House of Lords before Lords Bingham of Cornhill ; Nicholls of Birkenhead ; Hope of Craighead ; Hobhouse of Woodborough. 7th December 2000.

LORD BINGHAM OF CORNHILL My Lords,

1. I am in full agreement with the opinion of my noble and learned friend Lord Hobhouse of Woodborough, which I have had the opportunity to read in draft. I gratefully adopt his summary of the facts, the history of these proceedings and the submissions of the parties.

2. A time charterparty such as the present represents a complex commercial bargain between owner and charterer. The owner undertakes for the period of the charter to make his vessel available to serve the commercial purposes of the charterer. To this end the hull, machinery and equipment of the vessel are to be in a thoroughly efficient state, the capacity and fuel consumption of the vessel are specified and the vessel is to be ready to receive the charterer's intended cargo. The owner undertakes these obligations in consideration of the charterer's undertaking to pay for the hire of the vessel at an agreed rate.

3. The charterer agrees to pay hire for the vessel because he wants to make use of it. Crucial to the bargain, for him, are the terms which require the master to prosecute his voyages with the utmost despatch, which provide that the master (although appointed by the owner) shall be under the orders and directions of the charterer as regards employment and which require the charterer to furnish the master from time to time with all requisite instructions and sailing directions.

4. The complexity of a time charterparty derives partly from the fact that ownership and possession of the vessel, which remain in the owner, are separated from use of the vessel, which is granted to the charterer, and partly from the peculiar characteristics and hazards of carriage by sea. As one would expect, the safety and security of the vessel, her crew and her cargo are treated as matters of the highest importance. The charterers may only (under the present charter) send the vessel to safe berths, safe ports and safe anchorages, always afloat and always within Institute Warranty Limits, and the parties in this case agreed a long list of further exclusions. The owners are to remain responsible for the navigation of the vessel. The scope of this last, very important, stipulation is the main issue argued in this appeal.

5. The starting point in the present case is, in my opinion, the master's obligation to prosecute his voyages with the utmost despatch. Irrespective of any express orders by the charterer, that would ordinarily require him to take the route which is shortest and therefore quickest, unless there is some other route which is usual or there is some other maritime reason for not taking the shortest and quickest route. Helpful guidance on the correct approach in law was given by Lord Porter in ***Reardon Smith Line Limited v. Black Sea and Baltic General Insurance Company Limited*** [1939] A.C.562 at 584, a case concerned with deviation under a voyage charterparty: *"The law upon the matter is, I think, reasonably plain, though its application may from time to time give rise to difficulties. It is the duty of a ship, at any rate when sailing upon an ocean voyage from one port to another, to take the usual route between those two ports. If no evidence be given, that route is presumed to be the direct geographical route, but it may be modified in many cases for navigational or other reasons, and evidence may always be given to show what the usual route is, unless a specific route be prescribed by the charter party or bill of lading."*

6. The majority arbitrators referred to evidence before them that in the period 1 March to 31 May 1994 Ocean Routes had provided advice to some 360 vessels routed from the Pacific north west of North America to northern China, Korea or Japan, all of which had sailed on a northern route save for vessels heading for destinations far to the south of Japan. From that it would seem that the great circle route, which was the shortest and quickest route, was the usual route, although the arbitrators made no express finding to that effect. There was (so far as we know) no evidence to suggest that the rhumb line route was the usual, or a usual, route, and no finding to that effect. So, in the absence of what Lord Porter called "navigational or other reasons" for not taking the shortest and quickest route, the master was contractually obliged to take it.

7. The majority arbitrators concluded that the master had no good reason for not taking the shortest and quickest route. The dissenting arbitrator concluded that because the master was influenced by his previous bad experience of the great circle route and by his concern for safety he was "*absolutely entitled*" to decide as he did. The majority, however, in paragraph 21 of their reasons, "*considered that the Disponent Owners were prima facie in breach of their obligation under Clause 8 to ensure that the Master prosecuted his voyages with the utmost despatch . . . .*"

8. In paragraph 24 of their reasons the majority arbitrators again referred to *"the Master's breach in failing to prosecute the voyage with due despatch."* With those conclusions, on the findings of the majority arbitrators, I agree. In the absence of evidence that the rhumb line route was the usual route or a usual route, and in the absence of any satisfactory navigational or other reason for taking a longer and slower route, the master's obligation of utmost despatch required him to take the shortest and quickest route. This conclusion is in my view inescapable irrespective of any express orders given by the charterers.

9. But the decisions at all three levels below, and the argument at all levels including the House, primarily concentrated not on the master's duty of despatch but on the legitimacy of the charterers' express instructions to the master, following advice from Ocean Routes, to take the great circle route. Relying on clauses 11 and 8, the charterers contended that these were instructions concerning the employment of the vessel which they were entitled to give and with which the master was bound to comply. The owners relied on their responsibility, under

clause 26, for the navigation of the vessel and on their exemption, under clause 16, from liability for errors of navigation, as grounds for resisting the charterers' contention.

10. The majority arbitrators concluded that the master had no good reasons for rejecting the charterers' instructions to take the great circle route. Impliedly, therefore, they accepted that the charterers were entitled to give such instructions. They did not find that the navigation exception availed the master, since he *"had decided at the outset not to follow the course recommended by the weather routing service."* The dissenting arbitrator did not find that the charterers' instructions did not relate to the employment of the vessel but held that the master was entitled not to comply because he "*has to have the ultimate decision and responsibility for navigation."*

11. Oral argument before the judge no doubt led to a refinement of the issues, and his conclusion ([1999] QB 72 at 82) was clear and unequivocal: *"In my judgment these considerations lead to the conclusion that a decision whether to proceed across the Pacific by taking the great circle route or the rhumb line route or course would also be a decision in and about the navigation of the vessel and not in and about her employment."*

12. The merits of that decision did not matter because *"it was not, in my judgment, a decision as to the employment but as to the navigation of the vessel*"(p. 82). In the Court of Appeal, Potter LJ was more guarded than the judge, but held that since the master's reasons for taking the rhumb line route were based on the safety of the vessel and were not shown to be other than bona fide (despite his lack of candour concerning his reasons for taking the rhumb line route on the second disputed voyage) it was a decision as to navigation: [2000] QB 241 at 261.

