

LECTURE TO LLM SHIPPING LAW STUDENTS OF SOUTHAMPTON UNIVERSITY

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EMPLOYMENT AND INDEMNITY UNDER TIME CHARTER PARTIES

1. Introduction: The Context in which the concept operates

Under a voyage charter the owner, or disponent owner, is using the ship to trade for his own account. He decides and controls how he will exploit its earning capacity what trades he will complete in, what cargoes he will carry. He bears the full commercial risk and expense and enjoys the full benefit of the earnings of the vessel.

Under a time charter, the charterer employs the ship and exploits its earning capacity for profit. While ownership and possession of the ship remain with the owner, the use of it is granted to the charterer. It is placed by the owner at the disposal of the charterer for a period of time in return of payment of hire. The charterer is entitled to give contractual orders to the master. He determines the voyages to be performed; he chooses the cargoes and the bill of lading terms. He is entitled to sub-contract, in which case he will act as the 'disponent' owner. The parties to the charter party agree how the risks arising from the adventure will be allocated between themselves. In the event of no express agreement, the court will determine - from a true construction of the contract - how the parties intended to deal with certain risks or what risks each party agreed to bear.

Usually, experienced owners and charterers should know their legal position, rights and potential liabilities. But most do not, so you, as their future lawyers, have to make the most of it!

1.1 General principles of liability: As a general rule, liability usually arises from a breach committed by one person which causes loss to another. **Examples:**

- Breach of contractual terms, conditions, warranties, duty of care under contract. The remedy for breach is provided either in the contract or by law.

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- In the tort of negligence there must be a breach of the common law duty of care owed by one person to another causing loss. The recoverable damages must not be too remote, in other words, they must have been reasonably foreseeable by the defendant at the time of the breach.
- Under statutes, or conventions, there must be a breach of a provision. Such provision may or may not require fault, but the statute, or convention, may create strict liability (e.g. certain provisions of the Merchant Shipping Act 1995, the Pollution legislation, the Health and Safety legislation). The remedy is provided by the statute or convention.

1.2 Liability under the employment and indemnity concept

- An unlawful, or un-contractual, order by the charterer will be a breach of contract because he is not entitled to give it under the contract; For example,
 - an order to proceed to an unsafe port (**The Kanchenjunga**², see later);
 - an order to sign a bill of lading the terms of which are not consistent with the terms of the c/p (**Kruger v Moel**³: no incorporation in b/l of the c/p exclusion from liability clause);
 - an order to deliver cargo without presentation of bill of lading (**The Houda**⁴)
- The remedy for loss caused to the owner is dealt with either by an express or implied indemnity. Damages for breach are an alternative remedy.
- Under this concept, the owner's right to indemnity may also arise when the order is contractual but, nevertheless, causes loss to the owner by reason of compliance with the charterer's order (**The Island Archon**⁵).
- Indemnity means compensation for all loss caused by compliance with the charterer's order provided the chain of causation is not broken.

² [1990] 1 Lloyd's Rep 391, HL

³ [1907] A.C. 272, HL

⁴ [1994] 2 Lloyd's Rep 541, CA

⁵ [1994] 2 Lloyd's Rep 227, CA

2. Types of indemnity

- **Express:** as provided by the terms of the charter party e.g. clause 9 BALTIME C/P Form: "charterer shall indemnify owner against all consequences or liabilities arising from master... complying with such orders..."
 - **The owner does not have to prove breach by the charterer but just compliance with the order which caused the loss,** as the contract expressly provides.
 - **The Ann Stathatos**⁶ (explosion of cargo on board; the consequences of complying with the charterer's order to load a particular cargo was within the employment clause).
- **Implied:** NYPE Form c/p, clause 8: "the captain (although appointed by the owners) shall be under the orders and directions of the charterer as regards employment and agency".
 - **The clause does not expressly provide for an indemnity but it is implied by law.**
 - It is also justified by business efficacy in the sense that if the charterer requires to have the vessel at his disposal and to be free to choose voyages and cargoes, then the owner must be expected to grant such freedom only if he is entitled to be indemnified against loss and liability resulting from it (**The Island Archon; The Athanasia Comminos**⁷)

3. The concept of Indemnity versus damages

- **Indemnity** is concerned with compensation for all loss flowing from compliance with the orders given by the charterer, and
 - the loss must directly arise from the charterer's instructions;
 - the loss must be one which the owner must not be taken to have accepted (**The Island Archon**);

⁶ [1950] 83 Ll. L Rep 228

⁷ [1990] 1 Lloyd's rep 277

- the owners' compliance with the order does not break the chain of causation but it is the essential link in the chain of causation (**The Batis**⁸).

