[HIGH COURT OF AUSTRALIA.]

THE PRESIDENT OF INDIA . . . APPELLANT;

AND

THE MOOR LINE LIMITED . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1958.

MELBOURNE, *Mar.* 12, 13, 14; *May* 15.

Dixon C.J., Williams, Webb, Fullagar and Taylor JJ.

Charter party—Construction—Right of charterer to send cargo alongside "continuously"—Inability of shipowner's stevedore to obtain labour from Stevedoring Industry Board during hours other than normal working hours—Whether a breach of shipowner's obligation.

A charter party contained the following provision "The charterers . . . shall have the right of sending the cargo alongside continuously (Sundays and holidays excepted) and the vessel shall be bound to proceed with the loading if so required."

Held, by *Dixon* C.J., *Williams* and *Taylor* JJ., *Webb* and *Fullagar* JJ. dissenting, that a shipowner who was unable to accept cargo outside normal working hours because of the Stevedoring Industry Board's inability to supply labour was not in breach of his obligation under the charter party.

Decision of the Supreme Court of Victoria (*Herring* C.J.), affirmed.

APPEAL from the Supreme Court of Victoria.

This was an appeal by special leave from an order made by the Supreme Court of Victoria (*Herring* C.J.) by which answers were given to certain questions raised by the award of an umpire stated in the form of a special case for the decision of the court in the matter of a claim made by the President of India against Moor Line Limited arising out of a charter party made on 10th November 1950 between the parties at London in respect of the charter of the M.V. *Exmoor*.

The relevant facts and provisions of the charter party and the arguments of counsel appear sufficiently in the judgments of the Court hereunder.

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May 15.

D. I. Menzies Q.C. and *K. A. Aickin*, for the appellant.

Dr. *E. G. Coppel* Q.C. and *R. K. Fullagar*, for the respondent.

Cur. adv. vult.

The following written judgments were delivered :—

DIXON C.J. This appeal concerns the claim of a charterer against a shipowner for an allowance in respect of a period of twelve hours for which the charterer would have obtained despatch money had the stevedore for the shipowner been able to find labour to work the ship during those hours.

The respondents are owners of the M.V. *Exmoor*, 5,324 tons gross register. The appellant chartered her to carry a cargo of wheat from a port or ports in Australia to be named to Indian ports. The cargo was wheat in bulk *ex* silo and the term of loading was given as end of November or early December 1950. The ship was ordered to the port of Geelong for the purpose of loading wheat on 8th December 1950. The master gave notice to the charterer that she was ready to load at 1.30 p.m. on Tuesday, 19th December 1950. She was berthed at a silo wharf. The Grain Elevators Board owns the silos and provides the shore labour to work them in loading ships. The wheat is conveyed by endless belts and thence by chutes overhanging the vessel which are led into the holds. The chutes terminate in spouts by which the wheat is directed as may be required in the hold where it is levelled by trimming machines. The handling of the spouts in the hold and the use of the trimming machines to level the wheat form the responsibilty of the ship. The supply of wheat by conveyor belts and chutes is maintained by permanent employees of the Grain Elevator Board and the cost is charged by the board to the shipper or charterer. The board's men are members of the Storemen and Packers' Union. The work in the ship's hold in handling the spouts and trimming machines is undertaken by a stevedoring company employed by the ship which of course bears the cost. The stevedoring company employed registered waterside workers. Under the *Stevedoring Industry Act* 1949 it was necessary that the employer, the stevedoring company, should be registered and that the waterside workers it employed should be registered. The shipowners, not being registered, could not employ the labour directly. Moreover the supply of labour was controlled and allocated by a representative of the Stevedoring Industry Board. In December 1950 it appears that that board was unable to supply labour for M.V.

Exmoor except for work in ordinary hours. At the port of Geelong the ordinary working hours without payment of overtime were from 8 a.m. to 5 p.m. on all days except Saturdays and Sundays and on Saturday from 8 a.m. to 12 noon. That applies alike to members of the Storemen and Packers' Union and to waterside workers. The charter party contains a provision in relation to "continuous" work, and, purporting to act under the provision, the agents of the charterer on Monday, 18th December 1950 verbally notified the shipowners that they required the vessel to continue the work of loading during overtime hours from 5 p.m. to 11 p.m. on Wednesday, 20th December 1950. This was repeated on 20th December as to Thursday, 21st December. On 20th December the agent for the charterer wrote to the ship's agents that as on that day the ship had not proceeded with the loading during the hours from 5 p.m. to 10 p.m. (*sic*) they would hold the ship responsible for all charges and expenses thereby incurred by the charterers. The letter said further that in accordance with the same clause in the charter party the charterer would claim a deduction from the lay time used in loading the vessel. The same claim was repeated next day, Thursday, 21st December, with reference to the period between 5 p.m. and 11 p.m. on that day.

In fact the shipowner had not worked the ship during these hours on either of the respective days. They had applied to the Stevedoring Industry Board for labour for the purpose but were unable to obtain it. The facts and consequence of this are stated precisely in an agreed form as follows: "Bulk wheat was available for loading into the vessel and labour was available for operating the aforesaid method of loading at the silo and the endless belt. To comply with the requirements of the charterer to load during the aforesaid hours the stevedoring company applied to the representative of the Stevedoring Industry Board for the necessary stevedoring labour to operate the loading apparatus on the vessel and in the holds to enable the loading of the wheat into the vessel to proceed during these hours. The stevedoring authority at the port was unable to supply or provide such labour as all available waterside labour was working on other vessels and solely as a result thereof the loading of the wheat into the vessel could not proceed as required by the charterer." The cause of the inability of the Stevedoring Industry Board to provide labour was not a strike or lockout but simply the insufficiency of labour to meet the claims for labour to which the board gave priority as well as the claim for labour for overtime working of the *Exmoor*. The ship in fact began loading at 11.15 a.m. on 20th December when her

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lay days commenced. She completed loading at 4.35 p.m. on 23rd December 1950. Under the bill of lading the master was entitled to demand a certain quantity of bagged wheat and whether because he exercised this right or for some other reason she included a small quantity of bagged wheat in her cargo. She loaded 8,250 tons of bulk wheat, completing that loading at 1.50 p.m. on Friday, 22nd December. She then moved from the berth at the silo to a pier where she commenced loading at 3.50 p.m. on Friday, 22nd, completing the loading at 4.35 p.m. on Saturday. In the charter party the lay days were calculated by rates of loading which differ for bulk wheat and bagged wheat. For the quantity of bulk wheat loaded, the lay days worked out at five and a half days and for the bagged wheat at thirteen hours forty minutes. The total time actually used worked out at 77 hours. From this the charterer claims a deduction of the twelve hours in which the vessel had not worked overtime as required, namely the six hours on 20th December from 5 p.m. to 11 p.m. and six hours on 21st December from 5 p.m. to 11 p.m. Deducting these hours the time used would be sixty-five hours or two days seventeen hours. On that calculation the time saved would be three days eight hours forty minutes and as despatch money was calculated at £110 18s. 4d. a day that amounted to £372 16s. 1d. Except for the deduction of the twelve hours the shipowners agreed in this calculation. Disallowing the twelve hours the despatch money would amount to £317 6s. 11d.; that is to say there was a difference of £55 9s. 2d. The parties submitted to arbitration pursuant to a clause in the charter party the question whether the charterer was entitled in calculating working time to deduct from the lay time used the periods of time between 5 p.m. and 11 p.m. on the 20th and 21st days of December 1950. This form of question rather assumed that the claim was based simply on the right to despatch money. But as it was possible that the charterer's right was that the ship should be continuously worked and the remedy, strictly speaking, lay in unliquidated damages, it was agreed that this question should also be considered. For some reason that is not clear the amount involved as damages was agreed at £61 13s. 7d. instead of £55 9s. 2d. In the end the umpire stated his award in the form of a special case stating two questions, namely (1) whether upon the facts stated and the proper construction of the charter party the charterer is entitled in calculating working time to deduct from the lay time used the periods mentioned and (2) if no, whether there was a breach of the charter party by the shipowners rendering the shipowners liable to damages to the