13. The judge's decision was trenchantly criticised by the late Mr. Brian Davenport Q.C. in an article ***("Rhumb Line or Great Circle? - That is a Question of Navigation***" [1998] LMCLQ 502) which brings home the loss which English commercial law has suffered by his death and the cruelty of an affliction which denied him the judicial eminence he would surely have achieved. Both the judge's decision and that of the Court of Appeal were criticised as *"regrettable"* by Mr. Donald Davies, now the doyen of London maritime arbitrators: [1999] LMCLQ 461. In ***Reefer Express Lines Pty Ltd v. Cool Carriers AB*** (24 January 1996) New York arbitrators considered a charterparty containing clauses similar to clauses 8 and 11 of the present charter, it being accepted that the master was the final authority with respect of matters of navigation and safety. On facts indistinguishable from the present, save that the master had somewhat better reasons for refusing to comply with the charterers' instructions to take the great circle route from Seattle to northern China, the arbitrators unanimously held that the master had breached his duty under the charterparty by not following the charterers' directions.

14. Clause 8 of the present charterparty, providing that the master (although appointed by the owners) shall be under the orders and directions of the charterers, gives the charterer his key right under the contract: to decide where the vessel shall go and what she shall carry, how (in short) she shall be used, always subject to the terms of the charterparty. The language used is general, and the power correspondingly wide.

15. Caution is called for in reading earlier authorities in which the meaning of *"navigation"* has been considered, since the expression has been construed in different contracts and different factual contexts, but the cases nonetheless give valuable guidance. In ***Good v. The London Steam-Ship Owners' Mutual Protecting Association*** (1871) LR 6 CP 563 a sea-cock and a bilge-cock were left open, permitting the entry of water which damaged cargo. A claim was made against the owners of the vessel by consignees of the cargo, and the question was whether the damage had been caused by improper navigation, against which the owners were entitled to be indemnified. Willes J (at page 569) said: *"Improper navigation within the meaning of this deed is something improperly done with the ship or part of the ship in the course of the voyage."*

16. In ***Carmichael & Co. v. The Liverpool Sailing Ship Owners' Mutual Indemnity Association (***1887) 19 QBD 242 damage was caused to cargo because water entered the vessel through a port in the side of the vessel which had not been securely closed. It was held to have been caused by "improper navigation of the ship." A different conclusion was reached in ***Canada Shipping Co. v. British Shipowners' Mutual Protection Association*** (1889) 23 QBD 342 where cargo was contaminated through failure to clean the hold after a previous cargo. Bowen LJ (at page 344) said: *"Navigation must mean something having to do with the sailing of the ship; that is, of course, the sailing of the ship having regard to the fact that she is a cargo-carrying ship. Here the damage was caused by something which had nothing to do with the sailing of the ship."*

17. The ***Renée Hyaffil*** (1915) 32 TLR 83; (1916) 32 TLR 660 concerned a vessel bound for London from Gandia with a cargo of fruit and vegetables. The master put into Corunna where he remained for 23 days, for several reasons, including his reluctance to face the Bay of Biscay in winter. It was held that damage to the cargo had not been caused by a neglect, default or error of judgment in the navigation or management of the vessel within the meaning of the exceptions in the bills of lading.

18. In ***S.S. Lord (Owners) v. Newsum Sons and Company Limited*** [1920] 1 KB 846 the dispute was between owner and charterer. The master had decided to remain in port for some time, despite advice to continue the voyage by a prescribed route. Bailhache J. held that the master's deliberate choice, while in harbour, of one of two routes to be pursued could not be an error in the management or navigation of the ship within the meaning of an exception in the charterparty. While the judge, in my opinion, erred in his formulation of principle, I would not question his conclusion. The decision is inconsistent with the view that the choice of route from one port to another is a navigational matter within the sole discretion of the master.

19. The time-charterers in ***Suzuki and Co. Limited v. J. Beynon and Co. Limited*** (1926) 42 TLR 269 complained that the master had not prosecuted a voyage with the despatch required by clause 9 of the charterparty, apparently

through insufficient consumption of coal. The issue was whether the master's failure fell within clause 14 exempting the owner from liability for negligence or default of the master in the management or navigation of the steamer. There was a difference of opinion in the Court of Appeal and in the House of Lords. At page 274 Lord Sumner said: *"I see no ground for bringing the captain's action or inaction under the head of navigation. I speak with humility after what has just been said, but I still think that there is a real field in which the captain's shortcomings would not fall within the exception clause 14, and yet would constitute a breach of his obligation to use dispatch under clause 9. The maintenance of full speed may often be part of the duty which those responsible for navigation have to perform, directly or by others, as, for example, in order to save a tide at a bar or to correct excessive leeway or deflection by currents, or to make the ship quick to answer her helm, or to make a course good against head winds, or what not. Here, however, it is not pretended that the ship was handled in an unseamanlike manner, or that either ship or cargo was imperilled by the navigation that took place. The term "management" may better fit the present case, but it is not a term of art; it has no precise legal meaning, and its application depends on the facts, as appreciated by persons experienced in dealing with steamers. There is a management which is of the shore, and a management which is of the sea. I do not think the award states the facts sufficiently to enable us to say that the evidence is all one way to show mismanagement of the steamer, in the sense of clause 14, and without more facts before us we could not in any case deal with the question as a practical matter. Clause 9 is emphatically a merchants' clause. Its object is to give effect to the mercantile policy of preferring a saving of time to a saving of coal."*

20. The facts of ***Larrinaga Steamship Company v. The King*** [1945] AC 246 were unusual. The vessel, discharging at St. Nazaire, was ordered by charterers to return to Cardiff. Despite severely deteriorating weather conditions a Sea Transport Officer instructed the vessel to sail on completion of discharge to Quiberon Bay to join a convoy bound for the Bristol Channel. The master protested but complied. The vessel grounded and suffered damage. The owners claimed against the Crown as charterers, contending that the damage had resulted from the charterers' order to return to Cardiff. Lord Wright (as page 256) said: *"The view of the judge was that what he described as the 'sailing orders to Quiberon Bay to be obeyed forthwith . . .' were orders as to employment within cl. 9. With the greatest respect, I cannot agree with that view. These sailing orders which the judge found were given were, in my opinion, merely dealing with matters of navigation, in regard to carrying out the orders to proceed to Cardiff".*

