, but was

unfortunately delayed there and not redelivered to the owners until 11 May.

4 By 5 May it had become clear to everyone that the vessel would not be available to the new charterers before the cancelling date of 8 May. By that time, rates had fallen again. In return for an extension of the cancellation date to 11 May, the owners agreed to reduce the rate of hire for the new fixture to US$31,500 a day.

5 The owners claimed damages for the loss of the difference between the original rate and the reduced rate over the period of the fixture. At US$8,000 a day, that came to US$1,364,584·37. The charterers said that the owners were not entitled to damages calculated by reference to their dealings with the new charterers and that they were entitled only to the difference between the market rate and the charter rate for the nine days during which they were deprived of the use of the ship. That came to $158,301·17.

6 The arbitrators, by a majority, found for the owners. They said that the loss on the new fixture fell within the first rule in *Hadley v Baxendale* (1854) 9 Exch 341, 354 as arising "naturally, i e according to the usual course of things, from such breach of contract itself". It fell within that rule because it was damage "of a kind which the [charterer], when he made the contract, ought to have realised was not unlikely to result from a breach of contract [by delay in redelivery]": see Lord Reid in *C Czarnikow Ltd v Koufos (The Heron II)* [1969] 1 AC 350, 382–383. The dissenting arbitrator did not deny that a charterer would have known that the owners would very likely enter into a following fixture during the course of the charter and that late delivery might cause them to lose it. But he said that a reasonable man in the position of the charterers would not have understood that he was assuming liability for the risk of the type of loss in question. The general understanding in the shipping market was that liability was restricted to the difference between the market rate and the charter rate for the overrun period and "any departure from this rule [is] likely to give rise to a real risk of serious commercial uncertainty which the industry as a whole would regard as undesirable".

7 The majority arbitrators, in their turn, did not deny that the general understanding in the industry was that liability was so limited. They said, at para 17:

> "The charterers submitted that if they had asked their lawyers or their club what damages they would be liable for if the vessel was redelivered late, the answer would have been that they would be liable for the difference between the market rate and the charter rate for the period of the late delivery. We agree that lawyers would have given such an answer."

8 But the majority said that this was irrelevant. A broker "in a commercial situation" would have said that the "not unlikely" results arising from late delivery would include missing dates for a subsequent fixture, a dry docking or the sale of the vessel. Therefore, as a matter of law, damages for loss of these types was recoverable. The understanding of shipping lawyers was wrong.

9 On appeal from the arbitrators, Christopher Clarke J [2007] 1 Lloyd's Rep 19 and the Court of Appeal (Ward, Tuckey and Rix LJJ) [2007]

2 Lloyd's Rep 555 upheld the majority decision. The case therefore raises a fundamental point of principle in the law of contractual damages: is the rule that a party may recover losses which were foreseeable ("not unlikely") an external rule of law, imposed upon the parties to every contract in default of express provision to the contrary, or is it a prima facie assumption about what the parties may be taken to have intended, no doubt applicable in the great majority of cases but capable of rebuttal in cases in which the context, surrounding circumstances or general understanding in the relevant market shows that a party would not reasonably have been regarded as assuming responsibility for such losses?

10 Before I come to this point of principle, I should say something about the authorities upon which the understanding of shipping lawyers was based. There is no case in which the question now in issue has been raised. But that in itself may be significant. This cannot have been the first time that freight rates have been volatile. There must have been previous cases in which late redelivery caused the loss of a profitable following fixture. But there is no reported case in which such a claim has been made. Instead, there has been a uniform series of dicta over many years in which judges have said or assumed that the damages for late delivery are the difference between the charter rate and the market rate: see for examples Lord Denning MR in *Alma Shipping Corpn of Monrovia v Mantovani (The Dione)* [1975] 1 Lloyd's Rep 115, 117–118; Lord Denning MR in *Arta Shipping Co Ltd v Thai Europe Tapioca Service Ltd (The Johnny)* [1977] 2 Lloyd's Rep 1, 2; Bingham LJ in *Hyundai Merchant Marine Co Ltd v Gesuri Chartering Co Ltd (The Peonia)* [1991] 1 Lloyd's Rep 100, 118. Textbooks have said the same: see *Scrutton on Charterparties* 20th ed (1996), pp 348–349; *Wilford, Time Charters* 5th ed (2003), para 4.20. Nowhere is there a suggestion of even a theoretical possibility of damages for the loss of a following fixture.

11 The question of principle has been extensively discussed in the literature. Recent articles by Adam Kramer ("An Agreement-Centred Approach to Remoteness and Contract Damages" in *Comparative Remedies for Breach of Contract* (2005), eds Cohen & McKendrick, pp 249–286), Andrew Tettenborn ("*Hadley v Baxendale* Foreseeability: a Principle Beyond its Sell-by Date" in (2007) 23 Journal of Contract Law 120–147) and Andrew Robertson ("The Basis of the Remoteness Rule in Contract" (2008) 28 Legal Studies 172–196) are particularly illuminating. They show that there is a good deal of support in the authorities and academic writings for the proposition that the extent of a party's liability for damages is founded upon the interpretation of the particular contract; not upon the interpretation of any particular language in the contract, but (as in the case of an implied term) upon the interpretation of the contract as a whole, construed in its commercial setting. Professor Robertson considers this approach somewhat artificial, since there is seldom any helpful evidence about the extent of the risks the particular parties would have thought they were accepting. I agree that cases of departure from the ordinary foreseeability rule based on individual circumstances will be unusual, but limitations on the extent of liability in particular types of contract arising out of general expectations in certain markets, such as banking and shipping, are likely to be more common. There is, I think, an analogy with the distinction which Lord Cross of Chelsea drew in *Liverpool City Council v Irwin* [1977]

AC 239, 257–258 between terms implied into all contracts of a certain type and the implication of a term into a particular contract.

12 It seems to me logical to found liability for damages upon the intention of the parties (objectively ascertained) because all contractual liability is voluntarily undertaken. It must be in principle wrong to hold someone liable for risks for which the people entering into such a contract in their particular market, would not reasonably be considered to have undertaken.

13 The view which the parties take of the responsibilities and risks they are undertaking will determine the other terms of the contract and in particular the price paid. Anyone asked to assume a large and unpredictable risk will require some premium in exchange. A rule of law which imposes liability upon a party for a risk which he reasonably thought was excluded gives the other party something for nothing. And as Willes J said in *British Columbia and Vancouver's Island Spar, Lumber and Saw-Mill Co Ltd v Nettleship* (1868) LR 3 CP 499, 508: "I am disposed to take the narrow view, that one of two contracting parties ought not to be allowed to obtain an advantage which he has not paid for."

14 In their submissions to the House, the owners said that the "starting point" was that damages were designed to put the innocent party, so far as it is possible, in the position as if the contract had been performed: see *Robinson v Harman* (1848) 1 Exch 850, 855. However, in *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* (sub nom *South Australia Asset Management Corpn v York Montague Ltd*) [1997] AC 191, 211, I said (with the concurrence of the other members of the House):

> "I think that this was the wrong place to begin. Before one can consider the principle on which one should calculate the damages to which a plaintiff is entitled as compensation for loss, it is necessary to decide for what kind of loss he is entitled to compensation. A correct description of the loss for which the valuer is liable must precede any consideration of the measure of damages."

15 In other words, one must first decide whether the loss for which compensation is sought is of a "kind" or "type" for which the contract-breaker ought fairly to be taken to have accepted responsibility. In the *South Australia* case the question was whether a valuer, who had (in breach of an implied term to exercise reasonable care and skill) negligently advised his client bank that property which it proposed to take as security for a loan was worth a good deal more than its actual market value, should be liable not only for losses attributable to the deficient security but also for further losses attributable to a fall in the property market. The House decided that he should not be liable for this kind of loss:

> "In the case of an implied contractual duty, the nature and extent of the liability is defined by the term which the law implies. As in the case of any implied term, the process is one of construction of the agreement as a whole in its commercial setting. The contractual duty to provide a valuation and the known purpose of that valuation compel the conclusion that the contract includes a duty of care. The scope of the duty, in the sense of the consequences for which the valuer is responsible, is that which the law regards as best giving effect to the express obligations

A assumed by the valuer: neither cutting them down so that the lender obtains less than he was reasonably entitled to expect, nor extending them so as to impose on the valuer a liability greater than he could reasonably have thought he was undertaking" (p 212).

16 What is true of an implied contractual duty (to take reasonable care in the valuation) is equally true of an express contractual duty (to redeliver B the ship on the appointed day). In both cases, the consequences for which the contracting party will be liable are those which "the law regards as best giving effect to the express obligations assumed" and "[not] extending them so as to impose on the [contracting party] a liability greater than he could reasonably have thought he was undertaking".

17 The effect of the *South Australia* case was to exclude from liability the damages attributable to a fall in the property market notwithstanding C that those losses were foreseeable in the sense of being "not unlikely" (property values go down as well as up) and had been caused by the negligent valuation in the sense that, but for the valuation, the bank would not have lent at all and there was no evidence to show that it would have lost its money in some other way. It was excluded on the ground that it was outside the scope of the liability which the parties would reasonably have D considered that the valuer was undertaking.