charterer. If either of these questions were answered in the affirmative the umpire awarded £61 13s. 7d. to the charterer.

The charter party, upon the interpretation of which ultimately these questions must turn, consists of the Australian Grain Charter with eliminations and additions. The ship is required at the named port to load according to the custom of the port a full and complete cargo of wheat in bulk *ex* silo which the charterers bind themselves to provide not exceeding what the vessel can reasonably stow and carry and so on. The shipowners undertake that the vessel shall not load more than 8,925 tons nor less than 8,075, English weight (gross): (cl. 3). Subject to certain immaterial provisos it is provided that the cargo should be brought to and taken from alongside the vessel at the risk and expense of the charterers: (cl. 4). By cl. 9, a long clause, it is provided that the cargo shall be loaded at not less than the average rate of 500 tons for cargo in bags and 1,500 tons for cargo in bulk per weather working day (Saturdays, Sundays and holidays excepted) provided that the vessel can receive at this rate. It is settled by *William Alexander & Sons* v. *Aktieselskabet Dampskibet Hansa* (1) that the proviso concerning the vessel's capacity to receive has reference to her structural capacity and equipment and does not apply to such things as shortages of labour. The provision is subject to other provisos concerning Saturday work and wet weather which are not material. Clause 9 goes on to prescribe how the time shall be fixed from which loading shall count and to provide for the deduction of certain time for taking off and replacing hatches except at the commencement and completion. It includes a provision that charterers must supply as requested by the master a sufficient quantity of cargo in bags so as to provide the ship with a full and complete cargo in all cargo-carrying compartments or to load her down to her marks as may be appropriate. It may be surmised that it was as a result of this provision that the ship took on bagged wheat. Clause 9 then concludes with the following provision: "The charterers or their agents shall have the right of sending the cargo alongside continuously (Sundays and holidays excepted) and the vessel shall be bound to proceed with the loading if so required. In such cases all additional stevedoring and tallying expenses incurred as a result of working outside ordinary working hours shall be for charterers' account." Clause 11 provides that the stevedore at the loading port is to be nominated by the shipowners subject to the charterer's approval but the approval is not to be unreasonably withheld. All costs of loading, with the charges incidental thereto, are to be

(1) (1920) A.C. 88.

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borne by the shipowners subject to two exceptions one of which is that already mentioned under cl. 9 and the other is immaterial. Demurrage and despatch money at the port of loading is provided for by cl. 13 which is as follows:—"Should the vessel not be loaded at the rate herein stipulated, demurrage shall be paid at the rate of eightpence British sterling per gross register ton per running day and pro rata for any part of a day. Such demurrage shall be paid day by day, when and where incurred. For all working time saved at port or ports of loading despatch money shall be paid on completion of loading at the rate of one-half of the above rate of demurrage." It will be seen that the lay days are to be ascertained for the purposes of demurrage or despatch money by calculation based on the opening provision of cl. 9 requiring that loading be at not less than the average rate of 500 tons of cargo in bags and 1,500 tons of cargo in bulk. Once the calculation is made the clause operates in the same manner as it would if it actually stated a given number of days as that fixed for loading: see *William Alexander & Sons* v. *Aktieselskabet Dampskibet Hansa* (1) per Viscount *Finlay* (2), and *Love & Stewart Ltd.* v. *Rowtor Steamship Co. Ltd.* (3) where Lord *Sumner* says of similar provisions: "I think that the parties have manifested a clear intention in the charter to contract on the basis of a fixed number of lay days, for discharge at a daily rate enables the number of lay days to be fixed as soon as the quantity of cargo is known, and is equivalent to fixing the number of lay days beforehand" (4). The only other provision that appears material is cl. 18 containing exceptions covering a strike or lockout of any class of workmen essential to the loading of the cargo. Time lost thereby is not to count unless the vessel is already on demurrage. In that case the strike or lockout of the shipper's men does not prevent demurrage accruing if by the use of reasonable diligence he could have obtained other suitable labour. The clause concludes: "In the case of any delay by reason of the before mentioned causes, no claim for damages in respect thereof shall be made by the shippers or the receivers of the cargo, the owners of the ship, or by any other party under this charter. For the purpose of settling despatch money accounts, any time lost by the vessel through any of the above causes shall be counted as time used in loading." As has already been stated the lay days, calculated according to the formula for bulk and bagged wheat loading, amount to six days one hour and forty minutes. The primary claim of the charterer is that in ascertaining the time

(1) (1920) A.C. 88.
(2) (1920) A.C., at p. 94.
(3) (1916) 2 A.C. 527.
(4) (1916) 2 A.C., at p. 535.

worked twelve hours should be excluded from the actual time during which the ship worked because those hours would not have been consumed had the shipowner complied with the requirement to work continuously. It will be noticed that the charterer's right to despatch money is, according to the express terms of cl. 13, to be calculated only on all working time saved. Although the working time of the ship was not in fact saved the charterer claims that in calculating what is saved the ship cannot count against the charterer so much of the time which, although really used, was only so used in consequence of the default of the ship in the performance of its contractual duty. It is said that if, through the default of the ship in providing the labour necessary to load, the full lay time expired, that is six days, one hour and forty minutes, before loading commenced or before loading completed, then in that case demurrage would not be payable notwithstanding cl. 13 because in the circumstances the cause would be nothing but the failure, in breach of their contractual duty, of the shipowners to provide labour to receive the cargo and work the ship. The meaning of this contention is that in the clause a necessary implication is discoverable requiring that time actually passed shall not be counted as running against the charterer if the passage of that time is due to the default of the shipowners. In other words time attributable to the fault of the shipowners is outside the clause. In the same way it is contended that time is not to be counted as passing for purposes of calculating despatch money. No doubt this argument accords with the ordinary practice of making up despatch money or demurrage accounts. But it is difficult to reconcile it with the actual language of the provision for despatch money contained in cl. 13. It may be well enough to find in the provision relating to demurrage an implication that demurrage shall not be payable for a running day or part thereof where the delay is due to the default of the shipowners; but it does not follow that a corresponding implication can be made that despatch money is payable for time which would be saved but for the default of the shipowners. No doubt for that reason counsel for the charterer appeared principally to rely on a contention that the shipowners were in default because they had not complied with the final provision of cl. 9. They were therefore liable for damages which would necessarily recoup the charterer the net amount of despatch money to which he would have been entitled had the shipowners complied with their obligation. By the net amount of despatch money is meant the balance after the deduction of the additional expenses thrown on the charterer.

