[HIGH COURT OF AUSTRALIA.]

AUSTRALIAN WHEAT BOARD . . . APPELLANT;
DEFENDANT,

AND

REARDON SMITH LINE LIMITED . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1953-1954.

1953, PERTH, *Oct.* 19, 20, 21;

1954, MELBOURNE, *June* 2.

Dixon C.J., Webb and Taylor JJ.

Shipping—Charter-party—Voyage charter—"Proceed . . . to one or two safe ports . . . and there load . . . at such safe dock, pier, wharves, and/or anchorage, as ordered"—Ship ordered to unsafe port—Damage to ship and wharf—Breach of contract—Breach of duty.

The *Houston City*, a ship of 7,287 tons, was under charter to the defendant from the plaintiff. The charter-party was a voyage charter in the "Australian Grain Charter" form. Clause 1 of the charter-party provided that the vessel was to "proceed, as ordered by the charterers, to one or two safe ports in Western Australia, or so near thereto as she may safely get, and there load according to the custom of the port, . . . always afloat, at such safe dock, pier, wharves, and/or anchorage, as ordered, . . . a full and complete cargo of wheat in bulk . . ."

The charterer directed the ship to proceed to Geraldton and load a "full and complete cargo of wheat in bulk". No specific berth was ordered, but at the port of Geraldton No. 1 berth was the only berth from which a ship could load wheat in bulk. The wharf at Geraldton runs east and west and is exposed to weather from the north, from which direction gales are to be expected between the months of May and November. Number 1 berth is at the eastern end of the wharf and is the most exposed. The wharf is constructed of concrete with two horizontal timber waling-pieces and during bad weather it is necessary to keep vessels off the wharf by means of bow and stern hawsers attached to hauling-off buoys. The ship berthed on 7th July 1951 in fine weather. The hauling-off buoy to which the stern hawser could be attached had been removed for repair and the harbour master advised the master that it was about to be replaced. The harbour master did not suggest that the ship take any precautions in the meantime. Some fifty feet of the upper waling-piece

Revsd. 93. C.L.R. 578. Revsd: 1956 AC. 266.

H. C. OF A. 1953-1954.

AUSTRALIAN WHEAT BOARD v. REARDON SMITH LINE LTD.

in the centre of the berth was missing and it was not suggested that this would be replaced while the ship was in port. On 12th July 1951 without warning a gale blew from the northward which forced the ship against the wharf and caused damage to the ship and the wharf.

Held (*Dixon* C.J. dissenting) that although in the circumstances the berth could not be regarded as a safe berth and although it could not be said that there was a *novus actus interveniens* in the master actually berthing the ship at the wharf in the absence of the complete waling-pieces, and without a stream anchor and without protesting, the resulting damage to the ship did not constitute a breach of contract giving rise to damages, as the charterer did not by the charter-party warrant that a port or wharf to which the charterer ordered the ship would be safe.

Lensen Shipping Co. Ltd. v. *Anglo-Soviet Shipping Co. Ltd.* 40 Com. Cas. 320; *Samuel West Ltd.* v. *Wrights* (*Colchester*) *Ltd.* 40 Com. Cas. 186; followed and *G. W. Grace & Co. Ltd.* v. *Steam Navigation Co. Ltd.* (1950) 2 K.B. 383 distinguished.

Decision of the Supreme Court of Western Australia (*Wolff* J.) reversed.

APPEAL from Supreme Court of Western Australia.

Reardon Smith Line Ltd. was a company incorporated in England with objects which included the owning and chartering of steamers. The Australian Wheat Board was incorporated under *Wheat Industry Stabilisation Act*, 1948 (Cth.) with power, *inter alia*, to charter steamers. By charter-party dated 19th March 1951 Reardon Smith Line Ltd. chartered a single screw motor vessel M. V. *Houston City* to the Australian Wheat Board for the purpose of loading a full cargo of wheat in bulk *ex* silo and transporting same to Europe between the ports of Antwerp and Hamburg both inclusive. By cl. 1 of the charter-party it was agreed :—" That the said vessel, being in every way fitted for the voyage shall, with all convenient speed, after completion of her present voyage and discharge of her outward cargo (if any) proceed, as ordered by the charterers, to one or two safe ports in Western Australia, or so near thereto as she may safely get, and there loading according to the custom of the port, always afloat, at such safe dock, pier, wharves, and/or anchorage, as ordered, but the vessel shall not be required to shift more than once at each port unless at charterers' expense, from the charterers or their agents, a full and complete cargo of wheat in bulk, *ex* silo, which the said charterers bind themselves to provide, not exceeding what the vessel can reasonably stow and carry in addition to her tackle, apparel, provisions, fuel and furniture ". On 3rd July 1951 the Australian Wheat Board directed the master of the ship by radiogram as follows :—" Loading port Geraldton

full and complete cargo wheat in bulk advise ETA and if fitted ready to load ".

The port of Geraldton is situated on the southern extremity of Champion Bay on the west coast of Australia. The harbour's only wharf or quay is built of concrete and is about 1,500 feet long running east and west. It is situated on the southern side of Champion Bay. Number 1 berth is situated at the eastern end of the wharf and is the only berth where there are facilities for the bulk loading of wheat. This berth lies directly to the south of the harbour entrance and is exposed to all winds between north-west through north to north-east from which direction gales are to be expected between the months of May and November. To avoid the risk of damage to a ship occupying No. 1 berth and so berthed broadside to such winds, bow and hauling-off buoys had been provided in the harbour.

The *Houston City* berthed at No. 1 berth starboard side to on 7th July 1951. At this time the hauling-off buoy to which a line could be run from the stern of the ship was missing. It was expected that it would be repaired and replaced in a matter of days. Furthermore there was portion missing of the horizontal timber fender which ran alongside the wharf to keep ships off the actual concrete. On 12th July 1951 and whilst the vessel was still loading the wind blew from the northward with gale force causing the ship to be blown against the wharf and so causing damage both to the ship and to the wharf.

The plaintiff claimed that the port of Geraldton and the particular berth was unsafe within the meaning of the charter-party in that, *inter alia*, at all material times the wooden horizontal fender or waling-piece about 150 feet in length was missing from the middle of the bulk wheat loading berth, and further in that the hauling-off buoy was at all such times missing. The plaintiff claimed damages for breach of the contract contained in the charter-party in that the defendant board had ordered the ship to an unsafe port and berth, and further, or in the alternative, claimed as against the defendant damages for negligence.

The defendant in its defence denied that the port or wharf was unsafe and in addition pleaded that the master of the ship was negligent in the manner in which he berthed his ship. It was further contended by the defendant that if the berth or wharf was found to be unsafe then the master had with full knowledge of all material facts freely and voluntarily accepted the risk.

The learned trial judge (*Wolff* J.) found that the berth was at the material time unsafe and that the charterer by directing the

H. C. OF A. 1953-1954.

AUSTRALIAN WHEAT BOARD v. REARDON SMITH LINE LTD.

ship to such port was in breach of contract and liable for the resulting damage.

From this decision the Australian Wheat Board appealed to the High Court.

T. S. Louch Q.C. (with him *W. W. Johnston*) for the appellant. The defendant chartered the *Houston City* for one voyage only to load a full cargo of bulk wheat at one or two safe ports in Western Australia and to carry such cargo to one safe port on the continent of Europe between Antwerp and Hamburg. There are only three ports in Western Australia equipped for loading bulk wheat. Geraldton is one of these. The master of the ship was familiar with the port of Geraldton, and this and other ships of the plaintiff had been there before. Neither the charterer nor the shipowner contemplated the ship being directed to occupy any berth other than No. 1 berth. This was the only berth equipped for the loading of bulk wheat *ex* silo. The ship was directed to this berth by the harbour master (*Harbour and Pilotage Act* 1855, s. 7). At the time of berthing the master of the ship was aware that the hauling-off buoy opposite the eastern end of No. 1 berth was missing and he also knew that about fifty feet of the top horizontal fender at this berth was missing. It was the time of the year at which northerly blows were to be expected, and the function of the hauling-off buoys was to prevent the ship in such an event from bumping against the wharf. The master was familiar with the section of the *Australian Pilot* dealing with the port of Geraldton where the necessity for the use of hauling-off lines during the winter months is stressed. The learned trial judge rejected the plea that the port of Geraldton was unsafe. The finding in the court below was that the absence of the hauling-off buoy and the damaged fender rendered No. 1 berth unsafe during winter months and that consequently there was a breach of warranty giving rise to damages. This finding can only be supported on the basis that the master, with knowledge of the facts, was, nevertheless, obliged to occupy the berth, and further on the basis that in doing so he could take no step to neutralize the absence of the hauling-off buoy. Neither assumption is sound. The evidence shows that the berth would have been safe had the master put out a stream anchor, which would have fulfilled the function of the hauling-off buoy. It was the failure of the master to take this reasonable precaution which rendered the berth unsafe. The charterer did not know that the buoy was missing, nor that the horizontal fender had been damaged. The master of the ship possessing this knowledge should, if he had for this reason considered

the berth to be unsafe, have refused to occupy it and informed the charterer accordingly. Having elected to take his ship in, the shipowner cannot now hold the charterer liable for damages suffered in consequence. [He referred to *The Alhambra* (1); *Samuel West Ltd.* v. *Wrights (Colchester) Ltd.* (2); *S.S. Boveric Co. Ltd.* v. *Howard Smith* (3).]. Had the charterer been told the berth was temporarily unsafe it could have ordered the ship to await the repair of the hauling-off buoy, or alternatively, to go to another port. A voyage charter is no more than a contract for carriage. The charterer does not warrant the safety of the berth: see *Samuel West Ltd.* v. *Wrights (Colchester) Ltd.* (2) and *Scrutton* on *Charter Parties* 15th ed. (1948), Art. 35, p. 122. The master knew the risk and accepted it. The learned judge's finding that "where a charterer designates a berth he is bound to take reasonable precautions to ascertain that it is safe and if necessary warn the master" is not supported by the English decisions with reference to voyage charters. *G. W. Grace & Co. Ltd.* v. *General Steam Navigation Co. Ltd.* (4) was based on the provisions of a time charter, and cannot be applied to a voyage charter: *Lensen Shipping Co. Ltd.* v. *Anglo-Soviet Shipping Co. Ltd.* (5).

