[PRIVY COUNCIL.]

REARDON SMITH LINE LIMITED . . APPELLANT;
PLAINTIFF-RESPONDENT,

AND

AUSTRALIAN WHEAT BOARD . . . RESPONDENT.
DEFENDANT-APPELLANT,

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

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1955, *Dec.* 1, 5, 6, 7;

1956. *Jan.* 26.

Viscount Simonds, Lords Oaksey, Radcliffe, Keith of Avonholm and Somervell of Harrow.

Shipping—Charter-party—Voyage charter—Ship to proceed "as ordered by charterers" to safe port—Ship ordered to unsafe port—Damage to ship—Liability of charterers.

When by the terms of a charter-party the charterer is obliged to nominate a safe port and he fails to do so, nominating one which is unsafe, he will, subject to questions of remoteness, *novus actus interveniens* and the reasonableness of the master's action in accepting the nomination, be liable for all damage properly flowing from such failure as is sustained by the ship as a result of its entering such port.

A clause in a voyage charter-party in the "Australian Grain Charter" form provided that the ship chartered should "proceed, as ordered by the charterers, to one or two safe ports in Western Australia", and there load, always afloat, "at such safe dock, pier, wharves and/or anchorage as ordered" a cargo of wheat. The vessel was severely damaged in the course of loading in an unsafe port nominated by the charterers as the result of a storm which caused her to range heavily against the concrete side of the berth.

Held, that the words of the charter-party were an undertaking by the charterers to nominate a safe port and a safe dock within that port, and, accordingly, not having done so, the charterers were liable for damage to the ship flowing from the breach of that undertaking.

Dicta of *Devlin* J. in *Compania Naviera Maropan S/A* v. *Bowaters Lloyd Pulp & Paper Mills Ltd.* (1955) 2 Q.B. 68, at p. 77, as to the position of a master if and when he realizes or suspects danger or the possibility of danger at a nominated port, adopted.

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Compania Naviera Maropan S/A v. *Bowaters Lloyd Pulp & Paper Mills Ltd.* (1955) 2 Q.B. 68, approved; *Limerick S.S. Co. Ltd.* v. *W. H. Stott & Co. Ltd.* (1921) 2 K.B. 613 and *Lensen Shipping Co. Ltd.* v. *Anglo-Soviet Shipping Co. Ltd.* (1935) 40 Com. Cas. 320; 52 Ll.L.R. 141, considered; *Pass of Leny* (1936) 155 L.T. 421 and *Samuel West Ltd.* v. *Wrights (Colchester) Ltd.* (1935) 40 Com. Cas. 186, distinguished.

Decision of the High Court of Australia: *Australian Wheat Board* v. *Reardon Smith Line Ltd.* (1954) 91 C.L.R. 233, reversed.

APPEAL from the High Court to the Privy Council.

This was an appeal by special leave from the decision of the High Court (*Webb* and *Taylor* JJ., *Dixon* C.J. dissenting) (*Australian Wheat Board* v. *Reardon Smith Line Ltd.* (1)) allowing an appeal from the decision of the Supreme Court of Western Australia (*Wolff* J.) (2) in an action by the appellant as owner of the M.V. *Houston City* against the respondent as charterer of the vessel for damages for breach of the charter-party.

The relevant facts are set forth in the judgment of their Lordships hereunder.

A. A. Mocatta Q.C. and *John Donaldson*, for the appellant.

Sir *Garfield Barwick* Q.C. and *Michael Kerr*, for the respondent.

Their Lordships took time to consider the advice they would tender to Her Majesty.

Jan. 26, 1956. LORD SOMERVELL OF HARROW delivered the judgment of their Lordships as follows:

This is an appeal by special leave from a judgment of the High Court of Australia.

The appellant as owners of the M.V. *Houston City* sued the respondent as charterer under a voyage charter for damages for breach of contract. The respondent it is alleged ordered the *Houston City* to an unsafe port and unsafe berth and as a result the vessel suffered damage. The case proceeded on the issue of liability only.

