Glencore Grain Ltd. v Goldbeam Shipping Inc. [2002] EWHC 27 (Commercial)

JUDGMENT : Mr Justice Moore-Bick: Commercial Court. 25th January 2002

1. On 24th November 1997 Glencore Shipping Ltd ("Glencore") entered into a contract of affreightment with Goldbeam Shipping Inc. ("Goldbeam") on the Synacomex form with amendments for the carriage of between three and five cargoes of heavy grain, soyabeans, sorghums, soyapellets or soyabeanmeal in bulk from a range of River Plate and other South American ports to a range of ports in South East Asia and the Far East. In due course Goldbeam nominated the vessel *Mass Glory* to perform one of the voyages under the contract. Goldbeam was not the owner of the *Mass Glory*, but had itself chartered the vessel on 25th March 1998 on substantially the same terms from Navios International Inc. ("Navios"). Navios was not the owner of the vessel either, having taken her on hire from her owners, Bonusnauta Shipping Corp., under a charterparty dated 3rd July 1997 for a period of 11/13 months with an option in favour of the charterers for a further period of 11/13 months.

2. On 9th May 1998 the *Mass Glory* completed loading a cargo of soyapellets at Rio Grande and shortly afterwards Glencore declared Xiamen in the People's Republic of China as the first discharging port. The vessel entered the port of Xiamen on Sunday 14th June and passed the normal inward inspection later that day. She was then ready to berth and a berth was available for her, but she was unable to occupy it because the cargo documents were not in order and because the sellers of the cargo ordered the vessel not to allow anyone to have access to the vessel without production of an original bill of lading. The master gave notice of readiness at 0800 hours on Monday 15th June, but it was common ground that both voyage charters were berth charters and that since the vessel was not prevented by congestion from reaching her berth the notice of readiness was invalid. The problems with the cargo documents were not resolved until Sunday 9th August 1998 when the vessel was at last able to shift to a berth, having been kept waiting nearly two months. Discharging began later that day, but no further notice of readiness was given then or at any time after she reached the berth. Discharge of that part of the cargo destined for Xiamen was completed on 19th August and the vessel then left for Nantong to discharge the remainder.

3. In due course the owners under each of the voyage charters claimed damages for detention from the charterers in respect of the time lost while the vessel was kept waiting at Xiamen. The disputes between them were referred to arbitration and the parties sensibly ensured that the same tribunal was appointed in each case in order to enable the disputes under the two charters to be heard together, thereby reducing costs and eliminating the risk of inconsistent decisions. The arbitrators published separate awards, but for the most part they are in identical terms and except where otherwise necessary I shall only refer to the award in the arbitration between Goldbeam and Glencore. The expressions "the charterers" and "the owners" must therefore be understood as referring to the parties in the capacities in which they entered into the relevant contracts. The arbitrators held that the delay to the vessel at Xiamen was caused by the charterers' breach of contract, a conclusion that has not been challenged before me. However, in reaching their award as to the amount that the owners were entitled to recover by way of damages the arbitrators made decisions which have given rise to these two appeals under section 69 of the Arbitration Act 1996.

The effect of the laytime provisions on the assessment of damages

4. The first issue concerns the running of laytime at Xiamen and its effect on the assessment of damages for detention. The arbitrators held that since the notice of readiness given on 15th June was invalid, time did not start to count, and the laytime exceptions did not apply, while the vessel was waiting at the anchorage. The whole of that time was therefore to be taken into account in calculating damages for detention. However, despite the fact that no notice of readiness was tendered after the vessel reached the berth, the arbitrators held, by a majority, that laytime began to count at the commencement of discharge. They did so on the grounds that but for the charterers' breach of contract the vessel would have gone straight to berth on 14th June with the consequence that the notice of readiness given on 15th June would then have been valid. On that basis they held that the charterers' breach of contract caused the notice of readiness given on 15th June to be invalid, that they could not benefit from their own breach of contract and could not therefore rely on the absence of a valid notice of readiness to claim despatch.

5. On behalf of Glencore Miss Healy submitted that the *Mass Glory* was fully at the charterers' disposal from the moment she passed the inward inspection at Xiamen, even though she was not at a berth. Accordingly, when assessing damages for detention the arbitrators should have asked themselves how long the charterers were entitled to take discharging the vessel at Xiamen and should have assumed that they would have used the whole of the time available to them for that purpose. They should then have found how long the vessel actually spent at the port and assessed damages for detention taking into account the laytime notice periods and exceptions as well as the period by which the laytime had ultimately been exceeded. In support of that approach she relied on the decisions in ***Shipping Development Corporation v V/O Sojuzneftexport (The 'Delian Spirit')*** [1972] 1 Q.B. 103 and ***Kurt A. Becher G.m.b.H. & Co. K.G. v Roplak Enterprises (The 'World Navigator')*** [1991] 2 Lloyd's Rep. 23 and upon a passage in *Commencement of Laytime* (3rd ed., 1998) by the well known maritime arbitrator, Mr. Donald Davies. The practical effect of this submission, as Miss Healy recognised, would be to apply the laytime code from the time the vessel reached Xiamen, even though she was not then technically an arrived ship.

6. Miss Healy's alternative submission was that the arbitrators erred in holding that laytime began to run when the vessel commenced discharging at Xiamen. She submitted that in the absence of a valid notice of readiness time did not begin to run at all and that the charterers should therefore be credited with despatch for the whole of the allowed laytime.

7. These submissions were adopted by Mr. Croall on behalf of Goldbeam for the purposes of its appeal against the award in favour of Navios. In resisting the appeal by Glencore against the award in favour of Goldbeam Mr. Croall adopted the submissions of Miss Ambrose on behalf of Navios in support of the tribunal's decision.

8. The argument that the charterers were entitled, by one means or another, to obtain the benefit of the laytime provisions as from the moment the vessel passed her inward inspection at Xiamen is one which I am unable to accept. It is helpful to begin by reminding oneself of the essential nature of the adventure contemplated by a voyage charter. In ***E. L. Oldendorff & Co. G.m.b.H. v Tradax Export S.A. (The 'Johanna Oldendorff')*** [1974] A.C. 479 Lord Diplock at page 556 identified four successive stages, namely, the loading voyage, the loading operation, the carrying voyage and the discharging operation, and pointed out that each must be completed before the next can begin. Although the claim in the present case is for damages for detention, it raises questions about the point at which the carrying voyage ends and the discharging operation begins and the manner in which the parties have allocated the risk of delay to the vessel during these different stages of the adventure.

9. The carrying voyage ends and the discharging operation begins only when the vessel reaches her agreed destination. It was common ground that the charters in the present case were berth charters so the vessel's destination for these purposes was the berth at the port of discharge. In the absence of some provision to the contrary, therefore, the owners could not give notice of readiness, and laytime could not begin to run, until the vessel had entered a berth at Xiamen. Although clause 6 of the charter provided that laytime was to commence following the giving of notice of readiness "whether vessel be in berth or not", it was accepted that the owners could not rely on these words to enable them to give notice of readiness when the vessel was at the anchorage. The explanation can be found partly in the decision of the House of Lords in ***Bulk Transport Group Shipping Co. Ltd v Seacrystal Shipping Ltd (The 'Kyzikos')*** [1989] A.C. 1264 and partly in clause 37 of the charter which made it clear that notice of readiness could only be given before the vessel reached the berth if the berth was unavailable due to congestion. In the present case a berth was available for the vessel from the moment she arrived at Xiamen.