The charterers in that case knew that there was ice in the River Elbe, but nevertheless ordered the ship to Hamburg. The arbitrator expressly found that at the beginning of the voyages up and down the river no circumstances existed which would indicate to the master of the ship or experienced river pilots that an ice block was to be anticipated where it in fact occurred or in any other place.

The damages here are too remote. They were not the direct and natural consequences of an order given to load at Geraldton. The charterer is only liable for damage of a kind which he might reasonably foresee as likely to be suffered by compliance with his order (*Carver* on *Carriage of Goods by Sea*, 9th ed. (1952), p. 263). The damage must be "on the cards": *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.* (6).

N. de B. Cullen (with him *R. W. Cannon*), for the respondent. There was only one berth at Geraldton from which a ship could load bulk wheat. The charterer's order was, in the circumstances, an order to the ship to berth at that particular berth. The charterparty was a voyage charter to an unnamed port. When, in such

(1) (1881) 6 P.D. 68.
(2) (1935) 40 Com. Cas. 186.
(3) (1901) 7 A.L.R. 241.
(4) (1950) 2 K.B. 383.
(5) (1935) 40 Com. Cas. 320.
(6) (1949) 2 K.B. 528.

H. C. OF A. 1953-1954.

AUSTRALIAN WHEAT BOARD v. REARDON SMITH LINE LTD.

a case the charterer nominates a port or wharf then the position is as if this had been done in the charter-party (*Nelson* v. *Dahl* (1); *Tharsis Sulphur & Copper Co. Ltd.* v. *Morel Bros. & Co.* (2)). Further, if under such a charter-party the charterer fails to nominate a port he is in breach of contract. In so far as the appellant here contends that it did not nominate the berth it is setting up its own breach of contract. In any event this contention was abandoned at the trial. The berth was unsafe and could not by reasonable precautions be made safe. The danger caused by the absence of the fender and hauling-off buoy was not a danger within the contemplation of the parties when the charter-party was entered into. In a voyage charter to a named port or ports as ordered by the charterer the charterer is contractually bound to nominate such port or ports. The word "safe" when included in the charter-party is also contractual. Under such a charter-party the charterer is contractually bound to nominate a safe port. Failure to do so sounds in damages. *Ogden* v. *Graham* (3); *Harris* v. *Jacobs, Marcus & Co.* (4); *Evans* v. *Bullock* (5); *Hull S.S. Co.* v. *Lamport & Holt* (6); *Hall Bros. Steamship Co. Ltd.* v. *R. W. Paul Ltd.* (7); *Axel Brostrom & Son* v. *Louis Dreyfus & Co.* (8); *Temple S.S. Co. Ltd.* v. *Sovfracht* (9); *Samuel West Ltd.* v. *Wrights (Colchester) Ltd.* (10) can be distinguished. In this case the ship was not ordered "to a safe port", but "where she can safely deliver" at a named port. *Pass of Leny* (11) can also be distinguished because there the charterer had no knowledge of the port. The present case should be governed by the reasoning in *G. W. Grace & Co. Ltd.* v. *General Steam Navigation Co. Ltd.* (12). The master was not negligent. The learned judge below found in effect that to put out a stream anchor would have been both futile and dangerous. This finding was open on the evidence and should not be disturbed.

The damages are not too remote. If a ship is sent to an unsafe wharf it is in the ordinary course of things that it will be damaged.

T. S. Louch Q.C., in reply.

Cur. adv. vult.

(1) (1879) 12 Ch. D. 568.
(2) (1891) 2 Q.B. 647.
(3) (1861) 31 L.J.Q.B. 26.
(4) (1885) 54 L.J.Q.B. 492.
(5) (1877) 38 L.T. 34.
(6) (1907) 23 T.L.R. 445.
(7) (1914) 19 Com. Cas. 384.
(8) (1932) 38 Com. Cas. 79.
(9) (1946) 76 Ll L.L.R. 182.
(10) (1935) 40 Com. Cas. 186.
(11) (1936) 54 Ll. L.R. 288; 155 L.T. 421.
(12) (1950) 2 K.B. 383.

The following written judgments were delivered :—

DIXON C.J. The questions which this appeal raises for determination are two. The first may be stated in general terms. It is whether under the form of charter-party known as the Australian Grain Charter the charterer is liable to the shipowner for damage received by the ship owing to being directed by the charterer to an unsafe port or an unsafe wharf for loading. The second depends on an affirmative answer to the first question and is of a particular nature. It is whether damage received by a certain motor vessel named the *Houston City* on 12th July 1951 while loading at Geraldton under such a charter falls under that description.

The Australian Wheat Board, which is the appellant in this Court and the defendant in the action in the Supreme Court, chartered the ship from the owner Reardon Smith Line Ltd., which is the respondent in this Court and the plaintiff in the action. The charter-party was dated 19th March 1951 and was a voyage charter for the carriage of a cargo of bulk wheat from a Western Australian port. On 3rd July 1951 the charterers by radiogram to the master of the *Houston City* named Geraldton as the port and advised him that he was to load a complete cargo of wheat in bulk. There is only one berth at Geraldton for loading bulk wheat. It is No. 1 grain berth and lies at the eastern end of the quay. The quay is built of concrete and is about 1500 feet long running east and west on the southern side of the inner harbour of Champion Bay. Champion Bay is described by the *Australian Pilot* as " well sheltered from all winds except those between north-west through north to north east, from which direction gales sometimes blow with strength between May and November." Speaking of the quay, at which of course ships must be berthed broadside on to such winds, the same work says, " during bad weather it is necessary to keep vessels off the wharf by means of bow and stern hawsers to hauling off buoys. No. 1 wharf is the most exposed."

The *Houston City* reached Champion Bay on 7th July and, after waiting for a time while No. 1 berth was fully cleared, she was placed alongside by the pilot, who was also harbour master, about six o'clock in the afternoon of that day. She was moored starboard side to the wharf. Her port anchor was run out in a north-westerly direction to about 450 feet of chain. Unfortunately there was no hauling-off buoy to which a line could be run from the stern of the ship to assist in holding her off the concrete wharf. It was missing. In addition there was portion missing of the horizontal timber fender which ran along the side of the wharf to keep ships off the actual concrete. The wharf had been furnished with two parallel horizontal lines of waling as fenders and fifty feet of the upper

H. C. OF A. 1953-1954.

AUSTRALIAN WHEAT BOARD v. REARDON SMITH LINE LTD.

Dixon C.J.

section of the horizontal timbers had been missing for some months. The hauling-off or mooring buoy had been torn out during May 1951. There was a rock floor and the buoy had been held in thirty feet of water by two sixteen feet screws with a fifty feet bridle of three inch chain, but during a blow a ship had torn it away. A tender was to come to effect the replacement and she was said to be daily expected. In fact she arrived on 12th July, five days after the *Houston City* berthed. The harbour master told the master of the *Houston City* that the buoy had been damaged and removed and said, according to the latter, that its return was imminent, that it was expected at any moment. No suggestion was made by anyone then that the vessel's stream anchor should be unshipped and run out aft. It is unlikely that it would have been of much service in holding off the ship. At all events it was not done. The weather was fine and so long as it held there was no danger. But the weather did not hold. By about noon of 12th July, the day on which the tender actually began replacing the buoy, the weather had freshened from the northward and it rapidly increased to a gale. Before the gale subsided considerable damage had been done to the ship's starboard quarter, her plating suffered and her mooring ropes had been chafed and strained and one had parted. It is to recover in respect of this damage that the shipowner sues the charterer. The suit was heard by *Wolff* J. who found that in the absence of the waling and the buoy No. 1 berth was unsafe during the winter months, that there was no fault on the part of the master of the ship and that he acted reasonably. His Honour held that under the charter damage suffered by the ship owing to lying in an unsafe berth to which she had been ordered was recoverable from the charterer.

The material parts of the leading provision of the charter-party are as follows:—" the said vessel . . . shall, with all convenient speed, . . . proceed, as ordered by the charterers, to one or two safe ports in Western Australia, or so near thereto as she may safely get, and there loading according to the custom of the port, always afloat, at such safe dock, pier, wharves, and/or anchorage, as ordered . . . from the charterers or their agents, a full and complete cargo of wheat in bulk, *ex* silo, which the said charterers bind themselves to provide ". The charter-party does not contain a provision, such as is usually found in a time charter, placing the employment of the ship under the direction of the charterer nor a provision requiring the latter to indemnify the shipowner for loss or damage occasioned by the master's complying with the charterer's orders. The charterer is, of course, bound to provide a cargo and

the owner is bound, if it is provided in accordance with the terms of the charter, to load the cargo and carry it. It is the purpose of the clause quoted to prescribe these obligations, that is up to shipment of the cargo. The charterer must provide the cargo at a safe dock, pier or wharf in a safe port and he must give orders to the ship as to the port and the berth. In the present case, if the finding of the learned judge be accepted, the charterer did not fulfil this obligation but provided the cargo at an unsafe wharf; by acting on the charterer's order, which *ex hypothesi* did not comply with the contractual obligation of the charterer, the master placed his ship at an unsafe berth and the ship was damaged.

Two views may be taken of the legal consequence of the naming of an unsafe port or berth by a charterer under obligation to provide a cargo at a safe port and safe berth to which he must direct the ship. One is that he has simply failed to perform the condition upon the fulfilment of which the ship must berth and load and has failed to pursue the terms of the contract in providing a cargo. On this view his only breach of contract is in failing to supply a cargo in the appointed manner. The ship may refuse to proceed to the port or the berth and treat the charterer as in default in providing a cargo in accordance with the conditions of the contract. But if the ship proceeds to the unsafe port or berth that means there is no breach; the shipowner has waived fulfilment of a condition precedent, that is all. Having chosen to load the cargo, he cannot complain that it was supplied at a place where he need not have taken it.