Lord Porter (at page 261) said: *"Three answers to this argument have been made by the respondent. (1) That though an order specifying the voyage to be performed is an order as to employment, yet an order as to the time of sailing is not. That order, it is contended, is one as to navigation, or, at any rate, not as to employment. My Lords, this distinction seems to me to be justified: an order to sail from port A to port B is in common parlance an order as to employment, but an order that a ship shall sail at a particular time is not an order as to employment because its object is not to direct how the ship shall be employed, but how she shall act in the course of that employment. If the word were held to include every order which affected not the employment itself but any incident arising in the course of it almost every other liability undertaken by the charterer would be otiose, since the owners would be indemnified against almost all losses which the ship would incur in prosecuting her voyages."*

Then (at page 262) Lord Porter continued:

"(2) The second answer of the respondents was that even if it were conceded that orders to sail in a storm were orders in respect of which an indemnity is due, they must still be orders of the charterers as charterers and such as under this charterparty they are entitled to give. The mere instruction to sail may be such an order, but such an instruction leaves it to the discretion of the master who is responsible for the safety of his ship to choose the time and opportunity for starting on his voyage. I know of no right on the part of a charterer to insist that the safety of the ship should be endangered by sailing at a time when seamanship requires her to stay in port."

21. Lastly, I would refer to ***Newa Line v. Erechthion Shipping Co. SA*** [1987] 2 Lloyd's Rep. 180, in which Staughton J. at page 185 said:

"(2) Orders as to employment.

It is well settled that the orders which a charterer is entitled to give, and an owner bound to obey, are orders as to the employment of the vessel. They do not include orders as to navigation, which remains in the control of the owner through his master - at any rate in the absence of special and unusual terms. It follows that a charterer, again in the absence of such terms, is only bound to indemnify the owner against the consequences of orders as to employment, and not of orders as to navigation. That is established by ***Weir v. The Union Steamship Company Ltd.,*** *[1900] A.C. 525,* ***Larrinaga Steamship Co. Ltd. v. The King****, (1945) 78 Ll.L.Rep. 167; [1945] A.C. 246, the* ***Stag Line case****, Scrutton on Charterparties (19th ed.) p. 376, Carver on Carriage by Sea (13th ed.) par. 669, Wilford on Time Charters (2nd ed.) pp. 197-198.*

"The question here is whether the order to proceed to Dawes Island anchorage was an order as to employment or as to navigation. Seeing that the manifest intention was for the vessel to lighten there by discharging part of her cargo, I am of opinion that it was plainly an order as to employment. By contrast the advice of the pilot as to precisely where the vessel should anchor, if it had been an order and if (which is not suggested) it had been given on behalf of the charterers, would have been an order as to navigation."

22. It is not hard to think of orders which plainly relate to the employment of the vessel and others which plainly relate to its navigation. It is much less easy to formulate any test which clearly distinguishes between the two. The charterer's right to use the vessel must be given full and fair effect; but it cannot encroach on matters falling within the specialised professional maritime expertise of the master, particularly where the safety or security of the vessel, her crew and her cargo are involved. He is the person, on the vessel, immediately responsible. Technical

questions concerning the operation of the vessel are for him. Thus a decision when, in the prevailing conditions of wind, tide and weather, to sail from a given port is plainly a navigational matter, as held in the Larrinaga case. By contrast, a decision without good reason to remain in port instead of continuing with a voyage (as in ***The Renée Hyaffil*** and ***The S.S. Lord***) or to economise on bunkers for no good maritime reason (as in the Suzuki case) were properly regarded as falling outside the navigational area reserved to the master's professional judgment.

23. Despite the judgments below, I am of the clear opinion that the majority arbitrators were right to hold that the orders to take the great circle route on both the disputed voyages were orders which the charterers were entitled to give and with which (on the arbitrators' findings) the owners were bound to comply. This does not mean that the charterers usurped the owners' navigational responsibility. As pointed out in Lenfestey's Dictionary of Nautical Terms at page 196, *"To sail a perfect circle route would require continuous course changes, because a great circle intersects each meridian at a different angle (except when sailing straight along the equator). Since this is not practical, a series of points are established along the course, and the rhumb lines between them are sailed."*

24. The responsibility for making good, so far as practicable, whatever course is chosen of course remains with the master and crew, as does that for navigating the vessel safely into and out of port, and responding to maritime problems encountered in the open sea. But subject to safety considerations and the specific terms of the charter, the charterers may not only order a vessel to sail from A to B but may also direct the route to be followed between the two.

25. For these reasons, as well as those given by Lord Hobhouse of Woodborough, I would allow the appeal and make the order which he proposes.

LORD NICHOLLS OF BIRKENHEAD My Lords,

26. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill and Lord Hobhouse of Woodborough. For the reasons they give, and with which I agree, I would allow this appeal.

LORD HOFFMANN My Lords,

27. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill and Lord Hobhouse of Woodborough. For the reasons they give, and with which I agree, I would allow this appeal.

LORD HOPE OF CRAIGHEAD My Lords,

28. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill and Lord Hobhouse of Woodborough. I agree with them, and for the reasons which they have given I too would allow the appeal and make the order which Lord Hobhouse proposes.

LORD HOBHOUSE OF WOODBOROUGH My Lords,

29. This is an appeal under the Arbitration Act 1979 from a reasoned award of arbitrators appointed under a time charter dated Tokyo 21 October 1993. It was one of a chain of charterparties relating to the Liberian motor ship Hill Harmony described as being of 15,622 tons gross and 9,017 tons net register, having a deadweight capacity of 24,683 metric tons and a laden service speed of about 13 knots in good weather conditions. She had been built in 1985 and was a bulk carrier with 5 holds. The parties to the relevant charterparty were the respondents Whistler International Ltd of the British Virgin Islands as disponent owners and the appellants Kawasaki Kisen Kaisha Ltd of Tokyo as charterers: I will call them respectively the 'owners' and the 'charterers'.