A claim for indemnity is not subject to the rule of remoteness but there must be an unbroken chain of causation (The Eurus⁹).

- **Damages in contract** arise from a **breach** which causes loss; they must have been in the reasonable contemplation of the parties **when the contract was made**, (the remoteness rule applicable to breach of contract).
- **Damages in the tort of negligence** arise from breach of the common law duty of care causing the loss and the damage suffered which must have been **reasonably foreseeable at the time of the breach** (the remoteness rule in tort).

4. Scope of the employment clause under time charters

Employment **embraces economic aspects**, namely the exploitation of the earning potential of a vessel by the charterer. Crucial to the bargain for him are the terms which require the master to prosecute voyages with utmost despatch, which provide that the master shall be under the orders and directions of the charterer as regards employment (**The Hill Harmony**¹⁰).

A time charterer **employs the ship** not the crew, who remain the employees of the owner. The master, who is under the charterer's orders, **has an obligation to obey** the orders, unless he knows they are unlawful, in a sense of being un-contractual. In such a case, the owner, through the master, has a right of election either to reject or accept the order (see later).

⁸ [1990] 1 Lloyd's Rep 345, a voyage c/p concerning nomination of an unsafe port; in respect of charterers' instructions to the vessel regarding her employment, Hobhouse J held that there was no relevant distinction between time and voyage charter parties

⁹ [1998] 1 Lloyd's rep 351, CA: on construction of the c/p, cl. 36 was not intended to be an indemnity clause, so the remoteness rule of recoverable damages applied

¹⁰ [1998] 2 Lloyd's Rep 367; [1999] 2 Lloyd's Rep 209, CA; [2001] 1 Lloyd's Rep 147, HL

The orders which come within the scope of employment must be concerning the services of the ship not matters of navigation.

5. Distinction between employment and navigation: why does it matter?

'Employment' means employment of the ship to carry out the purposes for which the charterers wish to use her. It covers lawful trading orders for the best exploitation of the ship's earning capacity. 'Navigation' covers matters of seamanship for the ship's safe navigation and is under the control of the master (**Larrinaga SS v The Crown**¹¹).

This means that if the master makes a decision - based on reasonable grounds - concerning the safety of his ship, he will not be in breach of the charterer's orders. For example, choices as to the speed or steering of the vessel, or laying off a course on a chart, or deciding what time to sail to avoid bad weather, are matters of navigation.

An order to proceed to an anchorage to discharge the cargo, even if is given by the harbour authority, is an order as to employment (**The Erechthion**¹²).

In the absence of unusual terms in the charter, the charterer is only bound to indemnify the owner against the consequences of orders as to employment.

A difficult question arose in the case below with regard to determining which route the ship should have taken to reach the voyage destination.

6. The Hill Harmony and the issue of 'routing'

It was held by the House of Lords that determining which route to follow is primarily under the scope of employment. Evidence from experts can guide the parties as to which route would be the usual or direct one; thus it held that:

¹¹ [1945] 78 Ll. L Rep 167, HL (an order to proceed to Cardiff was an order as regards employment; but the stranding did not occur as a result of such order but by reason of a fortuitous incident; the order given by the sea transport officer to proceed in spite of the unfavourable weather was a naval order, for which the charterer was not responsible).

¹² [1987] 2 Lloyd's Rep 180

"It is the duty of the ship, at any rate when sailing upon an ocean voyage from one port to another, to take the usual route between those two ports. If no evidence be given, that route is presumed to be the direct geographical route, but it may be modified in many cases for navigational or other reasons, and evidence may always be given to show what the usual route is, unless a specific route be prescribed by the charter-party or bill of lading".¹³

Obviously, a conflict may arise between the master and the charterer because determining the route contains both economic and safety aspects. A shorter route saves money to the charterer but a longer may be safer in the prevailing weather conditions at the time.