The other view of the legal consequences, under such a provision, of the charterers directing the ship to an unsafe port or berth is that it goes further than a mere failure to fulfil a condition precedent to the shipowner's obligation and further than failure to pursue the condition of the contract in providing a cargo; it also amounts to a breach of the shipowner's obligation to direct the ship only to a safe port and a safe berth. Of course the master may disregard the order on the ground that the port or berth is unsafe. But on this view, if the master acts on the order, the charterer having broken a term of the charter in directing the ship to an unsafe port or berth is liable in damages for the consequence of the breach consisting in the giving of the direction.

It is apparent that the questions may arise with reference to the provisions governing the place of discharge just as they arise with reference to provisions dealing with the place of loading. It is not uncommon for a charter to give the charterer the right to direct the ship to a safe port or a safe berth there to unload the cargo.

H. C. OF A. 1953-1954.

AUSTRALIAN WHEAT BOARD v. REARDON SMITH LINE LTD.

Dixon C.J.

If the master considers a port of loading unsafe and the charterer refuses to provide a cargo at another port, he must go without a cargo and his owners must seek to recover dead freight or, if other employment for the ship is found, general damages. But if he considers a port of discharge is unsafe, he may discharge the cargo elsewhere and justify the course he has taken by supporting the correctness of his opinion in fact as to the unsafeness of the port. But clearly enough a master is placed in a predicament in either case, for this opinion may be held to be wrong. Whether the charter is a time or a voyage charter the same situation may arise. But in a time charter for any extended period the employment of the ship falls so much under the direction of the charterer that it perhaps appears inevitably right that he should assume a responsibility to the owner for causing the ship to proceed to an unsafe port or to berth at an unsafe wharf. No doubt in a time charter as in a voyage charter theoretically the choice lies with the master to refuse to comply with directions as outside the charter. Probably even in a voyage charter it is not often a very real or practicable alternative but in a time charter it must appear even less real. Again in a time charter a provision is much more likely to be found by which the shipowner is indemnified by the charterer against the consequences of the master's obeying the charterer's directions to him. It is not clear that such a provision covers directions which are outside the charterer's authority. No doubt it would be more in accordance with principle to construe such an indemnity clause as covering the lawful directions only of the charterer. To state the matter in another way, if the proper understanding of the principal clause be that it means only that a direction to proceed to an unsafe port is outside the contract and so unauthorized and void, then it would seem to follow that the indemnity clause should not naturally be interpreted as extending to the unauthorized direction. But perhaps it is not right first to interpret the principal clause under which the charterer obtains his right to order the ship to safe port or berth and then turn to the indemnity clause. If the two clauses are read in combination, the indemnity clause may be regarded as aiding the conclusion that the main clause means that an order to an unsafe port involves the charterer in responsibility for any consequent damage arising from the breach of obligation to provide a cargo at a safe port. But however this may be, it seems very unsatisfactory to place contrary interpretations on the provisions of a voyage charter enabling the charterer to order the ship to proceed to a safe port (whether for loading or discharge) and on the provisions in a time charter limiting her authorized employment

to safe ports. It is difficult to find logical or verbal grounds for the distinction which will satisfy the mind that it corresponds with any actual intention. It is still more difficult to justify the distinction as a matter of history or of tradition. In the days before steam a shipowner who let his ship upon a voyage charter for a voyage from or to safe ports as ordered by the charterer would more naturally regard the latter as warranting the safety of the ports to which he ordered the ship. The merchant who chartered the ship might be supposed to have at his command more information than the shipowner as to the safety of the distant ports whence or whither he shipped his merchandise. The merchant had his correspondents and it was to them that a chartered ship was often consigned.

Of the two views I have described I think that which has the stronger support both in reason and in authority is that which interprets the restriction expressed in the words " safe port or safe wharf or berth " as imposing an obligation upon the charterer not to direct the ship to an unsafe port or wharf or berth, so that any loss caused by his doing so falls upon him. The considerations which seem to support it in reason arise from the character of the provision in which the restriction occurs and its purpose. To fix the port of loading and to fix the port of delivery are two of the most essential things in the chartering of the ship. Both loading and discharge are effected by the co-operation of the parties and that in turn depends, on the side of the charterer, on the availability of the cargo at a proper place of loading or upon the provision of a berth for discharge, and on the side of the shipowner, upon his ship proceeding to the place of loading or discharge and lying there safely. When the charterer is prepared at the time of taking the charter to specify the place where the cargo will be available or the place at which he desires it delivered, the shipowner must take the responsibility of ascertaining whether he can safely berth his ship there or will take the risk of doing so. If he agrees upon the place then, subject to excepted perils, his liability to have his ship there is definite. But where the charterer cannot specify the place of loading or discharge at the time of the charter the shipowner must agree to submit his ship to the charterer's orders. The orders are normally given directly to the master. When the charter limits the choice to safe ports or safe berths the purpose is to impose upon the charterer the necessity of doing in the interest of the ship what the shipowner would have done if the charterer had been prepared to nominate to him a port of loading or discharge at the time of proposing the charter, namely avoiding an unsafe port. The fulfilment of the duty of naming the port of loading is inseparably

H. C. OF A. 1953-1954.

AUSTRALIAN WHEAT BOARD v. REARDON SMITH LINE LTD.

Dixon C.J.

connected with the fulfilment of the duty of providing the cargo. The charterer must provide the cargo at the named port and he must accordingly name a port where he can provide the cargo. If the safety of the port is in doubt, it seems better to suppose that the charterer must bear the responsibility of his choice, if it is a wrong one, and if the master is not prepared to take the extreme step of declining to lift the cargo because of the dubious security of the port. To place the master in the position of having to decide at his peril whether to take the risk of a doubtful port or berth as an alternative to refusing to come in and lift the cargo operates to the undue advantage of a charterer who in fact has named an unsafe port. For if the master of the ship decides not to frustrate the entire adventure but to take the risk, then on that construction of the clause, the master would, by his decision, relieve the charterer of all responsibility; whereas, had the decision of the master been the contrary, the charterer would, because the port was unsafe in fact, be liable for all the damage flowing from failure to provide a cargo according to the conditions of the charter. The point may be stated concisely by saying that the charterer promises that he will provide a cargo and that it will be at a port which is safe or by saying that he promises that he will name a port which is safe. This conclusion appears to me to be in accordance with the weight of authority. It is true that the course of judicial decisions affecting the question has not been entirely uniform and decisions directly dealing with damage to the ship itself are few and comparatively recent. But decided cases have worked out gradually the general operation of the clauses in a charter-party which require the charterer to provide a cargo at a safe port or safe wharf or the shipowner to deliver at a safe port or safe wharf as directed by the charterer. The result is that their purpose has been made clear and their application in many respects has been settled. The point which appears to me to be of capital importance in the decision of the present case is whether the giving of an order to proceed to a port that is unsafe amounts to a breach of obligation on the part of the charterer and that point appears to me to be definitely covered by what has been determined by the general operation ascribed to such a clause.

It is convenient to begin with the decision in *Woolley* v. *Reddelien* (1). It was a voyage charter requiring the ship, after delivering an outward cargo at Malta, with all convenient speed to sail to one of several ports as should be ordered at Malta. The shipowner sued the charterer, averring in his declaration that the

(1) (1843) 5 M. & G. 316 [134 E.R. 585].

charterer did not and would not within a reasonable time cause the ship to be ordered at Malta to sail and proceed to such port as aforesaid notwithstanding the shipowner's readiness and willingness to perform his obligations. It was decided that the charter implied a promise by the charterer to give such orders at the named port within a reasonable time, although no such promise was expressed. This decision may appear a little remote from the point at issue, but with it begins the progressive judicial explanation or exposition of the responsibility of the charterer for the preliminary steps which would result in the ship receiving a cargo at an appropriate place. The case was followed by *Rae* v. *Hackett* (1). There a voyage charter-party required the ship to sail and proceed in ballast to a safe and convenient port near Capetown and there load a full cargo of merchandise and therewith proceed to Cork or Falmouth. This was held to mean that the charterer must order the ship either to Cork or Falmouth. " It is clear that the charterer is the person to name the port, because he is to provide the cargo "—per *Alderson* B. (2). In *Ogden* v. *Graham* (3), there was a voyage charter of a ship to load at Swansea and proceed to a safe port in Chile with leave to call at Valparaiso. There was no express statement that the charterer should name the port, but at Valparaiso his agent did name a port in Chile and directed the master to proceed there to discharge. It happened that the port named was at the time closed by order of the Chilean Government because of some disturbances and the ship could not proceed thither without confiscation. She consequently remained for some time at Valparaiso until the port was open. She then sailed to the port named and discharged her cargo. The shipowner was held entitled to maintain an action against the charterer on account of the detention of the ship at Valparaiso. The port named was held to be unsafe at the time it was named, unsafe in the sense that it was a port into which the master could not take the ship without confiscation. The ground of the decision expressed by *Wightman* J. was that : " The charterers must pay the damage occasioned by the *breach of contract* in not naming a safe port, to which they have made themselves liable by the specific terms of the contract " (4). *Blackburn* J. said : " By the charter-party it is agreed that the vessel shall sail for a safe port in Chile, with leave to call at Valparaiso, and although it is not in terms so stated, it follows by necessary implication that the charterers are to name a safe port to the shipowner, who will then be

(1) (1844) 12 M. & W. 724 [152 E.R. 1390].
(2) (1844) 12 M. & W. 724, at p. 727 [152 E.R 1390, at p. 1391].
(3) (1861) 1 B. & S. 773 [121 E.R. 901].
(4) (1861) 1 B. & S. 773, at p. 780 [121 E.R. 901, at p. 903].