30. The time charter which was for 7/9 months at charterers' option was on the New York Produce Exchange form with amendments. It contained a London arbitration clause (clause 17) referring disputes to the arbitration of three commercial and shipping men in London in accordance with English law, the decision of any two of them to be final. The disputes between the owners and charterers was referred to arbitration in accordance with this clause. The arbitrators by a majority decided substantially in favour of the charterers. The owners obtained leave to take the award to the Commercial Court under the Act and Clarke J reversed the decision of the arbitrators, [1999] QB 72, but certified that the award raised a question of law of general public importance and gave leave to appeal. The charterers' appeal to the Court of Appeal was dismissed, [2000] QB 241, and they have now appealed with leave to your Lordships' House.

31. The relevant dispute relates to two laden voyages performed by the vessel from Vancouver to Japan in respectively January/February and April/May 1994. The actual cargoes carried are immaterial and were presumably non-perishable. The respective voyages should only have taken about 16¾ and 13¾ days. But on neither voyage did the vessel go by the shortest route. As a result, on one voyage she took 6½ days longer to get to her destination and consumed some 130 tons more fuel and on the other she took 3? days longer and consumed some 69 tons more. The loss to the charterers was about US$ 89,800. The owners denied liability for the charterers' loss. They contended that they were not obliged to send the vessel on the shortest route and furthermore were entitled to reject orders from the charterers to take the shortest route.

32. So far as presently relevant, the charterparty provided as follows. The vessel was let to the charterers for worldwide trading via safe ports, berths or anchorages always within Institute Warranty Limits. These limits are the geographical limits contained in the standard terms of marine H&M policies so this provision has the effect of precluding the charterers from requiring the vessel to go outside the geographical limits permitted by the owners' insurance cover assuming that that cover is on the ordinary terms. (The charterparty also excluded a list of other areas or countries which are not material to the present dispute, mostly relating to political and cognate risks.

Similarly there were clauses relating to ice which are likewise not relevant.) The owners undertook that the vessel when delivered would be seaworthy and in every way fit for the charter service and she was to be so maintained during the service. (cl.1) (A similar obligation of due diligence arose under the clauses paramount incorporated in the charterparty.) The owners had also to provide and pay for the crew. Nothing in the charterparty was to construed as a demise of the vessel to the charterers and the owners were to remain responsible for the navigation of the vessel, acts of pilots and/or tugboats, insurance, crew and all other matters as when trading for their own account. (cl.26)

33. The charterers were to provide and pay for the bunkers whilst the vessel was on hire and to pay for port charges, pilotages, agencies and all other usual charges. (cl.2) The charterers were to pay the hire half-monthly in advance at the agreed rate, the liability accruing from day to day except when the vessel was off-hire. (cl.4) The charterparty contained an off-hire clause (cl.15) which is not material to the present appeal since the arbitrators rejected the charterers' claim under that clause on a point of construction and that part of their decision was not the subject of an appeal. I express no view upon it.

34. The charterers were also under an obligation to furnish the captain of the vessel from time to time with all requisite instructions and sailing directions. (cl.11) The captain was to prosecute his voyages with the utmost dispatch and was, although appointed by the owners, to be under the orders and directions of the charterers as regards employment and agency. (cl.8) The vessel was to have the liberty to deviate for the purpose of saving life and property (cl.16) and by reason of the incorporation of the amended Hague Rules (v. inf.) any other reasonable deviation was permitted. (Art.IV r.4)

35. The charterparty also incorporated no fewer than three clauses paramount but no point arose on their application (***Adamastos Shipping Co. Ltd. v Anglo-Saxon Petroleum Co. Ltd.*** [1959] AC 133) nor as to which one was relevant. It was accepted that their effect was to incorporate an exception for loss or damage arising from the act, neglect or default of the master in the navigation or management of the ship in Article IV rule 2(a) of the amended Hague Rules.

36. The charterers' allegation was that the owners had been in breach of their obligation to prosecute the relevant voyages with the utmost dispatch and to comply with charterers' orders to proceed by the shortest route. The owners' response was that the orders and the choice of route did not relate to the employment of the vessel but to its navigation and all matters of navigation were within the sole province of the master to decide and, if he was in any way at fault, owners' liability was excluded under Article IV rule 2(a). The dispute therefore raised a question of the scope of the contrasting terms "employment" and "navigation" as used in this type of charterparty.

37. The arbitration was at the wish of the parties conducted on documents without an oral hearing. The arbitrators described the principal issue in the arbitration as being whether the master's decision to disregard the charterers' instructions as to the course which he was to take on the two voyages in question was unjustifiable. They referred to what appeared to be the background to the master's attitude. In October 1993, under a previous charterparty, the vessel had encountered heavy weather on a voyage from near San Francisco to a port in southern Japan and had suffered heavy weather damage. It was apparently this experience which had led the master in the following January and April to choose to follow a more southerly route from Vancouver to the east coast of Japan. Indeed, in January 1994, he gave this as his reason for refusing to obey the charterers' order to proceed by the shortest route, that is to say the *'great circle'* or more northerly route, and preferring to go further south along the *'rhumb line'* where he might expect easier weather conditions. Having considered the evidence, the (majority) arbitrators stated: "*We did not consider that this amounted to a satisfactory reason in itself for disregarding the Charterers' instructions.*" As regards the April voyage, the only reason which the master gave was that the vessel's auxiliary boiler was inoperative as it had broken down and not been repaired. This excuse if factually correct would have raised obvious difficulties for the owners as it involved saying that the vessel was not seaworthy. But the arbitrators rejected the master's excuse as spurious since the problem with the auxiliary boiler had been dealt with at Vancouver before the vessel sailed and no question of unseaworthiness could arise. The arbitrators suspected that his true reason was the same as before. They said: "*In the case of the second disputed voyage, if the master's decision had indeed been based upon the experience of [the 1993 voyage], it was even more difficult to justify than his decision in relation to the first disputed voyage given the fact that the voyage commenced in late April when the weather could be expected to have been significantly better on the recommended [shorter] route.*" They concluded that "*the evidence . . . had failed to demonstrate that the master had acted reasonably having regard to all the relevant circumstances in rejecting the charterers' orders on both these voyages*".