In the Supreme Court of Western Australia, *Wolff* J. (2) found for the appellant. On appeal the High Court by a majority, *Dixon* C.J. dissenting, found for the respondent (1).

The charter-party was dated 19th March 1951. The relevant provisions are as follows:—" It is this day mutually agreed . . .

(1) (1954) 91 C.L.R. 233.

(2) (1953) 55 W.A.L.R. 25; 1 Ll.L.R. 131.

1. 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 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 . . . 7. If proceeding in ballast, the master shall apply to charterers . . . for loading port orders by wireless 96 hours before arrival at the loading area . . . and orders for loading port shall be given by charterers by wireless within 48 hours of receipt of master's application ".

The question whether the port or wharf was unsafe within the meaning of the clause is logically the first issue. All judges below decided that it was. The main issue then argued was one of construction as to the liability, if any, of the charterer for damage to the ship which flowed from the non-safety of the port or wharf. There was a further issue as to whether, assuming the charterer's liability for damage, the damage on the facts of this case flowed from the breach.

After summarizing the facts it will be convenient to deal first with the issue of construction.

On 3rd July 1951, in accordance with cl. 7, the master sent a radio message to the respondent's office at Perth for orders. The relevant words in the reply were : " Loading Port Geraldton full and complete cargo wheat in bulk ".

The master had loaded grain at Geraldton on two previous occasions. There was only one berth suitable for loading grain and it is immaterial in this case whether one treats the allegation as coming under the words " safe port " or " safe wharves ". In the judgments below reference is made to the safety of the berth. In considering the principle it seems right to use one or other of the words contained in the relevant clause, either of which in the present case would apply. The vessel arrived on 7th July and was met by the pilot and harbour master, Captain Sweett. After a short wait for another vessel to get out of the way the *Houston City* berthed shortly after 5 p.m. The weather was fine.

The berth is exposed to northerly winds but the evidence did not establish that it was ordinarily unsafe for a vessel such as the *Houston City*. Two defects are relied on. One of two hauling-off buoys was missing and had been missing since the previous May. The master noticed the absence of the buoy and Captain Sweett

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informed him that its return was imminent. Further, in the centre of a waling-piece or fender some fifty feet was missing and had been missing for some months. There was no suggestion as to when it was likely to be replaced. Both the buoy and the waling-piece were to obviate the danger to a vessel at the berth from northerly winds.

There was a suggestion below that the master should have laid out an additional anchor. This was rejected by all the learned judges and was not pursued before the Board.

The 7th July was a Saturday. Loading began on the 9th and continued till the 12th. About 11.45 a.m. on that day the wind freshened from the north and soon increased to gale force. The ship rolled and damaged herself and the wharf. The learned judge found that the absence of the buoy and of the waling-piece contributed to the damage.

The vessel with the necessary parts and equipment to repair the buoy arrived on the 12th and repairs began. The buoy was restored on the 13th.

Proceeding on the basis that the port or wharf was unsafe the appellant's case on construction is simple. It submits that under cl. 1 the charterer has undertaken to nominate a safe port or wharf for the loading. In breach of this provision the port or wharf nominated was unsafe and if damage to the ship flowed from that breach as a natural and probable consequence the charterer is liable for it.

The respondent did not of course suggest that the owner could be compelled to load at an unsafe port, but contends that if the charterer nominated an unsafe port, the owner could reject the nomination, as soon, presumably, as he had discovered that the port was unsafe. He might be entitled to damages for delay caused by the nomination. If, however, he accepted the nomination and went to the port the charterer would, it is said, in no circumstances be liable for damage flowing from the want of safety, unless liability arose under some other provision in the contract.

The two rival contentions can be illustrated by two citations, one from the majority judgment and the other from a judgment of *Bailhache* J., in *Limerick S.S. Co. Ltd.* v. *W. H. Stott & Co. Ltd.* (1) cited by *Dixon* C.J. (2): " Clause 1 of the charter-party appears to us ", that is to the majority of the High Court, " 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

(1) (1921) 1 K.B. 568. (2) (1954) 91 C.L.R., at pp. 247, 248.