H. C. OF A. 1953-1954.

AUSTRALIAN WHEAT BOARD v. REARDON SMITH LINE LTD.

DIXON C.J.

able to earn his freight by proceeding thither" (1). And again "they are liable *for damages for not naming a safe port* within a reasonable time, and the measure of damages will be regulated by the detention of the ship at Valparaiso beyond that time" (2). It will be seen that although the damages were for detention and not for injury to the ship, they were attributable to the naming of an unsafe port, and the very naming of an unsafe port was considered a breach of contract. It is true that the master might have refused to go to the port at all and treated the charter as discharged by breach or regarded the condition precedent as unfulfilled by the naming of the port in question. That was the effect of *The Alhambra* (3), a decision which sometimes has been treated as meaning that it is his only course: see, for example, *S.S. Bovric Co. Ltd.* v. *Howard Smith* (4) per *Madden* J., a deduction for which there appears to me to be no foundation.

There are several other decisions which are based on the view that a direction to proceed to a port in fact unsafe for the purpose of discharging a cargo is itself a breach of obligation under a voyage charter providing that the ship should proceed to a named port for orders to discharge at a good and safe port within certain geographical limits. It is the foundation of one part of the decision in *Evans* v. *Bullock* (5). In that case a port was named by the charterer where it was found that the ship could not safely unload. The master proceeded to another place and there unloaded. The consignees then sued the shipowner unsuccessfully for the increased costs occasioned by the master unloading in the place chosen by himself. The shipowner, who had succeeded in the action as defendant, then commenced an action against the charterer for damages comprising (1) the extra costs incurred by him in the suit brought against him by the consignees; (2) the port dues incurred by him at the port of actual discharge in excess of the port dues he would otherwise have incurred; (3) insurance. The shipowner failed to recover under the first head of damage because it did not flow legally from the breach and under the third because the costs of insurance were considered to be contained in the demurrage which he had received. But he did recover the excess port dues as damages. Now it appears to me that the significance of this is that the shipowner recovered them as an item of damage attributable to the naming of a port that was in fact unsafe, showing necessarily that to order a ship to a port that was unsafe was itself a breach of

(1) (1861) 1 B. & S. 773, at p. 780 [121 E.R. 901, at pp. 903-904].
(2) (1861) 1 B. & S. 773, at p. 782 [121 E.R. 901, at p. 904].
(3) (1881) 6 P.D. 68.
(4) (1901) 7 A.L.R. 241, at p. 246.
(5) (1877) 38 L.T. 34.

obligation imposed by the charter on the charterer. This was also decided by *Sankey* J. in *Hall Bros. S.S. Co.* v. *R. & W. Paul* (1). It was a voyage charter requiring the ship " to call at Teneriffe for orders to discharge at a safe port in the United Kingdom, or so near thereto as she can safely get, always afloat, and deliver such cargo in accordance with the custom of the port for steamers " (1). At Teneriffe she received orders to discharge at King's Lynn, Norfolk. She found, however, that her draught did not permit her to enter the dock at King's Lynn and she lightened by discharging part of her cargo about eleven miles off down the Wash before going on and discharging the remainder of the cargo in the dock at King's Lynn. The shipowners sued the charterers for the extra expense involved in lightening the ship. *Sankey* J. said : " For them it was contended that King's Lynn was not a safe port within the meaning of the charter-party, that the defendants had *committed a breach of their contract in ordering the vessel to proceed there*, and were, therefore, liable in damages " (2). His Lordship upheld this contention deciding that King's Lynn was not a safe port for the ship loaded as she was and that the fact that the master accepted the order to proceed there did not preclude the owner from recovering damages.

In *Limerick S.S. Co. Ltd.* v. *Stott Co. Ltd.* (3) *Bailhache* J. had before him a claim by a shipowner against a charterer to recover the damage suffered by a ship through encountering ice on a voyage to and from the Finnish port of Abo. The claim depended on the provisions contained in a form of time charter which had been employed excepting ice-bound ports and excepting the steamer from any obligation to force ice. This, which was the principal matter decided, affects the present question, if at all, only remotely and indirectly. But a minor question arose, because after returning from Abo the ship was directed to proceed to Manchester. Although a form of time charter was employed, the charter was for one Baltic round voyage between good and safe ports or places within the limits of one Baltic round as the charterers should direct. It was under this provision that the direction to proceed to Manchester was given. The ship did proceed to Manchester but found that after she had discharged her cargo her height from the waterline was such that she could not proceed down the canal and clear the bridges unless her masts were cut. Accordingly her masts were cut and the shipowners sued the charterers to recover the costs incurred through doing it. *Bailhache* J. held that the shipowners

(1) (1914) 111 L.T. 811 ; 30 T.L.R. 598.

(2) (1914) 111 L.T. 811 at p. 811 ; 30 T.L.R. 598, at p. 598.

(3) (1921) 1 K.B. 568.

H. C. OF A. 1953-1954.

AUSTRALIAN WHEAT BOARD v. REARDON SMITH LINE LTD.

DIXON C.J.

were entitled to recover the cost as damages. His Lordship said: "In my judgment the expense of cutting the masts must fall upon the charterers, because they were only entitled to order the *Innisboffin* to a safe port, which means a port to which a ship can safely get and from which she can safely return. It was therefore a breach of contract for the charterers to order her to proceed to Manchester, and having committed a breach of contract they must pay the damages which flow from that breach of contract" (1). There was no appeal by the charterers from this part of the judgment but the shipowners appealed from the decision against them on that part of their claim relating to damage by ice. In dismissing the appeal *Scrutton* L.J. did make the following observation: "The question was argued before us whether the charterers who requested the ship to go to an unsafe or an ice-bound port, to which she was not bound to go, were liable if she went for damage sustained on her voyage. I desire to reserve my opinion on this point. The state of knowledge of shipowner and charterer may be material when the point has to be decided" (2). I take the observation to refer to the charter before the court and to mean no more than that the question was left undecided.

In *Axel Brostrom & Son* v. *Louis Dreyfus & Co.* (3) there was a voyage charter for the carriage of a cargo from Durban to a safe port in the United Kingdom. The charterers named Londonderry. The ship had a length too great to enable it to proceed up and down the winding River Foyle without tugs and these could only be procured from Glasgow. The shipowner obtained the tugs and sued the charterers to recover the cost of doing so. *Roche* J. held that Londonderry was not a safe port for that vessel because of the narrowness of the winding channel forming the access to a port where no tugs were available. The proceeding before his Lordship was an award in the form of a special case. The arbitrator had decided that Londonderry was an unsafe port and on that ground he held that the shipowners were entitled to recover from the charterers. But he made his award subject to the opinion of the Court upon the question whether on the true construction of the charter-party and on the facts stated Londonderry was a safe port to which the charterers were entitled to order the ship under the charter party. *Roche* J. confirmed the award, and, although the question whether unsafety of the port was a ground of liability was not specifically reserved for the court but was assumed, the confirmation of the award appears necessarily to imply that ordering the ship to an unsafe port was a breach of obligation.

(1) (1921) 1 K.B., pp. 575-576.
(2) (1921) 2 K.B. 613, at p. 621.
(3) (1932) 38 Com. Cas. 79.

In *Samuel West Ltd.* v. *Wrights (Colchester) Ltd.* (1) the shipowner sought to recover damages for actual physical injury to the ship. The charter was of a motor barge to take a cargo of coal " to Colchester as ordered or as near thereto as she could safely get and there deliver the cargo alongside any wharf vessel or craft as ordered where she could safely deliver." The berth to which she was sent was one where she took the ground but it proved a foul berth and she was damaged. The shipowners claimed against the consignees under a bill of lading incorporating the charter-party. *Branson* J. decided against the shipowners on the grounds—(1) that they had failed to prove that an order to go to that berth came from the consignees; (2) that by the word " safely " in the provision quoted the ship was simply excused from obeying an order of the consignee if the wharf was not one where she could safely deliver. His Lordship said: " The attempt to put as a matter of contract the safety of a berth upon the consignee as distinguished from the ship is an attempt which has not succeeded yet in any reported case." The second ground of this decision appears to me to be inconsistent in principle with the decisions to which I have already referred.

In *Lensen Shipping Co. Ltd.* v. *Anglo-Soviet Shipping Co. Ltd.* (2) before *MacKinnon* J., and (3) before the Court of Appeal, decided in the same year, the question arose under a time charter for a series of voyages between certain European limits. The charter contained provisions—(1) that the steamer should be employed between safe ports where she could lie always afloat or safe aground where steamers of similar size and draught are accustomed to lie safely; (2) that the captain should be under the orders of the charterer as regards, *inter alia*, employment of the ship; and (3) that the charterers should indemnify the owners against all consequences arising from the captain, officers, &c., complying with such orders. The ship was brought to a berth where she could not lie afloat or safe aground and was damaged. *MacKinnon* J. decided that the shipowners were entitled to recover the damages from the charterers and his decision was affirmed by *Greer* and *Slesser* L.JJ., *Maugham* L.J. dissenting. *Greer* L.J. based his decision on the grounds—(1) that the requirement that the berth should be safe formed part of the limitations on the employment of the ship; (2) that as the berth was unsafe the protective and the cesser clauses had no application; and (3) that as the limitations on the employment had been exceeded the obligations of the charterer had been broken.

(1) (1935) 40 Com. Cas. 186.
(2) (1935) 50 Ll. L.R. 62.
(3) (1935) 40 Com. Cas. 320: 52 Ll. L.R. 141.

H. C. OF A. 1953-1954.

AUSTRALIAN WHEAT BOARD v. REARDON SMITH LINE LTD.

Dixon C.J.

But his Lordship referred to *Samuel West Ltd.* v. *Wrights (Colchester) Ltd.* (1) and distinguished that decision, together with the decision in *The Empress* (2) on the ground that those cases did not relate to time charters and there was no clause that the master should obey the charterers' orders. It may be remarked that *The Empress* (2) was not a decision under a charter-party at all and that while *Samuel West Ltd.* v. *Wrights (Colchester) Ltd.* (1) was decided under a voyage charter, nevertheless for the reasons that I have already given the grounds of the distinction, although perhaps not in themselves insufficient, do not appear to be sound in principle.