38. The evidence to which the arbitrators were referring included independent evidence which they clearly accepted and which, as appears from the recitation in their Reasons, was uncontradicted by any other evidence. The charterers' orders as to the route were given after taking the advice of Ocean Routes. Ocean Routes are a well established specialist commercial organisation of which the business is to assemble and record information about weather and sea conditions in the oceans of the world at different times of year and accordingly to advise those involved in the marine transportation industry as to the most favourable routes to follow when crossing oceans. Thus when the arbitrators refer to the 'recommended' route they are referring to the route recommended by Ocean Routes. The evidence accepted by the arbitrators was that in the period March to May 1994 Ocean Routes had provided advice to some 360 vessels routed from the Pacific north west to northerly China Korea or Japan. All of these vessels had sailed on a northerly route. The only vessels that did not do so were vessels which were proceeding to destinations far to the south of Japan such as Singapore or the Philippines. There was no

evidence of any particular difficulties encountered by the vessels which had taken the northern route during the relevant period.

39. The (majority) arbitrators found that the owners were in breach of their obligation under the charterparty to ensure that the master prosecuted the voyages with the utmost dispatch and followed the charterers' orders regarding the employment of the vessel. They then considered the defence 'error' in navigation (sic). Following what they understood was the effect of the decision in ***S.S. Lord (Owners) v Newsum Sons & Co. Ltd.*** [1920] 1 KB 846, they concluded that the planning of the voyage was not a matter of navigation; it was not a case where the master had decided to alter course at sea.

40. Clarke J adopted a diametrically opposite approach. He held that the dispute related to matters of navigation not to matters of employment. It followed that the orders were not ones which the charterers were entitled to give and the decision what route to follow was one for the master alone. If any liability had arisen it would have been covered by the exception. At pp.81-2, he said: *"In my judgment an order as to where the vessel was to go, as for example to port A or B to load or discharge or to port A or port B via port C to bunker, would be an order as to employment which the master would be bound to follow, subject of course (as all parties agreed) to his overriding responsibility for the safety of his ship. An order as to how to get from where the ship was to port A, B or C would not, however, be an order as to employment but an order as to navigation. So, for example, to take an illustration discussed in argument, a direction to a master proceeding to a port of discharge to pass, say, on one side or another of a light vessel or an island or to proceed by way of one channel rather than another would be a direction as to navigation not employment. There can I think be no real doubt that a decision by a master as to which channel to take, what course to set or which side of an island or light vessel to go, would be a decision as to navigation and not as to employment. The same must be true of an order or direction to the master in any of those respects.*

41. In my judgment those considerations lead to the conclusion that a decision whether to proceed across the Pacific by taking the great circle route or the rhumb line route or course would also be a decision in an about the navigation of the vessel and not in and about her employment. It is true, as the arbitrators say and as has been urged in argument, that one decision or the other would be likely to have important financial consequences for the charterers (and perhaps also the owners), but that is true of many decisions which masters take."

42. He therefore was able to discard as irrelevant the arbitrators' view that the decisions of the master were unreasonable and unjustified. *"That might have been a good decision or a bad decision. It might have been justified or (as the arbitrators held) unjustified but it was not, in my judgment, a decision as to the employment but as to the navigation of the vessel."*

43. As regards whether the master had failed to prosecute the voyages with the utmost dispatch, Clarke J apparently concluded that the arbitrators had not found that he had failed to do so. He said that they had not considered it. (p.88)

44. In the Court of Appeal, the leading judgment, agreed to by the other members of the Court, was given by Potter LJ. He held that the ocean route to be followed by the vessel was a matter of navigation for the master and not a matter of employment upon which the charterers could give the master orders. Provided that the master acted bona fide, it did not matter whether he acted reasonably because the owners were protected by the exception in Article IV rule 2(a). He summarised his decision at pp.261-2: *"It seems to me, as Mr Hamblen [for the owners] submitted, that the master's decision was a decision on navigation because it was a decision upon what course or combination of courses to follow in prosecuting the overall voyage, and because the reason for the decision, made bona fide, was the master's concern for the safety of the vessel. ..... So far as the application of Article IV rule 2(a) is concerned, I consider that the judge was right in construing the term 'navigation' as therein appearing as extending to a decision taken, in the course of voyage planning to steer a particular course or courses having regard to the weather to be anticipated."*

45. These judgments of two such experienced judges are entitled to great respect but so is the decision of the commercial shipping arbitrators to whom the parties agreed that the resolution of their dispute should be entrusted. It should also be appreciated that the decision of Clarke J has been forcefully criticised by the late Mr Davenport QC in 1998 LMCLQ 502 and that the Court of Appeal decision has been similarly criticised from a commercial point of view at 1999 LMCLQ 461 by Mr Donald Davies, a highly experienced and legally qualified London maritime arbitrator who has also had experience as a master mariner. Similarly, Mr Young who appeared for the charterers was able to refer your Lordships to an award of maritime arbitrators in New York holding, on facts probably less favourable to charterers, that the master was not entitled to choose, contrary to the wishes of the charterers, to proceed across the Pacific by a longer and more southerly route.

46. The question raised by this dispute is not a new one. It reflects the conflict of interest between owners and charterers under a time charter. Under a voyage charter the owner or disponent owner is using the vessel to trade for his own account. He decides and controls how he will exploit the earning capacity of the vessel, what trades he will compete in, what cargoes he will carry. He bears the full commercial risk and expense and enjoys the full benefit of the earnings of the vessel. A time charter is different. The owner still has to bear the expense of maintaining the ship and the crew. He still carries the risk of marine accidents and has to insure his interest in the vessel appropriately. But, in return for the payment of hire, he transfers the right to exploit the earning capacity of the vessel to the time charterer. The time charterer also agrees to provide and pay for the fuel consumed and to bear the disbursements which arise from the trading of the vessel. The owner of a time chartered vessel does

not normally have any interest in saving time. An exception is where towards the end of a time charter, the expiry of the charter depends upon whether voyages can or cannot be performed within the allotted period. In such a situation the owners' interest will vary depending upon whether the charter rate is above or below the current market rate.