That was the issue in **The Hill Harmony**. The question was whether the master was in breach for not obeying the charterer's order, which caused loss to the charterer. The answer depended on the question whether routing was a matter of navigation or of employment.

The facts:

During the course of a voyage from Vancouver to Japan, the charterer instructed the master to take the shorter northern trans-Pacific route. The master insisted on proceeding by the southern, longer, route because the ship had previously suffered serious heavy-weather damage on the northern route. As a result, the ship took longer in the voyage and consumed more bunkers. The charterers claimed against the owners a sum for extra fuel consumption. Their case was that by reason of the master's decision, the owners were in breach of their obligation to follow the charterers' orders as to employment or of their obligation to proceed with utmost despatch. The owners denied that the master was in breach because determining what route to take was for the master to decide considering the safety of his ship. They argued it was not an order within the employment provision.

What was decided?

The majority arbitrators held that the charterers' routing instructions and orders were as to employment and the master was bound to follow them, unless he could justify his

¹³ Op. cit, fn 10, per Lord Bingham at p 149

refusal to do so. Both Clarke J and the CA held that the master's decision was about navigation since his reasons were based on the safety of his vessel and were bona fide. The House of Lords agreed with the arbitrators because the northern route was the usual choice in the absence of overriding factors and the master did not have any rational justification for what he did. Scheduling trading for the best exploitation of the ship's earning capacity did not involve a question of seamanship! The charterers won!

7. Could a clear line be drawn between employment and navigation?

An order specifying a voyage from A to B to be performed is an order as to employment, while an order as to the time of sailing considering the conditions of weather, wind and tide, is a matter of navigation. The object of the former order is to direct how the ship is to be employed; the object of the latter is how the ship shall act in the course of that employment (per Lord Porter in **Larrinaga v The Crown**). How does this fit with the reasons of Lord Bingham in *The Hill Harmony*?

Lord Bingham dealt with this specifically and said: While it is easy to think of orders relating to employment and orders relating to navigation, it is not so easy to formulate a test which clearly distinguishes between the two. He explained this further:

"The charterer's right to use the vessel must be given full and fair effect; but it cannot encroach on matters falling within the specialized professional maritime expertise of the master, particularly where the safety and security of the vessel, her crew and cargo are involved. He is the person, on the vessel, immediately responsible. Technical questions concerning the operation of the vessel are for him. Thus a decision when, in the prevailing conditions of wind, tide and weather, to sail from a given port is plainly a navigational matter, as held in the Larrinaga case. By contrast, a decision without good reason to remain in port instead of continuing with a voyage ... or to economise on bunkers for no good maritime reason ... were properly regarded as falling outside the navigational area reserved to the master's professional judgment.... Subject to safety considerations and the specific

terms of the charter, the charterer may not only order a vessel to sail from A to B but may also direct the route to be followed between the two".¹⁴

This decision places captains in a difficult position. Only in clear navigational matters will the master's exercise of discretion (in not following the charterer's directions) not be in breach of the charterer's orders. In grey cases he has to show that his reasons for not obeying orders were based on reasonable grounds. The conundrum here is that if the master follows the orders and there is damage caused to the ship by bad weather, the loss may be found not to have been caused by the charterer's order but by a fortuitous incident (see the *Larrinaga* case), or that the master's reaction in steering the ship to avoid adverse weather broke the chain of causation. The effect of such a result on the owner will be no indemnity from the charterer. What is a master supposed to do?

8. Have the Law Lords in *The Hill Harmony* taken into account the fears of the master about his ship's safety concerning the northern route?

The Law Lords relied on the arbitrators' findings of fact and that is the practice. The court does not re-examine the evidence if the matter has been heard by arbitrators who have made findings of fact. The majority arbitrators, unlike Clarke J and the CA, did not consider that the master's fears amounted to a satisfactory reason in itself for disregarding the charterer's instructions. But the arbitration was conducted on documents alone and there was no oral evidence taken from the master! On the other hand, reliance was placed on the advice of the Ocean Routes, which are specialist commercial organisation collecting record information about weather and sea conditions in the oceans at different times of the year. The charterers' orders as to the route were given after taking the advice of Ocean Routes.