In the *Pass of Leny* (3), decided in the following year there was a voyage charter of an oil tanker 190 feet long and 30 feet 6 inches in beam. The tanker was built to take the ground in the course of loading. The charter required the ship to proceed to Boston, Lincs., or as near thereto as she could safely get safely aground and there load a part cargo of 600 tons of petroleum. A clause in the charter provided that the tanker would load " at a place reachable on her arrival which shall be indicated by charterers and where she can always lie afloat or safely aground." She went to a wharf where as the tide fell she took the bottom of a berth not more than thirty feet wide. She had been moored not quite parallel to the wharf and she pivoted on her stern and slipped off and was damaged. *Bucknill* J. held that the charterers were not liable for the damage because he found that the owners had not established that the berth was unfit to lie upon. But at the same time his Lordship found that the berth was not a place where this ship could always lie safely aground and load because there was a substantial element of risk about the operation. His Lordship held that there was clearly no express warranty that the berth was one where the ship could so lie safely aground and that none should be implied. There was no warranty as to the fitness of the berth, express or implied. This conclusion appears to me to depend entirely on the construction of the special clause relating to the place reachable on the arrival of the ship.

Finally, *Devlin* J. gave an elaborate decision in *G. W. Grace & Co. Ltd.* v. *General Steam Navigation Co. Ltd.* (4) in which he reviewed the principal authorities. The case turned on a time charter in the Baltime form. The charterers apparently entered into a voyage sub-charter with the board of trade. Under the voyage charter the ship loaded a cargo of timber for London from Hamburg. On

(1) (1935) 40 Com. Cas. 186.
(2) (1923) P. 96.
(3) (1936) 155 L.T. 421.
(4) (1950) 2 K.B. 383.

the voyage to and from Hamburg the steamer was damaged by ice in the River Elbe. The time charter provided that the vessel was to be employed in lawful trades between good and safe ports between the Elbe, the United Kingdom and Brest, and by another clause that the master was to be under the orders of the charterers as regards employment, agency or other arrangements, and the charterers were to indemnify the owners against all consequences or liabilities arising from the master's signing bills of lading or otherwise complying with such orders. It was held that Hamburg was not a safe port within the meaning of the charter-party because the ship could not reach it and return from it safely. *Devlin* J. held that the action of the charterers in ordering the ship to Hamburg as an unsafe port constituted a breach of contract. The learned judge referred to *Hall Bros. Steamship Co. Ltd.* v. *R. & W. Paul Ltd.* (1) and *Axel Brostrom & Son* v. *Louis Dreyfus & Co.* (2) to the judgment of *Bailhache* J. in *Limerick S.S. Co. Ltd.* v. *Stott* (3) and of *MacKinnon* J. in *Lensen Shipping Co. Ltd.* v. *Anglo-Soviet Shipping Co.* (4) and said that they all proceeded on the basis that the order to go to an unsafe port or berth was a breach of the charter-party. His Lordship said : " Once the breach of contract is established, it seems to me to follow that, subject to the ordinary rule of remoteness, damages must result " (5). His Lordship referred to the ground on which *Greer* L.J. distinguished *Samuel West Ltd.* v. *Wrights (Colchester) Ltd.* (6) namely the ground that it did not relate to a time charter and that the contract did not contain a term that the master should obey the orders of the charterers as to the employment of the ship. *Devlin* J. said : " With the greatest deference, I find this distinction difficult to follow. It implies that, whereas under a voyage charterparty the master is not bound to obey the order of the charterer to go to a port or berth outside the contractual limits, under a time charterparty he is. I cannot think that the clause in the time charterparty which puts the master under the orders of the charterer as regards employment is to be construed as compelling him to obey orders which the charterer has no power to give " (7).

For the reasons I have already given I respectfully agree that the distinction is not sound. It is, of course, true that, since a charter-party is a contract the terms of which depend on what the parties

(1) (1914) 111 L.T. 811 ; 30 T.L.R. 598.
(2) (1932) 38 Com. Cas. 79.
(3) (1921) 1 K.B. 568.
(4) (1935) 50 Ll. L.R. 62 ; (1935) 40 Com. Cas. 320.
(5) (1950) 2 K.B., at p. 397.
(6) (1935) 40 Com. Cas. 186.
(7) (1950) 2 K.B., at p. 396.

H. C. OF A. 1953-1954.

AUSTRALIAN WHEAT BOARD v. REARDON SMITH LINE LTD.

DIXON C.J.

write into it, each charter-party must bear its own interpretation and its meaning must be derived from the full contents of the document and it is true that a time charter often contains clauses absent from a voyage charter such as a clause of indemnity and a clause enabling the charterer to give orders as to the employment of the ship. But I can see no reason why, in a voyage charter, as well as in a time charter, the traditional provision that the ship shall proceed to a safe port as ordered by the charterer or to a safe wharf, dock or berth as ordered by the charterer, should not be interpreted as imposing on the charterer an obligation to direct the ship only to a port or dock that is safe. No doubt it is one aspect of a total obligation resting on the charterer to provide a cargo at a safe port or safe berth to which he is to order the ship to proceed. But it does not follow that the breach of the obligation must be regarded always as consisting in the failure to supply the cargo at a safe port rather than in the sending of the ship to a port which is unsafe. The shipowner may reject the performance tendered of the obligation to provide a cargo and thus avoid danger to the ship at the expense of the loss of freight and his measure of damages will be determined accordingly. But he may accept the cargo though tendered in breach of the condition that it will be done at a safe port without relieving the charterer from the consequences, if they ensue, of his breach of that condition. Indeed that is the very point decided in *Hall Bros. &c. S.S. Co.* v. *R. & W. Paul* (1). The purpose of the provision is to protect the ship in both aspects.

For these reasons I am of opinion that the charterer is liable under the Australian Grain Charter to the shipowner for damage received by the ship owing to being directed to an unsafe port or an unsafe wharf for loading.

The question whether in this particular case the damage received by the chartered motor vessel *Houston City* on 12th July 1951 while loading at Geraldton was received by the ship owing to being directed to an unsafe port or an unsafe wharf depends on a number of matters. The first of them is whether in fact the berth at Geraldton was unsafe. There can be little doubt that the ship when it berthed on 7th July lay in a position of great hazard in case of a change in the weather, unless in the meantime the hauling-off buoy was repaired and replaced. What is an unsafe port or unsafe berth has been the subject of much discussion and no doubt the character of the charter and the contingency to which the given ship may be exposed must be taken into account in determining

(1) (1914) 111 L.T. 811.

whether the port is unsafe : see *Johnston Bros.* v. *Saxon Queen S.S. Co.* (1). But the only serious question here seems to me to arise from the temporary character of the condition which made the port or berth so unsafe in northerly weather. The absence of a buoy was temporary no doubt but it must be remembered that the berth was one which because of the natural features, its situation and its construction, exposed a ship lying at it to considerable danger from northerly weather and that the buoy was an attempt to remedy this natural defect in the character of the port. There was no certainty as to when the buoy would be replaced, just as there was no certainty as to how long the good weather would last. I think the correct view is that while the buoy was absent the berth was definitely unsafe and that the learned judge's finding was correct.

It was suggested that the learned judge was not justified in holding that the defendant ordered the ship to No. 1 berth. In this suggestion I cannot agree. No. 1 berth was the only berth at Geraldton at which bulk wheat could be loaded. When the charterer directed the ship to load bulk wheat at Geraldton it could mean only that she was ordered to No. 1 berth.

It was then contended that the damage to the ship was not the natural or probable consequence of her being ordered to the berth. The chain of causation was broken, it was suggested, because the decision of the master to rely upon the fine weather and not to put out a stream anchor intervened. The master knew the berth to be unsafe, so it was said, or liable to become unsafe on a change of weather. His action in going to the berth with that knowledge, it was said, was the true cause of the damage. I do not think that this view can be supported. The purpose of requiring the charterer to choose a safe port or berth is to avoid danger to the ship. By ordering the ship to an unsafe berth the charterer placed the master in a dilemma and the master's acquiescence in the order cannot relieve the charterer of his responsibility. If it is material the charterer may be taken to have known as much about the matter as the master. The charterer was represented by an agent who took charge of the loading and had the same opportunities for knowledge as the master. The master was guided by the harbour master-pilot who did not advise any other measures. In these circumstances it is difficult to see why the course which was taken was not a direct and natural consequence of the breach of the provision of the charter in giving an order to go to the berth at Geraldton.

In my opinion the judgment of *Wolff* J. is correct and the appeal should be dismissed.

(1) (1913) 108 L.T. 564.

H. C. OF A. 1953-1954.

AUSTRALIAN WHEAT BOARD v. REARDON SMITH LINE LTD.

WEBB AND TAYLOR JJ. This is an appeal from an order of the Supreme Court of Western Australia adjudging the appellant liable to the respondent for damages sustained by the respondent's motor vessel *Houston City* in the port of Geraldton on the 12th July 1951, and for damages which the respondent, pursuant to the *Jetties Act* 1926 and the *Harbours and Jetties Act* 1928-1940 of Western Australia, has become liable to pay in respect of damages to the wharf at that port.

At the time of the events out of which the dispute between the parties has arisen the *Houston City* was under charter to the appellant pursuant to a charter-party dated 19th May 1951, under which the vessel, after completion of her then present voyage and discharge of her cargo, was required, by cl. 1 thereof, to " proceed, as ordered by the charterers, to one or two safe ports in Western Australia, or so near thereunto as she may safely get, and there load according to the custom of the port, always afloat, at such safe dock, pier, wharves, and/or anchorage, as ordered, . . . a full and complete cargo of wheat in bulk *ex* silo which the said charterers bind themselves to provide, not exceeding what the vessel can reasonably stow and carry in addition to her tackle, apparel, provisions, fuel, and furniture ". The charter-party was in the usual form of the Australian Grain Charter and required the vessel after loading to proceed with all reasonable speed via certain alternative routes to discharge its cargo of wheat at one safe port on the continent between Antwerp and Hamburg both inclusive.