47. There have been a succession of statements by experienced commercial judges which refer to these features of charterparties. To quote Lord Mustill in **The Gregos** [1995] 1 Lloyd's Rep. 1 at p.4,

"My Lords, in merchant shipping time is money. A cargo ship is expensive to finance and expensive to run. The shipowner must keep it earning with the minimum of gaps between employments. Time is also important for the charterer, because arrangements must be made for the shipment and receipt of the cargo, or for the performance of obligations under sub-contracts. These demands encourage the planning and performance of voyages to the tightest of margins. Yet even today ships do not run precisely to time. The most prudent schedule may be disrupted by regular hazards such as adverse weather or delays in port happening in an unexpected manner or degree, or by the intervention of wholly adventitious events.

Where the charter-party is for a period of time rather than a voyage, and the remuneration is calculated according to the time used rather than the service performed, the risk of delay is primarily on the charterer. For the shipowner, so long as he commits no breach and nothing puts the ship off-hire, his right to remuneration is unaffected by a disturbance of the charterer's plans. It is for the latter to choose between cautious planning, which may leave gaps between employments, and bolder scheduling with the risk of setting aims which cannot be realized in practice.

"..... This conflict of interest becomes particularly acute when there is time left for only one more voyage before the expiry of the charter, and disputes may arise if the charterer orders the ship to perform a service which the shipowner believes will extend beyond the date fixed for redelivery."

48. What might be described as the scheduling of the vessel is of critical importance to the charterer so that obligations to others can be fulfilled, employment opportunities not missed and flexibility maintained. The *'utmost dispatch'* clause is, as Lord Sumner said in ***Suzuki & Co. Ltd. v J. Benyon & Co. Ltd.*** (1926) 42 TLR 269 at p.274, a merchants' clause with the object of giving effect to the mercantile policy of saving time. As a matter of this mercantile policy and, indeed, as a matter of the use of English a voyage will not have been prosecuted with the utmost dispatch if the owners or the master unnecessarily chooses a longer route which will cause the vessel's arrival at her destination to be delayed. If the charterer has sub-voyage-chartered the vessel to another or has caused bills of lading to be issued, the charterer will be under a legal obligation to ensure that the voyage be prosecuted without undue delay and without unjustifiable deviation. The charterer is entitled to look to the owner of the carrying vessel to perform this obligation and that is one of the reasons why the 'utmost dispatch' clause is included in the usual forms of time charter.

49. Suppose that the charterer does no more than order the vessel to load at Vancouver and proceed to a port on the east coast of Japan, that order would give rise to an obligation under the clause to proceed from one port to the other with the utmost dispatch and is inconsistent with a liberty to delay the vessel by going by a longer than necessary route. To proceed by an unnecessarily long route delays the vessel just as surely as if the vessel had sailed at something less than full speed. There may of course be countervailing factors such as adverse currents or headwinds which may make an apparently longer route in fact the more expeditious route but, on the arbitrators' findings, none of those factors justified taking the longer route in the present case.

50. Another difficulty for the owners' argument is the fact that the owners have already agreed in the charterparty what are to be the limits within which the charterers can order the vessel to sail, for present purposes the Institute Warranty Limits, and have undertaken that, barring unforeseen matters, the vessel will be fit to sail in those waters. It is not open to the owners to say that the vessel is not fit to sail from Vancouver to Japan by the shortest route within IWL. Yet it was exactly this type of argument which the courts below entertained. In fact, upon the findings of the arbitrators, the vessel was fit to sail by the shorter northern route and the master did not have any good reason for preferring the longer southern route. It was not a good reason that he preferred to sail through calm waters or that he wanted to avoid heavy weather. Vessels are designed and built to be able to sail safely in heavy weather. The classification society rules require, as does clause 1 of the NYPE Form, the maintenance of these safety standards. It is no excuse for the owners to say that the shortest route would (even if it be the case) take the vessel through the heavy weather which she is designed to be able to encounter.

51. The courts below discussed the question of deviation under bill of lading contracts or voyage charterparties. This was not directly material to a time charter where the contract is not a contract of carriage but a contract for the provision of the services of a crewed vessel. However there is a relationship between prosecuting a voyage with the utmost dispatch and doing so without unjustifiable deviation. Thus, in relation to a voyage charter, Lord Porter said, ***Reardon Smith Line Ltd. v Black Sea and Baltic General Insurance Co Ltd.*** [1939] AC 562 at p.584: *"It is the duty of a ship, at any rate when sailing upon an ocean voyage from one port to another, to take the usual route between those two ports. If no evidence be given, that route is presumed to be the direct geographical route, but it may be modified in many cases for navigational or other reasons, and evidence may always be given to show what the usual route is, unless a specific route be prescribed by the charterparty or bill of lading. ..... In some cases there may be more than one usual route. It would be difficult to say that a ship sailing from New Zealand to this country had deviated from her course whether she sailed by the Suez Canal, the Panama Canal, round the Cape of Good Hope or through the Straits of Magellan. Each might, I think, be a usual route."*

52. The question in that case was whether a visit to a bunkering port was a breach of the charterparty contract. There was evidence that it was usual for vessels loading at the loading port to proceed via the other port for bunkers. Therefore there was no breach of the contract of carriage.

53. A number of points relevant to the present case arise from this. Under the time charter the obligation is not simply to proceed by a usual route but to proceed with the utmost dispatch. Further, where the vessel should take on bunkers is, subject to emergencies, undoubtedly a matter for the charterers. The provision of bunkers is the charterers' responsibility and the charterers can give orders as to the bunkering ports to be visited; no question of what is usual arises. Again, Lord Porter points out that there may be more than one usual route for proceeding on a long voyage from one continent to another. The argument of the owners, from which they did not resile, was that in this situation the choice between the usual routes was entirely a matter for the master and the charterers could not give orders as to which was to be chosen, say, via the Cape of Good Hope or via the Suez Canal, even though the charterers would have to pay the canal and port dues and pay for the fuel consumed. (See also Mr Davenport QC, loc cit.) The significance of such choices are commercial and relate to the exploitation of the earning capacity of the vessel. They are within the ambit of the employment of the vessel and are matters about which time charterers can give orders. A time charterer can give an order because he wants the vessel to be well positioned for a commercial opportunity or other commercial reason. A time charterer can order the chartered vessel to proceed at an economical speed; the time charterer may be waiting for a cargo to become available or the laydays at a loading port may not begin until after a certain date.