The Law Lords took into account an overriding consideration that is that the risk of delay in time-charters is primarily

¹⁴ Per Lord Bingham in *Hill Harmony* op. cit, fn 10, at pp 152-153; cf Clarke J at first instance and Potter LJ at CA cited by Lord Hobhouse at p 155.

placed on the charterer. The scheduling of the vessel, they said, is of particular importance to the charterer so that obligations to others can be fulfilled, employment opportunities are not missed. The 'utmost despatch' clause is a merchant's clause with the objective of giving effect to the mercantile policy of saving time. That objective will not be met if the owners or the master unnecessarily choose a longer route causing delay.

On this point, Lord Hobhouse said:

"There may of course be countervailing factors such as adverse currents or headwinds which may make an apparently longer route in fact the more expeditious route but, on the arbitrators' findings, none of those factors justified taking the longer route in the present case".¹⁵

Thus it was held that there was no evidence that any other than the northern route was the usual route. Absent countervailing factors, it would be erroneous to conclude that all questions of what route to follow were questions of navigation, as the courts below had held.

9. Types of orders

- a. **Lawful or legitimate (contractual)**: those which the charterer is entitled to give under the contract; they are within the scope of employment
 - i. **There is no fault, no breach by the charterer**
 - ii. **Master has to obey the order**
 - iii. **The owner is entitled to an indemnity if loss results by reason of compliance with the order.**
 - iv. If the master disobeys, there will be a breach by the owner who will pay damages to the charterer for loss suffered (e.g **The Hill Harmony, The Nanfri**¹⁶). Alternatively, the c/p may provide for an indemnity as a remedy to the charterer if the master disobeys instructions.
- b. **Unlawful or illegitimate (un-contractual)**: those which the charterer is not entitled to give, thus

¹⁵ At,op. cit, fn 8, pp 156-157

¹⁶ *The Nanfri, Benfri and Lorfri* [1979] 1 Lloyd's Rep 201, HL: under a Baltime form c/p, owners instructed master not to sign "freight pre-paid" bills of lading, which was wrong

- i. Charterer commits a breach of contract
- ii. An illegitimate order does not, per se, amount to repudiation of contract (**The Gregos**¹⁷)
- iii. **The owner has a right of election**
 - 1. either to comply with the illegitimate order which does not mean he waives the right to claim damages,
 - 2. or to refuse to obey and demand a fresh order
 - 3. If the owner, via the master, elects to comply, the owner **loses the right to reject the order** later, but not the right to claim damages for loss caused by the breach (see **The Kanchenjunga**¹⁸).
 - 4. If the owner elects to refuse to comply with an illegitimate order, and the charterer does not issue a fresh order, the charterer will be in

¹⁷ [1995] 1 Lloyd's Rep 1, HL

¹⁸ The time charterers sent the ship to perform a single voyage with agreed 1/2 safe loading ports in the Arabian Gulf, excluding Iran and Iraq (which were involved in war) but including Kharg Lavan. The vessel was ordered to Kharg island; upon arrival, the master gave notice of readiness (NOR). On the same day, there was an Iraqi air raid upon Kharg island during which bombs were dropped. The master weighed anchor and proceeded away to a point of safety. Next day, the owners asked charterers to give a fresh order and nominate a safe port. The charterers insisted that the master should go back to Kharg island. The owners claimed that the charterers repudiated the contract. Both the arbitrator and Hobhouse J held the charterers were in repudiation. CA and HL reversed his judgment holding that the owners knew the facts of war between Iran and Iraq; they could have elected to reject the order as un-contractual. By giving NOR the owners asserted a right inconsistent with the right to reject the order after it had been accepted. The owners were in breach by disobeying to return to the port! But a clause in the c/p giving discretion to the master to leave port in case of war danger protected them from paying damages to charterers for the breach.

repudiation of contract, which the owner may elect to accept and claim damages for repudiation of contract (**The Gregos**).

- iv. The upshot is that with illegitimate orders the owner can claim either damages for breach of contract, or indemnity under the express provision of the contract, or indemnity implied by law.
- v. Claiming an indemnity is better for the owner in terms of the burden of proof. For example, he does not have to prove breach of contract nor does he have to show that the loss suffered was not too remote.

10. **Is there a Paradox?**

- a. With regard to the express indemnity, there is no paradox even if the indemnity arises from compliance with a contractual order because, under the maxim of freedom of contract, the parties have agreed that the charterer shall indemnify the owner for obeying charterer's orders.
- b. There seems to be a **paradox**, however, in cases in which the owner is protected by an implied indemnity when the charterer gives orders which he is entitled to give (**contractual**).