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 " (1).

In *Limerick S.S. Co. Ltd.* v. *W. H. Stott & Co. Ltd.* (2), the main issue related to ice at Abo. There was a second point. The ship had been ordered to Manchester. After discharge she was unable to get down the canal without cutting her masts. *Bailhache* J. 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 " (3).

Their Lordships are unable to construe the clause in the way suggested in the passage cited from the majority judgment. That construction in effect makes the nomination of an unsafe port equivalent in its legal consequences to a failure to nominate a port at all. This would seem to disregard the words and the realities of the relationship. The words of the clause in their Lordships' opinion are an undertaking by the charterers to nominate a safe port and a safe dock, etc., within that port. The charterer is given a choice, within limits prescribed, as to where he will have his cargo available for loading. It seems natural that he should give at any rate some undertaking as to its safety and that the owners should be entitled to rely on the place nominated being safe. If he breaks this undertaking and nominates an unsafe port and the ship is damaged through going there he will be liable for the damage, subject of course to possible questions of remoteness, or *novus actus interveniens*. This was the construction assumed by *Bailhache* J., in the passage cited. If there is any doubt in the charterer's mind as to the draught or dimensions of the ship as affecting its power

(1) (1954) 91 C.L.R., at p. 259.
(2) (1921) 1 K.B. 568.
(3) (1921) 1 K.B., at pp. 575, 576.

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to load safely at a particular port or berth there is obviously no difficulty in his getting any information he wants from the owners.

The authorities support the construction submitted by the appellant.

In *Ogden* v. *Graham* (1), the vessel was ordered by the charterer under a voyage charter-party to discharge at a port held to be unsafe. The owners refused to go to the port and claimed damages for detention. The lack of safety arose from the fact that the district was in a state of rebellion and any ship going to the port would have been confiscated. The defendant argued that " safe " referred only to incidents of navigation. This argument was rejected. *Wightman* J. said, " 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 " (2). *Blackburn* J., having held that the port was unsafe, said : " That being so, 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 " (3).

In *Hall Bros. S.S. Co. Ltd.* v. *R. & W. Paul Ltd.* (4), the vessel, under a voyage charter-party, was ordered to King's Lynn. The vessel could not reach the dock without lightening. *Sankey* J. held that as a result King's Lynn was not a safe port. It had been argued, *inter alia*, that as the master had accepted the order to proceed to King's Lynn no damages could be recovered. This argument was rejected and the plaintiffs recovered the costs incurred in lightening the vessel.

Limerick S.S. Co. Ltd. v. *W. H. Stott & Co. Ltd.* (5) has already been referred to. The charter in that case was a time charter under which the vessel was to be employed between good and safe ports or places within the limits of one Baltic round. It also contained a clause, usual in time charters, that the master shall be under the orders of the charterer who shall indemnify the owner for the consequences of complying with such orders. The majority in the High Court distinguished that case by reason of the presence of that latter clause. It is clear that that was not the ratio of the learned judge. He relied and relied only on the provision that the vessel could only be ordered to a safe port.

(1) (1861) 1 B. & S. 773 [121 E.R. 901].
(2) (1861) 1 B. & S., at p. 780 [121 E.R., at p. 903].
(3) (1861) 1 B. & S., at p. 782 [121 E.R., at p. 904].
(4) (1914) 111 L.T. 811 ; 30 T.L.R. 598.
(5) (1921) 1 K.B. 568.

In *Axel Brostrom & Son* v. *Louis Dreyfus & Co.* (1) a question of law as to the meaning of a safe port came before *Roche* J. on an award in the form of a special case. Under a voyage charter the charterer had ordered the vessel to Londonderry. Owing to her length she required tug assistance to negotiate the bends of the River Foyle. There were no tugs at Londonderry and one had to be obtained from Glasgow. The charterer argued unsuccessfully that the port was a safe port, but neither before the arbitrator nor before the judge was it suggested that the charterer was not responsible for the cost of obtaining the tug if he had ordered the vessel to an unsafe port.