10. Since the carrying voyage had not ended when the vessel reached the anchorage and the owners were not entitled to give notice of readiness under clauses 6 and 37, the laytime provisions could not operate. The effect of the charterers' breach of contract was simply to prevent the vessel from completing the carrying stage and reaching the point at which notice of readiness could be given. In principle, therefore, one would expect that the owners would be entitled to recover damages at large in respect of the period waiting at the anchorage without reference to the laytime provisions which could be brought into operation only after the vessel had reached her berth. This conclusion is supported by the decisions in ***Sociedad Carga Oceanica S.A. v Idolineole Vertriebsgesellschaft m.b.H. (The 'Angelos Lusis')*** [1964] 2 Lloyd's Rep. 28 and *Inca Compania Naviera S.A. and Commercial and Maritime Enterprises Evanghelos P. Nomikos S.A. v Mofinol Inc. (The 'President Brand')* [1967] 2 Lloyd's Rep. 338.

11. In ***The Angelos Lusis*** the vessel was chartered for a voyage from Constanza to one or two ports Antwerp-Rotterdam range. The charter provided for her to load and discharge at places reachable on arrival to be indicated by the charterers. The vessel arrived at Constanza to load, but was not permitted to enter the port until a berth was available. The vessel was not an arrived ship for laytime purposes and the owners therefore claimed damages for the charterers' breach of contract in failing to indicate a place for loading which the vessel could reach on her arrival. The dispute turned on the meaning of the word "arrival" in the context of the expression "reachable on arrival". The charterers argued that it required the vessel to be an arrived ship and that since the loading voyage had not ended at the point where the vessel was forced to wait the risk of delay fell on the owners. Megaw J. rejected that argument. He held that the word "arrival" was used in a more general sense and awarded the owners damages for delay caused to the vessel in entering berth.

12. Rather more light is shed on the present case by the decision in *The President Brand*. The vessel in that case was carrying a cargo under a port charter which again provided that she should discharge at a place reachable on arrival. In the event she was ordered to discharge at Lourenço Marques. The vessel arrived off the port at 0800 hours on 19th April and gave notice of readiness, but was unable to make any further progress because her draught was too great to enable her to cross the bar. At 0130 hours on 23rd April she crossed the bar and entered the port, but at 0400 hours she had to anchor and wait until a berth became free. Notice of readiness was given at 1100 hours that day. A berth became free at 1740 hours, but the vessel could not move during hours of darkness and she was therefore unable to berth until 1630 on 24th April. The owners claimed damages for the detention of the vessel from the time she arrived off the port (0800 hours on 19th April) until she reached her berth (1600 hours on 24th April); alternatively demurrage calculated on the basis that the notice of readiness given at 0800 hours on 19th April was valid and effective to start laytime running. Roskill J. held that the notice of readiness given on 19th April was invalid because the vessel was not within the commercial limits of the port and was not therefore an arrived ship. Nonetheless, the vessel had "arrived" within the meaning of the clause requiring the charterers to indicate a berth reachable on arrival and the charterers were therefore liable in damages for the time lost by reason of the vessel's inability to cross the bar. However, once across the bar the master could give a valid notice of readiness and it was incumbent on him to do so promptly. Roskill J. considered that there had been no unreasonable delay in giving notice of readiness and therefore the period of delay for which the charterers were liable in damages came to an end at 1100 hours on 23rd April when notice of readiness was given and the laytime provisions came into operation.

13. Miss Healy did not seek to argue that *The President Brand* was wrongly decided, but if the decision of Roskill J. is correct, as I think it clearly is, it is fatal to any suggestion that a valid notice of readiness can be given simply because the vessel has been prevented from becoming an arrived ship by the charterers' breach of contract. Nor does it provide any support for the proposition that, when calculating damages for detention during what remains part of the carrying voyage, allowance should be made for periods which do not count under the laytime provisions, such as week-ends and holidays. On the contrary, it supports the conclusion that the laytime provisions have no relevance until the vessel has reached a point at which a valid notice of readiness can be given, but that once that point has been reached the laytime and demurrage provisions apply to the exclusion of any further liability for damages at large. This, of course, is entirely consistent with the distinction drawn by Lord Diplock between the carrying voyage and discharging operation and with the allocation of the risk of delay during those different stages by means of the provisions governing the commencement and running of laytime.

14. Miss Healy sought to derive some assistance from the decision in ***Shipping Developments Corporation v V/O Sojuzneftexport (The 'Delian Spirit')*** [1972] 1 Q.B. 103. In that case the vessel was chartered to load a cargo of oil at a port in the Soviet Black Sea. The charter provided that she should load at a place reachable on arrival to be indicated by the charterers. The vessel was ordered to Tuapse, a small port where vessels must wait outside the breakwater if a berth is not immediately available. No berth was available for the vessel when she arrived so she anchored in the roads as near to the berth as she could get and gave notice of readiness to load. The Court of Appeal held that the vessel was an arrived ship when anchored in the roads and that the charterers were entitled to the benefit of the laytime for which they had paid, even though they were in breach of contract in failing to indicate a berth reachable on arrival. In reaching that decision the court relied on a number of earlier cases including *The Angelos Lusis* and ***The President Brand.***

15. The decision in *The Delian Spirit* clearly proceeds on the basis that the vessel had reached her destination and was an arrived ship. Once that point had been reached the loading voyage had been completed. Notice of readiness could be, and had been, given and the stage of the loading operation had begun. There is, as Lord Denning M.R. pointed out at page 123, plenty of authority to support the view that the laytime and demurrage provisions are intended to apply to the whole of the periods occupied by the loading and discharging operations, regardless of whether delay is caused by any particular breach of contract on the part of the charterers. The vessel in the present case had not reached the point at which she was an arrived ship, however, and the case is, therefore, clearly distinguishable from *The Delian Spirit* on this ground.

16. In support of her argument Miss Healy drew my attention to the final paragraph of the judgment of Sir Gordon Willmer in ***The Delian Spirit*** at page 127C-D in which he expressly left open the question whether the owners would have been able to pursue an independent claim for damages without taking account of the laytime provisions if the vessel had not been an arrived ship. However, the question which arises in this case did not arise in ***The Delian Spirit*** and does not appear to have been the subject of any significant argument. Sir Gordon was careful not to express any view on the matter, one way or the other, and I do not therefore think that any help can be derived from that source.