18 That seems to me in accordance with the careful way in which Robert Goff J stated the principle in *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA (The Pegase)* [1981] 1 Lloyd's Rep 175, 183, where the emphasis is upon what a reasonable person would have considered to be the extent of his responsibility:

E "the test appears to be: have the facts in question come to the defendant's knowledge in such circumstances that a reasonable person in the shoes of the defendant would, if he had considered the matter at the time of making the contract, have contemplated that, in the event of a breach by him, such facts were to be taken into account when considering his responsibility for loss suffered by the plaintiff as a result of such breach." F

19 A similar approach was taken by the Court of Appeal in *Mulvenna v Royal Bank of Scotland plc* [2003] EWCA Civ 1112, mentioned by Professor Robertson in the article to which I have referred. This was an application to strike out a claim for damages for the loss of profits which the claimant said he would have made if the bank had complied with its agreement to provide him with funds for a property development. The Court of Appeal held that G even on the assumption that the bank knew of the purpose for which the funds were required and that it was foreseeable that he would suffer loss of profit if he did not receive them, the damages were not recoverable. Sir Anthony Evans said, at para 33:

"The authorities to which we were referred . . . demonstrate that the concept of reasonable foreseeability is not a complete guide to the H circumstances in which damages are recoverable as a matter of law. Even if the loss was reasonably foreseeable as a consequence of the breach of duty in question (or of contract, for the same principles apply), it may nevertheless be regarded as 'too remote a consequence' or as not a consequence at all, and the damages claim is disallowed. In effect, the

chain of consequences is cut off as a matter of law, either because it is regarded as unreasonable to impose liability for that consequence of the breach (*The Pegase* [1981] 1 Lloyd's Rep 175 per Robert Goff J), or because the scope of the duty is limited so as to exclude it (*Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191), or because as a matter of commonsense the breach cannot be said to have caused the loss, although it may have provided the opportunity for it to occur . . ."

20 By way of explanation for why in such a case liability for lost profits is excluded, Professor Robertson, 28 Legal Studies 172, 183, offers what seem to me to be some plausible reasons:

"It may be considered unjust that the bank should be held liable for the loss of profits simply because the bank knew of the proposed development at the time the refinancing agreement was made. The imposition of such a burden on the bank may be considered unjust because it is inconsistent with commercial practice for a bank to accept such a risk in a transaction of this type, or because the quantum of the liability is disproportionate to the scale of the transaction or the benefit the bank stood to receive."

21 It is generally accepted that a contracting party will be liable for damages for losses which are unforeseeably large, if loss of that type or kind fell within one or other of the rules in *Hadley v Baxendale*: see, for example, Staughton J in *Transworld Oil Ltd v North Bay Shipping Corpn (The Rio Claro)* [1987] 2 Lloyd's Rep 173, 175 and *Jackson v Royal Bank of Scotland plc* [2005] 1 WLR 377. That is generally an inclusive principle: if losses of that type are foreseeable, damages will include compensation for those losses, however large. But the *South Australia* and *Mulvenna* cases show that it may also be an exclusive principle and that a party may not be liable for foreseeable losses because they are not of the type or kind for which he can be treated as having assumed responsibility.

22 What is the basis for deciding whether loss is of the same type or a different type? It is not a question of Platonist metaphysics. The distinction must rest upon some principle of the law of contract. In my opinion, the only rational basis for the distinction is that it reflects what would reasonably have been regarded by the contracting party as significant for the purposes of the risk he was undertaking. In *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, where the plaintiffs claimed for loss of the profits from their laundry business because of late delivery of a boiler, the Court of Appeal did not regard "loss of profits from the laundry business" as a single type of loss. They distinguished, at p 543, losses from "particularly lucrative dyeing contracts" as a different type of loss which would only be recoverable if the defendant had sufficient knowledge of them to make it reasonable to attribute to him acceptance of liability for such losses. The vendor of the boilers would have regarded the profits on these contracts as a different and higher form of risk than the general risk of loss of profits by the laundry.

23 If, therefore, one considers what these parties, contracting against the background of market expectations found by the arbitrators, would reasonably have considered the extent of the liability they were undertaking, I think it is clear that they would have considered losses arising from the loss

of the following fixture a type or kind of loss for which the charterer was not assuming responsibility. Such a risk would be completely unquantifiable, because although the parties would regard it as likely that the owners would at some time during the currency of the charter enter into a forward fixture, they would have no idea when that would be done or what its length or other terms would be. If it was clear to the owners that the last voyage was bound to overrun and put the following fixture at risk, it was open to them to refuse to undertake it. What this shows is that the purpose of the provision for timely redelivery in the charterparty is to enable the ship to be at the full disposal of the owner from the redelivery date. If the charterer's orders will defeat this right, the owner may reject them. If the orders are accepted and the last voyage overruns, the owner is entitled to be paid for the overrun at the market rate. All this will be known to both parties. It does not require any knowledge of the owner's arrangements for the next charter. That is regarded by the market is being, as the saying goes, res inter alios acta.

24 The findings of the majority arbitrators shows that they considered their decision to be contrary to what would have been the expectations of the parties, but dictated by the rules in *Hadley v Baxendale* as explained in *The Heron II* [1969] 1 AC 350. But in my opinion these rules are not so inflexible; they are intended to give effect to the presumed intentions of the parties and not to contradict them.

25 The owners submit that the question of whether the damage is too remote is a question of fact on which the arbitrators have found in their favour. It is true that the question of whether the damage was foreseeable is a question of fact: see *Monarch Steamship Co Ltd v Karlshamns Oljefabriker (A/B)* [1949] AC 196. But the question of whether a given type of loss is one for which a party assumed contractual responsibility involves the interpretation of the contract as a whole against its commercial background, and this, like all questions of interpretation, is a question of law.

26 The owners say that the parties are entirely at liberty to insert an express term excluding consequential loss if they want to do so. Some standard forms of charter do. I suppose it can be said of many disputes over interpretation, especially over implied terms, that the parties could have used express words or at any rate expressed themselves more clearly than they have done. But, as I have indicated, the implication of a term as a matter of construction of the contract as a whole in its commercial context and the implication of the limits of damages liability seem to me to involve the application of essentially the same techniques of interpretation. In both cases, the court is engaged in construing the agreement to reflect the liabilities which the parties may reasonably be expected to have assumed and paid for. It cannot decline this task on the ground that the parties could have spared it the trouble by using clearer language. In my opinion, the findings of the arbitrators and the commercial background to the agreement are sufficient to make it clear that the charterer cannot reasonably be regarded as having assumed the risk of the owner's loss of profit on the following charter. I would therefore allow the appeal.

LORD HOPE OF CRAIGHEAD

27 My Lords, my initial impression at the end of the excellent argument with which we were presented by counsel on both sides was that, on the facts

found proved by the majority arbitrators, this appeal must fail. But, having had the benefit of reading in draft the opinions of my noble and learned friends, Lord Hoffmann, Lord Rodger of Earlsferry and Lord Walker of Gestingthorpe, I have come to the conclusion that their decision was based on an error of law and that the view of this case that was taken by the minority arbitrator was right.

28 The majority arbitrators based their approach on their understanding of the test of remoteness as explained in *The Heron II* [1969] 1 AC 350, and in particular by Lord Reid at pp 382–383, as being to ask whether the loss in question was "of a kind which the defendant, when he made the contract, ought to have realised was not unlikely to result from [the] breach". This had the result, as they put it, that the parties' knowledge of the markets within which they operated at the date of the addendum which extended the original charter period was more than sufficient for the loss claimed to be within their contemplation. Counsel for the charterers had agreed in exchanges with members of the tribunal that the "not unlikely" results arising from the late delivery of the vessel would include missing dates for a subsequent fixture. The majority then asked themselves what was within the contemplation of the parties as a not unlikely result of a breach which resulted in missing such a date, bearing in mind that it was agreed that the market rates for tonnage go up and down, sometimes quite rapidly. They answered this question in the owners' favour. On the facts, they said, the need to adjust the relevant dates for the subsequent employment of the vessel through the revised terms agreed with the new charterers was within the contemplation of the parties as a not unlikely result of the breach. It might be that the precise amount of the loss could be seriously affected by market factors such as a sharp drop of the rate for the particular type of vessel during the relevant period. But the type of loss was readily identifiable.

29 The minority arbitrator pointed out that this would be to impose on the charterers a completely unquantifiable risk in what is a relatively common situation—late delivery under a time charter—given the exigencies of the shipping industry. If the test was what a reasonable man in the position of the charterers would have understood at the time of entering into the charter, it was impossible to conclude that they would or should have understood that they were assuming responsibility for the risk of loss of a particular follow-on fixture concluded by the owners. They had no knowledge of or control over the duration of any follow-on fixture which the owners might conclude. The fundamental problem that he had with the owners' argument was that if damages of this type were recoverable without particular knowledge sufficient to justify an assumption of risk it was difficult to see where a line was to be drawn, and there was a real risk of serious commercial uncertainty which the industry as a whole would regard as undesirable.

30 Both approaches share a common, and as it seems to me an entirely orthodox, starting point. They ask what should fairly and reasonably be regarded as having been in the contemplation of the parties at the time when the contract was entered into. The refinement that, on the facts of this case, the relevant date was the date of the addendum is not of any practical significance. Both parties were experienced in the market within which they were operating. Late delivery under a time charter is a relatively common

A situation, and it is not difficult to conclude that the parties must have had in contemplation when they entered into the contract that this might occur. Nor it is difficult to conclude—indeed this was conceded by counsel for the charterers—that in a market where owners expect to keep their assets in continuous employment late delivery will result in missing the date for a subsequent fixture. The critical question however is whether the parties must be assumed to have contracted with each other on the basis that the B charterers were assuming responsibility for the consequences of that event. It is at this point that the two approaches part company.

31 Assumption of responsibility, which forms the basis of the law of remoteness of damage in contract, is determined by more than what at the time of the contract was reasonably foreseeable. It is important to bear in mind that, as Lord Reid pointed out in *The Heron II* [1969] 1 AC 350, 385, C the rule that applies in tort is quite different and imposes a much wider liability than that which applies in contract. The defendant in tort will be liable for any type of loss and damage which is reasonably foreseeable as likely to result from the act or omission for which he is held liable. Reasonable foreseeability is the criterion by which the extent of that liability is to be judged, and it may result in his having to pay for something that, D although reasonably foreseeable, was very unusual, not likely to occur and much greater in amount than he could have anticipated. In contract it is different and, said Lord Reid, at p 386, there is good reason for the difference:

> "In contract, if one party wishes to protect himself against a risk which to the other party would appear unusual, he can direct the other party's attention to it before the contract is made, and I need not stop to consider E in what circumstances the other party will then be held to have accepted responsibility in that event."