On 3rd July the master of the vessel, having completed his then present voyage and discharged the outward cargo, informed the appellant by wireless of his estimated time of arrival at Fremantle and applied for loading orders. In reply the appellant, on the same day, nominated Geraldton as the port of loading for a full and complete cargo of wheat in bulk and thereupon the *Houston City* proceeded to that port arriving about 5.45 p.m. on 7th July.

The port of Geraldton is situated on the southern extremity of Champion Bay where the foreshores of that bay curve from the eastern shores of the bay towards the west. The western end and a substantial portion of the northern side of the harbour is enclosed by a stone breakwater. Towards the end of this stone breakwater there extends from the curve of the bay on the eastern side a structure composed partly of a timber viaduct and stone breakwater. The entrance to the harbour, which is little more than 400 feet wide, is from the north and lies between the extremities of the breakwater and the structure referred to. The harbour's only wharf extends from the east to the west along portion of the southern

extremity of the bay and provides berthing accommodation for a limited number of ships, but No. 1 berth, which is the only berth where there are facilities for the bulk loading of wheat, lies directly to the south of the harbour entrance and distant therefrom about 2,000 feet. The evidence establishes that this berth is frequently used by vessels for bulk loading of wheat, and, indeed, that under earlier charters to the appellant other vessels of the respondent have, on occasions, used this berth. The harbour, however, is not sheltered from winds blowing from directions between north-east and north-west and it is from these directions that gales, on occasions, blow with strength between May and November. According to the *Australian Pilot* (Vol. V, 4th ed.), which was tendered in evidence, " during bad weather it is necessary to keep vessels off the wharf by means of bow and stern hawsers to hauling-off buoys ", and No. 1 berth is said to be the most exposed To avoid the obvious risks to which a vessel might otherwise be subjected hauling-off moorings had been provided in the harbour but on this particular occasion a screw mooring, normally situated approximately 750 feet to the north of the western extremity of No. 1 berth and to which, normally, a stern mooring would, or should be, made fast, was missing and not available for this purpose. It had been struck by a vessel some little time before and had not at this time been restored, though the arrival of a repair ship, the *Cape Otway*, was expected at any moment. Notwithstanding the absence of this mooring, however, the master of the *Houston City* berthed starboard side on at No. 1 berth. Before doing so he dropped his port bow anchor some little distance from the wharf but he did not, as it was contended he should have, run out a stream anchor from the stern of his vessel. At the time of his arrival the weather was fine and neither he nor the pilot thought that such a precaution was necessary.

It was in these circumstances that the vessel commenced loading on 9th July. But on 12th July before loading was completed a wind of gale force commenced to blow from the north and the movement of the vessel during the period of the gale, which lasted a few hours only, caused considerable damage not only to the vessel itself but also to the wharf. The wharf was a concrete structure normally fitted with two horizontal fenders constructed of heavy timber but at this time, it should be observed, approximately fifty feet of the upper fender was missing at this berth. The respondent in these circumstances claimed that Geraldton was not a safe port and on this basis contended that the appellant was liable to make good to it the damage sustained by its vessel and also damages for its liability under the Acts referred to to make good the damage to

H. C. OF A. 1953-1954.

AUSTRALIAN WHEAT BOARD v. REARDON SMITH LINE LTD.

Webb J. Taylor J.

the wharf. The substantial basis of the respondent's claim was that since, in the circumstances as they existed in July 1951, Geraldton was not a safe port within the meaning of the charter-party, the appellant's action in directing the master of the ship to proceed there constituted a breach of the latter's obligations under the charter-party. It was conceded that this voyage charter did not contain any undertaking on the part of the charterer to indemnify the shipowner against the consequences of the master's compliance with the orders of the former but it was contended that the effect of cl. 1—or, rather, that one of its effects—was to impose upon the charterer an obligation to refrain from ordering the vessel to an unsafe port and consequently that such an order constituted a breach of contract sounding in damages. For this proposition the respondents relied strongly on the observations of *Devlin* J. in *G. W. Grace & Co. Ltd.* v. *General Steam Navigation Co. Ltd.* (1) to which reference will later be made.

The first question which arose on the case presented to the learned trial judge by the respondent was whether at the relevant time Geraldton was a safe port for the *Houston City*. The learned trial judge found that it was not, and though he was of the opinion that the evidence did not establish any general proposition that Geraldton was an unsafe port, he was clearly of the opinion that the absence of the hauling-off mooring and of a substantial portion of the upper fender made the bulk wheat loading berth an unsafe berth in July 1951 for a vessel of the dimensions of the *Houston City*. The mooring was, as he said, a facility provided to meet the known conditions and obviate the dangers attendant upon the berthing of a vessel broadside on to the quarter from which bad weather might at that time of the year reasonably be expected. In these circumstances it is difficult to see how No. 1 berth could be regarded as a safe berth at the relevant time unless alternative steps might reasonably have been taken to avoid the very obvious risks involved in entering Geraldton harbour and berthing at that berth. It was, however, suggested that, in the absence of the hauling-off mooring a stream anchor should have been run out from the vessel's stern immediately after she berthed for use as a hauling-off mooring in an emergency of the type which arose. But the learned trial judge accepted expert evidence to the effect that neither a stream nor a kedge anchor would have been effective in the circumstances which prevailed and we see no reason why this view should not be accepted. A review of the whole of the evidence leaves us with the conviction that no witness was prepared to assert that the taking of such a

(1) (1950) 2 K.B. 383.

precaution would have obviated the risks involved though they may to some extent have been lessened. Nor could any witness suggest other precautionary steps which could or might have been taken either upon the berthing of the vessel or after the emergency had arisen which would have prevented or avoided damage to the vessel. The vessel itself could not have been moved from the wharf after the gale commenced without the probability of even greater damage and since the gale arose suddenly and without warning no attempt was made to move the vessel at an earlier stage. There is no suggestion that the gale was of unprecedented force or that it was of a nature not reasonably to be expected during the winter months and, if this be so, we fail to see how the berth to which the vessel was directed can be held to have been a safe berth on the occasion in question, and, accordingly there is no reason why the finding of the learned trial judge on this point should be discharged.

The next question is whether the appellant, having nominated Geraldton as the loading port, is liable in damages to the respondent. The claim that the appellant should be held liable was, according to the learned trial judge, founded on an allegation of breach of contract on its part. " The charterer ", he said, " is said to have warranted the safety of the berth ". In dealing with this contention the learned trial judge referred to *Samuel West Ltd.* v. *Wrights (Colchester) Ltd.* (1) and the *Pass of Leny* (2) which he regarded as being in conflict with the proposition that the charterer is liable in such a case as the present. Thereafter his Honour referred to a number of other cases including *G. W. Grace & Co. Ltd.* v. *General Steam Navigation Co. Ltd.* (3) and referred to the fact that in the latter case *Devlin J.* expressed the view that the dictum of *Branson* J. in *West's Case* (1) was unsatisfactory. But in the result his Honour did not apply the observations in either of these cases but adopted as governing the case a passage from *Carver's " Carriage of Goods by Sea "*, 9th ed. (1952). In so doing his Honour said : "At p. 691 of *Carver* it is pointed out that where the person giving the order knows of the danger, or where it is to be considered as within his reasonable contemplation, he would on principle appear to be liable for loss caused in consequence of compliance with the order in any event. I should be inclined to doubt whether the charterer's knowledge is material in a case where the term ' safe wharf as ordered ' is to be construed as a warranty. But here the defendant knew, or ought to have known, of the

(1) (1935) 40 Com. Cas. 186.
(2) (1936) 54 LI. L.R. 288.
(3) (1950) 2 K.B. 383.

H. C. OF A. 1953-1954.

AUSTRALIAN WHEAT BOARD v. REARDON SMITH LINE LTD.

Webb J. Taylor J.

condition of the berth where it was intended that the ship should go and to which it was compulsorily piloted. The editor of the ninth edition of *Carver* draws attention to the statement in s. 460 of the previous editions, that ' where the charterer designates the berth he is bound to take reasonable precautions to ascertain that it is safe, and, if necessary, warn the master '. I think the statement is good law and applicable here. The necessary control was present, the order was given by the charterer, and it was obeyed. The act of the master in staying in the berth after he became aware of the defect was not unreasonable. His act was ' lawful, reasonable and free from blame if he was merely doing what an intelligent observer knowing how he was circumstanced would have expected him to do ; any damage resulting would be the direct and natural consequence of the breach of contract in giving the order '. (See per Lord *Wright*, *Summers* v. *Salford Corporation* (1)). That is the position as I see it with the ' *Houston City* '. The defendant is responsible for the damage sustained by the ship and any loss which the ship suffers in making good the damage to the wharf ".

It is difficult to see the precise ground upon which his Honour's decision was, in the ultimate analysis, based. If it was based on breach of contract constituted by a direction to the master to proceed to an unsafe port, it is, we should think, immaterial that the appellant knew or ought to have known of the unsafe condition of the Geraldton harbour and No. 1 berth in particular, whilst if it is based on the proposition that the appellant was bound to take reasonable precautions to ascertain that it was safe and, if necessary, warn the master the appellant's liability must be regarded as arising from the breach of an *extra* contractual duty owed to the respondent. The proposition that such a duty exists and that breach of it will give rise to an action for damages really negatives the proposition that the liability of a charterer in the circumstances of the appellant arises from a breach of contract constituted by the giving of a direction to proceed to a port which is in fact unsafe. We do not think that there is any authority which requires us to hold that the charterer's liability in such a case as the present arises from breach of a duty to take reasonable precautions to ascertain that a designated berth is safe, " and, if necessary, warn the master ". In our view the appellant is either liable in damages for breach of contract or is not under any liability whatever and we should add that were it not for the observations of *Devlin* J. in *Grace's Case* (2) we would have little hesitation in holding that the appellant is not in the circumstances of this case liable.