As explained earlier there is justification for it, that is, in return for the freedom given to the charterer by the owner to use the vessel to make profit, it is deemed reasonable in law that the charterer should bear the risk of loss caused to the owner for compliance even with a lawful order: (**The Athanasia Comninos**; see also **The Island Archon**¹⁹).

11. **The ambit of employment Orders; further examples**

- **To load cargo.** The cargo loaded may cause loss to the ship, the crew or to other cargo. In absence of an intervening cause breaking the chain of causation between

¹⁹ Op. cit, fn 5 ,at pp 232-234

compliance with the order and the loss, the charterer will be liable to indemnify the owner.

- The orders to load cargo of coal in **The Athanasia Comminos** and **Georges C Lemos** were legitimate and fell within the employment clause of the c/p. An explosion on board arose in both cases from the ignition between air and a quantity of methane gas, which had been emitted from the coal after loading. But the owners failed in the *Athanasia Comminos* case on causation; the chain of causation had been broken by the crew's lack of appropriate care to carry coal (the explosion was ignited by a smoker's match!). The owners won in *Georges C Lemos*, as no fault was found on the part of the ship regarding the care of the cargo. In this case, the answer to the question "why there was an explosion" was simply "because there was methane in the hold"; and "why was methane in the hold"? "Because the time-charterer called on the vessel to load coal". This answer was sufficient to found an indemnity, without proof that the coal was in any way unusual²⁰.
- If the cargo loaded is dangerous, there will be a breach of the implied term, or of the 'collateral' warranty by the shipper, that the cargo shipped is not dangerous, entitling the owner to claim an indemnity, or damages as an alternative remedy. The owner has to prove that the shipment created risks which he never contracted to bear. As the time-charterer is not the shipper, in such cases there will be a chain of proceedings under each contract down the line, or a direct action by the owner against the shipper under the bill of lading²¹ contract or in tort.

²⁰ Op. cit. fn 7, per Mustill at p 296

²¹ Under the HVR, Art IV r 6, liability of the shipper to the owner for damage is strict, e.g. not dependent on his fault: *The Giannis NK* [1998] A.C. 605, at 612-613, HL; see also *The Fiona* [1994] 2 Lloyd's Rep 506, CA (carrier in breach of duty to make ship seaworthy by cleaning holds from previous cargo); *The Kapitan Sakharov* [2000] 2 Lloyd's Rep 255 CA (chemicals in container exploded, ship caught fire and sank)

- o Even when the cargo is loaded under the supervision of the master (as per the un-amended clause 8²² of the NYPE form c/p), the charterer will be held liable to indemnify the owner against liabilities incurred by the owner as a consequence of complying with the charterer's orders or directions pursuant to clause 8. Bad stowage invariably causes damage to the cargo, or even the ship if the cargo explodes due to improper stowage, as it happened in **The Aconcagua**²³, an interesting recent decision. There are series of questions raised here, e.g. what is the effect of interference with loading by the master? Does he have a right or a duty to supervise? Does he owe a duty to intervene to prevent unseaworthiness of the ship, and thus prevent the loss to his owner? (see also **The Imvros**²⁴, concerning insufficient lashing of cargo resulting in the loss of the deck cargo overboard and in the unseaworthiness of the ship)²⁵.
- **To sign bills of lading as presented.** This may expose owners to liability to third parties, if there are terms in the b/l which are inconsistent with the terms of the c/p (**Kruger v Moel** ²⁶: the master to sign b/l without prejudice to the charter", meaning that exclusion from liability clauses in the c/p must be included in the b/l; for example, an omission to include a negligence clause in the b/l, as was in the c/p, rendered the owner unable to recover contribution from the cargo interests to his general average expenses incurred after collision of his ship with

²² The un-amended Clause 8 further provides: "the charterers are to load, stow and trim the cargo at their expense under the supervision of the captain". It is well settled that this wording has the effect of transferring from the ship owner to the charterers the primary responsibility for both arranging and paying for the named operations to be carried out: *Court Line v Canadian Transport* [1940] AC 934, HL. The equivalent provision in a Baltime form of c/p is clause 4. Parties to a c/p sometimes amend the clause by adding the words "and responsibility" after "supervision". The addition of these words has the effect of a prima facie transfer of the responsibility for loading etc from the charterer to the owner (see *The Shinjitsu Maru No 5* [1985] 1 Lloyd's Rep 568) provided there is no intervention by the charterer causing the relevant loss