17. Miss Healy also drew my attention to a passage in *Commencement of Laytime* (3rd ed., 1998) by Mr. Donald Davies at pages 130-131 in which the author suggests that when a vessel is waiting at or off a port it should be unnecessary to decide whether she is technically an arrived ship because it is illogical and unfair to set laytime off against delay caused by the charterers' breach of contract if the vessel is anchored a short distance within the port limits but not to do so if she is anchored a short distance outside them. Mr. Davies bases that suggestion partly on a passage from the judgment of Lord Denning M.R. in *The Delian Spirit* at page 123 in which he said *"The answer is given by a long line of cases which establish that where the charterers have been guilty of a breach causing delay, they are entitled to apply their lay time so as to diminish or extinguish any claim for the delay, leaving the shipowners to claim for demurrage at the agreed rate for any extra delay over and above the lay time. The reason is because they have bought their lay time and paid for it in the freight, and are entitled to use it in the way which suits them best, and in particular to use it so as to wipe out or lessen any delay for which they would otherwise be responsible."*

    It is important to note, however, the context in which this passage appears. The earlier part of the judgment deals at some length with whether the ***Delian Spirit*** was an arrived ship and his conclusion that she was provides the background to what follows. I think that is clear from the fact that the line of cases to which he referred include *The President Brand* to which he referred with approval.

18. It has long been recognised that the completion of the carrying voyage is a critical stage in the adventure, not least because it marks the point at which the charterers' obligation to co-operate with the owner in discharging the goods begins. For that reason it is usually also the point at which notice of readiness can be given in order to bring into operation the laytime and demurrage provisions of the charter and at which the risk of delay to the vessel passes from the owner to the charterer. The purpose of a notice of readiness in this context is twofold: to inform the charterer that the vessel has completed the carrying voyage and is at his disposal for the discharging of cargo; and to start the running of laytime. Unless the parties have agreed otherwise, therefore, a valid notice of readiness cannot be given until the vessel has reached her agreed destination, whether that be the port, the berth or some other place identified in the charter: see ***T.A. Shipping Ltd v Comet Shipping Ltd (The 'Agamemnon')*** [1998] 1 Lloyd's Rep. 675 to which I shall refer again later. However, it is open to the parties to agree that notice of readiness may be given before the vessel reaches her destination, as was done in the present case by

the inclusion in clauses 6 and 37 of provisions enabling the vessel under certain circumstances to give notice of readiness before she reached the berth. The distinction between being an arrived ship and not being an arrived ship may in some cases seem rather technical, but the parties to a contract of this kind are well aware of the significance of reaching the place at which notice of readiness can be given and the consequences which follow from it. The laytime provisions of the charter, including the provisions regulating the giving of notice of readiness, are part of a carefully worked out commercial arrangement freely entered into by both parties. I agree with Miss Ambrose that there is no illogicality or unfairness in giving effect to them in accordance with their terms. Such factors do not seem to have troubled Roskill J. unduly in ***The President Brand*** and it is interesting to note that in *The Delian Spirit* all three members of the court approved his judgment in that case without any reservation. For these reasons I am unable to agree with the views expressed by Mr. Davies on this point.

19. Finally Miss Healy sought to derive support from the decision of the Court of Appeal in ***Kurt A. Becher G.m.b.H. & Co. K.G. v Roplak Enterprises S.A. (The 'World Navigator')*** [1991] 2 Lloyd's Rep. 23. In that case Roplak had sold a cargo of maize to Becher f.o.b. Rosario under a contract which incorporated the Argentine Centro terms. These provided for the carrying vessel to be loaded at a certain daily rate and for buyers to give sellers at least fifteen days notice of the vessel's readiness to load. The vessel reached Zona Comun in the River Parana some 250 miles below Rosario on 13th June and gave notice of readiness to load, but because of congestion in Rosario roads was instructed to wait there. Thereafter, because of deficiencies in the shipper's documentation the vessel lost her turn and was overtaken by other vessels. Had that not happened she would have berthed at Rosario on 25th June. As a result of the delay she did not enter berth until 11th July, but she completed loading on 22nd July, well within the time allowed under the contract because the shipper was capable of greatly exceeding the daily loading rate contained in the Centro conditions. The Court of Appeal held that although the seller was in breach of its duty to do all that was necessary to enable the vessel to berth on the expiry of the 15 days' notice, the buyer had suffered no loss because the seller was entitled to use the whole of the time allowed to it under the Centro conditions and it was to be assumed that even if the vessel had reached Rosario earlier, the seller would have chosen to perform the contract in the manner least beneficial to the buyer.

20. In my view there are some important distinctions to be drawn between ***The World Navigator*** and the present case. Although the contract in that case provided for a minimum loading rate once the vessel was in berth and for the buyer to give notice to the seller of the vessel's readiness to load, it was a contract for the sale of goods, not a voyage charter. The function of the notice of readiness was to enable the seller to make the necessary arrangements for the goods to be loaded, not to inform him that the ship was then at his immediate disposal. That is reflected in the fact that the buyer had to give *at least* 15 day's notice of the vessel's readiness and in the fact that it was unnecessary for the vessel to have reached any specific point on her approach voyage before such a notice could be given. The seller's obligation under the Centro terms to load the cargo at a minimum daily rate arose only when the vessel had entered berth and was not linked to the giving of notice of readiness to load. The extent to which the parties sought to allocate the risk of delay to the vessel and the manner in which they did so differed markedly from that which one finds in the established form of voyage charter, and indeed from that which one finds in each of the two charters with which I am concerned in this case.

21. In *The World Navigator* the only consequence of the seller's breach of contract was that the vessel began loading her cargo later than would otherwise have been the case. In order to recover damages the buyer was therefore forced to contend that if she had berthed earlier in Rosario she would also have completed loading earlier. However, that argument, if successful, would have resulted in the buyer's obtaining at the seller's expense a benefit (in the form of a faster loading rate) for which it had not contracted. In my view the present case is different. Here the parties agreed that the risk of delay to the vessel fell on the owners during the carrying voyage, subject to any breach of contract on the part of the charterers for which they would be responsible in the ordinary way. Once the point was reached at which notice of readiness could be given the risk of delay beyond the agreed laydays fell on the charterers. This is not, therefore, a case in which the owners are seeking to obtain an uncovenanted benefit by seeking to obtain more from the charterers than they had undertaken to provide. The parties have simply allocated the risk of delay in different ways at different stages of the adventure and the point had not been reached at which the laytime provisions came into effect. For this reason I do not think that the decision in *The World Navigator* has any relevance to the present case.

22. At this point it is necessary to return to the arbitrators' Reasons. In paragraph 5.22 they held that the notice of readiness tendered at 0800 hours on 15th June was invalid. It follows from what I have said above that in my judgment they were right to do so.

23. In paragraph 7.06 of the Reasons the arbitrators rejected the argument based on ***The Delian Spirit*** and ***The World Navigator*** that laytime saved should be set off against the period of detention at the anchorage. In my judgment they were right to do so for the reasons I have already given. I also agree with them that if any time was saved during discharging it was to be paid for in despatch.

The commencement of laytime at Xiamen

24. In section 10 of the Reasons the arbitrators deal with the commencement of laytime at Xiamen. In paragraph 10.05 they held, correctly, that the carrying voyage ended only when the vessel reached the discharge berth at Xiamen and in paragraph 10.08 they found that the notice of readiness given by the master on 15th June had been "received", but not "accepted", by the agents to whom it had been tendered. It follows that they were right to hold that the notice of readiness was invalid and that the charterers did not agree to treat it as valid.