54. But even if the courts below should have got involved, which they have not, in a discussion of what was the usual route across the Pacific from Vancouver to the east coast of Japan, the arbitrators' Reasons were clear. The northerly route was the shortest route. There was no evidence that any other route was a usual route. There was evidence that the northerly route was the usual route to follow as it had been by 360 vessels over a three month period. It was also incorrect to treat the case as if it left open the possibility that there had been a rational justification for refusing to proceed by the northerly route. The arbitrators found that the master did not have any rational justification for what he did. My Lords, it follows from what I have already said that, on the findings of the arbitrators, the charterers were, by ordering the vessel to proceed by the shortest and most direct route, requiring nothing more than was in any event the contractual obligation of the owners. Therefore the question whether the order was an order as regards the employment of the vessel is academic. But it was in truth such an order. The choice of ocean route was, in the absence of some over-riding factor, a matter of the employment of the vessel, her scheduling, her trading so as to exploit her earning capacity. The courts below, by contrast, accepted the owners' argument that it was necessarily a matter of the navigation of the vessel.

55. In support of this argument, the charterers primarily relied upon ***Larrinaga SS Co v The King*** [1945] AC 246. The vessel in question had suffered a marine casualty: in the early hours of 14 October 1939, in a storm, she had stranded on a bank outside St Nazaire. She was at the time under requisition by the British Government on the terms of the T99A charterparty which effectively incorporated war risks insurance. This insurance includes cover for accidents occurring during or the consequence of "warlike operations". The vessel had at the time received an oral order from a Sea Transport Officer to vacate the berth and sail to join a convoy proceeding to the Bristol Channel. As a result of the stranding the vessel was seriously damaged. Her owners sought to recover the cost of repairs from the Government. They put their claim on two bases, neither of which succeeded. First, they claimed that the casualty was a consequence of a warlike operation: it was not, nor was she engaged on such an operation at the time. Secondly, they claimed under the charterparty indemnity clause on the basis that the casualty was caused by obeying an order regarding the employment of the vessel. This too failed for a number of reasons. The only order as regards the employment of the vessel was that requiring her to proceed from the French port to the English port; that order did not cause the casualty; in any event the order to leave St. Nazaire had been a naval order not an order of the charterer. The relevant parts of the speeches are those relating to whether there was an order of the charterer regarding the employment of the vessel and whether the casualty was caused by that order or by the master's navigation of the vessel. The question of causation is a real one. Lord Porter stressed this at pp.260-1. He referred to the fact that employment related to the employment of the vessel and that the order had been to sail after discharge was complete. He said: *"But this order did not in a legal sense, and I doubt if such an order ever could, cause such a loss. ..... This wording left it to the master's discretion to sail at a reasonable time thereafter, and in determining what is a reasonable time all such matters as the state of the weather and the exhaustion of the crew would properly be taken into consideration. In these circumstances it cannot be said that either of these orders caused the damage which the ship suffered. A loss is not, under English law, caused by orders to make or by making a voyage because it occurs in the course of it. Such a loss is merely the fortuitous result of the ship being at a particular place at a particular time, and in no legal sense caused by the charterers' choice of port to which the ship is directed or their instructions to her master to proceed to it. But it was said that the ship sailed not by reason of the written order to proceed, but by the subsequent oral order, and that such an order did cause the loss, since it was the probable and contemplated result of sailing in unfavourable weather that the ship might suffer damage which, had the master been free to choose his own time, would probably have been avoided."*

56. This argument Lord Porter rejected, giving three reasons for doing so. First, he drew a distinction between an order to sail from port 'A' to port 'B' and an order to sail at a particular time, the former being a direction as how the ship shall be employed and the latter relating to how she shall act in the course of that employment. His second reason was that, whilst a mere order to sail may be an order which the charterer is entitled to give, this still *"leaves it to the discretion of the master who is responsible for the safety of his ship to choose the time and*

opportunity for starting on his voyage". "I know of no right on the part of a charterer to insist that the safety of the ship should be endangered by sailing at a time when seamanship requires her to stay in port." (p. 262) An order from a naval authority could be different but that was not something for which the Government was liable as charterer. His third reason was one of lack of legal causation. (Later authorities confirm this need for a direct causal link: eg The White Rose [1969] 1 W.L.R. 1098.) The other members of the House agreed with Lord Porter, Lord Wright adding, at p. 255, that 'employment' meant "*the services which the ship is ordered to perform*" and contrasting it with 'navigation'.

57. Lord Porter used the word 'seamanship'. This word was also used by Lord Sumner in ***Suzuki v Benyon*** (sup) when describing what was encompassed by the exception for errors of navigation. That case concerned the master of a time chartered vessel which failed, without any good reason, to steam at full speed. He said, 42 T.L.R.269, 274: *"I see no ground for bringing the captain's action or inaction under the head of navigation. ..... there is a real field in which the captain's shortcomings would not fall within the exception clause 14 ['negligence, default or error in judgment of the .... master ..... in the management or navigation of the steamer'] and yet would constitute a breach of his obligation to use dispatch under clause 9 ['the captain shall prosecute all his voyages with the utmost dispatch']. The maintenance of full speed may often be part of the duty which those responsible for navigation have to perform, directly or by others, as, for example, in order to save a tide at a bar or to correct excessive leeway or deflection by currents, or to make the ship quick to answer her helm, or to make a course good against head winds, or what not. Here, however, it is not pretended that the ship was handled in an unseamanlike manner, or that either ship or cargo was imperilled by the navigation that took place."*

58. Similarly, in the case ***The Renée Hyaffil***, 32 TLR 83 (Evans P), 42 TLR 660 CA, the vessel was supposed to be performing a winter voyage from the east coast of Spain to London laden with a cargo of fruit but the master did not wish to brave the weather in the Bay of Biscay even though it was no worse than might be expected for that time of year. He put into La Corunna and stayed there for 23 days. When sued, the owners sought to rely upon the exception neglect in the navigation or management of the vessel. This defence failed both before the judge and in the Court of Appeal. "*That delay had nothing to do with the navigation or management of the ship as such.*" (per Swinfen Eady LJ, at p.660)