²³ [2006] 2 Lloyd's Rep 66

²⁴ [1999] 1 Lloyd's Rep 848

²⁵ This raises further issues of allocation of responsibility between charterers and owners as far as cargo claims are concerned pursuant to the mechanical approach to resolving cargo claims under the INTERCLUB Agreement, which was invented to solve the difficulties arising from Clause 8 of the NYPE c/p: see *The Strathnewton* [1983] 1 Lloyd's Rep 219

²⁶ [1907] A.C. 272, HL, (b/l omitted the exclusion clause of the c/p for exclusion from liability for stranding and other accidents of navigation even when caused by the negligence of the master)

another ship due to the negligence of the captain: **Milburn v Jamaica Fruit**²⁷. The master is not obliged to sign a b/l not in the form as appears at the end of the c/p, and a b/l with blanks was not in such form (**The Garbis**²⁸).

- o There should also be no misdating of the b/l on signing. If the master signs a bill of lading knowing that the date is wrong, he will commit the tort of deceit. The ship owner, as contracting party to the bill of lading, will be liable to third parties who suffer loss. Traders rely on the b/l date, which should be the date of completion of loading, to fix the price of the goods.
- o In **The Almak**²⁹ the master signed 2 bills of lading for the consignment of gasoline and of gas oil respectively. Both should have borne the same date; the first was correctly dated (27 June) but the second was dated 22 June. Without noticing the discrepancy, the master signed. When the shipping documents were tendered under the letter of credit, the bank did not notice the discrepancy and the documents were taken up and paid for. As a result the buyers were debited by the bank the higher price based on the b/l date of 22 June instead of 27. The market price of gasoline oil fell by \$7 per ton between those two dates and the buyers/consignees of b/l made a loss and claimed it from the owners. The charterer had to indemnify the owners for their liability to the buyers. On the issue whether the owners impliedly promised that reasonable care would be taken to ensure that the b/l presented to the master for signature bore the correct date, it was held no such implication was needed under the sub charter to make the charter work effectively. The owners did not owe a duty to the charterer to take reasonable care to protect him from his own mistake.

²⁷ [1900] 2 Q.B. 540, CA

²⁸ [1982] 2 Lloyd's Rep 283

²⁹ [1985] 1 Lloyd's Rep 557

- **To proceed to a port or berth.** The port may be prospectively unsafe, hence a breach of the warranty of safety (**The Evia No 2**³⁰; **The Eastern City**³¹). Provided the chain of causation is not broken, the owner can claim damages suffered due to the breach, or an indemnity for his loss caused by the charterers' order.
- **To deliver goods.** If the party receiving the goods is not entitled to them, the carrier will be in breach of the b/l contract for misappropriation of the goods.
 - In **Strathlorne v Andrew Weir**³², the financing bank did not get paid under the letter of credit because the goods were misappropriated. The bank claimed damages from the ship owners; the charterers, in turn, were liable to indemnify them for such loss.
 - An order by the charterer to deliver the goods to the wrong party is not a lawful order and the master is not obliged to obey. But if the act is not manifestly illegal and there is nothing to raise the suspicion of the master about the wrongful order, so as to refuse to act, the charterer is bound to indemnify the owner (**The Sagona**³³).
- **To deliver goods without production of the b/l; unlawful order.** In **The Houda**³⁴, the master did not have to accept it and he was not in breach for disobeying the order. Furthermore, he had a reasonable time to consider the order.
- **To order the ship to a last voyage.** The voyage may be legitimate or illegitimate. It will be illegitimate if it exceeds the agreed or implied maximum margin of the time charter when the order has to be performed. The master can refuse an illegitimate order and ask for a fresh order. So the owner has a right of election to accept or reject the order. If he elects to perform it, he only loses the right to

³⁰ [1983] 1 A.C.736, HL (nature of the obligation)

³¹ [1958] 2 Lloyd's Rep 127, CA

³² [1934] 50 Ll. L Rep 185, CA

³³ [1984] 1 Lloyd's Rep 194

³⁴ [1994] 2 Lloyd's Rep 541

reject the order later, but he does not lose the right to claim damages for breach of contract (**The Gregos**³⁵).