25. It was common ground at the arbitration that no notice of readiness was given after 15th June. Glencore therefore contended that laytime did not begin to run and that none of the time spent discharging should be regarded as having been used when it came to calculating demurrage and despatch. It appears from paragraph 10.23 of the Reasons that there was also a dispute as to whether a valid notice of readiness had been given at the second discharging port, Nantong, but the arbitrators found it unnecessary to decide that question because they held that by virtue of clause 38 of the charter it was unnecessary for the vessel to give notice of readiness at the second discharging port in order to start time running. There is no appeal against their decision on this point and I say no more about it other than that it precludes any argument that time did not count at Nantong.

26. In support of her submission that in the absence of a valid notice of readiness time did not begin to run at Xiamen Miss Healy drew my attention to the decisions in ***Transgrain Shipping B.V. v Global Transporte Oceanico S.A. (The 'Mexico 1')*** [1990] 1 Lloyd's Rep. 507, ***T.A. Shipping Ltd v Comet Shipping Ltd (The 'Agamemnon')*** [1998] 1 Lloyd's Rep. 675 and ***Glencore Grain Ltd v Flacker Shipping Ltd (The 'Happy Day')*** [2001] 1 Lloyd's Rep. 754.

27. In ***The Mexico 1*** the vessel was chartered for the carriage of a part cargo of maize in bags from Argentina to Angola. The charter gave the owners the right to complete the vessel with other cargo. By a separate agreement with the same charterers the owners also agreed to carry a parcel of beans from Argentina to Angola. When the vessel arrived at her discharging port both the maize and the beans were overstowed by the completion cargo and as a result neither was accessible when the vessel gave notice of readiness to discharge. No further notice of readiness was given and a question therefore arose as to when time started to count in relation to those two cargoes. The Court of Appeal held that by the terms of the contract a valid notice of readiness had to be given in order to start laytime running. If the notice of readiness was invalid, then, as Mustill L.J. pointed out (at page 510, col.1), *". . . . . unless something happened after the notice was sent to make the laytime start, it never started at all, with the consequence not only that the owners have earned no demurrage, but also that they are obliged to pay the charterers despatch money for the whole of the laytime."*

28. The charterers in that case had conceded before the arbitrators that time had begun to run when discharging of the maize began, but as Mustill L.J. said, it is difficult to see how that conclusion can be reached in the absence of findings of fact sufficient to support an agreement on the part of the charterers to dispense with a valid notice of readiness or a waiver by them of their right to receive one. A mere request for delivery of the goods has been held not to be sufficient to amount to a waiver of that right: see ***Pteroti Compania Naviera S.A. v National Coal Board*** [1958] 1 Q.B. 469. Having conceded the point before the arbitrators, however, the charterers in *The Mexico 1* did not ask the court to disturb that part of the award, so it became unnecessary for it to express a final view on the question. In the present case, however, Glencore made no such concession.

29. In ***The Mexico 1*** the real point for decision was whether an invalid, and therefore ineffective, notice of readiness could take effect at a later date when the ship became ready in all respects to discharge the cargo. The court held that it could not. In that case (as in this) the charter required the vessel to give notice of actual, not prospective, readiness to discharge the cargo. A notice given when the vessel was not ready, but which was intended to take effect at an uncertain date in the future, would not only fail to satisfy the express requirements of the contract, but would be essentially unbusinesslike.

30. In ***The Agamemnon*** the vessel was chartered for a voyage from Baton Rouge to Brisbane with a cargo of steel pipes. The charter allowed notice of readiness to be given at or off the port if a berth was not then available. The vessel gave notice of readiness at the South West Pass at the mouth of the Mississippi. This is a customary waiting area for vessels wishing to enter the Mississippi to load at one of the upriver ports, but is not within the area of the port of Baton Rouge which is some 170 miles away. The vessel entered the Mississippi the next day and proceeded to the anchorage at Baton Rouge where she waited for a berth. No further notice of readiness was given and the vessel entered berth the next day and began loading her cargo.

31. A dispute arose over the commencement of laytime. The arbitrators held that as the anchorage at Baton Rouge was the nearest the vessel was permitted to approach the berth the charterers should have accepted the notice of readiness originally given at the South West Pass when she reached the anchorage and that therefore the notice should be treated as taking effect as if it had been given at that time. When the matter came before the court on the appeal the owners submitted that the notice of readiness given at the South West Pass should be treated as inchoate because the vessel was in fact ready to load when the notice was given, even though she had not then arrived at the place at which a valid notice could be given under the terms of the charter. In this way they sought to distinguish the decision in ***The Mexico 1***.

32. Thomas J. rejected that submission. He held that an effective notice of readiness can only be given when the conditions set out in the charter have been met. These include not only that the vessel should be in the appropriate state of readiness but also that she should be at the stipulated place. When the vessel gave notice of readiness she was not at a place from which a contractual notice could be given and the notice was therefore invalid and ineffective to start time running, either at the time it was given or later when the vessel reached the anchorage at Baton Rouge. I would respectfully agree with that conclusion. In that case too, however, the charterers had conceded before the arbitrators that time began to run when the vessel started loading and therefore the question left unanswered in *The Mexico 1* did not arise for consideration.

33. That question did arise for decision, however, in ***The Happy Day***. In that case the vessel was fixed under a berth charter for the carriage of a cargo of wheat from Odessa to Cochin. She arrived off Cochin on 25th September

1998 but was unable to enter the port because she had missed the tide. Nonetheless, the master gave notice of readiness at 16.30 hours that day. The vessel entered port on 26th September and began discharging, but no further notice of readiness was given. One of the issues raised before the court was whether laytime had begun to run even though a valid notice of readiness had not been given. Langley J. held that it did not. In particular, he held, following the decision in ***Pteroti Compania Naviera S.A. v National Coal Board*** [1958] 1 Q.B. 469 that it was not possible to infer any agreement on the part of the charterers to give up their rights simply from the fact that they had not formally rejected the notice of readiness and had allowed discharging to begin.

34. These three decisions were cited to the tribunal in the present case, but the majority held that they could be distinguished on the grounds that in each of them the fault lay with the ship in the sense that the notice of readiness had simply been tendered prematurely. They held that in the present case, by contrast, the only reason the notice of readiness was invalid was because the vessel had been prevented from berthing on 14th June, and therefore from being in a position to serve a valid notice of readiness on 15th June, by the charterers' breach of contract. They held that there was a causal link between the charterers' breach and the invalidity of the notice of readiness and that, since the charterers could not be permitted to benefit from their own breach, they were estopped from denying that time started counting from the commencement of discharge.

35. The decisions in ***The Mexico 1*** and ***The Agamemnon*** reaffirm the principle that in a case where the charter stipulates that laytime is to begin following the giving of notice of readiness time will not begin to run (in the absence of waiver or agreement to the contrary) unless and until a valid notice of readiness has been given. In the present case the tribunal has not held that there was any agreement on the part of Glencore to treat the notice of readiness as effective as from the time when discharging began; nor has it held that Glencore waived its rights with effect from that time. That is not surprising because there are no findings of fact that would support either of these conclusions. If time is to run at all in the present case, therefore, it can only be because the notice of readiness given on 15th June is to be treated as valid and effective to start time running in accordance with the terms of the charter. That being the case, I can see no basis on which the arbitrators could properly hold that laytime at Xiamen started to count from the commencement of discharge. If Glencore is prevented by its own breach of contract from saying that the notice of readiness was invalid, time ought to count from 8.00 a.m. on 16th June in accordance with clause 6.