In *Samuel West Ltd.* v. *Wrights (Colchester) Ltd.* (2), *Branson* J. made some observations which are cited and relied on by the majority of the High Court. A study of the facts makes it clear that the observations were not necessary to the decision. The owners of a motor barge claimed damages from the defendant as consignee on the ground that their vessel had been injured at a wharf to which she had been ordered by the defendant. There was no evidence that the defendant had ordered her there. The words to be construed were different and the learned judge apparently construed them as leaving open the question which party had to decide on safety. He added words to the effect that in his opinion it was the owners or their master. He referred to the fact that the draught and structure of the ship would be within the knowledge of the master.

In the *Pass of Leny* (3) the port, Boston, was named in the charter-party. The damage was done at the berth and the owners of the vessel sued the owners and managers of the wharf as first defendants and the charterers as second defendants. The charter-party provided that the loading place or dock should be " indicated " by the charterers. These words were construed by *Bucknill* J. as not amounting to an express promise of safety, and he refused to imply such an obligation. In their Lordships' opinion neither of these cases lends any effective support to the respondent's construction.

In *Lensen Shipping Co. Ltd.* v. *Anglo-Soviet Shipping Co. Ltd.* (4) questions of law came before the court on a special case. The charter was a time charter. The berth was unsafe and the ship had been delayed and damaged. Facts and issues had become involved. In the Court of Appeal, *Greer* L.J. at the end of his judgment used

(1) (1932) 38 Com. Cas. 79.
(2) (1935) 40 Com. Cas. 186.
(3) (1936) 155 L.T. 421.
(4) (1935) 40 Com. Cas. 320; 52 Ll.L.R. 141.

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words which suggest that the claim for ordering to a port which was not safe succeeded under the employment and indemnity clause which is not of course ordinarily found in a voyage charter. There are other passages in his judgment which suggest that he was treating this as an alternative to the case made under the " safe ports " clause. Where a time charter contains as it did in *Lensen's Case* (1) an undertaking by the charterer that the vessel is to be employed between good and safe ports, the liability of the charterer is at any rate in all ordinary circumstances the same as where under a voyage charter-party the charterer undertakes to nominate a safe port.

In *G. W. Grace & Co. Ltd.* v. *General Steam Navigation Co. Ltd.* (2) *Devlin* J. reviewed the authorities. He disagreed with *Branson* J.'s dictum and doubted the existence of the distinction suggested by *Greer* L.J. between time charters and voyage charters in " safe port " cases. The case arose out of a time charter.

After the hearing of the present case in the High Court the issue under consideration came before *Devlin* J. and the Court of Appeal (*Compania Naviera Maropan S/A* v. *Bowaters Lloyd Pulp & Paper Mills Ltd.* (3)). It was held that under the charter-party the charterer was under an obligation to nominate a safe loading place for the ship chartered. The loading place being unsafe and the master having acted reasonably the charterer was held liable for damage to the ship. Substantially the same argument was put forward as in the present appeal and rejected.

The decision of the High Court in the present case was cited and the Court felt unable to adopt the majority decision and approved the Chief Justice's dissenting judgment.

It was argued as here that it was for the master to decide and that if he accepted the nomination the charterer was under no liability for damage arising out of the absence of safety. On the general and difficult question as to the position of the master if and when he realizes or suspects danger or the possibility of danger, their Lordships would adopt the following passage from the judgment of *Devlin* J. : " I think, therefore, that the real question is not so much whether a distinction can be drawn between a voyage and a time charter, as whether any charter-party, whether for voyage or for time, is exempt from the application of the ordinary law of contract. I see no reason in principle why it should be, and I do not think that business convenience requires it. Indeed, I think business, whether maritime or otherwise, might be gravely

(1) (1935) 40 Com. Cas. 320; 52 Ll.L.R. 141.
(2) (1950) 2 K.B. 383.
(3) (1955) 2 Q.B. 68.