(1) (1943) A.C. 283.

(2) (1950) 2 K.B. 383.

Clause 1 of the charter-party appears to us to be designed to define the obligations of the shipowner with respect to loading ports and to prescribe, consequentially, a limitation upon the charterer's *rights* to designate such ports though, no doubt, under that clause and cll. 6 and 7 the appellant was bound to give appropriate loading orders and provide the stipulated cargo. There is, of course, ample authority for the proposition that a failure or refusal, pursuant to such a provision, to designate a safe port will sound in damages and the nomination of an unsafe port may well be involved in such a failure or refusal. But it by no means follows that where the nomination of an unsafe port is involved in such a failure or refusal the shipowner may recover not only the damages which flow from the failure or refusal but also the damages sustained by the vessel after proceeding to the designated port and as the result of its unsafe nature or condition. Such damages do not flow from a refusal to nominate a safe port. The provisions of cl. 1 do not purport to impose upon the charterer any obligation other than that already indicated and there is no reason why any implication should be made having the effect of imposing upon it an obligation to ascertain whether a port which it desires to designate is safe or not, or, of giving rise to a warranty that any designated port is in fact safe. The view which we have expressed apparently commended itself to *Branson* J. in *West's Case* (1) where the consignee's bill of lading incorporated the terms of an existing charter-party which stipulated for the carriage of cargo to " Colchester as ordered or so near thereunto as she may safely get, and there deliver the same alongside any wharf, vessel or craft, as ordered, where she can safely deliver " (2). The relevant contention of the shipowner in that case was stated by *Branson* J. in the following form : " It is said that under the charterparty, the terms of which were incorporated in the bill of lading, there was a duty upon the defendants—a contractual duty—to order this vessel alongside a safe berth, and as the defendants were under that duty, in the first place there is a presumption that the berth alongside which the vessel went was the berth to which she was ordered to go, and, secondly, that being so, and the berth being an unsafe berth, there was a breach of contract on the part of the defendants " (3). After reviewing the facts his Lordship proceeded : " It seems to me that the attempt to put as a matter of contract the safety of a berth upon the consignee as distinguished from the ship is an attempt which has not succeeded yet in any reported case. I think, when one considers the construction of this portion of the charterparty, it really means no

(1) (1935) 40 Com. Cas. 186.
(2) (1935) 40 Com. Cas., at p. 188.
(3) (1935) 40 Com. Cas., at p. 190.

H. C. OF A. 1953-1954.

AUSTRALIAN WHEAT BOARD v. REARDON SMITH LINE LTD.

Webb J. Taylor J.

more than this, that it gives a right to the consignee to give an order to the ship to go to Colchester and there 'deliver alongside any wharf, vessel or craft, as ordered'. But that right is controlled by the next words in the charterparty, 'where she can safely deliver'. Who is to ascertain whether a particular berth is one at which the ship can safely deliver is not prescribed by the contract at all. It is said by Mr. *Holman* that the duty must lie upon the consignee because the ship cannot tell what sort of a berth she will find alongside the wharf, vessel, or craft alongside which she is ordered to go. But the consignee cannot in the ordinary way tell what is the draft of the ship, what is the shape of her bottom, and what sort of berth she wants in order to be able to lie there without taking damage if she has to take the ground. She may be a ship which can take the ground safely, or she may not. It seems to me that the true position is that the charterparty gives the consignee a right to order the vessel alongside any particular wharf, but if the vessel does not know what it is going to find there it can make inquiry, and if it finds that it cannot safely deliver by going there, then it is excused from obeying that order; that is all, in my view, that is intended by those words of the charterparty. I think that view is supported by what is said by *Hill* J. in his judgment in the case of *The Empress* (1)" (2).

The circumstances which gave rise to the litigation which led to the decision of *Bucknill* J. in the *Pass of Leny* (3) may, perhaps, be said to be distinguishable from those in the present case, but it is a clear decision that where, under a charter-party which required that a vessel should proceed to "Boston (Lincs.) or as near thereto as she can safely get (safely aground)", an order was given that she should proceed to a particular berth which was in fact unsafe the action of the charterer did not constitute a breach of contract.

The case of *Lensen Shipping Co. Ltd.* v. *Anglo-Soviet Shipping Co. Ltd.* (4) upon which the respondent strongly relied in this appeal, is, however, markedly different from the present case and the last two mentioned cases. The facts in that case showed that the vessel in question was chartered by the Lensen Shipping Co. Ltd. to the Anglo-Soviet Shipping Co. Ltd. for a series of voyages within certain European trade limits. Clause 1 of the charter-party contained printed words providing that the vessel should be employed between safe ports where she could lie safely always afloat followed by the typewritten words "or safe aground where steamers of similar size

(1) (1923) P. 96.
(2) (1935) 40 Com. Cas., at pp. 191-192.
(3) (1936) 155 L.T. 421.
(4) (1935) 40 Com. Cas. 320.

and draft are accustomed to lie aground in safety ". Clause 8 of the charter-party provided that the captain should prosecute all voyages with the utmost despatch and that he should be under the orders of the charterers as regards employment, agency or other arrangements. Further it provided that the charterers should indemnify the owners against all consequences or liabilities arising from the captain, officers, or agents signing bills of lading or other documents or otherwise complying with such orders. Finally cl. 12 provided, *inter alia*, that the charterers should be responsible for loss or damage caused to the steamer or to the owners by goods being loaded contrary to the terms of the charter-party or by improper or careless loading or stowage of goods or any other improper or negligent act on their part or that of their servants. A preliminary question arose as to whether the words " where she can lie safely always afloat or safe aground where steamers of similar size and draft are accustomed to lie aground in safety " were part of the definition of the extent to which the charterers were entitled to employ the vessel during the whole period of her employment. *Greer* L.J. was of the opinion that this was the true interpretation, though he was prepared, alternatively, to hold that the same result followed by necessary implication. Accordingly he said : " it follows that the ship was employed at a loading berth which was outside the limits in which the owners agreed that she should be employed " (1) and upon this, among other grounds, his Lordship considered the charterers liable for the damage which had been occasioned by reason of the vessel loading at an unsafe berth. He was also of the opinion that the charterers were, in any event, liable under the provisions of the indemnity clause and also under the provisions of cl. 12 to which we have already referred. On this appeal, however, the respondents relied upon the observations made by his Lordship in relation to the first ground upon which he considered the charterers were liable and contended that there was no relevant distinction between the position of a charterer under a time charter of the nature under consideration in that case and that of the appellant under charter-party before the Court in the present case. In the course of the argument it was contended that, notwithstanding a provision that he shall be under the orders of the charterer as regards the employment of a ship, the master of a vessel under a time charter is not bound to obey an order, such as an order to proceed to an unsafe port, which takes the employment of the vessel outside the contractual limits. This being so, it is said,

(1) (1935) 40 Com. Cas., at p. 329.

H. C. OF A. 1953-1954.

AUSTRALIAN WHEAT BOARD v. REARDON SMITH LINE LTD.

Webb J. Taylor J.

there is no real distinction between the situation which presented itself to the Court of Appeal in that case and the circumstances which we are called upon to consider. We think, and it seems to us that *Greer* L.J. must also have thought, that there is a very real distinction between the two sets of circumstances. In the present case the master, as such, was under no obligation to accept orders from the charterer. No doubt as master of the vessel and as a servant of the respondent he was bound as regards the latter to fulfil the terms of the contract evidenced by the charter-party so far as he was called upon to do so, but he was under no obligation to accept orders from the charterer generally as to the employment of his ship. In *Lensen's Case* (1) *Greer* L.J. thought it necessary to refer to a number of the provisions of the charter-party for the purpose of determining the rights of the parties and it seems reasonably apparent that he attached importance to the circumstance that the charterers were entitled to give orders as to the employment of the ship, and it was a material circumstance that orders for the employment of the ship could be given only within the limits of the charter-party which included a limitation to ports " where she can lie always afloat or safe aground where steamers of similar size and draft are accustomed to lie aground in safety " (2). The giving of an order to the master to proceed to an unsafe berth, though one which he may have been entitled to refuse to execute, was an order which he was entitled to carry out on the charterer's behalf and, undoubtedly, in such circumstances the shipowner was entitled to complain that the charterers had committed a breach of contract by ordering the master to take the vessel to an unsafe berth. In executing the order there could, we think, be little doubt that the act of the master must, as between the shipowner and the charterers, be regarded, in law, as the act of the latter, and, as such, as constituting a breach of contract giving rise to damages. Considerations such as these, it seems to us, were vital to the observations of *Greer* L.J. on the first point upon which he based his decision and, that this was so, is evident from his concluding observations concerning cases such as *Samuel West Ltd.* v. *Wrights (Colchester) Ltd.* (3). Concerning such cases his Lordship said : "A number of cases were cited in support of the charterers' contentions, but I do not think they have any relevancy to the questions of construction that arise on this charterparty. Cases such as *West, Ltd.* v. *Wrights (Colchester), Ltd.* (3) and *The Empress* (4) do not apply, for, among other reasons, they do not relate to time charters, nor

(1) (1935) 40 Com. Cas. 320.
(2) (1935) 40 Com. Cas., at p. 325.
(3) (1935) 40 Com. Cas. 186.
(4) (1923) P. 96.

did the contracts in those cases contain a term that the master should obey the orders of the charterers or shippers as to the employment of the ship " (1).

The same considerations we think are implicit in the reasons of *Slesser* L.J. who based his decision upon the implication " that it was the intention of the parties, as derived from the charterparty, though not so expressed in words, that the vessel should be employed not only between good and safe ports or places where she could lie safely always afloat or safe aground but also between good and safe berths with similar qualifications—the word ' port ' or ' places ' to be deemed to include that part of the port or places which is a berth " (2). His Lordship's reference to the limits within which the vessel should be employed must be taken to mean the limits within which the vessel should be employed *by the charterer*.