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The charterer put forward the simple case that under the final provision of cl. 9 the vessel was bound to proceed with the loading between the hours of 5 p.m. and 11 p.m. on 20th and 21st December because he had so required by his notices and that it had failed to do so. There was therefore a breach of contractual obligation for which the shipowners were liable in damages. This wears all the appearance of an over-simplification of the provision relating to the requirement that the vessel should load continuously. When the clause says that the charterer shall have the right to send the cargo alongside the vessel continuously and the vessel shall be bound to proceed with the loading if so required, it seems clear enough that the purpose is to extend the hours during which the charterer is entitled to expect the vessel to load, that is to say extend loading time beyond ordinary hours of labour. The extension enables the charterer to require that the vessel be worked during what may be called a period of overtime, subject to the charterer bearing the additional cost of stevedoring and tallying expenses. It would be a strange and illogical interpretation of the clause if it were read as giving to the charterer a special right of a different order or kind from that which the charter gives him with respect to loading during ordinary hours of labour. It is true that the provisions of the charter party dealing with the charterer's right to loading during ordinary hours of labour are less explicit. For the provision contained in the last paragraph of cl. 9 is expressed in terms of unqualified obligation. The opening words of cl. 9 which deal with the average rate of loading contain a description of stipulation which is usually read as imposing an obligation upon the charterer for the benefit of the shipowner. See *Carver's Carriage of Goods by Sea* 10th ed. (1957) ch. 19, p. 826. The proviso, however, suggests that in the present instance the stipulation is not solely concerned with the right of the shipowners. For in that case there would be no reason to add "provided the vessel can receive at this rate". If therefore at the end of the period of lay days the rate has not been kept up owing to the default of the shipowners the charterer may be able to complain of a breach of this stipulation. No one doubts that in the end the charterer is entitled to have a full and complete cargo of wheat in bulk not more than 8,525 tons nor less than 8,075 tons loaded by the ship. But that defines the obligation of the shipowners as carriers in terms of quantity: it does not touch the question of the shipowners' duties as to the rate of, or total time occupied in, loading. No doubt, too, the clause relating to despatch money carries with it an implication that the shipowners shall not by their wrongful act or default disable the charterer

from earning despatch money. But it appears obvious that the contract could not be construed as imposing on the shipowners any duty enabling the charterer to earn despatch money which was stricter or less qualified than the duty placed on the shipowners by law not to cause the charterer to incur demurrage by the shipowners' act or default. What is meant may be illustrated by applying the argument which the charterer based on the concluding words of cl. 9 to a hypothetical set of facts. Let it be supposed that the shortage of labour at the port of Geelong were so great that the Stevedoring Industry Board were unable to supply labour for portion of the work of loading during ordinary hours of labour as well as for work beyond those hours. Let it be supposed, too, that the charterer under the concluding words of cl. 9 " sends the cargo alongside continuously and requires the vessel to proceed with the loading ". It might well be in such circumstances that the ship could not be loaded during the lay days and that, subject to the question of the shipowners' default being the cause, the charterer would become liable for demurrage. It would be ridiculous if that were the case to accept the argument of the charterer as to the concluding words of cl. 9 which relate to overtime loading and to decide that there had been a breach of that provision with the consequence that, at the same time as demurrage was running against the charterer, the charterer was becoming entitled either to despatch money or to damages covering despatch money. The illustration shows, if proof were needed, that a construction of the charter party must be adopted which will bring into harmony the provisions relating to loading within ordinary hours of labour and the provision contained in the concluding words of cl. 9 enabling the charterer to require loading beyond the ordinary hours of labour. Not only this, it is necessary also to adopt a harmonious interpretation of the provision relating to despatch money and that relating to demurrage. The truth appears to be that a default of contractual duty on the part of the shipowners which is of a kind that would prevent the accrual of demurrage may be a default sufficient to entitle the charterer to damages covering despatch money. But it would seem incongruous to treat some act or omission on the part of the shipowners as a breach of contract giving rise to a liability for damages for the loss of despatch money unless the act or omission is of a kind which under the provisions of the charter party would prevent a liability for demurrage arising if it were to prove the sole cause of a delay in loading sufficiently long to exhaust the lay days or lay time.

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In spite of the case law upon the relief of a charterer from a liability for demurrage, it is perhaps not an overstatement to say that every charter party is an instrument which must be interpreted with due regard to the provisions it contains and the terms in which they are expressed. In the present case it is clear enough that the charter party applies to require the shipowners to accept the cargo from the chutes of the silo by means of the spouts. When the concluding words of cl. 9 speak in unqualified terms of the ship being bound to proceed with the loading that is their application to or operation upon the bulk loading at the silos at Geelong. That too is the application or operation of the words with which cl. 9 begins, viz. "The cargo shall be loaded at not less than" and so on. But unlike the concluding words, the opening words of cl. 9 do not expressly impose on the ship an obligation "to proceed with the loading". Is the consequence of construing cl. 9 as a whole, the first words with the last, that it must be read as imposing upon the shipowners a contractual obligation to receive the cargo as and when the charterer or shipper properly tenders it during the prescribed or customary time of loading? In a sense this must be so. The two things must be concurrent. But that does not necessarily mean that if the shipowners are disabled from doing their part by events beyond their control they have no answer to a complaint by the charterers that the shipowners have prevented the earning of despatch money or caused them to incur a liability for demurrage. It is only because of the absolute terms in which the concluding part of cl. 9 is expressed that the contrary view suggests itself. Because that is so an argument was advanced for the shipowners that this part of the clause had no application to the present case. It is necessary to turn aside from the main theme to deal with this argument.

It will be noticed that the charterers or their agents are given the right of sending the cargo alongside continuously. It was said that these words are hardly apt to describe the process of transmitting bulk wheat by moving belts from a silo and then through a chute into spouts delivering in the vessel's hold. But as the charter party is intended to cover bulk loading it seems right to construe them as covering the process. The word "continuously" gives rise to some difficulty. Until the case reached this Court the parties accepted the view that the notices given by the charterer were within the clause, but for the first time it was suggested in this Court that "continuously" meant through the whole period of loading without break and that as the notices required continuity only through a limited period they were not within the clause. No