32 The point that Lord Reid was making here was that the more unusual the consequence, the more likely it is that provision will be made for it in the contract if it is to result in liability. Account may be taken of it in the rates that are provided for in the contract. Or terms may be written into the F contract to provide for the extent, if any, of the liability. That is the way that commercial contracts are entered into. As Blackburn J said in *Cory v Thames Ironworks and Shipbuilding Co Ltd* (1868) LR 3 QB 181, 190–191, if the damage were exceptional and unnatural it would be hard on a party to be made liable for it because, had he known what the consequences would be, he would probably have stipulated for more time or made greater G exertions if he had known the extreme mischief that would follow from the non-fulfilment of his contract. The fact that the loss was foreseeable—the kind of result that the parties would have had in mind, as the majority arbitrators put it—is not the test. Greater precision is needed than that. The question is whether the loss was a type of loss for which the party can reasonably be assumed to have assumed responsibility.

H 33 How then is this question to be addressed? The statement of principle by Robert Goff J in *The Pegase* [1981] 1 Lloyd's Rep 175, 183 asks whether, if he had considered the matter, at the time of making the contract, the defendant would have contemplated that, in the event of a breach by him, the facts in question would be taken into account in considering his responsibility for loss suffered as a result of the breach. This depends on the

degree of relevant knowledge held by him at the time of entering into the contract. Alderson B in *Hadley v Baxendale* (1854) 9 Exch 341, 354–355, distinguished between special circumstances that were wholly unknown to the party breaking the contract and the amount of injury which would arise generally and in the great multitude of cases not affected by any special circumstances. Losses in the latter category are losses which the parties may be taken to have in contemplation and to make provision for, in one way or another, in their contract. Losses in the former are losses which the party in breach was unable to contemplate when considering the terms on which he could agree to enter into the contract. These statements direct attention to the extent of the charterer's knowledge of the facts that are in question in this case.

34 In this case it was within the parties' contemplation that an injury which would arise generally from late delivery would be loss of use at the market rate, as compared with the charter rate, during the relevant period. This something that everybody who deals in the market knows about and can be expected to take into account. But the charterers could not be expected to know how, if—as was not unlikely—there was a subsequent fixture, the owners would deal with any new charterers. This was something over which they had no control and, at the time of entering into the contract, was completely unpredictable. Nothing was known at that time about the terms on which any subsequent fixture might be entered into—how short or long the period would be, for example, or what was to happen should the previous charter overrun and the owner be unable to meet the new commencement date. It is true that neither party had any control over the state of the market. But in the ordinary course of things rates in the market will fluctuate. So it can be presumed that the party in breach has assumed responsibility for any loss caused by delay which can be measured by comparing the charter rate with the market rate during that period. There can be no such presumption where the loss claimed is not the product of the market itself, which can be contemplated, but results from arrangements entered into between the owners and the new charterers, which cannot.

35 In the Court of Appeal [2007] 2 Lloyd's Rep 555, para 117, Rix LJ observed that the doctrine of remoteness is ultimately designed to reflect the public policy of the law. Developing this theme, he said in para 119 that it would be undesirable and uncommercial for damages for late delivery to be limited to the period of the overrun unless the owners could show that they had given their charterers special information of their follow-on fixture. It was undesirable, he said, because this would put the owners too much at the mercy of their charterers at time of raised market rates. That seems to me, with respect, to overstate the position. The owners too are in the market and can at least expect to be compensated at market rates for the period of any delay. But he also said that it was uncommercial, because a new fixture would in all probability not be fixed until at or about the time of the redelivery. So the demand would be for information that the owner could not provide when entering into the contract.

36 In my opinion the commercial considerations point the other way. This was the crucial point in the case which led the minority arbitrator to dissent from the majority. As he pointed out, a party cannot be expected to assume responsibility for something that he cannot control and, because he does not know anything about it, cannot quantify. It is not enough for

him to know in general and on open-ended terms that there is likely to be a follow-on fixture. This was the error which lies at the heart of the decision of the majority. What he needs is some information that will enable him to assess the extent of any liability. The policy of the law is that effect should be given to the presumed intention of the parties. That is why the damages that are recoverable for breach of contract are limited to what happens in ordinary circumstances—in the great multitude of cases, as Alderson B put it in *Hadley v Baxendale*—where an assumption of responsibility can be presumed, or what arises from special circumstances known to or communicated to the party who is in breach at the time of entering into the contract which because he knew about he can be expected to provide for. This is a principle of general application. We are dealing in this case with a highly specialised area of commercial law. But the principle by which the issue must be resolved is that which applies in the law of contract generally.

37 For these reasons, which owe much to my noble and learned friends' careful review of the authorities, I too would allow the appeal.

LORD RODGER OF EARLSFERRY

38 My Lords, Mercator Shipping Inc, the respondents in this appeal, were at all material times the owners of the bulk carrier *Achilleas*. In January 2003 they entered into a time charter-party in terms of which they let the *Achilleas* to the appellants, Transfield Shipping Inc ("the charterers"). On 12 September 2003 the charter period was extended for a further five to seven months, the exact period in charterers' option. In terms of the addendum, the terminal date for redelivery of the vessel to the owners was midnight on 2 May 2004.

39 In the event, the charterers did not redeliver the *Achilleas* to the owners until 08.15 on 11 May 2004. It is common ground that, by failing to return the vessel by midnight on 2 May, the charterers were in breach of contract and are accordingly liable in the appropriate sum of damages for that breach. The dispute is about what constitutes the appropriate sum of damages. As a result of an agreement between the parties, the arbitrators and the courts have been faced with a stark choice between two fixed figures.

40 The charterers contend that their liability in damages is confined to the difference between the market rate of hire and the charterparty rate for the period from midnight on 2 May till 08.15 on 11 May. That would amount to US$158,301·17. The owners contend that in the circumstances the charterers' liability extends further, however, so as to include the owners' loss of profit under a follow-on fixture.

41 On a date which is not identified by the arbitrators in their award, the charterers sub-chartered the vessel for a final voyage. She was to load a cargo of coal at Quingdao in China for discharge at Tobata and Oita in Japan. There is nothing in the findings made by the arbitrators to suggest that, if all had gone to plan, this final voyage would have prevented the charterers from redelivering the vessel, in accordance with their contractual obligation, by 2 May. In these circumstances, it must be presumed that the final voyage was legitimate.

42 On 20 April the charterers gave a 10-day estimated notice of redelivery between 30 April and 2 May. After receiving that notice, on or about 21 April the owners fixed a follow-on time charter for about four to six months with Cargill International SA ("Cargill"). Cargill was entitled

to cancel that charterparty if the *Achilleas* had not arrived at the delivery point by 8 May. A

43 By 24 April the vessel had finished loading the coal at Quingdao. On 30 April she reached Oita, having discharged the relevant part of her load at Tobata. At Oita she experienced delays. Previously, on 27 April the charterers had given a revised notice of redelivery on 4/5 May—which, though involving a breach of contract, would still have been in time for the vessel to be delivered to Cargill within the laycan. B

44 By 5 May the owners had recognised, however, that the vessel was going to be redelivered too late for her to be delivered to Cargill by 8 May. They therefore entered into discussions with Cargill to obtain an extension of the cancelling date under their charter. Cargill agreed to extend it to 11 May. At some point between the date when the Cargill charter was fixed (on or about 21 April) and 5 May, the market rate of hire for such vessels had fallen sharply, however. Therefore, in return for the extension of the cancelling date, Cargill insisted on the original rate of US$39,500 per day being reduced to US$31,500 per day. The charterers make no criticism of the steps taken by the owners. C

45 At 08.15 on 11 May, when Transfield redelivered the vessel to the owners at Oita, the owners immediately delivered her to Cargill under their charter. Cargill redelivered the vessel to the owners at 08.15 on 18 November 2004. D

46 In these circumstances the owners claim damages (agreed at US$1,364,584·17) for their loss of profit as a result of having to reduce the daily rate of hire under the Cargill fixture by US$8,000, when they obtained the extension of the cancelling date which they needed in order to accommodate the charterers' delay in redelivering the vessel. Clearly, the owners incurred that loss in the wake of the charterers' breach of contract. Nevertheless, in respectful disagreement with Christopher Clarke J and the Court of Appeal, I have come to the conclusion that the charterers are not liable in damages for the owners' loss of profit. E

47 Today, as for more than 150 years, the starting-point for determining the measure of damages for breach of contract is the judgment of Alderson B in *Hadley v Baxendale* (1854) 9 Exch 341. The story is well known. The plaintiff owners of a flour mill in Gloucester arranged for the defendant common carriers (the firm of Pickfords) to take their broken mill shaft to a firm in Greenwich which was to use it as a pattern to produce a new shaft. Unknown to the defendants—as the court held—the plaintiffs had no other shaft and so could not operate their mill until they got the new one. In breach of contract, the defendants delayed in transporting the broken shaft. The plaintiffs sued the defendants for the profits which they lost from being unable to operate their mill during the period of delay. The Court of Exchequer held that they could not recover the loss of profits. F G

48 Frequently only one sentence from the judgment of Alderson B is quoted as enshrining the principle with which the case is synonymous. But it is preferable to have regard to slightly more of what he said, at pp 354–355: H

> "Now we think the proper rule in such a case as the present is this:—Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be

A considered either arising naturally, i e, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, B which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise C generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in D estimating the damages arising out of any breach of contract."

It was by referring back to the language of the third sentence in this passage that Alderson B went on to hold, at p 356, that, in the circumstances, the defendants were not liable for the loss of profits:

"But it is obvious that, in the great multitude of cases of millers sending E off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred, and these special circumstances were here never communicated by the plaintiffs to the defendants. It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract."