36. However, I think there is a more fundamental error in the reasoning of the majority. Although it is not spelled out in quite this way, they proceeded on the basis that if the charterers had not been in breach of contract the vessel would have berthed on 14th June and the notice of readiness given at the anchorage on 15th June would then have been valid. From this they conclude that it was the charterers' breach that caused the notice of readiness given on 15th June to be invalid and that it was the charterers' breach that was the cause of the vessel's failure to give a valid notice.

37. In my view that is plainly wrong and overlooks the fact that if the vessel had been able to enter berth on 14th June, a notice of readiness given on 15th June would have been given from the berth, not from the anchorage. It is true that Glencore's breach of contract prevented the vessel from reaching a berth on 14th June and so prevented the owners from giving a valid notice of readiness on 15th June, but it does not follow that it caused the notice of readiness, which could not properly be given at the anchorage, to be invalid, or that it prevented the owners from giving a valid notice of readiness when the vessel did eventually berth. The reason the notice of readiness given on 15th June was invalid was because the owners gave it prematurely, that is, before the vessel had reached the place stipulated in the charter; and the reason the vessel failed to give a valid notice of readiness was because the owners failed to give one when she did eventually reach the stipulated place. Insofar as Glencore's breach of contract prevented the vessel from becoming an arrived ship, the owners are entitled to recover damages for delay. In truth, therefore, by making a claim for despatch on the basis that no effective notice of readiness was given Glencore is not seeking to benefit from its own breach of contract but from the owners' independent failure to give notice of readiness once the vessel had reached the point at which notice could properly be given. For these reasons the decision of the majority in paragraph 10.20 of the Reasons that laytime began to count from the commencement of discharge at Xiamen cannot in my view be sustained.

38. It is therefore necessary to consider whether, despite the lack of a valid notice of readiness, laytime started to count for some other reason when discharging operations began. Two points may be made at the outset. The first is that the parties in the present case have provided in clear terms for the steps which must be taken in order for laytime to begin and there is no reason in principle why the contract should not be permitted to operate in accordance with its terms. It follows, as Mustill L.J. observed in *The Mexico 1*, that it is difficult to see how time could begin to count in these circumstances in the absence of waiver or agreement. The second is that it is always open to the parties, if they so wish, to provide for contingencies of this kind, for example, by providing that time actually used before the commencement of laytime is to count: see clause 8 of the charter in *The Agamemnon*.

39. In the ***Happy Day*** Langley J. considered the significance of the decision in *The Mexico 1* in relation to the owners' submission that time started to count automatically on the commencement of discharge. He said at page 760 (col.1) *"In reaching the conclusion he did, Lord Justice Mustill emphasized (p.513) that the contract itself provided for the commencement of laytime to be started by a valid notice "and in no other way", and as a result rejected the notion (adopted by the arbitrators) that an invalid notice could be treated as "inchoate", becoming effective when the cargo was or was known to be available for discharge. For my part, I can see no basis on which a different conclusion could be justified by substituting the time when discharge actually commences for the time when the vessel was or was*

known to be ready for discharge. That too, absent estoppel or the like, would be to re-write the contract in a manner which I think to be illegitimate and inconsistent with the reasoning of Lord Justice Mustill."

40. I entirely agree. When, as here, the terms of the contract are clear and the parties have not demonstrated an intention, by one means or another, to depart from them, there is no justification for seeking to modify those terms in an attempt to alleviate what is perceived to be some element of unfairness, especially in a case where that unfairness arises from the failure of one party to operate the contract in accordance with its terms. Nor do I think that one can properly resort to some wider concept of "futility" to obviate the need to give a notice of readiness under these circumstances. The case of ***Barrett Brothers (Taxis) Ltd v Davies*** [1966] 1 W.L.R. 1334 which was relied on before Langley J. was concerned with a different kind of term in a different kind of contract. It is well understood that under a charter of this kind notice of readiness is given in order to start laytime running, not merely to provide the charterers with information which in many cases will already be in their possession. As such it represents an essential step in the contractual mechanism for allocating the risk of delay in loading or discharging. Whether a step of that kind is essential in the performance of a contract is a matter for the agreement of the parties. If the parties have stipulated that a notice must be given in order to bring some other provision of the contract into operation, I doubt whether it could ever be dispensed with on the grounds that to give such a notice would be futile.

41. Miss Ambrose submitted that ***The Happy Day*** could be distinguished from the present case because by their breach of contract the charterers themselves had obtained effective control over the vessel's movements and so determined when she would became ready to discharge. She submitted that the requirement to give notice of readiness to discharge cannot have been intended to apply in those circumstances. It is true that on the arbitrators' findings there was nothing the owners themselves could do to hasten the moment at which the vessel entered berth, but the fallacy in the argument lies in the assumption that the function of a notice of readiness is merely to impart information. For the reasons I have already given I do not think that in the present charter its function is so limited.

42. For these reasons I am satisfied that the majority of the tribunal were wrong to hold that time started to count at Xiamen from the commencement of discharge. No valid notice of readiness was ever given at that port and therefore time did not begin to run.

43. It was common ground that if time did not begin to run, none of the laytime was used, but Miss Ambrose submitted that on the true construction of clause 7 of the charter, if laytime did not begin to run at all, despatch money did not become payable. The part of clause 7 dealing with the payment of despatch provides as follows: "*Owners to pay to Charterers despatch money for working time saved in loading/discharging at the rate of US$6,000 per day of 24 consecutive hours or pro rata.*" and she submitted that time cannot be "saved" if it never starts to run.

44. One finds no mention of this point in the award, nor does it appear in this form in any respondent's notice. In these circumstances I doubt whether it is open to the owners to pursue it on this appeal, but even if it is, I do not think that it is well-founded. It is important to read this part of clause 7 in its context which includes clauses 5, 6 and 33. These provide as follows:

> "*5. Cargo to be . . . . . discharged . . . . . as per clause 33.*
>
> *6. Laytime at loading and discharging ports shall commence . . . . . if written notice of readiness to load or discharge is given to Shippers or Receivers or their Agents . . . . . .*
>
> *33. Vessel to discharge at the average rate of 5,000 metric tons per weather working day of 24 consecutive hours except China where . . . . . 2,500 metric tons basis soyameal/pellets . . . . . .*"

45. In my judgment the expression "Owners to pay to Charterers despatch money for working time saved" in clause 7 means that the owners will pay the charterers for each day of working time that is allowed by the contract but is not used. The amount of working time allowed is to be calculated by reference to the quantity of cargo and the agreed rate of discharge and the amount used is to be calculated by reference to the time taken to complete the discharge of the vessel after the expiry of a valid notice of readiness. The time that was allowed but has not been used is to be regarded as saved. A failure to give notice of readiness simply results in none of the time allowed being used and therefore in the whole of that time being saved and a corresponding liability for the payment of despatch. This approach is reflected in the observations of Mustill L.J. in ***The Mexico 1*** in the passage at page 510 to which I referred earlier, in the decision of Diplock J. in ***Pteroti v National Coal Board*** and in the decision of Langley J. in ***The Happy Day***, a decision on the same charter form.