doubt this may be justified by a literal construction but in a commercial contract of this description a practical construction should be adopted if possible and it seems reasonably certain that the parties meant that the hours of loading might be extended so as to be continuous over particular parts of the period when loading was taking place. At all events that is how the parties themselves instinctively understood the clause and how for a long time their legal advisors accepted it. It comes back therefore to the question whether upon a consideration of the provisions of the charter party the shipowners were under a contractual obligation to receive the wheat between 5 p.m. and 11 p.m. on the nights of 20th and 21st December notwithstanding their inability to obtain labour to do so from the Stevedoring Industry Board. It must be confessed that on the face of the charter party there is not a little to support an affirmative answer. There is the unqualified language of the last part of cl. 9 and there are implications in cl. 18, particularly the last part of it. It seems to be implied that but for what it contains the shipowners would be under a liability. But on the whole there seems insufficient ground in these considerations for construing the clauses of the charter party as departing from the settled doctrine that once the vessel is at the berth and ready to load when the time for loading commences the charterer must bear the consequences of delays unless they arise from the fault of the shipowner or his servants or agents. In *Cantiere Navale Triestina* v. *Russian Soviet Naptha Export Agency* (1) *Atkin* L.J. speaks of "the principle for which there is ample authority" which he describes thus, "that in such a charter there is an absolute obligation on the charterer to load the vessel within the time that is stipulated for loading her, and that he is not excused from doing that by any cause unless it is one for which he has stipulated in a properly drawn exception, or unless the failure to load arises by reason of the shipowners' default. It really is hardly necessary to cite authority for that proposition, but there is a very recent authority in the House of Lords bearing on the matter, *William Alexander & Sons* v. *Aktieselskabet Dampskibet Hansa* (2), which was an appeal from a decision of the Court of Session in Scotland. There a vessel was chartered to proceed to Archangel and load a cargo of timber and thereafter to proceed with the cargo to Ayr. The charter party provided that the cargo was to be loaded and discharged at the rate of not less than 100 standards per day, whether berth available or not, "always provided the steamer can load and discharge at this rate", and that, in the event of the steamer being detained beyond the time stipulated

(1) (1925) 2 K.B. 172. (2) (1920) A.C. 88.

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as above for loading and discharging, demurrage should be paid at £70 per day and *pro rata* for any part thereof. The ship duly arrived at Ayr, and if the discharge had been carried out at the stipulated rate it would have been completed in six and one-third days, but owing to a shortage of labour at the port it occupied thirteen and one-third days. The shipowner claimed seven days' demurrage. Viscount *Finlay* said (1): 'On this appeal a great many cases were cited laying down the rule that if the charterer has agreed to load or unload within a fixed period of time (as is the case here, for *certum est quod certum reddi potest*), he is answerable for the non-performance of that engagement, whatever the nature of the impediments, unless they are covered by exceptions in the charter party or arise through the fault of the shipowner or those for whom he is responsible. I am here adopting in substance the language used by Lord Justice *Scrutton* in his work upon *Charterparties and Bills of Lading*, art. 131. Of the authorities I will mention only *Budgett & Co.* v. *Binnington & Co.* (2), and I refer specially to the judgment in that case given by Lord *Esher*. Although no authority upon the point was cited which would in itself be binding upon your Lordships' House, there has been such a stream of authority to the same effect that I think it would be eminently undesirable to depart in a matter of business on this kind from the rule which has been so long applied, even if your Lordships felt any doubt as to the propriety of these decisions in the first instance. I myself have no doubt as to their correctness, and I understand that this is the opinion of all your Lordships' " (3). The cases relate to the liability of the charterer to demurrage but they are attributable to the principle that once the vessel is at the service of the charterer she remains so to speak at his charge apart from lay days unless he is relieved by the default of the owner, his servants or agents. So much has been made in this case of the language of Lord *Esher* M.R. in *Budgett & Co.* v. *Binnington & Co.* (2) that one hesitates to repeat it. But he does say, " . . . but of this I am certain, that if the shipowner is prevented from carrying out his share of the discharge by the acts of persons over whom he has no control the case comes within the same category as the case of non-delivery caused by some physical misfortune over which he has no control " (4). The decision is not to be explained on the ground that on the particular facts the supposed default of the shipowners was not the " cause " or " sole cause " of the delay in discharge. In

(1) (1920) A.C., at p. 94.
(2) (1891) 1 Q.B. 35.
(3) (1925) 2 K.B., at pp. 205, 206.
(4) (1891) 1 Q.B., at p. 39.

Leeds Shipping Co. Ltd. v. *Duncan Fox & Co. Ltd.* (1) *Mackinnon* J. as he then was dealt with a charter party for discharge in a fixed time and what he said applies equally well to loading within a certain time, or a time to be made certain, which is the same thing. His Lordship said : " The effect of a charterparty in this form for discharge in a fixed time really amounts to a guarantee by the charterer that the discharge shall be completed in that fixed time, and if the discharge is not completed in that fixed time the charterer is liable to pay the agreed demurrage unless the failure to have the ship discharged in the agreed time is due to the fault of the shipowner, in that the shipowner has not done his part in regard to something which it was within his power to do. The result is that supposing there is a strike or an insufficiency of labour, although that may prevent the shipowner from doing his part of the discharge, yet that is not due to any failure on his part in regard to something that it was in his power to do, and it is, therefore, not due to the default of the shipowner " (2).

It is unnecessary to multiply the citation of cases. It is enough to say that what is established concerning responsibility for demurrage must be the key to the correlative responsibility for despatch money when it is claimed by way of breach of contract or otherwise and that the particular provisions of this charter party do not justify any special construction or operation producing a different result.

I think the appeal should be dismissed.

WILLIAMS J. I agree in the reasons for judgment of *Taylor* J. In my opinion the appeal should be dismissed.

WEBB J. I would allow this appeal.

There are no rules of construction of documents that are peculiar to charter parties and no presumption in favour of a shipowner as against a charterer. The respective rights and liabilities of each are to be discovered from the terms of the particular charter party.

This charter party imposes on the charterer the obligation to pay demurrage and on the shipowner the obligation to pay despatch money and there is nothing in its terms that I can see which points to one obligation being stricter than the other.

The terms provide that the vessel is to proceed as ordered by the charterers to Geelong and there load *according to the custom of the port* a full and complete cargo of wheat in bulk *ex* silo which the

(1) (1932) 37 Com. Cas. 213.

(2) (1932) 37 Com. Cas., at p. 217.

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charterers bind themselves to provide (cl. 1). The shipowners undertake that the vessel will not load less than a specified tonnage nor more than a specified tonnage (cl. 3). The cargo is to be loaded at not less than the average rate of 1,500 tons per weather working day, Saturdays, Sundays and holidays excepted. The charterers have the right of sending cargo alongside continuously, Sundays and holidays excepted, and the vessel is to proceed with the loading if so required. In such cases all additional stevedoring and tally expenses, as the result of working outside ordinary working hours, are to be for the charterer's account (cl. 9). The stevedore at loading port is to be nominated by the shipowner, subject to the charterer's approval, and all costs of loading and incidental charges are payable by the shipowner except those payable by the charterer under cll. 9 and 4 (cl. 11). Should the vessel not be loaded at the rate stipulated "*demurrage shall be paid*" at the rate of eighteen pence per ton per running day, and for all working time saved "*despatch money shall be paid*" at the rate of one-half of the demurrage rate (cl. 13). If the cargo cannot be loaded by reason of a strike or lockout, any time lost is not to count unless the vessel is already on demurrage; but a strike or lockout of the shipper's or receiver's men is not to prevent demurrage accruing if by the use of reasonable diligence he could have obtained other suitable labour. In the case of any delay by reason of strikes or lockouts no claim for damages is to be made by the shipper or receiver of the cargo or the shipowner or by any other party. *For the purpose of settling despatch money accounts any time lost by the vessel through strikes or lockouts shall be counted as time used in loading* (cl. 18).