F

49 The entire passage containing the applicable principles was quoted with approval by Viscount Sankey LC in *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452, 474–475. In *Monarch Steamship Co Ltd v Karlshamns Oljefabriker (A/B)* [1949] AC 196, 221, Lord Wright identified the distinction drawn by Alderson B as being "between damages arising naturally (which means in the normal course of things), and cases where G there were special and extraordinary circumstances beyond the reasonable prevision of the parties . . ." Like Lord Hodson in *C Czarnikow Ltd v Koufos (The Heron II)* [1969] 1 AC 350, 411A–C, I find guidance in Alderson B's use of the expression "in the great multitude of cases". In the words of Lord Hodson, it indicates:

"that the damages recoverable for breach of contract are such as H flow naturally in most cases from the breach, whether under ordinary circumstances or from special circumstances due to the knowledge either in the possession of or communicated to the defendants. This expression throws light on the whole field of damages for breach of contract and points to a different approach from that taken in tort cases."

50 The same idea is, of course, to be found, more compactly, in other well-known statements by celebrated commercial judges. For example, in *Horne v Midland Railway Co* (1872) LR 7 CP 583, 591, Willes J said that, in contract, "damages are to be limited to those that are the natural and ordinary consequences" of the breach, while in *Cory v Thames Ironworks and Shipbuilding Co Ltd* (1868) LR 3 QB 181, 190, Blackburn J said that the measure of damages is "what might be reasonably expected in the ordinary course of things to flow from the non-fulfilment of the contract, not more than that".

51 In *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, 539, Asquith LJ explained that: "Everyone, as a reasonable person, is taken to know the 'ordinary course of things' and consequently what loss is liable to result from a breach of contract in that ordinary course." He went on to say that, at p 540, for loss to be recoverable, the defendant did not need to foresee that a breach must necessarily result in that loss:

> "It is enough if he could foresee it was likely so to result. It is indeed enough, to borrow from the language of Lord du Parcq in the [*Monarch Steamship*] case, at p 158, if the loss (or some factor without which it would not have occurred) is a 'serious possibility' or a 'real danger.' For short, we have used the word 'liable' to result."

52 As Lord Reid pointed out in *The Heron II* [1969] 1 AC 350, 389E–G, by referring to foreseeability, Asquith LJ cannot have been intending to assimilate the measure of damages in contract and tort. Moreover, there might appear to be a certain tension between the idea that, to be recoverable, a loss must be something which would result from the breach in the ordinary course and the idea that it is enough that the loss is just something which is liable to result. Lord Reid therefore surmised that Asquith LJ might have meant that the loss was foreseeable as a likely result. That appears to be an appropriate way of reconciling the two aspects of Asquith LJ's opinion. In any event, amidst a cascade of different expressions, it is important not to lose sight of the basic point that, in the absence of special knowledge, a party entering into a contract can only be supposed to contemplate the losses which are likely to result from the breach in question—in other words, those losses which will generally happen in the ordinary course of things if the breach occurs. Those are the losses for which the party in breach is held responsible—the stated rationale being that, other losses not having been in contemplation, the parties had no opportunity to provide for them.

53 In the present case, the arbitrators found that—as conceded by counsel then acting for the charterers—missing a date for a subsequent fixture was a "not unlikely" result of the late redelivery of a vessel. That concession has been criticised elsewhere, but the House must proceed on the basis that, when they entered into the addendum, the parties could reasonably have contemplated that it was not unlikely that the owners would miss a date for a subsequent fixture if the *Achilleas* were redelivered late. The majority of the arbitrators also found that, at the time of contracting, the parties, who were both engaged in the business of shipping, would have known that market rates for tonnage go up and down, sometimes quite rapidly. Nevertheless, as Rix LJ himself pointed out [2007] 2 Lloyd's Rep 555, 577, para 120—when seeking to combat any criticism

A that the Court of Appeal's decision would throw the situation in general into confusion because late redelivery and changing market conditions are common occurrences—"It requires extremely volatile market conditions to create the situation which occurred here". In other words, the extent of the relevant rise and fall in the market within a short time was actually unusual. The owners' loss stemmed from that unusual occurrence.

B **54** The obligation of the charterers was to redeliver the vessel to the owners by midnight on 2 May. Therefore, the charterers are taken to have had in contemplation, at the time when they entered into the addendum, the loss which would generally happen in the ordinary course of things if the vessel were delivered some nine days late so that the owners missed the cancelling date for a follow-on fixture. Obviously, that would include loss suffered as a result of the owners not having been paid under the contract for C the charterers' use of the vessel for the period after midnight on 2 May. So, as both sides agree, the owners had to be compensated for that loss by the payment of damages. But the parties would also have contemplated that, if the owners lost a fixture, they would then be in a position to enter the market for a substitute fixture. Of course, in some cases, the available market rate would be lower and, in some cases, higher, than the rate under the lost D fixture. But the parties would reasonably contemplate that, for the most part, the availability of the market would protect the owners if they lost a fixture. That I understand to be the thinking which lies behind the dicta to the effect that the appropriate measure of damages for late redelivery of a vessel is the difference between the charter rate and the market rate if the market rate is higher than the charter rate for the period between the final terminal date and redelivery: *Hyundai Merchant Marine Co Ltd v Gesuri* E *Chartering Co Ltd (The Peonia)* [1991] 1 Lloyd's Rep 100, 108. In that passage Bingham LJ was adopting the approach which had been indicated in earlier authorities: *Alma Shipping Corpn of Monrovia v Mantovani (The Dione)* [1975] 1 Lloyd's Rep 115, 117–118, per Lord Denning MR, and *Arta Shipping Co Ltd v Thai Europe Tapioca Service Ltd (The Johnny)* [1977] 2 Lloyd's Rep 1, 2, per Lord Denning MR.

F **55** More particularly, this understanding of the general position lies behind the observations of Lord Mustill in *Torvald Klaveness A/S v Arni Maritime Corpn (The Gregos)* [1994] 1 WLR 1465. In that case, when the charterers insisted on proceeding with a voyage which had become illegitimate by the time it was due to commence, the owners refused. The owners began to negotiate a replacement fixture with a concern named G Navios, involving a higher rate of freight plus a bonus. In the event, the parties to the original charterparty reached a without prejudice agreement under which the owners would perform the voyage and, if in subsequent proceedings it were held that they had been justified in refusing to perform it, they would be entitled to a sum reflecting the difference between the chartered rate of hire and the more advantageous terms of the proposed substitute fixture with Navios. The sum in question was roughly H US$300,000.

56 In these circumstances the House did not need to deal with the measure of damages in a case of late redelivery. Nevertheless, Lord Mustill said that the obligation of the charterers was to redeliver the vessel on or before the final date or to pay damages for breach of contract. He added,

at p 1470: "On damages, see . . . *The Peonia* [1991] 1 Lloyd's Rep 100"— so endorsing, en passant, what Bingham LJ had said in that case.

57 In the Court of Appeal in *The Gregos* [1993] 2 Lloyd's Rep 335, 348 Hirst LJ had drawn attention to what he described as the owners' "windfall damages" under the without prejudice agreement by comparison with the damages which would have been awarded simply in respect of a few days' late redelivery. Lord Mustill said [1994] 1 WLR 1465, 1477:

> "At first sight, this apparently anomalous result is a good reason for questioning whether the claim for repudiation was soundly based. On closer examination, however, the anomaly consists, not so much in the size of the damages, but in the fact that damages were awarded at all. Imagine that the without prejudice agreement had not been made, and that the owners, having treated the charter as wrongfully repudiated, had accepted a substitute fixture with Navios. If one then asked what loss had the repudiation caused the owners to suffer, the answer would be 'None'. On the contrary, the charterers' wrongful act would have enabled the owners to make a profit. Even if they had not accepted the substitute employment they might very well have suffered no loss, since they would have been in the favourable position of having their ship free in the right place at the right time to take a spot fixture on a rising market. In neither event would the owners ordinarily recover any damages for the wrongful repudiation."

The implication from this passage is that, ordinarily, the appropriate measure of damages will be that set out by Bingham LJ in *The Peonia* [1991] 1 Lloyd's Rep 100, since owners will be able to obtain substitute employment for their vessel.

58 I would enter two caveats. First, it may be that, at least in some cases, when concluding a charterparty, a charterer could reasonably contemplate that late delivery of a vessel of that particular type, in a certain area of the world, at a certain season of the year would mean that the market for its services would be poor. In these circumstances, the owners might have a claim for some general sum for loss of business, somewhat along the line of the damages for the loss of business envisaged by the Court of Appeal in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, 542–543. Because of the agreement on figures, the matter was not explored in this case and I express no view on it. But, even if some such loss of business could have been reasonably contemplated, as *Victoria Laundry* shows, this would not mean that the owners' particular loss of profit as a result of the re-negotiation of the Cargill fixture should be recoverable. To hold otherwise would risk undermining the first limb of *Hadley v Baxendale*, which limits the charterers' liability to "the amount of injury" that would arise "ordinarily" or "generally".

59 Secondly, the position on damages might also be different, if, for example—when a charterparty was entered into—the owners drew the charterers' attention to the existence of a forward charter of many months' duration for which the vessel had to be delivered on a particular date. The charterers would know that a failure to redeliver the vessel in time to allow the owners to deliver it under that charter would be liable to result in the loss of that fixture. Then the second rule or limb in *Hadley v Baxendale* might well come into play. But the point does not arise in this case.

A **60** Returning to the present case, I am satisfied that, when they entered into the addendum in September 2003, neither party would reasonably have contemplated that an overrun of nine days would "in the ordinary course of things" cause the owners the kind of loss for which they claim damages. That loss was not the "ordinary consequence" of a breach of that kind. It occurred in this case only because of the extremely volatile market B conditions which produced both the owners' initial (particularly lucrative) transaction, with a third party, and the subsequent pressure on the owners to accept a lower rate for that fixture. Back in September 2003, this loss could not have been reasonably foreseen as being likely to arise out of the delay in question. It was, accordingly, too remote to give rise to a claim for damages for breach of contract.