- There are now two alternative ways of assessing damages for late redelivery, commonly known as: **The Peonia**³⁶ rule, which is damages on the basis of the **overrun period**, (namely, the market hire rate (if higher than the c/p rate) for the period between the contractual redelivery date and the actual one); and **The Achilleas**³⁷ rule, based on **loss of profit on a subsequent fixture; (both CA decisions)**.
- It was a legitimate order in **The Achilleas** when it was given and when it was to be performed; nevertheless it exceeded the maximum agreed length of the charter and the ship was redelivered late. Having received notice from the charterer of the lateness of redelivery, the owners – in order to mitigate their loss - renegotiated their subsequent charter with Cargill. In lieu of getting an extension of the cancelling date under the subsequent fixture, they agreed with Cargill to reduce the daily hire rate by \$8,000.00. They claimed loss of profit from the charterers as damages, in the agreed sum of \$1,364,584, calculated on the basis of their daily loss of hire multiplied by the days of the whole period of the Cargill charter, which was of similar length as the overrun charter. Had the owners not renegotiated the terms, they would probably have lost the whole fixture, but that was not discussed in evidence! The decision has been criticised as creating uncertainty and unpredictability as to the level of damages the charterers may be held to pay in future cases. However, I think that the uncertainty point has been overstated by critics and, as Rix LJ said obiter, each case will be considered on its own facts. The charterers have overreacted but their arguments are based on commercial not legal grounds. In any case, they made many concessions both during their negotiations with the owners and the trial. As a

³⁵ [1995] 1 Lloyd's Rep 1, HL

³⁶ [1991] 1 Lloyd's Rep 100, CA

³⁷ [2007] EWCA Civ 901

matter of principle or precedent, there was no previous decision dealing with loss of profit caused by an overrun of a c/p. Leave to appeal to the HL has just been granted.

- In **The Gregos**, by contrast, there was an illegitimate last voyage order given, which was not accepted. A fresh order was requested which was refused by the charterers rendering them in repudiation of the charter.

12. Causation

The owner has to prove a causative link between compliance with the order and the loss (**The Evangelos TH**³⁸); no need to prove fault of the charterer. As seen earlier, some orders do not involve fault if they are orders which the charterer is entitled to give.

12.1 Causation is a mixed question of law and facts.

Owner must prove that **the proximate cause of the loss was the order** given by the charterer with which the master had to comply

- In **The Acquacharm**³⁹, the owner failed to show that the transshipment expenses incurred after lightening the vessel in order to pass the Panama Canal were proximately caused by the charterer's order to go through the canal. Instead, the loss was caused by the master's fault in overloading the vessel.
- In **The White Rose**⁴⁰ there was no causal connection between the order to load at a USA port and the loss incurred by the owners having to pay damages to a stevedore for personal injury. The stevedore fell through an unfenced tween deck hatch of the vessel and brought a claim against the owner in Minnesota where the court awarded high damages. The owner claimed, unsuccessfully, an indemnity against the charterer alleging that had the charterers not ordered the ship there, the

³⁸ [1971] 2 Lloyd's Rep 200

³⁹ [1972] 1 Lloyd's Rep 7, CA

⁴⁰ [1969] 2 Lloyd's Rep 52

owners would not have to pay such high damages for a personal injury claim as was allowed under the Minnesota law.

12.2 There must be an unbroken chain of causation between the order and the loss.

- The chain may be broken by negligence of the crew or the master:
 - For example, in the **Nogar Marin**⁴¹ the bill of lading stated that the goods were shipped in apparent good order and condition. The receivers arrested the ship claiming damage based on the fact that the cargo of wire rods was rusty on delivery. The claim was settled including legal costs. The owners claimed indemnity against the time charterers. It was found that the master of the ship was negligent in failing to record on the mate's receipt that the cargo was damaged before shipment, so as to ensure that the ship's agent did not issue clean bills of lading. The owners' claim failed because the intervening negligence of the master broke the chain of causation. It was his task to verify the condition of the goods before signing and then sign the b/l with appropriate qualification.
 - By contrast, in **The Sagona**, there was no reason for the master to suspect that the delivery of the goods was to the wrong party. Thus, there was no break in the chain of causation.