It is not questioned that under these provisions the charterer has an absolute obligation to pay demurrage for delays not caused by the fault of the shipowner or those for whom he is responsible: *Budgett & Co.* v. *Binnington & Co.* (1); *William Alexander & Sons* v. *Aktieselskabet Dampskibet Hansa* (2).

While I see no reason in these terms for holding that the provision in cl. 9, that the charterer and his agents have the right of sending the cargo alongside continuously—if that provision can apply to loading *ex* silo—imposes a stricter obligation on the shipowner in respect of overtime than is imposed during ordinary hours, still, as regards despatch money there is nothing in the terms of the charter party that indicates that the obligation on a shipowner to pay for ordinary time saved is not as absolute an obligation as that imposed on the charterer to pay demurrage. The similarity of the terms used in imposing the respective obligations and more

(1) (1891) 1 Q.B. 35. (2) (1920) A.C. 88.

particularly those in cl. 13 which I have placed in inverted commas, do not permit of a contrary view. But if there is any doubt as to this it is, I think, removed by the provision in cl. 18 that in settling despatch money accounts time lost by the vessel through strikes and lockouts is to be counted as time used in loading. This provision is for the protection of the shipowner and it is required only if the shipowner is otherwise absolutely liable. The provision would serve no purpose if the shipowner's liability were not absolute and he was merely required to do his best to avoid any loss of time which would defeat or diminish the charterer's claim for time saved. As I see the position the shipowner is liable not only to pay for time actually saved but for time that would have been saved if the vessel had loaded during overtime hours as required by the charterer. If time actually saved fixes the limit of the shipowner's liability there is no need for the provision in cl. 18 referring to despatch money accounts.

As to whether loading *ex* silo is contemplated in the part of cl. 9 which gives the charterer the right to continuous loading, I am not prepared to hold that it is not, in view of the provision that the loading is to be according to the custom of the port.

FULLAGAR J. In this case I agree with the judgment of *O'Bryan* J. delivered on 4th June 1954, and I am of opinion that this appeal should be allowed. I wish to add only one or two observations to what has been said by *O'Bryan* J.

The question in the case—whether it be thought easy or difficult to answer, and whether a score of authorities or none be called in aid—is from first to last a pure question of the construction of certain words in a particular contract. Those come at the end of cl. 9 of the charter party, and are:—"The charterers . . . shall have the right of sending the cargo alongside continuously (Sundays and holidays excepted) and the vessel shall be bound to proceed with the loading if so required." The contract goes on to provide that, if such "continuous" working extends outside ordinary working hours, all additional stevedoring and tallying expenses incurred as a result shall be paid by the charterers. The words quoted appear to me to be plain and unambiguous. They say that the vessel shall—if so required, and she was so required—be bound to proceed with the loading. And they mean, in my opinion, that the vessel shall be bound to proceed with the loading. I am not able to make them mean that the vessel shall do her best to proceed with the loading, or that she shall proceed with the loading if labour is available—any more than I am able to make them mean

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that she shall proceed with the loading if it is a nice sunny day and her master is willing to proceed. The word " bound " imports an unqualified contractual obligation, and " to proceed with the loading " means to proceed with her part of the joint operation.

Most of the authorities cited to us are reviewed in the judgment of *O'Bryan* J. Because the construction of one document cannot be controlled by the construction of another in different terms, I should have thought that none of them was directly relevant, but I think that they do become indirectly relevant because of an argument that the view of cl. 9 which I regard as inevitable leads to an absurdity. They are cases in which a charterer or other freighter or merchant resists a claim for demurrage on the ground that, for the whole or part of the period claimed, the shipowner was himself not able to receive or discharge the cargo as the case may be. In these cases, in the absence of anything analogous to the relevant part of cl. 9, it has been uniformly held over a long period that a right to demurrage is not defeated by inability of the shipowner to receive or discharge for a period, though it is otherwise if the freighter has been prevented from doing his part in loading or discharging by " fault " or " default " of the shipowner. It has been put in various ways. In the *Hansa Case* (1), Viscount *Finlay* said :—" On this appeal a great many cases were cited laying down the rule that if the charterer has agreed to load or unload within a fixed period of time (as is the case here, for *certum est quod certum reddi potest*), he is answerable for the non-performance of that engagement, whatever the nature of the impediments, unless they are covered by exceptions in the charterparty or arise through the fault of the shipowner or those for whom he is responsible " (2). In *Thiiss* v. *Byers* (3) it is put as a matter of an implied term in a contract. *Blackburn* and *Lush* JJ. said :—" We took time to look into the authorities, and are of opinion that, where a given number of days is allowed to the charterer for unloading, a contract is implied on his part, that, from the time when the ship is at the usual place of discharge, he will take the risk of any ordinary vicissitudes which may occur to prevent him releasing the ship at the expiration of the lay days " (4).

The argument from absurdity cannot be put by saying that, if my view is correct, the ship will be subject (by virtue of cl. 9) to a more onerous obligation when she is working overtime, and (by the application of the authorities) to a less onerous obligation when she is not working overtime. This is because the relevant part of

(1) (1920) A.C. 88.
(2) (1920) A.C., at p. 94.
(3) (1876) 1 Q.B.D. 244.
(4) (1876) 1 Q.B.D., at p. 249.

cl. 9 is not limited to overtime working. Continuous working will not necessarily involve payment of overtime. The argument can, however, be fairly put in this way. Unless and until the relevant part of cl. 9 comes into operation by virtue of a " requirement " on the part of the charterer, the shipowner is subject only to the implied and qualified obligation defined by Lord *Finlay* and *Blackburn* and *Lush* JJ. But, as soon as there is a " requirement " by the charterer, he becomes subject to an express and unqualified obligation. And this, it is said, is absurd. At the least it is a curious result, which is not likely to have been intended.

I would answer this argument in two ways. First, I would say that, even if a very unlikely, or even absurd, result follows, I would not be deterred from attaching to the relevant part of cl. 9 what I consider to be its plain meaning. The words are, as *Isaacs* J. would have said, intractable. This would not be the first case in which parties have made a contract in clear terms which lead to a surprising result. But I would say, in the second place, that the so-called absurd result by no means follows. For I think that the clear and express words of cll. 9 and 18 must have the effect of displacing altogether the implication which might otherwise be made. Too little importance has, I think, been attached to cl. 18. So far as despatch money is concerned, it contains an express provision which would be quite unnecessary if the whole " risk of vicissitudes " rested by implication on the charterer.

O'Bryan J. correctly, I think, treated the right to recover damages for breach by the shipowner of the undertaking contained in cl. 9 as correlative to the right to recover demurrage. In other words he rightly reasoned, I think, that the express words of cl. 9, by excluding implications which would or might otherwise have had to be made, produced a twofold result. If the claim were one for demurrage, any time during which the shipowner was in breach of cl. 9 would have to be excluded. On the other hand, if the lay days were not exhausted at the time when the breach occurred, the charterer could recover damages in respect of the period during which the breach continued, or could set off such damages against demurrage subsequently incurred.