61 Rix LJ [2007] 2 Lloyd's Rep 555, 577, para 119 objects that such an C approach is uncommercial because to demand that, before the charterers are held liable, they would need to know more than they already do in the ordinary course of events, is to demand something that cannot be provided. But that is simply to criticise the long-standing rule of the English law of contract under which a party is not liable for this kind of loss, precisely because it arises out of unusual circumstances which are not—indeed, D cannot be—within the contemplation of the parties when they enter into the contract. In any event, it would not, in my view, make good commercial sense to hold a charterer liable for such a potentially extensive loss which neither party could quantify at the time of contracting.

62 Rix LJ also describes the charterers as "happily [draining] the last drop and more of profit at a time of raised market rates": [2007] 2 Lloyd's E Rep 555, 577, para 119. But, in reality, at the outset the sub-contract and the final voyage amounted to nothing more than a legitimate use of the vessel which the charterers had hired until 2 May and for which they were paying the owners the agreed daily rate. The delay which led to the breach of contract was caused by supervening circumstances over which the charterers had no control. The charterers' legitimate actions under their contract provide no commercial or legal justification for fixing them with liability for F the owners' loss of profit, due to the effects of an "extremely volatile market" in relation to an arrangement with a third party about which the charterers knew nothing.

63 I have not found it necessary to explore the issues concerning *South Australia Asset Management Corpn v York Montague Ltd* [1997] AC 191 and assumption of responsibility, which my noble and learned friend, G Lord Hoffmann, has raised. Nevertheless, I am otherwise in substantial agreement with his reasons as well as with those to be given by Lord Walker of Gestingthorpe. I would allow the appeal.

LORD WALKER OF GESTINGTHORPE

Introduction

H **64** My Lords, in *James Finlay & Co Ltd v Kwik Hoo Tong Handel Maatschappij* [1929] 1 KB 400, 417 Sankey LJ (echoing a submission of counsel) said of the decision of this House in *R & H Hall Ltd v WH Pim (Junior) & Co's Arbitration* (1928) 33 Com Cas 324, that it had "astonished the Temple and surprised St Mary Axe". It is now generally regarded as

a sound decision on its special facts (see for instance *Sir Roy Goode, Commercial Law*, 3rd ed (2004), pp 385–386).

65 In this appeal your Lordships are faced with concurrent judgments of judges of great commercial experience (Christopher Clarke J at first instance and Rix LJ with the agreement of Ward and Tuckey LJJ in the Court of Appeal, upholding a majority award by experienced arbitrators) which are said to have upset an old and well-established commercial understanding (see John Weale, "Dogs that Didn't Bark" *(The Achilleas)* [2008] LMCLQ 6; the author suggests that the outcome of the case was influenced by the charterers' concessions, and the dissenting arbitrator seems to have taken a similar view). The charterers have been the appellants at every stage of the appeal process. While conceding that the point is not squarely covered by precedent, they urge your Lordships to restore the general understanding which has prevailed in the shipping world, so as to uphold commercial certainty. The respondent shipowners concede that there is no clear precedent in their favour, but put this down to the comparatively recent clarification (in *Hyundai Merchant Marine Co Ltd v Gesuri Chartering Co Ltd (The Peonia)* [1991] 1 Lloyd's Rep 100) of the law as to a charterer's liability for damages for delay after a "legitimate last voyage". The shipowners say that the judgments below were correct applications of the general principles laid down in *Hadley v Baxendale* (1854) 9 Exch 341 and later decisions refining those principles, including *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] KB 528 and *C Czarnikow Ltd v Koufos (The Heron II)* [1969] 1 AC 350.

The rule in Hadley v Baxendale

66 In these circumstances your Lordships have to revisit some important general issues. These are all aspects of how the rule in *Hadley v Baxendale* has been developed or modified by 150 years of case law. This topic was reviewed by Robert Goff J in *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA (The Pegase)* [1981] 1 Lloyd's Rep 175, 181–183. He observed, at p 181: "although the principle stated in *Hadley v Baxendale* remains the fons et origo of the modern law, the principle itself has been analysed and developed, and its application broadened, in the 20th century." After referring to the *Victoria Laundry* case and to *The Heron II*, Robert Goff J stated, at p 182:

> "The general result of the two cases is that the principle in *Hadley v Baxendale* is now no longer stated in terms of two rules, but rather in terms of a single principle—though it is recognised that the application of the principle may depend on the degree of relevant knowledge held by the defendant at the time of the contract in the particular case. This approach accords very much to what actually happens in practice; the courts have not been over-ready to pigeon-hole the cases under one or other of the so-called rules in *Hadley v Baxendale*, but rather to decide each case on the basis of the relevant knowledge of the defendant."

67 The recognition of the rule as a single principle accords with the reality that even under the first limb, the defendant often needs some particular knowledge (for instance Mr Baxendale's firm had to know, as Lord Pearce pointed out in *The Heron II*, at p 416, that the article accepted for carriage from Gloucester to Greenwich was a broken millshaft). The

A degree of knowledge assumed under the first limb depends on the nature of the business relationship between the contracting parties. The different outcomes of *Hadley v Baxendale* and the *Victoria Laundry* case depended in part (though only in part) on the fact that the defendant in the latter case was an engineering company supplying a specialised boiler, and not merely a carrier of goods with which it had no particular familiarity.

B **68** Another consequence of the (at least partial) assimilation of the two limbs is to raise doubt as to whether the notion of assumption of responsibility (as a precondition for liability for a larger measure of damages) is necessarily confined to second limb cases. That notion appears to be a watered-down version of the proposition (originating in *British Columbia and Vancouver's Island Spar, Lumber and Saw-Mill Co Ltd v Nettleship* (1868) LR 3 CP 499, 509 and rejected by Lord Upjohn in *The* C *Heron II* [1969] 1 AC 350, 422) that the defendant is liable for a larger measure of damages only if that has been made a term of the contract. Diplock LJ in *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428, 1448 described this as an implied undertaking given by the defendant to the plaintiff to bear the larger measure of loss, derived from (a) the defendant's knowledge of special circumstances and (b) the further factor:

D > "that he should have acquired this knowledge from the plaintiff, or at least that he should know that the plaintiff knew that he was possessed of it at the time the contract was entered into and so could reasonably foresee at that time that an enhanced loss was liable to result from a breach."

69 It may be that this rather precise formulation of the notion of E assumption of responsibility applies (if at all) only to what are recognisably second limb cases. But the underlying idea—what was the common basis on which the parties were contracting?—seems to me essential to the rule in *Hadley v Baxendale* as a whole. Businessmen who are entering into a commercial contract generally know a fair amount about each other's business. They have a shared understanding (differing in precision from case to case) as to what each can expect from the contract, whether or not it is F duly performed without breach on either side. No doubt they usually expect the contract to be performed without breach, but they are conscious of the possibility of breach. These points are repeatedly made in the authorities: it is sufficient to refer to the much-quoted speech of Lord Wright in *Monarch Steamship Co Ltd v Karlshamns Oljefabriker (A/B)* [1949] AC 196, 220–223, and to Robert Goff J in *The Pegase* at pp 182–183 (part of this G passage is quoted by my noble and learned friend, Lord Hoffmann, in para 18 of his opinion).

70 The consequence is that although the fundamental principle in *Hadley v Baxendale* applies to contracts of every sort (at any rate since the abolition in 1989 of the rule in *Bain v Fothergill* (1874) LR 7 HL 158) particular types of contract in regular use in different areas of commercial, industrial and financial life (such as charterparties, construction contracts, H and agreements for the sale and purchase of a controlling shareholding in a large company) have inevitably become specialised subjects. They are dealt with by specialist lawyers acting for well-informed businessmen. Anything that causes surprise in Essex Court is likely to cause surprise in St Mary Axe also. When the majority arbitrators stated, in para 17 of their reasons, that a

lawyer and "a broker in a commercial situation" would have given different answers to the same question they were in my opinion assuming, incorrectly, that two different questions were the same. I shall come back to this point.

The Heron II

71 *The Heron II* [1969] 1 AC 350 calls for close attention because, although decided over 40 years ago, it is the most recent full discussion of *Hadley v Baxendale* 9 Exch 341 in your Lordships' House. It was concerned with a charterparty for the carriage of sugar from the Black Sea port of Constanza to the Iraqi port of Basrah, where there was a sugar market. The cargo was delivered late and the charterers claimed (and were awarded) damages for their market loss of about £1·40 per ton on about 3,000 tons of sugar. In dismissing the appeal the court declined to follow *The Parana* (1877) 2 PD 118, a decision from what "was still the golden age of sail": Lord Upjohn, at p 428. But the real importance of the case is in its discussion of general principles.

72 The House's decision was unanimous but each member of the Appellate Committee gave a full opinion, and unfortunately none of them in terms expressed either agreement or disagreement with any of the others. Their Lordships treated the decision of the Court of Appeal in the *Victoria Laundry* case [1949] 2 KB 528 with "varying degrees of enthusiasm" (Donaldson J in *Aruna Mills Ltd v Dhanrajmal Gobindram* [1968] 1 QB 655, 668). They themselves expressed differing views as to the requisite degree of probability of loss if it was to be recoverable following a breach of contract.

73 Lord Reid observed, at p 385:

> "I am satisfied that the court [in *Hadley v Baxendale*] did not intend that every type of damage which was reasonably foreseeable by the parties when the contract was made should either be considered as arising naturally, i e in the usual course of things, or be supposed to have been in the contemplation of the parties. Indeed the decision makes it clear that a type of damage which was plainly foreseeable as a real possibility but which would only occur in a small minority of cases cannot be regarded as arising in the usual course of things or be supposed to have been in the contemplation of the parties: the parties are not supposed to contemplate as grounds for the recovery of damage any type of loss or damage which on the knowledge available to the defendant would appear to him as only likely to occur in a small minority of cases. In cases like *Hadley v Baxendale* or the present case it is not enough that in fact the plaintiff's loss was directly caused by the defendant's breach of contract. It clearly was so caused in both. The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation."

Here, Lord Reid saw the law as applying an objective test, and one which reflects the realities of the business transaction entered into by the contracting parties.