The position under the Goldbeam charter

46. In paragraph 10.13 of the Reasons the arbitrators record that despite the invalidity of the notice of readiness, Goldbeam agreed with Navios that laytime commenced when discharging began at Xiamen and that on that basis Navios and Goldbeam agreed on the amount of despatch earned at the two discharging ports. They also record in paragraph 10.14, however, that the agreement between Navios and Goldbeam had been reached before judgment was delivered in ***The Happy Day*** and that at the hearing Goldbeam was adopting against Navios the arguments and submissions being made by Glencore.

47. On the hearing of the appeals Miss Ambrose for Navios submitted that Goldbeam had not sought to challenge the findings in paragraph 10.13 and that, whatever might be the position as between Glencore and Goldbeam, as between Goldbeam and Navios, Goldbeam was bound by its agreement that time started to count on the commencement of discharge. However, I think Mr. Croall was right in saying that that involves reading too much

into the Reasons. It is clear, as one would expect and indeed as the arbitrators confirm, that at the hearing Goldbeam adopted against Navios the arguments made against it by Glencore and adopted against Glencore the arguments made against it by Navios. If there had been a binding agreement between Goldbeam and Navios to treat laytime at Xiamen as counting from the commencement of discharge, that would have been a complete answer to the argument originating from Glencore that time did not begin to run at all. If the point had been raised by Navios in those terms, I am sure that the arbitrators would have referred to it, whether or not they found it necessary to decide it. Instead they mention the fact that the agreement was made before judgment was delivered in ***The Happy Day*** and record the fact that Goldbeam adopted Glencore's submissions. I think it is clear that the arbitrators were not intending to hold that there was a binding agreement between Navios and Goldbeam that time was to count from the commencement of discharge, but were simply explaining why it had become necessary to deal with the issue and the background to it. Further support for that view can be found in paragraph 4.16 of the Reasons for the award between Goldbeam and Navios which suggests that the agreement was limited to the amount that would be due if laytime began to run on commencement of discharge at Xiamen. In these circumstances I do not think that Goldbeam is precluded from adopting the submissions made on behalf of Glencore and contending that laytime did not begin to run at Xiamen.

Damages

48. The arbitrators dealt with the measure of damages in section 8 of their Reasons. They began by considering the loss actually suffered by Navios and found that it was represented by the additional hire that had become due during the period of the vessel's detention at Xiamen. Hire was payable under the time charter between Navios and Bonusnauta at the rate of US$10,400 a day, but the arbitrators found that since July the market had fallen considerably to the point where the rate for the ***Mass Glory*** in the Pacific in August 1998 was US$7,250 a day. They also found that Navios would indeed have redelivered the vessel to Bonusnauta as soon as she had completed her employment under the charter to Goldbeam.

49. The arbitrators next considered whether the loss suffered by Navios was too remote to be recoverable against Goldbeam. Having considered at some length a number of the leading authorities on remoteness of damage, including ***Koufos v C. Czarnikow Ltd (The 'Heron II')*** [1969] A.C. 350, they held that it was not, partly because when entering into the charter Goldbeam must have been aware from the description of Navios as "disponent owners" that Navios had taken the vessel on time charter. They also held that it was "not unlikely" that a delay of 55 days would result in the vessel's being redelivered late under the time charter rather than being fixed for further employment at current market rates.

50. The arbitrators then turned to consider the position between Glencore and Goldbeam. Glencore submitted that the loss ordinarily flowing from the detention of a vessel is the loss of her earning capacity which is to be measured by reference to market rates. It argued that the loss sustained by Navios in this case was unusual and outside its reasonable contemplation and was therefore too remote to form part of the loss recoverable from it by Goldbeam. The arbitrators did not embark on any consideration of what was or was not within the contemplation of Glencore at the time it entered into the contract with Goldbeam. Instead they held that in the light of the decisions in ***Stargas S.p.A. v Petredec Ltd (The 'Sargasso')*** [1994] 1 Lloyd's Rep. 412 and ***Sacor Maritima S.A. v Repsol Petroleo S.A.*** [1998] 1 Lloyd's Rep. 518 it was settled law that where the breach of a sub-charter puts the disponent owner in breach of the head charter the disponent owner is entitled to be indemnified in full in respect of its liability under the head charter and any costs incurred in defending the claim, provided only that it has not failed to mitigate its loss. The arbitrators found that there had been no failure on the part of Goldbeam in this case to mitigate its loss and that Glencore was therefore liable to indemnify Goldbeam in full.

(a) Goldbeam's liability to Navios

51. Mr. Croall's submissions on behalf of Goldbeam were mainly directed to resisting Glencore's attempt to overturn the arbitrators' decision concerning the effect of the decision in ***The Sargasso***. However, he did adopt against Navios Miss Healy's submission that when a party is liable by reason of his breach of contract for the detention of a vessel damages are normally to be assessed by reference to the prevailing market rate since that represents the earning capacity of the vessel of which the owner has been deprived and is the loss ordinarily within the contemplation of the parties at the time the contract was made. In support of that proposition I was referred to ***SIB International S.R.L. v Metallgesellschaft Corporation (The 'Noel Bay')*** [1989] 1 Lloyd's Rep. 36.

52. This part of Miss Healy's argument was not really controversial and I accept that in general damages for the detention of a vessel are to be calculated by reference to the prevailing market rate. A ship is a profit-earning chattel and the market rate therefore normally provides the best guide to her earning capacity at any given time. Unusually profitable employment that might for one reason or another have been available to her will not normally be taken into account because it will not have been within the defendant's reasonable contemplation. It will therefore be regarded as too remote in law to be recoverable. In the present case Navios did not seek to recover damages for the loss of the opportunity to employ the vessel elsewhere; it sought instead to recover additional costs arising from the prolongation of the voyage by reference to a rate of hire which exceeded current market levels and did so because the time charter under which it employed the vessel was coming to an end. The fact that Navios had an option to continue the charter is in my view irrelevant. It was not bound to exercise the option and unless it chose to do so the charter would expire in accordance with its terms. I do not think it right, therefore, to treat Navios' decision not to exercise its option to extend its charter with Bonusnauta as a special factor affecting the measure of its loss.

53. Having referred to ***Hadley v Baxendale*** (1854) 9 Exch. 341, the arbitrators record in paragraph 8.06 of the Reasons that it was conceded by all parties to the proceedings that the second limb of the rule did not apply in this case. I take this to mean that all those concerned were agreed that no special circumstances were communicated by Navios to Goldbeam or by Goldbeam to Glencore which would affect the parties' contemplation of the loss that would ordinarily follow from a breach of the contract causing delay to the vessel. It is not surprising, therefore, that Goldbeam submitted as against Navios that a claim for damages calculated by reference to the rate of hire payable by Navios under the time charter with Bonusnauta rather than by reference to the market rate for the vessel was too remote to be recoverable. However, notwithstanding what is said in paragraph 8.06 the arbitrators found in paragraph 8.19 of the Reasons that Goldbeam was aware from the terms of the voyage charter itself that the vessel was on time charter to Navios and that seems to have played a significant part in their subsequent finding as to what was, or should have been, within the reasonable contemplation of Goldbeam at the time it entered into the contract.