12.3 Is the owner in danger of being found that he has accepted the risk?

Certain relevant principles must be stated first:

- The master has an obligation to obey charterer's orders and not unduly question them (The Nanfri).
- He is also obliged to refuse orders when there is a danger to the ship or her cargo.

⁴¹ [1988] 1 Lloyd's Rep 412,CA

- The law states that the master is entitled to act in faith that the charterer is giving legitimate orders (The Kanchenjunga).
- Depending on the circumstances, the doctrine 'volenti non fit injuria' is not applicable.
 - In **The Stork**⁴², the master acted reasonably in obeying the charterer's order to proceed to a port (which proved to be unsafe) and in placing reliance on the assurance given to him about the safety of the place by the pilot sent to him by the charterer.
- Although the master is under a legal obligation, as provided by the contract, to proceed with the utmost despatch, he has a reasonable time to consider the order given (Midwest Shipping v D. I. Henry Ltd⁴³; The Houda).
- If the order given is clearly illegitimate, there is a right to elect to refuse compliance, as mentioned earlier.
- Electing to obey an illegitimate order does not break the chain of causation to claim an indemnity or damages if a loss is sustained.
- Only if the risk arising from an order is **obvious and notorious at the date of the c/p**, which the owner can refuse to take by refusing the order, will amount to acceptance of the risk depending on the circumstances of the case (see **The Island Archon**).
 - "What risks the ship owner has agreed to bear must depend on the true construction of the charter and therefore of the situation when the charter was entered into"⁴⁴.
 - In this case, the charterer ordered the ship to go to Basrah, an Iraqi port; the port agents were requiring security for shortage of cargo before the ship was allowed to sail. The port authority was issuing certificates of alleged shortages based on highly

⁴² [1955] 2 QB 68

⁴³ [1971] 1 Lloyd's rep 375

⁴⁴ Op. cit, fn 5 , at p 236

dubious allegations. The Iraqi courts had jurisdiction and inevitably were issuing judgments based on these certificates, accepting them as conclusive evidence. Every ship was almost bound to have shortage claims at that time in Iraq, hence it became known as the 'Iraqi system'. The loss suffered by the owners in this case, although there was no shortage of cargo, was a consequence of the charterer's order. The owners claimed indemnity under an express indemnity clause of the NYPE c/p, which contained also clause 8 (implied indemnity).

- o The findings were that the 'Iraqi system' was well known only when the vessel was ordered there. In these circumstances the ship owners' failure to guard against the difficulties over a year before could not provide grounds for barring their claim.

13. Summary of the general principles

- a. Orders which give rise to an indemnity relate only to matters concerning the employment of the ship: **The Hill Harmony**
 - i. Identify what is within the scope of indemnity
 - ii. To be within the scope, the loss must directly flow from the charterer's instructions
 - iii. And the loss must be one which the owner cannot be taken to have accepted (**Island Archon**)
 - iv. Owners' compliance does not break the chain of causation but it is the essential link in the chain (**The Batis**)
- b. Navigation matters are for the master to determine, who remains responsible for the safety of the ship and the care of cargo, and do not give rise to an indemnity (**Larrinaga v The Crown**).
- c. The master cannot unduly question charterer's orders (**The Nanfri**). If he disobeys orders without being able to show reasonable grounds for doing so, or when there are no overriding factors concerning the ship's safety, the owner will be liable to the charterer for loss of time and extra fuel expenses (**Hill Harmony**).

- d. The master has a reasonable time to consider an order
(The Houda)
- e. The master is entitled to act in faith that the order is lawful
(The Stork; The Kanchenjunga)
- f. The master is not bound to obey orders which the charterer is not entitled to give **(The Houda)**.
- g. Even when the owner through the master chooses to obey an illegitimate order, he does not lose his right to claim damages caused by the illegitimate order, being a breach. Electing to proceed to an unsafe port is not a waiver of the right to claim damages. What the owner loses is the right to reject the order once it has been accepted **(The Kanchenjunga)**.
- h. The owner remains liable for his master's negligence, if that is the cause of his loss which breaks the chain of causation between the order and the loss **(The Nogar Marin)**.

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