A **74** Lord Reid then considered the *Victoria Laundry* case and disapproved of it so far as what Asquith LJ had said went beyond previous authorities. Lord Reid stated, at p 389:

> "To bring in reasonable foreseeability appears to me to be confusing measure of damages in contract with measure of damages in tort. A great many extremely unlikely results are reasonably foreseeable: it is
B true that Lord Asquith may have meant foreseeable as a likely result, and if that is all he meant I would not object further than to say that I think that the phrase is liable to be misunderstood. For the same reason I would take exception to the phrase 'liable to result' in paragraph (5). Liable is a very vague word but I think that one would usually say that when a person foresees a very improbable result he foresees that it is
C liable to happen."

75 Lord Reid also disapproved of the expressions "a serious possibility", "a real danger" and "on the cards". He said, at p 390:

> "If the tests of 'real danger' or 'serious possibility' are in future to be authoritative then the *Victoria Laundry* case would indeed be a landmark because it would mean that *Hadley v Baxendale* would be differently
D decided today. I certainly could not understand any court deciding that, on the information available to the carrier in that case, the stoppage of the mill was neither a serious possibility nor a real danger. If those tests are to prevail in future then let us cease to pay lip service to the rule in *Hadley v Baxendale*. But in my judgment to adopt these tests would extend liability for breach of contract beyond what is reasonable or
E desirable. From the limited knowledge which I have of commercial affairs I would not expect such an extension to be welcomed by the business community and from the legal point of view I can find little or nothing to recommend it."

76 Their Lordships were unanimous in disapproving the expression "on the cards" but Lord Morris of Borth-y-Gest, Lord Pearce and Lord Upjohn,
F at pp 400, 415 and 425 respectively, approved the expressions "real danger" and "serious possibility". Lord Hodson preferred the expression "liable to result". Lord Pearce and Lord Upjohn both expressed the view that *Hadley v Baxendale* would have been decided the same way on a "real danger" or "serious possibility" test.

77 The diversity of opinion in the House as to the most appropriate language is no doubt partly a matter of linguistic taste. Lord Reid's apparent
G preference for "not unlikely" as against "likely" cannot be ascribed to an uncharacteristic preference for a double negative rather than a simple word. A few years later he made some famous observations in *Davies v Taylor* [1974] AC 207, 213 (a case concerned with quantification of damages under the Fatal Accidents Acts):

> "You can prove that a past event happened, but you cannot prove that
H a future event will happen and I do not think that the law is so foolish as to suppose that you can. All you can do is to evaluate the chance. Sometimes it is virtually 100%: sometimes virtually nil. But often it is somewhere in between. And if it is somewhere in between I do not see much difference between a probability of 51% and a probability of 49%."

It would not be a normal use of English to say that an eventuality with a probability of 51% is likely and one with a probability of 49% is unlikely (although in other fields, notably in connection with the civil standard of proof of past events, the law does make such a distinction). In ordinary discourse, there is a middle ground (say, for illustration, between 60% and 40% probability) within which an event would not normally be described as either likely or unlikely. Lord Reid's choice of language reflects his view (shared by the rest of the House) that the outcome need not be an odds-on chance.

78 To my mind, however, the diversity of opinion in *The Heron II* has another and more important significance. Other passages in the speeches show that their Lordships had well in mind (but did not, perhaps, spell out at length) that it is not simply a question of probability. It is also a question of what the contracting parties must be taken to have had in mind, having regard to the nature and object of their business transaction. If a manufacturer of lightning conductors sells a defective conductor and the customer's house burns down as a result, the manufacturer will not escape liability by proving that only one in a hundred of his customers' buildings had actually been struck by lightning. The need to take account of the nature and object of the contract is recognised, I think, in the passage from Lord Reid's speech, at p 385, which I have already quoted; in Lord Morris's speech, at pp 398–399; in Lord Pearce's speech, at pp 416–417 (with the example of the court ceiling collapsing during a sitting); and in Lord Upjohn's speech, at pp 424–425. The need for the loss suffered to be within the horizon of the parties' contemplation (Lord Pearce, at p 416) makes it less important to define its degree of probability with any precision. Arguably a vague expression (such as "real possibility") is actually preferable, because it is more flexible, once it is understood that what is most important is the common expectation, objectively assessed, on the basis of which the parties are entering into their contract.

79 My Lords, I had reached this point in drafting my opinion when my noble and learned friend, Lord Hoffmann drew to my attention the articles by Adam Kramer, Professor Tettenborn, and Professor Robertson, not cited in argument, that are mentioned in para 11 of Lord Hoffmann's opinion. These scholars develop ideas about *Hadley v Baxendale* which, although differently formulated, share some common ground. They demonstrate that foreseeability by itself is not a satisfactory test, and Kramer and Tettenborn emphasise the importance of what I have rather imprecisely referred to as the nature and object of the contract entered into by the parties. Both refer to a possible analogy with the restriction of damages in tort under the SAAMCO principle (see *South Australia Asset Management Corpn v York Montague Ltd* [1997] AC 191). Robertson is against approaching allocation or assumption of risk as a matter of contractual interpretation. I have found all these materials very helpful.

The majority arbitrators' decision

80 The arbitrators took seriously their task as the fact-finding tribunal, recognising (at the outset of the majority's reasons) that there were issues of law which might be taken to appeal. The majority identified (para 7) a difference between the parties as to whether, and how far, *The Heron II* had reformulated the rule in *Hadley v Baxendale*. The majority did not in terms

A resolve that difference, but seem to have adopted the "not unlikely" test. In para 8 they stated:

> "As [counsel for the charterers] agreed in exchanges with members of the tribunal the 'not unlikely' results arising from the late redelivery of a vessel were not numerous, but would include missing dates for (a) a subsequent fixture, (b) a dry docking and (c) a sale of the vessel."

B They then carried this forward, to my mind out of context, to the discussion in para 17 of the answers that would have been given by a lawyer or by a broker.

81 In para 9, after a reference to *The Rio Claro* [1987] 2 Lloyd's Rep 173, 175, they continued:

> C "We consider on the facts that the type or kind of loss suffered by the owners, i e the need to adjust relevant dates for the subsequent employment of the vessel through the revised Cargill terms, was within the contemplation of the parties as a not unlikely result of the breach. The fact that the extent of the loss was greater than anticipated is not relevant: see *Christopher Hill Ltd v Ashington Piggeries Ltd* [1969] 3 All ER 1496, 1524F per Davies LJ."

D 82 I have some difficulties with these passages. There seems to be a gap in reasoning between the bare fact of missing a fixture (an eventuality which would not, in a rising market, occasion any financial loss) and the very heavy financial loss for which the owners claimed (and recovered) damages in this case. *Ashington Piggeries* was a case of physical damage (the claimant's pigs died from disease caused by mouldy feed, which was in turn caused by E defective feed hoppers). A much closer authority would have been the *Victoria Laundry* case [1949] 2 KB 528, in which the Court of Appeal declined to award damages for the loss of unusually profitable dyeing contracts, but indicated that recovery for some loss of profit on such contracts would be possible:

> F "We agree that in order that the plaintiffs should recover specifically and as such the profits expected on these contracts, the defendants would have had to know, at the time of their agreement with the plaintiffs, of the prospect and terms of such contracts. We also agree that they did not in fact know these things. It does not, however, follow that the plaintiffs are precluded from recovering some general (and perhaps conjectural) sum for loss of business in respect of dyeing contracts to be reasonably G expected, any more than in respect of laundering contracts to be reasonably expected." (P 543.)

The loss of unusually profitable contracts, unknown to the vendor of specialised equipment at the time of the sale contract, will often be a "serious possibility" or "real danger"; but it was held not to be within the reasonable contemplation of the parties to the sale contract.

H 83 So in this case it was open to the arbitrators to conclude that for the owners to miss a fixture was a "not unlikely" result of the delay, but it did not follow from that the charterers were liable for an exceptionally large loss (measured by the entire term of the fixture) when the market fell suddenly and sharply (apparently, from the rates renegotiated with Cargill, by about 20%) between 21 April and 8 May 2004. As Rix LJ said in the Court of

Appeal, at para 120, "It requires extremely volatile conditions to create the situation which occurred here". A

84 The majority arbitrators referred to a number of authorities, cited by the charterers, to the effect that the normal measure of damages for late delivery is the market rate (if higher than the charter rate) for the period from the latest date for re-delivery under contract until the date of actual re-delivery. They made a passing reference to the discussion of this point by Lord Mustill in *Torvald Klaveness A/S v Arni Maritime Corpn (The Gregos)* [1994] 1 WLR 1465, 1477–1478, on which Rix LJ commented in paras 58–59 of his judgment. The majority regarded these authorities as giving the charterers only very limited assistance. Ultimately they accepted and applied the owners' submission that "what mattered was that the type of loss claimed was foreseeable": para 18 of the majority reasons. That was in my opinion too crude a test, and it was an error of law to adopt it. What mattered was whether the common intention of reasonable parties to a charterparty of this sort would have been that in the event of a relatively short delay in re-delivery an extraordinary loss, measured over the whole term of renewed fixture, was, in Lord Reid's words, "sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within [the defaulting party's] contemplation". Lord Mustill's dictum in *The Gregos* indicates that that would not have been the common intention of reasonable contracting parties, and I respectfully agree. B C D

85 In the Commercial Court Christopher Clarke J relied on the *Ashington Piggeries* case and, though he made a passing reference to the *Victoria Laundry* case, did not consider what was said in that case about loss of extraordinary profit. He found no error in the "foreseeable" test stated in para 18 of the majority arbitrators' reasons. E

86 Rix LJ did refer to what was said in the *Victoria Laundry* case about extraordinary profit. In para 89 he cited the passage which I have set out above. But in a later passage he seems to have discounted it, either because the arbitrator had been faced with a choice between two agreed figures (para 106) or because the owners made the Cargill fixture "at an appropriate time" (para 107—the reference to *The Pegase* should, I think, be to *Koch Marine Inc v D'Amica Societa Di Navigazione ARL (The Elena D'Amico)* [1980] 1 Lloyd's Rep 75). No doubt the fixture was made at an appropriate time (Rix LJ did not say of the owners, as he chose to say of the charterers, at para 96, that they were "keen to squeeze the last drop of profit from what . . . was a particularly strong market": see also para 119, referred to by my noble and learned friend, Lord Rodger of Earlsferry). But it was contrary to the principle stated in the *Victoria Laundry* case, and reaffirmed in *The Heron II*, to suppose that the parties were contracting on the basis that the charterers would be liable for any loss, however large, occasioned by a delay in re-delivery in circumstances where the charterers had no knowledge of, or control over, the new fixture entered into by the new owners. F G H

87 For these reasons, and for the further reasons given by my noble and learned friends, Lord Hoffmann, Lord Hope of Craighead and Lord Rodger of Earlsferry, whose opinions I have had the advantage of reading in draft, I would allow this appeal.