54. It is clear from paragraph 8.21 of the Reasons that Goldbeam was not specifically aware that the time charter between Navios and Bonusnauta was coming to an end, but the arbitrators rejected Goldbeam's submission that the loss being claimed by Navios was too remote on two grounds. In paragraph 8.21 they said this: *"In our view, Goldbeam's argument to this effect must fail for two reasons viz. (a) it was equally probable that a delay of 55 days could result in the late re-delivery of the vessel under the time charter party and (b) in any event, the loss suffered has to be reasonably foreseeable . . . . . i.e. "not unlikely" or "a serious possibility" rather than probable. We find that it is reasonably foreseeable that a delay to a vessel which is on time charter could result in the vessel being re-delivered late, or in other words, that it is not unlikely that delay to a vessel on time charter could result in her being re-delivered late*."

The expressions "*not unlikely*" and "*a serious possibility*" are taken from the speeches in ***The Heron II*** to which the arbitrators had earlier referred.

55. The arbitrators' finding that it was "*equally probable*" (by which I think they must have meant as probable as not) that a delay of 55 days could result in the late redelivery of the vessel is a finding of fact which in my view they were entitled to make in the light of the period of delay itself and their knowledge of the trade in question. As such it is not open to review on this appeal. Similarly, their conclusion that it was "*reasonably foreseeable*" or "*not unlikely*" that a delay of this magnitude to a vessel on time charter could result in her being re-delivered late with the consequence that the charterer would incur an additional liability for hire which could not be recovered through her continued employment is one which is not in my view open to challenge. It involves the application of the principles set out in the ***Heron II*** to the facts found by the tribunal and although it is to be treated as a conclusion of mixed fact and law, there are no grounds for suggesting that it is fatally flawed. It follows that in my view the arbitrators were entitled to hold that the loss claimed by Navios was not too remote to be recoverable from Goldbeam.

(b) Glencore's liability to Goldbeam

56. When they came to consider the claim by Goldbeam against Glencore the arbitrators made no findings comparable to those in paragraphs 8.12 and 8.19 – 8.21 of the Reasons, simply contenting themselves with holding that because Glencore's breach of the sub-charter caused Goldbeam to be in breach of the head-charter, Goldbeam was entitled as a matter of law to be indemnified in full by Glencore in respect of its liability to Navios. The tribunal based its decision on what it understood to be the effect of the decisions in ***The Sargasso*** and ***Sacor v Repsol***.

57. The essence of Glencore's complaint in the present case is that at the time of entering into the charter with Goldbeam it could not reasonably have contemplated the possibility that a breach of charter causing delay to the vessel might expose Goldbeam to a liability to the head owner for damages that could properly be assessed otherwise than by reference to the prevailing market rate for the vessel. The arbitrators made no findings about what Glencore should or should not have had in contemplation, but it follows from their reasoning that even if they had accepted that part of Glencore's case their decision would have been the same. Miss Healy submitted that the arbitrators' decision is contrary to principle because it leads to the conclusion that the extent of Glencore's liability to Goldbeam falls to be determined not by reference to circumstances which Glencore itself could reasonably be expected to have had in contemplation at the time of entering into the contract with Goldbeam, but by reference to a different contract between different parties and to circumstances which were not, and perhaps could not have been, within its reasonable contemplation.

58. It should be noted that although the findings made by the tribunal in paragraphs 8.19 – 8.21 of the Reasons suggest that any charterer in Goldbeam's position could be expected to have contemplated the possibility that a delay of 55 days might cause the vessel to be redelivered late, the arbitrators' conclusion that the loss sustained by Navios was not too remote depends in part on their finding that Goldbeam knew that the vessel was under time charter to Navios. Whether the existence of that time charter was or should have been within the contemplation of Glencore is a matter on which no finding has been made. The question raised by this limb of the appeal, therefore, is whether, as a matter of law, a party (A) who commits a breach of contract knowing that it will cause the other party to the contract (B) to be in breach of a similar obligation under a contract with a third party (C) is liable in damages to B in the amount of B's liability to C, even though the loss sustained by C was outside the reasonable contemplation of A at the time he entered into the contract with B, though within the reasonable contemplation of B at the time he entered into the contract with C.

59. The contractual arrangements in ***The Sargasso*** bear some similarity to those in the present case. The plaintiffs, Stargas, chartered the vessel *Sargasso* from Petredec under a time charter for a period of about 19 months. Stargas sub-chartered the vessel to Neste for the carriage of a cargo of propylene from Sines to Antwerp. On arrival the cargo was found to have been contaminated with the residues of previous cargoes of butadiene. Neste claimed damages from Stargas who in turn made a claim against Petredec to recover the amount of its liability to Neste and the costs incurred in defending the proceedings brought against it. Clarke J. held that Petredec was in breach of its obligation under the time charter, that its breach caused Stargas to be in breach of a similar obligation under the voyage charter and that the damages for that breach were to be measured by the amount Stargas had been ordered to pay Neste together with the costs incurred in defending the claim.

60. Clarke J. reached that conclusion for the following reasons. The time charter incorporated the Hague Rules. The period of hire was 19 months and it was within the reasonable contemplation of the parties when they entered into the contract that Stargas might sub-charter the vessel on voyage terms from time to time. It was also within the reasonable contemplation of the parties that any such voyage charter might incorporate the Hague Rules. It follows that it must have been within the contemplation of Petredec that a breach of the Hague Rules on its part would put Stargas in breach of the corresponding provisions of the voyage charter. It was also within the contemplation of the parties that a sub-charter might contain an arbitration agreement. An award made against Stargas pursuant to any such arbitration agreement would, as a matter of law, ascertain and quantify the liability of Stargas to the sub-charterer. Such an event must also, therefore, have been within the reasonable contemplation of the parties. Accordingly, the payment by Stargas of an award made in favour of the sub-charterer under these circumstances would represent a loss which had been caused by Petredec and was therefore recoverable by Stargas from Petredec unless it could be shown either that Stargas had failed to take proper steps to protect its position or that the arbitrators had reached a perverse decision. In either of those eventualities the chain of causation would be broken.

61. The problem in the present case, however, is not one of causation but of remoteness. This question did not arise in *The Sargasso* since a loss represented by the diminution in the value of the cargo resulting from contamination was obviously within the contemplation of the parties to the charter in each case. It is interesting to note that it was accepted in ***The Sargasso*** by counsel appearing on behalf of Stargas that the loss which his clients were seeking to recover must not be too remote. Clarke J. also drew attention to the problem of remoteness when discussing the case of ***Grébert-Borgnis v J. & W. Nugent*** (1885) 15 Q.B.D. 85. In that case the plaintiff, who was a fur merchant carrying on business in Paris, contracted to buy sheepskins from the defendant. In the course of their negotiations he made it clear that he was buying the goods in order to satisfy a customer in Paris. The parties entered into a contract for the sale and purchase of a specified quantity of sheepskins of certain sizes and colours to be supplied at certain times. On the same day the plaintiff entered into a contract with his French customer for the sale of sheepskins of the same sizes and description and on the same terms except as to price. The defendant failed to supply some of the goods and, there being no alternative source of supply, the plaintiff was unable perform his contract with his customer. The plaintiff's customer brought proceedings against him in France and recovered damages in the sum of FF700, then equivalent to £28. In the English action the plaintiff sought to recover from the defendant the sum he had been held liable to pay to his customer together with damages in respect of his own loss of profit. The judge made an award of damages in respect of both heads of loss.