TAYLOR J. This is an appeal by special leave from an order of the Supreme Court of Victoria (*Herring* C.J.) by which answers were given to three questions raised by the award of an umpire which was stated in the form of a special case. In answering the questions as he did the learned Chief Justice stated that he did so

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for the reasons given by him on an earlier occasion when, in circumstances which it is unnecessary to relate, the Full Court had entertained an appeal from *O'Bryan* J. which raised precisely the same questions. On that occasion the Full Court disagreed with *O'Bryan* J. and purported to discharge the order which he had made.

The umpire's award was made pursuant to the submission to arbitration of a dispute between the appellant and respondent concerning their respective rights as charterer and owner under an Australian Grain Charter. The charter party related to the motor ship "*Exmoor*" and it required that vessel to proceed, as ordered by the charterer, to specified ports in Australia, there to load a full and complete cargo of wheat in bulk *ex* silo and then to proceed to one safe port in a specified region of India and there discharge it. The Australian port selected by the charterer was Geelong in the State of Victoria and, pursuant to the charterer's notification, the vessel arrived there on 19th December 1950. Notice of the vessel's readiness to load was given to the charterer on the same day and loading commenced on 20th December. The loading operations were completed on 23rd December, which was within the permitted lay days, but they would have been completed somewhat earlier if loading had proceeded between 5 p.m. and 11 p.m on both 20th and 21st December as required by the charterer. The appropriate notice requiring the vessel to continue loading during these hours was given but owing to the unavailability of labour the respondent was unable to continue with the loading operations.

The method employed for the loading of bulk wheat at Geelong and the circumstances in which labour ceased to be available to the respondent on the nights of 20th and 21st December were the subject of explicit findings of fact by the umpire: "The method of loading bulk wheat at the silo wharves at Geelong involves the movement of the wheat from the silo through galleries by way of endless belts to points above chutes which overhang the vessel. The said chutes are led into the holds of the vessel and the wheat is directed by spouts at the end of the chutes to the required part of the hold and is levelled in the hold by trimming machines. When it is proceeding, the wheat travels along the endless belts from the silo to the end of the belts, and there it falls into the chutes. Labour is required for operating this method of loading, both at the shore end namely at the silo, and for the working of the endless belts; and in the ship for the handling of the spouts and trimming machines. The cost of the labour required to operate the shore end of the loading apparatus was borne by the charterer, and the

cost of the labour required to operate the loading apparatus on the ship and in the holds was borne by the ship, in each case in the manner hereinafter set out, and the labour for each such process was provided in the manner hereinafter set out. The shore labour is provided by the Grain Elevators Board (the owners of the silos) for and on behalf of the charterer and is paid for by the charterer pursuant to an arrangement between the charterer and the Grain Elevators Board. The men who do the work are permanent employees of the Grain Elevators Board and such employees are and are required to be members of the Storemen and Packers Union. The charterer is not concerned with the engagement of the labour for operating the loading apparatus on the vessel and in the holds. Such labour is arranged for by the stevedoring company applying to the representative of the Stevedoring Industry Board which allocates men to the stevedoring company for engagement by it. The cost of such labour is borne by the ship pursuant to the shipowner's contract with the stevedoring company which provided for payment to the stevedoring company of a specified sum per ton of cargo handled in respect of the loading thereof, the stevedoring company being responsible under such contract for engaging the labour required and for paying the wages of the labour so engaged. The employment of such labour was restricted by virtue of the *Stevedoring Industry Act* 1949 to registered waterside workers engaged by registered employers. The stevedoring company was a registered employer but the shipowner is not and was not a registered employer under the *Stevedoring Industry Act* 1949. The method by which such registered waterside workers were engaged by registered employers is that the registered employer applied to the appropriate stevedoring industry authority at Geelong for labour for the ship in question and if such labour was available and allocated by the authority to the ship, it was engaged by the said employer. The supply of registered waterside workers at Geelong as at other ports was controlled and allocated by a representative of the Stevedoring Industry Board. Pursuant to s. 22 of the *Stevedoring Industry Act* 1949 the said board had determined a quota for the port of Geelong which was in operation at all material times. At Geelong labour was allocated to ships according to the time of their arrival except that priority with regard to labour was given to ships in the loading and unloading of certain specified classes of cargo. The motor vessel " Exmoor " was not loading such a specified class of cargo as to be entitled to special priority for the supply of waterside labour."

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"Pursuant to the terms of cl. 9 of the charter party the charterer on or about 18th December 1950 verbally required the vessel to continue the work of loading during overtime hours from 5.00 p.m. to 11.00 p.m. on 20th December 1950, and on 20th December 1950 verbally required the vessel to continue the work of loading during overtime hours from 5.00 p.m. to 11.00 p.m. on 21st December 1950. Bulk wheat was available for loading into the vessel and labour was available for operating the aforesaid method of loading at the silo and the endless belts. To comply with the requirement of the charterer to load during the aforesaid overtime hours the stevedoring company applied to the representative of the Stevedoring Industry Board for the necessary stevedoring labour to operate the loading apparatus on the vessel and in the holds to enable the loading of the wheat into the vessel to proceed during these hours. The stevedoring authority at the port was unable to supply or provide such labour as all available waterside labour was working on other vessels and solely as a result of the inability of the stevedoring authority to supply or provide such labour the vessel was entirely prevented from and was unable to continue the loading during the said overtime hours as required by the charterer."

Upon these facts the appellant claimed that, since it was entitled to have the loading operations continue during the hours mentioned and it was ready to proceed with its part of the operation, it was prevented, solely by the default of the respondent from completing the operations at an earlier time. Its resultant claim was for an extra twelve hours despatch money, amounting to approximately £55 or, alternatively, damages for breach of the respondent's contractual obligations with respect to the loading of the vessel, which, it was said, prevented the appellant from earning additional despatch money. It is agreed that such damages, if payable, should be assessed at £61 13s. 7d.

The appellant's first claim may be disposed of briefly. By cl. 13 of the charter party it was provided that: "For all working time saved at port or ports of loading despatch money shall be paid on completion of loading at the rate of one-half of the above rate of demurrage." Accordingly, in order for the appellant to substantiate a claim for additional despatch money as such, it was necessary for it to establish that the appropriate working time was saved in loading at Geelong. This was the condition, explicitly stated, upon which despatch money was to become payable and it is only too clear that it is not shown to be satisfied by proof that working time, which was not in fact saved, would have been saved

if loading operations had not been interrupted by the inability of the respondent to obtain suitable labour. The contrary view, it is only fair to say, was but faintly pressed before us and the appellant's first claim must, inevitably, fail.

The solution of the difficulties attendant upon the second claim depends upon whether or not there can be found in the charter any provision which, in the prevailing circumstances, operated to impose upon the respondent, without qualification, an obligation to provide labour during the hours in question for the manipulation upon the ship of the loading apparatus and trimming machines. The appellant, of course, maintains that such a provision can be found and, in this contention, he is supported by the views of *O'Bryan* J. On the other hand, the learned Chief Justice, in common with the other members of the Full Court, took the contrary view and held that the appellant's claim could not succeed.