59. ***The Renée Hyaffil*** was cited in ***Lord v Newsum*** [1920] 1 KB 846 which was relied upon by the charterers but criticised by the courts below as being inconsistent with ***Carmichael v Liverpool Sailing Ship Owners Mutual Indemnity Association*** (1887) 19 QBD 242. In ***Lord v Newsum***, the vessel was under a six month time charter made in 1916. She was ordered on a laden voyage to Archangel but had to abandon the voyage because the master chose to proceed by a route close to the coast of Norway and was held up by the presence of German submarines. If he had proceeded by a route further from the coast, as prescribed by the British Admiralty and by the Norwegian war risk insurers, she would have been able to complete the voyage. The owners were held liable under the *'utmost dispatch'* clause. The *'navigation and management'* clause was held to provide no defence. Bailhache J said, at p. 849: "*The deliberate choice, while in harbour, of one of two routes to be pursued cannot, I think, be an error in the 'management' or in the 'navigation' of the ship. There is no doubt sometimes great difficulty in drawing the line between what is and what is not 'navigation,' but I think the line ought to be drawn in the way I have indicated and as excluding the deliberation by the master in port regarding the route by which he will proceed to his port of destination.*"

60. The decision was no doubt correct but the reasoning is certainly confusing. The character of the decision cannot be determined by where the decision is made. A master, whilst his vessel is still at the berth, may, on the one hand, decide whether he needs the assistance of a tug to execute a manoeuvre while leaving or whether the vessel's draft will permit safe departure on a certain state of the tide and, on the other hand, what ocean route is consistent with his owners' obligation to execute the coming voyage with the utmost dispatch. The former come within the exception; the latter does not. Where the decision is made does not alter either conclusion.

61. My Lords, what I have said has the support of Staughton J in ***The Erechthion*** [1987] 2 Lloyd's Rep.180 at p.185 where he distinguished between an order to proceed to a particular anchorage and lighten - *'employment'* - and taking the advice of the pilot as to where in that anchorage to drop the anchor - *'navigation'*. The owners have relied upon various insurance cases giving a broad interpretation to the use of the word 'navigation' in policies and other insurance contracts. These cases did not assist in the present case which is concerned with the use of the term in an exception clause in contracts of carriage and the amended Hague Rules and its interrelationship with the use of the word 'employment'.

62. The meaning of any language is affected by its context. This is true of the words '*employment'* in a time charter and of the exception for negligence in the 'navigation' of the ship in a charterparty or contract of carriage. They reflect different aspects of the operation of the vessel. *'Employment'* embraces the economic aspect - the exploitation of the earning potential of the vessel. 'Navigation' embraces matters of seamanship. Mr Donald Davies in the article I have referred to suggests that the words '*strategy'* and '*tactics'* give a useful indication. What is clear is that to use the word '*navigation*' in this context as if it includes everything which involves the vessel proceeding through the water is both mistaken and unhelpful. As Lord Sumner pointed out, where seamanship is in question, choices as to the speed or steering of the vessel are matters of navigation, as will be the exercise of laying off a course on a chart. But it is erroneous to reason, as did Clarke J, from the fact that the master must choose how much of a safety margin he should leave between his course and a hazard or how and at what speed

to proceed up a hazardous channel to the conclusion that all questions of what route to follow are questions of navigation.

63. The master remains responsible for the safety of the vessel, her crew and cargo. If an order is given compliance with which exposes the vessel to a risk which the owners have not agreed to bear, the master is entitled to refuse to obey it: indeed, as the safe port cases show, in extreme situations the master is under an obligation not to obey the order. The charterers' submissions in the present case and the arbitrator's Reasons and decision did not contravert this.

64. In the present case, the exception did not provide a defence. First, the breach of contract was the breach of both aspects of the owners' obligations under clause 8 of the time charter - to prosecute the voyage with the utmost dispatch and to comply with the orders and directions of the charterers as regards the employment of the vessel. As a matter of construction, the exception does not apply to the choice not to perform these obligations: ***Knutsford Steamship Co. v Tillmanns & Co.*** [1908] AC 406; ***Suzuki v Beynon*** (sup). In the words of Lord Loreburn LC at [1908] AC p.408: the master "*simply broke his contract, interpreting it erroneously*". In the same case, at p.410, Lord Dunedin said, referring to the exception of error of judgment in navigating the ship or otherwise: "*It seems to me fantastic to extend it to the idea of a captain forming a wrong legal opinion on the meaning of a clause in the bill of lading and then proceeding to act upon it.*" (See to the same effect Kennedy LJ in the Court of Appeal at [1908] 2 KB 406-7.) Secondly, any error which the master made in this connection was not an error in the navigation or management of the vessel; it did not concern any matter of seamanship. Thirdly, the owners failed to discharge the burden of proof which lay upon them to bring themselves within the exception. This was clearest with regard to the second of the two relevant voyages where the arbitrators could only guess at, "suspect", why it was that the master acted as he did.

65. My Lords, the courts below were wrong to set aside the award of the arbitrators. Their award was not erroneous in point of law. The interpretation which they placed upon the utmost dispatch and employment clause was one which was open to them and it was likewise right for them, on the view they took of the state of the evidence, to conclude that the defence was not made out. The arbitrators' role in deciding a dispute of this kind draws upon their experience of the shipping industry and the problems it gives rise to. Their description of the commercial character of the bargain struck in a time charter echoed that of Lord Mustill already quoted and is the same as that which I have attempted to explain. They stressed that if the owners wished to rely upon the navigation defence they must explain their position and justify what they had done. In so far as the arbitrators did have any explanation from the master, they rejected it as not providing any justification for not proceeding by the shorter northern route, the great circle route. The evidence of the recommendations of Ocean Routes was uncontradicted.

66. Accordingly the appeal should be allowed; the respondents, Whistler International Ltd, should pay the costs of the appellants, Kawasaki Kisen Kaisha Ltd, in your Lordships' House, in the Court of Appeal and in the Commercial Court, such costs to include any sums which Kawasaki Kisen Kaisha Ltd were ordered by Clarke J to pay in respect of the costs of Tokai Shipping Co Ltd; and the order of Clarke J should be set aside and the award upheld.