A **BARONESS HALE OF RICHMOND**

88 My Lords, shipowners let out their ship for a period of five to seven months, to end no later than midnight on 2 May 2004. The charterers notified the shipowners that the ship would be back no later than then. The shipowners therefore contracted to let the ship to new charterers for a period of about four to six months, promising that they could have the ship no later than 8 May 2004. The agreed price of hire was $39,500 a day. The ship was B delayed on its last voyage and the owners did not get their ship back until 11 May 2004. The new charterers agreed to take the ship, but by then the market had fallen and they would only take it at a reduced price of $31,500 a day. Are the first charterers liable to pay only for the use of the ship for the number of days that they were late at the market rate then prevailing? Or are they liable to pay the difference between what the owners would have C got from the new charter had the ship been returned in time and what the owners in fact got?

89 My Lords, this could be an examination question. Although the context is a specialised one, the answer has mainly to be found in the general principles to be derived from the well known authorities to which your Lordships have all referred, principally *Hadley v Baxendale* (1854) 9 Exch 341; *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] D 2 KB 528 and, above all, *C Czarnikow Ltd v Koufos (The Heron II)* [1969] 1 AC 350. There is no obviously right answer: two very experienced commercial judges have reached one answer, your Lordships have reached another. There is no obviously just answer: the charterer's default undoubtedly caused the owner's loss, but a loss for which no one has ever had to pay before. The examiners would surely have given first class marks E to all the judges who have answered the question so far.

90 In common with my noble and learned friend, Lord Hope of Craighead, I was at first inclined to agree with the very full and thoughtful judgments in the courts below which arrived at the second answer. Their careful reviews of the shipping cases show that, although the normal measure of damages is undoubtedly the first, there is no case in which a claim to the second has been rejected. The fact that no one has thought to F make such a claim before now does not mean that it is unfounded. The question was unlikely to arise if the last voyage on which the charterer wished to send the ship was illegitimate, because the owner could then refuse to undertake it and the first charter would come to a premature end (or he might undertake it without prejudice as happened in *The Gregos* [1994] 1 WLR 1465). And until the decision in *The Peonia* [1991] 1 Lloyd's G Rep 100 it would not arise if the last voyage was legitimate, because the charterer was not liable at all for delay which was not his fault. So the novelty of the claim is no answer. It is not novel in principle. The object of damages for breach of contract is to put the claimants in the position in which they would have been had the contract been properly performed. Had this contract not been broken in the way that it was, the claimants would have had the benefit of the next fixture at the original rate. Putting H them in the position in which they would have been had the contract been performed in accordance with its terms entails paying them the difference. No one has suggested that it was at all unusual or unlikely for the owners to commit their ship to a new fixture to begin as soon as possible after the ship was free from the first. It was conceded before the arbitrators that missing

dates for a subsequent fixture was a "not unlikely" result of late redelivery. Both parties would have been well aware of that at the time when the contract was made. They would also have been well aware that a new charter was likely to commit that particular ship rather than to allow the ship-owner to go into the market and find a substitute to fulfil his next commitment if his ship was late back. Charterparties allowing the owner to substitute a different vessel are unusual. Above all, if the parties wish to exclude liability for consequential loss of this kind then it will be very simple to insert such a clause into future charterparties. It would take a much more complicated piece of drafting, following some complicated negotiations, to impose liability for this sort of loss. To rule out a whole class of loss, simply because the parties had not previously thought about it, risks as much uncertainty and injustice as letting it in.

91 That argument cuts both ways. We are looking here at the general principles which limit a contract breaker's liability when the contract itself does not do so. The contract breaker is not inevitably liable for all the loss which his breach has caused. Loss of the type in question has to be "within the contemplation" of the parties at the time when the contract was made. It is not enough that it should be foreseeable if it is highly unlikely to happen. It would not then arise "in the usual course of things": see *The Heron II* [1969] 1 AC 350, 385, per Lord Reid. So one answer to our question, given as I understand it by my noble and learned friend, Lord Rodger of Earlsferry, is that these parties would not have had this particular type of loss within their contemplation. They would expect that the owner would be able to find a use for his ship even if it was returned late. It was only because of the unusual volatility of the market at that particular time that this particular loss was suffered. It is one thing to say, as did the majority arbitrators, that missing dates for a subsequent fixture was within the parties' contemplation as "not unlikely". It is another thing to say that the "extremely volatile" conditions which brought about this particular loss were "not unlikely".

92 Another answer to the question, given as I understand it by my noble and learned friends, Lord Hoffmann and Lord Hope, is that one must ask, not only whether the parties must be taken to have had this type of loss within their contemplation when the contract was made, but also whether they must be taken to have had liability for this type of loss within their contemplation then. In other words, is the charterer to be taken to have undertaken legal responsibility for this type of loss? What should the unspoken terms of their contract be taken to be? If that is the question, then it becomes relevant to ask what has been the normal expectation of parties to such contracts in this particular market. If charterers would not normally expect to pay more than the market rate for the days they were late, and ship-owners would not normally expect to get more than that, then one would expect something extra before liability for an unusual loss such as this would arise. That is essentially the reasoning adopted by the minority arbitrator.

93 My Lords, I hope that I have understood this correctly, for it seems to me that it adds an interesting but novel dimension to the way in which the question of remoteness of damage in contract is to be answered, a dimension which does not clearly emerge from the classic authorities. There is scarcely a hint of it in *The Heron II*, apart perhaps from Lord Reid's reference, at p 385, to the loss being "sufficiently likely to result from the breach of

A contract *to make it proper* to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation" (emphasis supplied). In general, *The Heron II* points the other way, as it emphasises that there are no special rules applying to charterparties and that the law of remoteness in contract is not the same as the law of remoteness in tort. There is more than a hint of it in the judgment of Waller LJ in *Mulvenna v Royal Bank of Scotland plc* [2003] EWCA Civ 1112, but in the B context of the "second limb" of *Hadley v Baxendale* where knowledge of an unusual risk is posited. To incorporate it generally would be to introduce into ordinary contractual liability the principle adopted in the context of liability for professional negligence in *South Australia Asset Management Corpn v York Montague Ltd* [1997] AC 191, 211. In an examination, this might well make the difference between a congratulatory and an ordinary C first class answer to the question. But despite the excellence of counsels' arguments it was not explored before us, although it is explored in academic textbooks and other writings, including those cited by Lord Hoffmann in para 11 of his opinion. I note, however, that the most recent of these, Professor Robertson's article on "The basis of the remoteness rule in contract" (2008) 28 Legal Studies 172 argues strongly to the contrary. I am not immediately attracted to the idea of introducing into the law of contract D the concept of the scope of duty which has perforce had to be developed in the law of negligence. The rule in *Hadley v Baxendale* asks what the parties must be taken to have had in their contemplation, rather than what they actually had in their contemplation, but the criterion by which this is judged is a factual one. Questions of assumption of risk depend upon a wider range of factors and value judgments. This type of reasoning is, as Lord Steyn put E it in *Aneco Reinsurance Underwriting Ltd v Johnson & Higgins Ltd* [2002] 1 Lloyd's Rep 157, 186, a "deus ex machina". Although its result in this case may be to bring about certainty and clarity in this particular market, such an imposed limit on liability could easily be at the expense of justice in some future case. It could also introduce much room for argument in other contractual contexts. Therefore, if this appeal is to be allowed, as to which I continue to have doubts, I would prefer it to be allowed on the narrower F ground identified by Lord Rodger, leaving the wider ground to be fully explored in another case and another context.

Appeal allowed with costs.

C T B

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H

IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

GOOD SHIP LTD

Claimant / Owners

- and –

SEASTAR LINE SA

Respondent / Charterers

MV "BUONA VISTA"
C/P dd. 25 March 2021

CLAIMANT'S SKELETON ARGUMENT
For a hearing on 16 Sept 2021, 10am

Housekeeping

- *There is a hearing bundle ("the Bundle") which the Tribunal is asked to read. Page references in this skeleton argument refer to the Bundle;*
- *There are two witnesses: Captain R.R. Nelson for Owners and Ms M. Chen for Charterers;*
- *Time estimate: 2 hours*

A. Introduction

1. The Claimant ("Owners") bring this claim for
   1.1. US$140,000 in hire which the Respondent ("Charterers") wrongfully deducted from hire due under a time charter dated 25 March 2021 ("the Charterparty") for MV "BUONA VISTA" ("the Vessel").
   1.2. US$140,000 in damages for late redelivery in breach of the Charterparty, giving credit for the $140,000 already paid by Charterers.

2. There are three issues:
   2.1. Was the Vessel off-hire from 16-30 April 2021 as alleged by Charterers?
   2.2. Was there an agreement to vary the terms of the Charterparty to permit discharging at Porto Alegre? On this point witness evidence will be adduced by both parties.
   2.3. It is common ground that the Vessel was redelivered late. However, at what rate should Owners be compensated for this period of delay?