For the purposes of pursuing this inquiry it is convenient to set out those provisions of the charter to which reference was made during argument. As already appears the charter party, by cl. 1, required that the vessel should proceed to a loading port or ports as ordered and there load, according to the custom of the port, " a full and complete cargo of wheat in bulk *ex* silo ". The words " *ex* silo " are interlined on the printed form of charter. By cl. 4 it was provided that " The cargo shall be brought to and taken from alongside the vessel at the risk and expense of the charterers " and, further, " that, where cargo in bags is brought in wagons within reach of the vessel's tackle the charterers shall at their expense put the bags at the open doorway of the wagon in such a position that they may be taken most conveniently by the shipowners' men standing on the quay." Clause 9 made provision for the average rate of loading per weather working day in the following terms: " (9) The cargo shall be loaded at not less than the average rate of 500 tons for cargo in bags and 1,500 tons for cargo in bulk per weather working day (Saturdays, Sundays and holidays excepted) provided the vessel can receive at this rate, and provided that Saturday shall count as a full day if work is performed on that day, subject to a reduction of half a day if no work is performed after noon." The final provision of cl. 9 stipulated that the charterer should have the right of sending the cargo alongside continuously and concluded, " the vessel shall be bound to proceed with the loading if so required ". In such case all additional stevedoring and tallying expenses incurred as a result of working outside ordinary working hours were to be for the charterer's account. Clause 11 was in the following terms: " The stevedore at loading port or

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ports shall be nominated by the shipowners subject to the charterers' approval, which approval is not to be unreasonably withheld. All cost of loading, together with the charges incidental thereto, shall be borne by the shipowners except such as are payable by the charterers under cll, 4 and 9. The cargo shall be stowed under the supervision and direction of the master who shall have the right of appointing tally clerks on behalf of the shipowners." Finally cl. 18, upon which the appellant placed some reliance, was as follows: "If the cargo cannot be loaded or discharged by reason of a strike or lock-out of any class of workmen essential to the loading or discharging of the cargo, any time lost by reason thereof shall not count during the continuance of such strike or lock-out unless the vessel is already on demurrage, but a strike or lock-out of the shipper's or receiver's men shall not prevent demurrage accruing if by the use of reasonable diligence he could have obtained other suitable labour. In the case of any delay by reason of the before mentioned causes, no claim for damages in respect thereof shall be made by the shippers or the receivers of the cargo, the owners of the ship, or by any other party under this charter. For the purpose of settling despatch money accounts, any time lost by the vessel through any of the above causes shall be counted as time used in loading."

It will be seen that, although the leading provision of the charter party contemplated that the vessel would load a cargo of wheat in bulk *ex* silo, the other provisions which purported to define the respective obligations of the parties with respect to loading are more appropriate to the loading of general cargo. For instance, the cargo was to be brought to and taken from alongside the vessel at the risk and expense of the charterers and, if cargo in bags should be brought in waggons within reach of the vessel's tackle, the charterers were at their own expense to put the bags at the open doorway of the waggons in such a position that they might be taken most conveniently by the shipowner's men standing on the quay (cl. 4). The "shipowner's men" presumably were those provided by a stevedoring contractor for a stevedore at loading ports was to be nominated by the shipowner subject to the charterer's approval, and all costs of loading, except such as those payable by the charterer under cll. 4 and 9, were to be borne by the shipowner. One may be pardoned for thinking that there is room for controversy concerning the precise effect of these provisions when bulk wheat *ex* silo was to be loaded in the manner described and where the leading obligation of the vessel was to load its cargo "according to the custom of the port".

O'Bryan J. solved the difficulty in the case by holding that the respondent was, in the circumstances, bound by the final provision of cl. 9 " to receive the cargo continuously ". He referred to the language of the provision and added : " Now that is an obligation, as absolute and unconditional as the obligation of the charterer to load or unload within a fixed time. The shipowner was under a duty to proceed with the loading continuously if so required by the charterer."

Accordingly he held that the respondent had bound itself unconditionally to provide labour pursuant to the appellant's requirement that loading should continue on the nights of 20th and 21st December. The view expressed by his Honour, however, is deficient in the sense that it does not attempt to define the extent of the obligation denoted by the words " proceed with the loading ". Rather it appears to assume that the provision, operating independently of any other provision in the charter party, threw upon the respondent an unconditional obligation, not only to keep the vessel ready to receive cargo outside ordinary working hours if so required, but also to undertake, by its agents, without qualification, the work necessary on the vessel to enable the loading operations to continue. Whatever might be the significance of the critical words in another setting, however, one thing is clear in the present case. The clause was not intended to and did not impose upon the respondent any obligation with respect to the loading operations which was of a quality different from that which applied during ordinary working hours. It is, of course, beyond question that the respondent, as owner, was subject to some obligation with respect to loading during ordinary working hours. So much is obvious though it is not necessary at the moment to attempt to define its precise character. But apart from the final provision of cl. 9 it was under no obligation to continue loading outside ordinary working hours. When this is borne in mind both the purpose and effect of that provision readily appear ; its purpose and effect were merely to require the respondent to perform outside working hours, if so required, his obligations under the charter with respect to loading. To hold otherwise would mean that the respondent's obligations with respect to loading at such times were to be measured by the concluding provisions of cl. 9 alone whilst its obligations with respect to loading at other times were ascertainable only from the other provisions of the charter party. It may safely be said that the final provision of cl. 9 was not intended to and did not produce this anomalous result and, therefore, that the solution of the problem in this case must be found in an examination of the respondent's general obligations under the charter with respect to loading.

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Before proceeding to make such an examination it should be said that the actual decisions in cases such as *Budgett & Co.* v. *Binnington & Co.* (1) and *William Alexander & Sons* v. *Aktieselskabet Dampskibet Hansa* (2) and other like cases do not provide the solution of the problem before us. These cases, which were discussed in the reasons of the learned Chief Justice, were concerned with the obligation to pay demurrage and they illustrate the proposition that a shipowner's right to payment is not necessarily dependent upon his own readiness and willingness to co-operate in the process of loading or unloading; he is entitled to payment if the loading or unloading operations be unduly delayed unless it be shown that his own default alone has caused the delay or, of course, that the delay has occurred in circumstances which, by express stipulation, leaves him with no claim. Consequently, in those cases demurrage was held to be payable where the same cause prevented both the shipper and the shipowner from carrying out loading operations, the essence of the decisions being that, under usual forms of charter where a fixed time for loading is specified, the condition upon which demurrage is payable is the detention of the vessel beyond the permitted time and the only qualification of the charterer's liability to pay (apart from special stipulations) is that he is not answerable where the cause of the delay is, as it has been called, the default of the shipowner. In such cases the vessel is detained solely by the default of the shipowner but an exhaustive statement of what constitutes "default" on the part of the shipowner sufficient to defeat his right to demurrage may well extend beyond a precise definition of the positive obligations undertaken by him with respect to the loading of the cargo. In the earlier of the two cases referred to, however, Lord *Esher* made some observations concerning the extent of a shipowner's obligations with respect to loading and these were relied upon by the respondent. Speaking of the facts of the case his Lordship said: "Now, has the shipowner failed in this duty through any default of his own, or of persons for whom he is responsible? The persons for whom he is responsible are the persons who represent him in his absence. If, for instance, the master refused to discharge the cargo, the owner would be responsible. How much further this rule of liability extends I am not prepared to say—whether, for instance, it extends to the case of the crew refusing to work; but of this I am certain, that if the shipowner is prevented from carrying out his share of the discharge by the acts of persons over whom he has no control, the case comes within the same category as the case of non-delivery caused by some