62. The defendant appealed against the award of damages on the grounds that the judge should not have awarded the plaintiff damages in respect of the amount he had been held liable to pay his French customer. The Court of Appeal held that since the plaintiff had informed the defendant that he was buying the goods specifically to enable him to satisfy a corresponding contract with his customer, the case differed from that in which goods are sold in circumstances where resale may be contemplated in general terms but the seller has no specific knowledge of the purpose for which they have been bought. Sir Baliol Brett M.R., with whom Baggallay and Bowen L.JJ. both agreed, considered that the case was covered by the second limb of the rule in ***Hadley v Baxendale***. As a result, the loss suffered by the plaintiff in the form of a liability to his sub-buyer was not too remote in itself to be recoverable.

63. However, that still left the problem of deciding how much the plaintiff was entitled to recover from the defendant in respect of his liability to the sub-buyer. Brett M.R. considered that in a case of this kind a line should be drawn by reference to the defendant's knowledge of the sub-contract – i.e. by reference to what he could reasonably have had in contemplation as the ordinary consequences of a breach. He said at page 90

" But where the sub-contract was fully made known to him in all its terms, in my opinion the defendant would be liable; and the proper inference, and one which the jury might infer, would be that he had contracted with the plaintiff upon the terms that if he broke his contract he should be liable for all the consequences of a failure by the plaintiff to perform his sub-contract.

Still, however, it seems to me, according to what has been decided, that the original vendor, in such a case as this, is only liable, in the case of a breach of contract, for the natural consequences of so much of the sub-contract as was made known to him. If he were told, for instance, that the contract was that if I do not supply my purchaser with the goods which I am ordering from him, my vendor, I shall have to pay my purchaser 4l. a ton for every ton which I do not deliver, then, if there be a breach of the contract, the original vendor would have to pay the 4l. a ton. But supposing there was in the sub-contract between myself and my purchaser not only a stipulation that I should pay 4l. a ton, but, besides that, I should be liable to a penalty of 5l. a day, although that is in the sub-contract, yet if that part of it was not made known to the original vendor, then for that reason and because it is not a natural consequence of

his bargain, he would not be liable to pay the penalty of 5l. a day. It seems to me that the cases establish that the original vendor is to be liable to so much of the sub-contract as was made known to him, but only to that extent."

64. Bowen L.J. said at page 93 *"It seems to me, also, that in a case of this sort, where there was no market into which the parties could go and buy against the broken contract, the natural result which must have been contemplated at the time the original contract was made must have been that there would be a liability by the purchaser to his sub-purchaser. It was for the judge to do the best he could with regard to the amount which he might assess in respect of this. The limit of the liability must clearly be what the purchaser had to pay. But it does not follow that was necessarily what he would be entitled to charge against his vendors. The learned judge would have to give something substantial not exceeding the amount which had to be paid by the purchaser to his sub-purchaser."*

65. I respectfully agree with Clarke J. (*The Sargasso*, page 422 col.1) that it was the recognition that the extent of the plaintiff's liability to the third party may be affected by circumstances which the defendant himself did not have in contemplation that explains why in ***Grébert-Borgnis v J. & W. Nugent*** the judgment in the French proceedings did not automatically determine the amount that the plaintiff could recover in the English action in respect of this head of loss. It represented the maximum amount he could recover under that head, of course, because he could not recover more than he had been required to pay. But it did not follow that because he had been required to pay £28 he could automatically recover it in full from the defendant. The amount awarded by the French court could, however, be taken into account as evidence of what would be a reasonable amount to award by way of damages in respect of that head of loss. In this context I can see no difference of principle between the case where B's liability to C has been determined in arbitration (that being within the contemplation of A and B at the time the contract was made) and the case where it has been determined by a foreign court, at any rate if C has brought proceedings in a jurisdiction in which he might reasonably have been expected to pursue his claim.

66. *The Sargasso* has been considered in two subsequent cases, by Mance J. in ***Sacor v Repsol*** and by Colman J. in ***Aquator Shipping Ltd v Kleimar N.V. (The 'Capricorn 1')*** [1998] 2 Lloyd's Rep. 379. The issues in ***Sacor v Repsol*** were very different from those which arose in ***The Sargasso*** and from those which arise in the present case and I do not think that it is necessary to discuss the decision in any detail. I agree with Mance J., however, that it is important to identify the true scope of the judgment in ***The Sargasso***. Clarke J. was concerned with issues of causation. No issues of remoteness of damage arose in that case and although, as I have already observed, he recognised their potential relevance, he did not have to consider in any detail what effect, if any, they might have on the measure of damages. In ***The Capricorn 1*** Colman J. followed and applied the reasoning of Clarke J. in ***The Sargasso*** in relation to the evidential effect of an award made in an arbitration under the sub-charter. For a loss to be recoverable, however, it is not enough that it should be caused by the defendant's breach. It must also not be too remote in law.

67. The arbitrators held in paragraph 8.25 of the Reasons that *"it is settled law that where the breach of a sub-charter puts the innocent party (in this case Goldbeam) in breach of a head charter, then it is the breach of the sub-charter which has caused Goldbeam to be liable to Navios in the amount of any award and in respect of any costs incurred resisting the claim that gave rise to the award. Hence Goldbeam are entitled to be indemnified in full by Glencore for their liability to Navios plus any costs incurred by Goldbeam in defending the claim unless Goldbeam have somehow failed to mitigate their loss. We find that Goldbeam have not failed to mitigate their loss."*

68. I think it is clear that in reaching that conclusion the arbitrators were of the view that provided the chain of causation remained unbroken Glencore was *as a matter of law* liable to indemnify Goldbeam against its liability to Navios without regard to any other considerations. For the reasons I have given I think they were wrong in that view. In my judgment, both as a matter of principle and authority, whether Glencore is liable to indemnify Goldbeam in full against its liability to Navios depends not only on whether Glencore's breach of contract caused Goldbeam to incur that liability but on whether the liability was such as to be within the reasonable contemplation of Glencore at the time it entered into the contract. Insofar as the loss suffered by Navios, and therefore by Goldbeam, was not within Glencore's reasonable contemplation, Glencore cannot be held liable to indemnify Goldbeam in respect of it.

69. Since, as they understood it, Glencore was liable as matter of law to indemnify Goldbeam in full, the arbitrators made no findings in relation to the extent of Glencore's knowledge or as to what circumstances were or were not within its reasonable contemplation at the time it entered into the charter with Goldbeam. Nor did they consider whether the loss claimed by Goldbeam was too remote. In the absence of such findings the award will have to be remitted to the arbitrators to enable them to give further consideration to these questions.

Mr. Simon Croall (instructed by Bird & Bird) for the appellant
Miss Clare Ambrose (instructed by Rayfield Mills) for the respondent