3. Owners will rely on well-established authority to show that the the lockdown imposed by the port authorities in Porto Alegre does not trigger the off-hire clause 15 of the Charterparty. Charterer's case on the alleged amendment of the permitted range is fanciful and Owner's case is supported by the contemporaneous evidence, but in any event the right to damages was not given up. As to damages, Owners are entitled to the rate they could have achieved on the market had they received the Vessel in accordance with the Charterparty. Owners' claim should therefore succeed in full.

B. The facts

4. The agreed facts are set out at p.5 of the Bundle.

C. ISSSUE 1: Off-hire?

5. The unamended clause 15 of the Charterparty states in relevant parts:

> [I]*n the event of loss of time from deficiency of men or stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, drydocking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost.* (p. 8)

6. Charterers argue that the Vessel was off-hire due to an "other cause preventing the full working of the vessel" (para. 3.2 of the Defence Submissions). However, it is well-established that extraneous causes, such as the "circuit breaker" lockdown in this case do not bring a Vessel into this unamended off-hire provision.

7. The quarantine measures are an external event, analogous to the ships deliberately sunk by the Chinese in the river Yangtze after war broke out with Japan in 1937 so as to trap *The Errington Court*. Branson J in *Court Line v Dant & Russell* (1939) 44 Com Cas 345 held that "*the delay caused by the boom*" did not come "*within the words 'any other cause preventing the full working of the vessel*'". (p. 20)

8. Rix J in *The Laconian Confidence* [1997] 1 Lloyd's Rep 139 held (at 151) that "…*the unamended words 'any other cause' do not cover an entirely extraneous cause, like the boom in* Court Line". (emphasis added) (p. 40)

9. The Vessel was therefore not off-hire during the 14-day period of delay, because the lockdown which caused the delay was such an entirely extraneous cause.

10. Charterers may wish to argue that the lockdown was not entirely external as it may have been taken in response to potential Covid-19 infections on the Vessel. However, the explanatory note issued by the municipality makes clear that the lockdown was imposed because "*foreign crew members infected port employees in the process of cargo operations*". (p. 6) This is a general remark and the decision was clearly driven by many different factors entirely unlinked to the Vessel, such as the local testing regime. A much clearer link to the condition of the vessel would be needed in order to trigger the off-hire provision. Therefore, the Vessel was not off-hire from 16-30 April 2021.

D. Issue 2: Variation of the Permitted Range?

11. This issue will be dealt with more fully in oral submissions following cross examination, but the points below can already be set out:

    11.1. It is inherently unlikely that Captain Nelson would simply in a phone call agree to amend such a fundamental point of the Charter, especially without checking with Owners' head of operations or someone at the head office first.

    11.2. This analysis is supported by the contemporaneous documentary evidence: in his email of 10 April 2021, Captain Nelson writes: *"As said, I will discuss with Owns. I don't think discharging at Porto Alegre will be a problem. Will keep you posted."* (p. 19)

    11.3. This shows that no final agreement had been reached and that any possible amendment would have to be cleared with Owners' management.

12. But even if Captain Nelson did agree to sail to Porto Alegre, that alone is not sufficient to deprive Owners of their right to damages. A shipowner who accepts an unlawful order does not without more deprive itself of a right to claim damages (*The Kanchenjunga* [1990] 1 Lloyd's Rep 391 at 400 per Lord Goff):

> *"the situation in which the owners found themselves was one in which they could either reject the charterers' nomination of Kharg Island as uncontractual, or could nevertheless elect to accept the order and load at Kharg Island, thereby waiving or abandoning their right to reject the nomination but retaining their right to claim damages from the charterers for breach of contract."* (p. 59)

13. It is common ground that the Vessel was delivered outside of the range stated in the Charterparty. As there was no amendment, Owners are entitled to the damages they seek for this breach. No port within the range was subject to any restrictions. Thus, had the

Vessel been delivered as agreed and within the permitted range, the vessel would not have been off-hire in any event.

E. Redelivery

14. It is common ground that the Vessel was redelivered 14 days late. The Vessel should have been redelivered no later than 30 April 2021. In the event, she was redelivered on 14 May 2021. Charterers have admitted that Owners should at least receive $140,000 for this delay (para. 6 Defence Submissions) and have paid this sum. Owners have given credit for sums paid.

15. However, the normal measure of damages "*is the difference between what the owners earned in hire under the charter during the period of overrun and what the market would have paid for the use of the ship during the same period*" (Time Charters at §4.53). Owners' primary case should be uncontroversial therefore: the market rate was $30,000 per day during the time of the overrun and therefore this is what Owners should receive.

16. Owners were entitled to deliver the Vessel into the follow-on Charter between 1-20 May. Had the Vessel been delivered on time (i.e. by 30 April), Owners could have made good use of the market rate and lost this opportunity due to the delay.

17. Therefore, Owners are entitled to the difference between the charterparty and the charter rate already paid by Charterers for the 14 day delay: 14x$10,0000 = $140,000.

F. Conclusion

18. The Tribunal is therefore invited to award Owners the sums set out in paragraph 1 of this skeleton argument plus interest and the costs of the reference.

NICHOLAS VINEALL QC

ANNA HOFFMANN

4 PUMP COURT

7 September 2021

IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN LMAA ARBITRATION
BETWEEN:

GOOD SHIP LTD

Claimants / Owners

- and -

SEASTAR LINE SA

Respondents / Charterers

m.v. "Buona Vista"

THE CHARTERERS' SKELETON ARGUMENT

References in the form **{•}** are to pages of the bundle.

1 There are three questions for the Tribunal to decide:

1.1 Was the Vessel off-hire during the 'circuit-breaker lockdown' in Porto Alegre during the second half of April of this year?

1.2 If so, had the Charterers breached the Charter by nominating Porto Alegre as the discharge port? Or had the parties agreed that the Vessel could go there?

1.3 What damages are the Owners entitled to for the subsequent late redelivery of the Vessel? Damages based on the market rate during the 'overrun' period? Or on the rate that the Owners would actually have earned?

ISSUE 1: OFF-HIRE

2 It is common ground that cargo operations at Porto Alegre were delayed during the second half of April by a municipal ordinance that imposed a 14-day 'circuit-breaker lockdown': **Agreed Facts §10 {6}**.

3 The question is: was that an off-hire event under the Charter? It was:

3.1 The relevant clause is clause 15 **{8}**, which provides that "*in the event of loss of time from deficiency of men or stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, drydocking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost*".

3.2 Under that clause, the critical question is: was the lockdown a cause of delay coming within the phrase "*any other cause preventing the full working of the vessel*"? The answer is that it was: the circuit-breaker lockdown prevented the full working of the Vessel because it prevented her from discharging her cargo.

4 The Charterers accept that a ship will not be off-hire where the cause of delay is action by the local port authorities which is "*unjustified by the condition (or reasonably suspected condition) of ship or cargo*": ***The Laconian Confidence*** [1997] 1 Lloyd's Rep 139 at **151lhc {40}**.

5 But that is not what happened here: the circuit-breaker was not an interference "*unjustified by the condition (or reasonably suspected condition) of ship or cargo*". On the contrary:

5.1 The lockdown was imposed because the authorities believed that foreign crews – including the Vessel's crew – were, or were potentially, carrying Covid-19: **Agreed Facts [11] {6}**.

5.2 The 'circuit breaker' was therefore prompted by the reasonably suspected condition of the crew.

ISSUE 2: PERMITTED RANGE

6 If the Vessel was off-hire, the Owners claim the hire they lost during the lockdown as damages. Essentially, they say (1) the Charterers breached the Charter by nominating a discharge port – i.e. Porto Alegre – which was outside the permitted range and (2) this resulted in the Vessel being delayed, as there was no such lockdown at any of the ports within the permitted range.

7 But the Charterers' answer to that is that the parties agreed in terms to allow the Vessel to go to Port Alegre. Specifically, on 10 April, the Charterers' Ms Chen telephoned the Owners' Captain Nelson and they agreed to vary the permitted trading range. The Tribunal will hear the witnesses' oral evidence on this point.

ISSUE 3: DAMAGES FOR LATE REDELIVERY

8 It is common ground on the pleadings that the Vessel was redelivered 14 days late and that the Owners are entitled to damages as a result: **Claim [5.3] {12}** and **Defence [5.1] {14}**.

9 But the parties disagree about *the measure* of damages:

9.1 The Charterers accept that the Owners are entitled to the difference between the hire that they in fact received under the Charterparty and the hire they would have received under the Follow-on Charter – i.e. the next charter that the Owners had fixed for her – if the Vessel had been redelivered on time. That difference is US$140,000, and the Charterers have given credit for that amount in their final hire payment.

9.2 But the Owners say that that is not enough: they want damages of US$280,000, on the basis that they are entitled to the difference between the hire they actually received and the market rate of hire during the period of the overrun.

10 That claim should not succeed. It is contrary to basic principle[1] because it would leave the Owners in a better position than they would have been in if the Vessel been redelivered on time:

10.1 Had the contract been performed, the Vessel would have been redelivered on 30 April 2021 – with the result that she would then have been delivered straight into the Follow-on Charter, 14 days earlier than she was in fact delivered.

10.2 She would never have been traded in the market during those 14 days. So the Owners could not have earned the market rate of hire on which their claim for damages is based.

CONCLUSION: AWARD

11 For these reasons, the Tribunal is asked:

11.1 To find that the Vessel was off-hire during the period 16 – 30 April 2021.

11.2 To dismiss the Owners' claim for damages and to find that the parties agreed to vary the discharge range.

11.3 To dismiss the Owners' claim for 'market rate' damages over and above the damages they have already been given credit for.

Julian Kenny QC

Michal Hain

14 September 2021

[1] In the words of Lord Scott in ***The Golden Victory*** [2007] 2 Lloyd's Rep 164 at **[30]**, "*the claimant is entitled to the benefit, expressed in money, of the contractual rights he has lost, but not to the benefit of more valuable contractual rights than those he has lost*" **{72}**.