In *G. W. Grace & Co. Ltd.* v. *General Steam Navigation Co. Ltd.* (3) *Devlin* J. referred to the fact that *Samuel West Ltd.* v. *Wrights (Colchester) Ltd.* (4) was cited in the Court of Appeal and distinguished by *Greer* L.J. on the ground that it did not relate to a time charter and on the ground that the contract did not contain a term that the master should obey the orders of the charterers as to the employment of the ship. " With the greatest deference ", said *Devlin* J., " I find this distinction difficult to follow. It implies that, whereas under a voyage charterparty the master is not bound to obey the order of the charterer to go to a port or berth outside the contractual limits, under a time charterparty he is. I cannot think that the clause in the time charterparty which puts the master under the orders of the charterer as regards employment is to be construed as compelling him to obey orders which the charterer has no power to give " (5). " But ", his Lordship added, " it is perhaps sufficient for my determination of the present case that it concerns a time charterparty and is therefore governed by *Lensen Steamship Company Ltd.* v. *Anglo-Soviet Steamship Company Ltd.* (6) and not by *Samuel West, Ltd.* v. *Wright's (Colchester) Ltd.* (4) " (5). In referring to the fact that the charter-party in *West's Case* (4) did not contain a term that the master should obey the orders of the charterers as to the employment of the ship *Greer* L.J. was merely referring to the terms of the relevant contractual stipulation usually found in time charters. With deference to *Devlin* J. it seems to us that it was not suggested that the master of a vessel under a

(1) (1935) 40 Com. Cas., at p. 330.
(2) (1935) 40 Com. Cas. 320, at pp. 330-331.
(3) (1950) 2 K.B. 383.
(4) (1935) 40 Com. Cas. 186.
(5) (1950) 2 K.B., at p. 396.
(6) (1935) 40 Com. Cas. 320.

H. C. OF A. 1953-1954.

AUSTRALIAN WHEAT BOARD v. REARDON SMITH LINE LTD.

Webb J. Taylor J.

time charter containing such a clause is bound to obey an order of the charterer to go to a port or berth outside the contractual limits; what his Lordship appears to have had in mind was that where the master is placed under the orders of the charterer the action of the master in executing an order of the charterer to proceed to an unsafe port or berth is as between the parties, and notwithstanding the fact that the master may be entitled to refuse to execute the order, in law, the act of the charterer and that, as such, it constitutes a breach of contract on the part of the charterer.

In the course of the argument on the present appeal reference was also made to *Hall Bros. Steamship Co. Ltd.* v. *R. & W. Paul Ltd.* (1); *Axel Brostrom & Son* v. *Louis Dreyfus & Co.* (2) and the judgment of *Bailhache* J. in *Limerick Steamship Co. Ltd.* v. *W. H. Stott & Co. Ltd.* (3). These cases were also referred to by *Devlin* J. in *Grace's Case* (4) after stating his own view of the point involved in the case before him. He said: "As the authorities are not clear and conclusive on the point which I have to determine, I shall state my own view on it. I think that it is necessary first to determine whether the giving of the order constitutes a breach of contract. *Ex hypothesi*, the order has no contractual force and is therefore of no greater validity than an order given to the ship by a stranger. The charterers in this case do not expressly warrant that their orders will be within their powers, and it might be argued that it is for the recipient to determine for himself whether they are binding on him or not. In some types of contract, that may be so; but in this case counsel for the charterers concedes that the charterparty, either on its true construction or by implication, forbids the giving by the charterers of orders outside their powers, and accordingly that the giving of an order to sail to an unsafe port is a breach of the charterparty. If this concession had not been made, counsel would plainly have found it difficult to explain *Hall Brothers Steamship Co. Ltd.* v. *R. & W. Paul Ltd.* (1); *Axel Brostrom and Son* v. *Louis Dreyfus and Co.* (2) and the judgments of *Bailhache* J. in *Limerick Steamship Company Ltd.* v. *W. H. Stott and Co. Ltd.* (3) and of *MacKinnon* J. in *Lensen Steamship Company Ltd.* v. *Anglo Soviet Steamship Company Ltd.* (5), which all proceeded on the basis that the order to go to an unsafe port or berth was a breach of the charterparty. The same result might be reached, irrespective of the giving of any order, by construing cl. 2 as a warranty that the ship would not be

(1) (1914) 19 Com. Cas. 384.
(2) (1932) 38 Com. Cas. 79.
(3) (1921) 1 K.B. 568.
(4) (1950) 2 K.B. 383.
(5) (1935) 40 Com. Cas. 320.

employed otherwise than between good and safe ports; but, in view of the charterers' concession, I need not consider this" (1). We respectfully agree that it was implicit in the charter-party under consideration in *Grace's Case* (2) that orders should not be given by the charterer to the master to proceed to an unsafe port. The basis of such an implication is to be found in the limits within which it was agreed that the charterer should be authorized to employ the ship and in the stipulation that the master should be under the orders of the charterers as regards employment agency or other arrangements. The implication, it may be said, was necessary to carry out the clear intention of the parties with respect to the employment of the ship and, in relation thereto, the giving of orders to the master. But it does not follow that such an implication arises in all cases or that failure to make the concession which was in fact made by counsel for the charterers in that case would have caused difficulty in explaining the other cases referred to by his Lordship. As a general rule there is, we should think, no room for such an implication where the master is not, as between the ship-owner and the charterer, subject to the orders of the latter and this is the position in the present case. In *Hall Bros. Steamship Co. Ltd.* v. *R. & W. Paul Ltd.* (3) the question concerning which *Devlin* J. expressed difficulty does not appear to have been raised. The questions which arose for decision were whether the plaintiffs were estopped from alleging that King's Lynn was not a safe port, whether King's Lynn was in fact a safe port and whether the port itself included not only the dock but the place where the vessel was lightened before proceeding into the dock. The full terms of the charter-party do not appear in the report of the case and we should not have thought that that decision is an authority for any general proposition relevant to the present case. In *Axel Brostrom & Son* v. *Louis Dreyfus & Co.* (4), *Roche* J. was concerned with questions raised in a special case stated by an arbitrator. The arbitrator had found that the port of Londonderry was not a safe port for the vessel mentioned in that case and on that basis he awarded a sum of money to the owners. The only question raised by the case for the opinion of the Court was whether on the true construction of the charter-party and on the facts set out Londonderry was a safe port. The case expressly provided that should that question be answered in the negative the award should stand but that if it should be answered in the affirmative there was to be substituted an award that the owners were not entitled

(1) (1950) 2 K.B., at p. 396.
(2) (1950) 2 K.B. 383.
(3) (1914) 19 Com. Cas. 384.
(4) (1932) 38 Com. Cas. 79.

H. C. OF A. 1953-1954.

AUSTRALIAN WHEAT BOARD v. REARDON SMITH LINE LTD.

Webb J. Taylor J.

to recover any damages against the charterer. Again, there is nothing appearing from the reasons in that case to assist in the solution of the present problem. The third case, that of *Limerick Steamship Co. Ltd.* v. *W. H. Stott & Co. Ltd.* (1) was concerned with a vessel under time charter to the defendants and the shipowner sought to recover damages for breaches of the charter-party. One breach complained of was that the vessel had been ordered to an ice-bound port. A second complaint was that she had subsequently been ordered to proceed to Manchester and that, although she was able to pass through the Manchester Shipping Canal on her way to Manchester, she was unable, after having discharged her cargo, to proceed down the canal and clear the bridges without cutting her masts. In these circumstances it was contended that Manchester was not a safe port for this vessel. There was a finding for the charterers in respect of the first breach complained of, but in respect of the second breach damages were awarded. But this was a case where the vessel was let and the charterers agreed to hire the steamer for one Baltic round voyage and where the vessel was to be employed in lawful trades between good and safe ports or places within the limits of a Baltic round voyage. The charter-party further provided that " although appointed by the owners the captain shall be under the orders and direction of the charterers as regards employment, agency, or other arrangements " (2). This being so, the principles applied in the *Lensen Shipping Co.'s Case* (3), were applicable and there is, we think, no difficulty in reconciling the view in that case with the views in *West's Case* (4).

We have been unable to find any case where, in the circumstances such as the present, a charterer has been held to warrant the safety of a port nominated by him, or, where the nomination of an unsafe loading port or berth pursuant to a charter-party in the form of that which is before us has been held to constitute a breach of contract giving rise to damages where the master of the vessel has accepted the order and proceeded to the port and there sustained damage. There is, as we have already said, no doubt that a refusal or failure to provide the stipulated cargo at a safe port is answerable in damages but such a conclusion depends upon principles which do not assist in the solution of the problem which arises in this case. In all the circumstances we prefer to adopt the observations of *Greer* L.J. in the *Lensen Shipping Co.'s Case* (3) and those of *Branson* J. in *West's Case* (4) rather than those of

(1) (1921) 1 K.B. 568.
(2) (1921) 2 K.B., at p. 614.
(3) (1935) 40 Com. Cas. 320.
(4) (1935) 40 Com. Cas. 186.

Devlin J. in *Grace's Case* (1) and to hold that where under a charter-party in the form of that which is before us an unsafe port or berth is nominated by the charterer he does not, merely by reason of such nomination, become liable for damages sustained as a result of the master proceeding to such unsafe port or berth. Nor, do we think, that in the circumstances of this case there is any other ground upon which the charterer should be held liable. Accordingly we are of the opinion that the appeal should be allowed.

Appeal allowed with costs. Order of Supreme Court discharged. In lieu thereof enter judgment for the defendant with costs.

Solicitor for appellant, *D. D. Bell*, Crown Solicitor for Commonwealth.

Solicitors for respondent, *Frank Unmack & Cullen.*

F. T. P. B.

(1) (1950) 2 K.B. 383.