(1) (1891) 1 Q.B. 35. (2) (1920) A.C. 88.

physical misfortune over which he has no control. In such a case, it has been decided that he is not prevented from enforcing the contract of the freighter—as, for instance, in the case of prevention by weather or the acts of other consignees preventing a lower cargo being taken out of the vessel" (1). In the course of the same case *Lindley* L.J. "protested" against the idea of the shipowner being held responsible for a strike of the dock-labourers. He said: "I agree that there is an implied term in the contract, and that is, that the shipowner shall not prevent the freighter from performing his part of the contract; and if it is shewn that this has happened, the freighter is discharged. This is a general principle, applicable to all contracts, including maritime ones. In this case, I protest against the idea of the shipowner being held responsible for a strike of the dock-labourers. He does not hire them; he cannot discharge them; and in no sense are they his servants; and it cannot be said that, by reason of the strike, the shipowner has prevented the freighter from performing his part of the contract" (2). The observations of Lord *Esher* should, according to the learned authors of several editions of *Carver's Carriage of Goods by Sea*, "be read with some caution". At p. 881, 9th ed. (1952) it is said: "This passage must be read with some caution. Acts of persons who are doing the shipowner's work cannot be treated as in all respects analogous to misfortunes, such as bad weather, with which the shipowner has nothing to do. It is implied in the shipowner's contract that he will, at least, be reasonably diligent in doing his part of the discharge; and he is liable to the consignees for any damages sustained through a failure in that respect. It is a question of fact in each case whether he has taken all reasonable steps to get the work done." It may well be that the decisions in these cases and the observations quoted do not afford any true or satisfactory guide in solving the problem in this case but it is important to observe that their Lordships treated the stipulation concerning the time fixed for unloading as an undertaking given by the charterer for the benefit of the shipowner. The precise term of the provision under consideration in *Budgett & Co.* v. *Binnington & Co.* (3) does not appear from the report, but their Lordships' attitude to the clause, whatever its terms, was no departure from the traditional view which is exemplified by observations made in *Aktieselskabet Reidar* v. *Arcos Ltd.* (4). The effect of the authorities on this point is stated in *Carver*, 9th ed. (1952) p. 872, in the following

(1) (1891) 1 Q.B., at pp. 38, 39.
(2) (1891) 1 Q.B., at p. 40.
(3) (1891) 1 Q.B. 35.
(4) (1926) 2 K.B. 83; (1927) 1 K.B. 352.

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manner: "It is, therefore, usual in charterparties, and sometimes in bills of lading, to fix times within which the ship is to be loaded, and discharged; and where that is done, the provision is understood as an undertaking by the freighter that the ship shall be loaded or discharged within the time so fixed. The shipowner must not be in default; he must by his servants do his part of the work of receiving and stowing, or unloading, with diligence and with the proper number of men; but the undertaking as to the time which the loading or discharge shall occupy is given by the freighter, not by the shipowner. This used commonly to be marked in the charterparty by saying that so many days 'are to be allowed *the said merchant* for loading, etc.'. But the effect is the same whether the clause is in that form, or states, generally, as is now usual, that the cargo 'shall be loaded' in so many days. The promise is made by the freighter, for the benefit of the shipowner." I see no reason to differ from the views expressed in this passage and it is, as will appear, a matter of some importance in this case.

When we come to examine the facts of the present case we find that the respondent bound itself to provide a ship of a specified capacity at a port of loading in Australia, that, pursuant to the appellant's direction, it became bound to provide that vessel at Geelong and, there, receive a full cargo of wheat in bulk. By cl. 4 it was the obligation of the charterer to bring the cargo to the side of the vessel and by cl. 11 the respondent implicitly undertook to appoint, with the approval of the charterer, a stevedore to perform the work of loading the cargo into the vessel. This work, it may be observed, was work which, because of the provisions of the *Stevedoring Industry Act* 1949, the respondent could not lawfully undertake to perform by its own immediate servants. Then, by cl. 9, a daily loading rate was specified which, in the case of bulk wheat, was 1,500 tons per weather working day. Upon the strength of these provisions the appellant asserts that the respondent undertook, first of all, that the vessel would receive the cargo and, secondly, that it promised unconditionally that the cargo would be loaded at the specified daily rate during ordinary working hours and, if required, that the loading would proceed continuously. There are, however, two answers to this contention. In the first place, the respondent did not undertake to perform the work of loading the cargo into the vessel by its own immediate servants; as already mentioned it could not lawfully undertake to do so. What it undertook to do was to appoint a stevedore approved by the appellant to perform this task and it did not undertake or warrant that suitable labour would at all times be available for this purpose

As already appears, the stipulation concerning the daily rate of loading (cl. 9) was a stipulation for the benefit of the shipowner and there is nothing in that clause which threw upon the respondent an obligation to load the cargo at any specified rate though, quite clearly, it implicitly undertook that it would not, by any default on its part, prevent the appellant from carrying out its obligations. But since it did not undertake or warrant that labour would be available at all times its inability to obtain the necessary labour did not constitute default on its part. Secondly, it may be said that a number of the provisions in the charter party were not strictly appropriate to the manner of loading which was actually employed. When regard is had to the manner in which the loading operations were conducted it will be seen that what the appellant complains of is that the respondent was unable to obtain the necessary labour for the operation of the loading apparatus and trimming machines in the vessel's holds. So far as I am able to see there is no provision in the charter party capable of being understood as an unconditional undertaking by the shipowner that labour for these purposes would be available at all times. Finally, I add that the provisions of cl. 18 of the charter are quite insufficient to induce me to entertain the contrary view.

In conclusion it may be said that cases such as *Hick* v. *Raymond & Reid* (1) and *Ford* v. *Cotesworth* (2)—both of which were relied upon by the respondent—are of no assistance. Each of those cases was concerned with a claim against a cargo owner under a charter party which did not specify any fixed time for loading and unloading and the question at issue was whether the time taken was, in the circumstances, more than a reasonable time. The distinction between the obligations of the parties under a charter of this character and one which specifies a fixed time for loading is amply demonstrated by the observations in *Postlethwaite* v. *Freeland* (3); the distinction is plain and their Lordships' observations need not be repeated.

In the result, I agree with *Herring* C.J. concerning the manner in which the questions raised by the award should be answered and the appeal should, in my opinion, be dismissed.

Appeal dismissed with costs.

Solicitors for the applicant, *Snowden, Neave & Demaine.*
Solicitors for the respondent, *Middleton, McEacharn & Shaw.*

R. D. B.

(1) (1893) A.C. 22.
(2) (1868) L.R. 4 Q.B. 127.
(3) (1880) 5 App. Cas. 599.