impeded if the ordinary principle were not allowed to operate freely —and by the ordinary principle I mean that, generally speaking, a man is entitled to act in the faith that the other party to a contract is carrying out his part of it properly. It does not lie in the mouth of the promisor to say that a promisee has no right to assume that a promise has been faithfully carried out and should make his own inquiries to see whether it is or not. If everything done under contract has to be scrutinized and tested by the other party before he can safely act upon it, many transactions might be seriously held up—in doubtful cases, perhaps indefinitely. Even if the breach is clear, it is vital to the proper conduct of business that the promisee should be able, if he considers the breach a minor one, to proceed without sacrificing his right to be indemnified. That is just as important in a voyage charter-party as in any other sort of business. Suppose that the master thinks that the nominated berth is barely large enough and that he might scrape his vessel's sides and damage her paintwork. If (as is the case here) it is the only berth that can be nominated, is he to throw up the voyage ? I am not asked to assess the damages in this case, so I do not know what was the cost of repairing the *Stork*. But it is certain that if the ship had sailed away from Tommy's Arm without carrying her freight, the cost of the time lost would have been considerable. It is possible even in this case that a prudent master, without knowing for certain whether he was right or not and so acting in the interests of all concerned, might have felt that the risk of damage to the vessel's bottom was outweighed by the certainty of time lost. A master under a voyage charter-party is often confronted with this sort of problem, as, for example, when he has to decide whether to accept or reject cargo that may be dangerous, and there are, of course, many cases in which the ship has recovered for damage done to her by dangerous cargo. To deny the defendants' proposition does not mean that a master can enter ports that are obviously unsafe and then charge the charterers with damage done. The damages for any breach of warranty are always limited to the natural and probable consequences. The point then becomes one of remoteness of damage ; or if it is thought better to put it in Latin, the expressions *novus actus interveniens* and *volenti non fit injuria* are ready to hand. There is also the rule that an aggrieved party must act reasonably and try to minimize his damage. A master who entered a berth which he knew to be unsafe (and which perhaps the charterer had nominated in ignorance of its condition) rather than ask for another nomination and seek compensation for any time lost by damages for detention, might find himself in

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trouble. So might a master who sought compensation for the time lost in sailing back across the Atlantic because he had not cared to risk damage to his paintwork " (1).

On the question of construction both in principle and on authority their Lordships are of opinion that the appellant succeeds.

Certain subsidiary submissions were made by the respondent. It was argued that the danger was likely to be of such short duration that the Board should reverse the finding that the port was not safe. This was put forward on the assumption that if the buoy, the repair of which was expected at any time, had been in order the absence of the waling piece would not have rendered the berth unsafe. There is no finding to this effect, nor does the point appear to have been raised. It would seem that the learned trial judge took the opposite view. The master seems to have thought the waling-piece would not have mattered if the buoy was back, but a marine surveyor called by the appellant said the wharf would not be safe with a substantial part of an upper waling-piece missing. In any event there was no certainty as to when the buoy would be repaired. This submission fails.

In the present case the port was unsafe at the time of the nomination and remained unsafe until the damage occurred. There was discussion in the argument as to the position if, at the time of nomination, the port would so far as could be foreseen be safe for the vessel when loading but became unsafe later through circumstances unforseeable by the charterer. The point does not arise here and it is unnecessary to decide it. It would be a question of construction.

There are no grounds in their Lordships' opinion for disturbing the findings that the port or wharf was unsafe or the further finding that the master acted reasonably and the damage therefore flowed from the breach.

Their Lordships will therefore humbly advise Her Majesty that the appeal be allowed and the order of *Wolff* J. restored. The respondent will pay the costs in the High Court and of this appeal.

Solicitors for the appellant, *Holman, Fenwick & Willan.*
Solicitors for the respondent, *Coward, Chance & Co.*

B. McP.

(1) (1955) 2 Q.B., at pp. 77, 78.